Chapter 20

US Cross-border Investments in European Commercial Mortgage Markets

Anthony R. G. Nolan,
Partner, K&L Gates LLP

Diego Shin,
Special Counsel, K&L Gates LLP

20.1 Introduction[1]

In late 2011 and early 2012, the fragile green shoots of recovery began to peek out from the barren blasted heath of the crisis-blown financial markets. Market activity was spurred by a rare confluence of secular trends, which included the strategic imperative of European financial institutions to deleverage and divest assets in order to improve their regulatory capital, leverage and liquidity ratios, a phenomenon that has been described elsewhere in this book. Markets were also impacted by the liquidity provided by pension and investment funds throughout the world, which have been particularly interested in prime commercial real estate (CRE) assets in major European cities.[2] Whilst investment in European CRE has long been regarded as a relative value play for many global investors, North American interest in European CRE has, in particular, proven to be an effective counterweight to the traditional interest of European investors in US CRE opportunities.

As set out in Chapter 3, as the European CRE sector and related debt markets have emerged from the massive repricing of credit risk and property fundamentals that occurred during the GFC, a significant part of the resurgence in demand for European CRE assets has come from the US. Indeed, it has been estimated that US investors represented almost a quarter of all of investments in European CRE between 2010 and 2015, with US investors deploying €19 billion in 2014 and €16.4 billion in 2015.[3]

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1 The authors are grateful for the comments of their tax colleague Tom Lyden to this Chapter.
2 This Chapter should be read in conjunction with the opportunity for such investors identified in detail in Ch.22.
3 Cushman & Wakefield, ''Investment Market Update: Record investment set to continue—Europe Q4 2015'', at *http://www.cushmanwakefield.co.uk/en-gb/research-and-insight/2016/investment-market-update-europe-q4-2015* [Accessed 11 August 2016].

There are many reasons why US investors looked to the Old Continent in the wake of the GFC in the New World. One reason is that European CRE, which had long been valued as a source of diversification, became more attractive as US mortgage markets were broadly affected by the fall in the residential sector and CRE properties were affected by the steep fall off in tenant demand in US markets. Another is the weakening trend of the US dollar in relation to major European currencies, which affected the demand of US investors for future cash flows denominated in those currencies, no more so than what has occurred since the UK's Referendum vote on its continuing membership of the EU that took place on 23 June 2016, where following the positive vote to leave the EU (Brexit), Sterling fell precipitately over 10%. Lastly, European CRE capital markets were relatively active at a time that CRE deal volumes in the US were moribund. While it remains to be seen how the investment story will play out in light of Brexit and the long-running efforts of the EU to avert hard devaluations by Eurozone member states, it appears that continuing uncertainty over European fiscal and monetary policy will provide additional attractive occasions for opportunistic private equity investors to obtain interests in fundamentally strong CRE at favourable prices, as discussed in Chapter 22, albeit caveated and subject to regional and political uncertainty arising from the economic climate in the Southern European jurisdictions and the fallout from Brexit as well as the ramifications of terrorism.

This Chapter will touch on some of the strategic and tactical issues that potential investors should be prepared to address when investing in European CRE. These include country-specific features; differences and similarities between investments through interests in mortgages, mezzanine notes and B-pieces; CMBS in Europe and the US; the CRE debt secondary markets; and problems associated with the economic pressures in the Eurozone.

20.2 Asset-level investment considerations

The confection of a winning bid to acquire CRE assets requires a sound strategy coupled with compelling financing and engaged and competent service providers and asset managers on the ground. Moreover, it requires a proper appreciation of the legal technicalities associated with investments in European CRE by international investors. In some respects, this last ingredient can be particularly challenging for investors whose investment experience has been limited to their own jurisdictions, for CRE is uniquely influenced by the law of the place where the property is located. In law, as in commercial life, it truly can be said that the secret of CRE investment is ''location, location, location''.

Cross-border considerations in Europe are more complex than in the US not merely because of language and cultural differences, but also because of the fundamentally different evolution of real estate law in Europe and the US

despite converging conceptions of a federal system. In the US, whilst real estate law and law governing enforcement or foreclosure is specific to each US State, the laws of each US State—particularly with respect to CRE as opposed to residential real estate—can be viewed as relatively homogenous in a very general way, at least if compared to the hotchpotch of various legal systems and concepts evident across national borders in Europe.

As an example, it is fairly typical in the UK to see borrowing structures with varying degrees of complexity where the borrowers may be located in certain jurisdictions with favourable offshore tax regimes (such as, by way of illustration, Ireland, Netherlands, Luxembourg, Jersey or Gibraltar), or which provide greater tax efficiency, or are required to be used to comply with applicable national law on the basis of the underlying assets collateralising a given loan (the Netherlands or France, among others). Added complexity is introduced to the extent that the underlying CRE securing such financings may be located in one or more European jurisdictions and to the extent that the documentation governing such loan and associated hedging relationships may be subject to the national laws of another EU Member State. Accordingly, European CRE loans involve an appreciation of various legal regimes (each with its own lending and security requirements) that are distinct from each other. This is a fundamental difference from the US legal framework for equivalent transactions to the extent that standards are essentially sui generis or incompatible with other regimes.

The enforcement of rights in a CRE mortgage depends heavily on the local law governing interests in the subject CRE, the enforceability of subordination and intercreditor arrangements, and the local power of eminent domain. In addition to the basic impact of cross-border legal systems on the structure and documentation of a CRE loan, the appraisal of value of a CRE project is often a function of planning (zoning in the US) and land use restrictions, which in the experience of investors with a point of reference in the US, are resolved at the most local level of government. This may depend as much on local conceptions of what is the highest and best use for a loan as on conventional legal doctrine. This consideration should also extend to the political climate in the location of any proposed investment assets where populist governments and/or local authorities have been attempting to curb lender enforcement rights over certain types of properties and limiting development opportunities. Therefore, an important consideration for US investors in European CRE is to strategically map the legal concepts and enforcement rights that are relevant to determinations of value to the corresponding concepts to which they are accustomed in their home jurisdictions.

20.2.1 Strategy

In order to realise the strategic vision, it is also necessary to have in place a robust platform or service provider network that permits realisation of those expectations, bearing in mind that the ultimate strategy will deter-

mine the manner in which a CRE portfolio is managed. In the case of a classic long-term equity management play, it will be particularly important to have a strong servicing and property and/or asset management capability on an asset-by-asset basis with disposition or favourable refinancing as an ultimate exit strategy.[4] On the other hand, in the case of a distressed lending ''loan to own'' strategy the most important elements of investment success will be the ability to obtain value by enforcement and ultimate disposition, refinancing or repositioning of the property after enforcement. The application of these considerations to an individual case will depend on the nature of the parties to a transaction and the character of the acquisition of the interest in CRE, as discussed above. However, in order to have a meaningfully realistic exit strategy, the investor should consider having a captive servicer platform (either in-house or appointed via a non-exclusive third party arrangement) to provide the expertise in resolution strategy.

20.2.2 Financing

The specific implementation of a portfolio acquisition strategy may be affected by the conditions in which the acquiring party will expect to finance its acquisition. Some basic considerations have been discussed above. Financing terms may be affected by a variety of factors, including whether the CRE acquisition is being conducted on an asset-by-asset basis, or as part of a broader portfolio transaction, whether the financing is structured using securitisation techniques. The objectives and timelines of the bidder that may impact the use of leverage may also affect investment decisions. In the case of investment funds these generally relate to the fund guidelines and in the case of joint ventures they may require negotiation between the bidders on a common set of parameters.

A key consideration will be the difficulty of obtaining third party debt or equity financing to support the acquisition. Financial institutions now view with greater interest opportunities to finance portfolio sales on non-performing CRE assets due to the margins and fees payable and relatively quick repayment. CMBS has also been the source of vendor financing in certain occasions. Whilst we have witnessed the opening of sources of third party finance, it remains for evident reasons both portfolio and buyer specific. The availability of third-party financing sources provides greater options for an ultimate exit. Taken together with a steady ream of investment opportunities to finance portfolio acquisitions in Europe, a sustainable level of activity in the short term appears likely. In that sense, there is opportunity for investors to take an equity stake in a transaction or provide straight financing (either alone or in syndicate) to third party purchasers or by investing in related CMBS to allow such parties to gain exposure to transactions they may have not otherwise been able to access, in so-called ''loan on loan'' financing. Whether such institutions will prefer an equity, financing or capital markets investment role will ultimately depend on the

[4] See further Chs 9, 10 and 11.

risk/return profile of the transaction that may ultimately cater more to certain types of institutions rather than others.

20.2.3 Getting the necessary parties onboard

As discussed above, a crucial element of any strategy that involves a financing option is to determine the optimal source of financing, whether provided by a third party lender or through CMBS, and the terms of the financing. This will involve very different considerations depending on the nature of the financing party and the way in which the financing is structured. It may be necessary to structure a financing in such a way to satisfy rating agency criteria,[5] if the objective is to create highly rated CMBS securities that satisfy investment guidelines of capital market investors, or alternatively to facilitate the issuance of asset-backed commercial paper by permitting the conduit to satisfy its own rating requirements.

The identity of parties to a financing transaction will be dictated to a great extent by the nature of the transaction. A trustee or security trustee, an administrator, a servicer and a special servicer are all potential parties to a financing transaction. Their roles in the European market are dealt with throughout this book.

20.2.4 Certain legal considerations affecting marketing

20.2.4.1 Type of asset or transaction

The amount of due diligence required in respect of a CRE transaction is heavily dependent on the nature of the asset and of the transaction itself. In the case of a whole loan acquisition, the purchaser will have full power to exercise control over the loan and negotiate any work-outs or other resolution strategies with the related borrowers, subject only to restrictions imposed by local law. As described above, a purchaser must appreciate the local laws affecting its proposed exit strategy in relation to each asset it is acquiring. European loan structures can be complex when compared with their US equivalents and can involve a number of very distinct legal regimes. A transaction may involve non-CRE assets such as synthetic swaps and there may also be exposures to third parties that may introduce counterparty credit risk to a transaction where that counterparty may also have rights to administer or influence the decision-making in respect of the reference obligation.

Apart from the predictable impact that the governing laws of the place of incorporation of each member of a given borrower group may have on a structure as well as the location of the underlying income producing properties, it is also important to consider the various tax considerations that can have an impact on such strategies. These tax considerations may

[5] See further Ch.14.

not necessarily be limited to the applicable tax regime affecting the location of where the CRE is situated, but may extend to the relevant entity's place of incorporation and/or where it effectively manages and operates its business, among other considerations.

On the other hand, if the asset is a tranche of a loan, or a CMBS security, the ability of the holder to take actions with respect to it may be materially limited if other parties (whether lenders or bondholders) have contractual rights permitting them to exercise control rights over the asset, such as rights to consult on servicing decisions, special servicing transfers or appraisal reductions, each of which have been discussed in previous Chapters. Furthermore, the extent to which the CRE asset may be out of the money may affect the identity of the party entitled to exercise such control rights, as the controlling party is often defined as a majority of the most subordinate class with at least 25% of its principal amount outstanding. It is worth noting that it is not always easy in Europe to identify such controlling party at any given time because publicly placed European securitisations do not maintain a central register of noteholders and because CMBS securities are often held in book-entry form through Euroclear. This problem of identification is similar to that affecting US CMBS in book-entry form that is held through DTEC. Accordingly, purchasers of non-controlling classes of bonds may wish to take additional steps to identify which institutions are represented within the controlling class where the identity of such institutions can have an impact on how the purchaser's realisation strategy is or can be implemented and whether such strategy is ultimately realistic taking into account such third parties' own interests.

20.2.4.2 Control

In the case of CMBS securities, the control determinations can be complicated by many factors, including intercreditor issues between the securitisation and subordinate loans that are secured by the same mortgaged property but are held outside the securitisation structure. These types of intercreditor issues are often apparent in tranched A/B loan structures, where the senior (or A) tranche of the loan is placed in a securitisation and the subordinate (or B) tranche is either held, assigned or is itself securitised in a mezzanine CMBS or CRE CDO.[6] The subordination and intercreditor arrangements are of great importance because the party with control over enforcement rights and other functions such as appraisal reductions will have great influence over determinants of value.

The nature of the asset and the nature and existence of other creditors (such as swap counterparties, junior lenders, senior lenders or mezzanine lenders) may affect the extent to which the purchaser may exercise control rights in respect of the asset. For example, swap counterparties to financing structures often have contractually determined rights to share in cashflow from

[6] See Chs 5, 6 and 7.

the charged property, with remedies upon certain events that can include changes to payment entitlements and step-up of rights to direct certain determinations. To the extent that there are other lenders in the structure, or that rights are held by CMBS bondholders, other parties (such as third party lenders, swap providers or loan servicers) will be involved in the transaction or the administration of the underlying asset in either an ownership, secured party or agency capacity. Any of such parties may present an obstacle to a purchaser that seeks to implement its own resolution strategy by acquiring a direct interest in the loan CMBS bonds backed by the loan.

A fairly typical example of how such parties to a transaction can directly impact the management of a loan relationship is seen in the rights such parties may have to require the termination and appointment of their nominated special servicer (if any has been appointed). In distressed loans, such special servicers will have primary responsibility in managing the lender/borrower relationship, interfacing with the borrower as to proposed work-out or restructuring plans and ultimately when and whether to take any enforcement action in respect of that loan and its security. It is also possible that such third parties may have certain consent or consultation rights before such prescribed actions are implemented in respect of the related loan or its security. These types of consideration will affect the nature of a CRE investor's interactions with the borrower, as well as the opportunities for realisation of value or liquidity.

20.2.4.3 Facility agent/security agent transfers

In order to maximise the opportunities of realisation on a particular loan asset, the purchaser (or its delegates) normally must be able to interface directly with the borrowers on the underlying loans. Effective channels of communication can be crucial to the ability to engage in modifications of the loan and to understand issues involving the borrower that can affect value. To the extent that any of the existing agents in a loan structure are intending to exit the transaction after the purchaser completes its acquisition of the asset by the purchaser, it is important to ensure that such transfers are permitted and to control the costs and liabilities involved in the same, including, such items as transfers of any related security held in any particular agent's own name. Similarly to what has been described above, local law requirements may have an impact on the selection of any replacements, as certain European jurisdictions regulate the types of entities that may perform certain functions in respect of CRE assets. As discussed in other Chapters, securitisations will usually involve other intermediaries as well, such as a loan agent or servicer or a special servicer who will be a point of contact with the underlying obligors. Following its acquisition of the CRE interest, it will be important for the purchaser to assess the extent of its control over the selection and replacement of this intermediary and to ensure that the preferred intermediary is in the role. The considerations discussed above under "control" will be germane to that assessment.

20.2.4.4 Restrictions on assignability

The assignability of a CRE loan that has been acquired is an important element to determining the lender's exit, in the case of a direct loan and of the lender's ability to take necessary actions and make needed determinations, in the case of a loan that is financed through a CMBS structure. In cases where a CRE loan or other asset is not capable of being assigned, it is necessary to consider alternative structures such as loan participations or total return swaps. However, these arrangements pose their own challenges, including the continuing interposition of the lender of record as counterparty, facing the party with the actual credit exposure to the underlying borrower. In order to be viable, any transaction must be structured and implemented in such a way that the purchaser or servicer may effectively take lender decisions in respect of a CRE loan.

20.3 Special considerations for US investors

As discussed in Chapter 1, CMBS has historically represented a source of liquidity for investments in commercial mortgages. The combination of bankruptcy-remote structuring and structured credit enhancement to provide a basis for issuance of highly-rated mortgage-backed securities has long been a potent structuring tool, one that has facilitated capital formation in the CRE markets worldwide.

Although the previous sections of this Chapter have focused on asset-level issues, a crucial set of considerations for transactions sold to US investors relates to the regulatory impact of the structure on US investors, and conversely on the impact that US investors can have on the legal position of a non-US issuer or sponsor.

Commercial mortgage investments that are packaged into securities for sale to investors in the US raise several sets of legal issues. In respect of European issued ABS, these may involve an interplay between US and European legislation, which may impose additional requirements to those which would apply on a purely domestic issuance.[7] From a US perspective, the principal issues involve the registration requirements of and substantive liability under the securities laws, the need to obtain an exemption from registration of the issuer as an investment company, the need to structure the transaction to be eligible for investment by pension plans without causing a prohibited transaction under US pension law and the need to structure the transaction in such a way as to qualify for favourable treatment under US tax law governing real estate mortgage investment conduits.

[7] Recent legislative requirements in respect of European CRE and CMBS are discussed in Chs 16 and 17, whilst this Chapter solely explores US considerations.

In the earlier edition of this Chapter, we omitted discussion of potential regulatory reforms that had not yet affected securitisation or private equity transactions but would possibly have an impact on them depending on how certain rule making activity to implement the Dodd-Frank Wall Street Reform, Consumer Protection and Transparency Act (Dodd-Frank Act) was carried out. At the time, those issues were too uncertain to assess authoritatively. At the time of writing, the passage of Regulation AB II and the Risk Retention provisions of the Dodd-Frank Act are keystone pieces in the regulatory framework affecting CMBS and should play a key role in any investment analysis.

20.3.1 Securities laws

Any offering of securities in the US or to US persons (including European issuances marketed to US investors) must be registered with the US Securities and Exchange Commission (SEC) unless an exemption from registration is available. The typical exemptions used for CMBS offerings are Regulation D and r.144A under the Securities Act of 1933, as amended (Securities Act). Regulation D applies to private placements of securities to ''accredited investors'', both on initial sale and on resale, but is not intended for broadly distributed offerings, although the US JOBS Act has relaxed the restrictions on general solicitations of such offerings in certain circumstances. Rule 144A is a resale exemption that applies to offerings to ''qualified institutional investors'', which are institutional investors that own at least $100 million of securities issued by unaffiliated investors.[8]

Registered offerings of CMBS must comply with the registration and disclosure requirements of the SEC's Regulation AB. This rule sets forth specific requirements for disclosure of information about sponsors, originators, servicers, trustees of a securitisation transaction and also requires significant information about the pool assets, including detailed information about significant obligors as well as static pool information about the current pool and prior securitised pools. In addition, registered offerings must comply with the requirements of SEC Rule 193 to provide disclosure about the underwriting of the securitised assets. Regulation AB requires that service providers certify annually as to compliance with servicing stan-

[8] Registered offerings are subject to liability under ss.11 and 12 of the Securities Act of and s.10(b) and 17 of the Securities Exchange Act of 1934 as amended. Section 11 imposes joint and several strict liability to the issuer, its officers and directors, the underwriters and any experts who have consented to be named as such in the prospectus for losses arising from any material misstatement or omissions in the prospectus, although the underwriters can defend against a claim under s.11 by showing that they had conducted ''due diligence''. Section 12 imposes strict liability against any person who offers or sells a security by means of a prospectus or oral communication which includes a material misstatement or omission. Section 10(b) and s.17(a) require, as a condition to liability, that the defendant knew or was reckless in not discovering that the disclosure contained a material misstatement or omission. As a practical matter, registered offerings expose the sponsor to greater risk of liability than unregistered offerings because under current law only s.10(b) and s.17(a) provides a basis of securities law liability in those transactions.

dards. Regulation AB has been in place since 2004 and CMBS offerings in the US have been structured in reliance on it, with reporting, certification and indemnification provisions that have become quite standard over the years.

In mid-2011 the SEC proposed amendments to Regulation AB that significantly altered how transactions must be handled in the CMBS market. The final rule passed in 2014, with the SEC having adopted many of the proposed changes in Regulation AB in its most current iteration Regulation AB II. Regulation AB effected significant revisions to Regulation AB with respect to the shelf registration eligibility requirements, disclosure requirements and credit risk retention requirements for CMBS offerings. Regulation AB II asset-level disclosures will apply to both CMBS and re-securitisations of CMBS. Regulation AB changed the original standards by enacting new asset-level data disclosure and reporting requirements; new shelf registration eligibility requirements to reduce the undue reliance on credit ratings (CMBS are no longer required to be rated as ''investment grade'' to be eligible for shelf registration); mechanisms to enforce representation and warranty statements made about underlying assets; filing restrictions requiring that a complete preliminary prospectus be filed at least three days before the first sale in the offering; and the creation of new standardised forms for the registration of CMBS as well as a provision for paying registration fees on a ''pay-as-you-go'' basis.

Regulation AB does not change the basic substantive definition of an asset backed security, but it does invalidate certain exceptions that impinge on the instruments flexibility. For example, securities backed by assets that arise in non-revolving accounts are no longer considered to be asset-backed securities because they are excluded from the master trust exception to the discrete pool requirement; the revolving period for securities backed by non-revolving assets is now one year instead of three years; for securities backed by a pool with a prefunding period, the prefunding account cannot exceed 25% of the offering proceeds (or the principal balance of the total asset pool in the case of master trusts).

Regulation AB II does not enact public disclosure requirements on private securitisations under Rule 144A, which originally was a key component of the proposed rules in 2011. European or smaller players that find the additional regulatory requirements too onerous for practical, financial or language-related reasons may resort to conducting only 144A transactions instead of coping with the additional burden. The proposed amendments to Regulation AB would have changed this by requiring that the investors in unregistered offerings of CMBS be contractually entitled to require the full suite of Regulation AB disclosure that they would have been entitled to receive in a registered offering. This would have eroded the distinction between registered and unregistered offerings and would have bifurcated the CMBS market into fully SEC-registered deals and truly private deals. Sponsors of CMBS transactions sold into the US would thus be forced to

navigate between the Scylla of heightened liability and the Charybdis of reduced liquidity.

Compliance with Regulation AB II requires filing the new Form SF-3 for shelf registrations of all CMBS offerings. Form SF-3 revises the eligibility criteria for shelf offering in four critical ways. First, the CEO of the depositor must certify for each offering, in writing, that (s)he has reviewed the transaction prospectus, acknowledges the content and accuracy of the loan documents, and claims that (s)he believes that the issuance is structured to produce the requisite cash flows. CEO certification about the disclosure contained in the prospectus and the structure of the securitisation must take place at the time of each offering. Secondly, there must be an independent review of the asset pool documents. This ''asset reviewer'' is tasked with reviewing the representations and warranties of the disclosure and to investigate potential ''trigger events'' outlined in the loan documents. The review must be carrier out by a CMBS Regulation AB II ''certified person''. Thirdly, SF-3 requires a dispute resolution clause guaranteeing mediation for repurchase demands that have not been resolved after 180 days.[9] Finally, the party responsible for filing Form 10-D must disclose requests from an investor to communicate with other investors.

One cannot authoritatively discuss the impact of regulatory reforms to the securitisation market without discussing the effect of the Dodd-Frank risk retention rules. Risk retention is now the cornerstone of the US regulatory reform efforts in the securitisation area. Mandated under Section 941 of the Dodd-Frank Act (which also added s.15G to the Securities and Exchange Act of 1934, 15 USC sec. 78o-11), Dodd-Frank was designed to align the interests of securitisers with those of investors in the ABS market. Section 941 mandates that securitisers retain at least 5% of the credit risk of any securitised asset pool for at least five years, or designate a B-piece buyer (third-party risk retention). However Dodd-Frank leaves room for the SEC to determine the scope of any exemptions from these rules for securitisation involving high-quality assets and the form and composition of such risk retention.[10]

US regulators recognise that employing third-party purchasers specifically negotiating for the purchase of a first-loss position is a common feature of

[9] Buyback demands tend not to occur very often in the CMBS market, therefore the effectiveness of this provision is unknown and untested.

[10] Compare the Dodd-Frank Risk Regulation Rules to recent EU proposals to alter risk alignment rules for the ABS market. Current rules in Europe mirror the US' 5% retention requirement. However, EU lawmaker Paul Tang proposes ''simple, transparent and standardized rules'' that not only increase risk retention rates to upwards of 20% but also establishes a public registry detailing investor positions and loan information. A copy of the draft report can be found at *http://www.europarl.europa.eu/* [Accessed 11 August 2016]. Other proposals involve authorising the European Banking Authority to vary retention rates by type of security or investor risk portfolio.

CMBS transactions typically absent from other asset classes. Section 15G(c)(1)(E)(ii) of the Exchange Act expressly permits the SEC to create rules permitting third-party retention for CMBS transactions. Two, but no more than two, third-party purchasers are permitted to satisfy the risk retention requirement through the purchase of an ''eligible residential interest''. Third-party purchasers often are, or are affiliated with, special servicers in CMBS transactions. Due to this strong connection and the special servicing rights in CMBS transactions, Dodd-Frank requires the appointment of an Operating Advisor (OA) in all CMBS transactions that rely on the third-party risk retention option. This rule is intended to limit the ability of third-party purchasers to manipulate cash flows through special servicing. Whether the B-piece is initially sold to a third-party purchaser or sold to a third-party purchaser after the initial five year holding period expires, the transaction must have an OA in place at all times that a third-party purchaser holds any portion of the required risk retention.

Credit risk may only be passed onto another qualified B-piece buyer or servicer. The risk retention rules provide an exception to restrictions on transfers of the retained credit risk in CMBS transactions, permitting the transfer of the retained interest by any initial third-party purchaser to another third-party purchaser at any time after five years after the date of the closing of the transaction, provided that the transferee satisfied each of the conditions applicable to the initial third-party purchaser under the CMBS option, in connection with such a purchase. The secondary third-party purchaser can then subsequently transfer the interest to another qualifying third-party purchaser.

While there has been considerable experience with the operation of Regulation AB in US CMBS transactions, many look with trepidation on the potential impact of the proposed amendments to Regulation AB on the wider CRE finance market. In particular, there is a concern that the enhanced disclosure requirements may pose compliance difficulties, particularly where the underlying assets may themselves consist of structured finance securities with respect to which the issuer cannot provide adequate disclosure with respect to underlying assets.

20.3.2 Investment Company Act

Securitisation entities are ''investment companies'' as defined in the Investment Company Act of 1940, as amended (Investment Company Act), and therefore are required to register as such unless an exclusion from the definition applies. As a practical matter it is imperative for CRE structured finance transactions to operate under an exclusion from registration, because the substantive requirements of the Investment Company Act that apply to registered investment companies are antithetical the requirements of securitisations. These requirements include stringent limitations on leverage that would severely curtail the ability to use financing in a manner

that is customary for CRE investments, as well as restrictions on transactions with affiliates and certain other business activities that could hinder the relationships among many parties to the CRE transaction. The consequences of failure to register an investment company for which an exclusion does not apply include administrative sanctions and automatic unenforceability under US law of all contracts that the investment company has entered into.

The most common exclusion for CMBS transactions and other CRE transactions is s.3(c)(5)(C) of the Investment Company Act. That section excludes from the definition of investment company ''[a]ny person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged ... [in the business of] purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.'' Many different types of companies in a variety of businesses rely on this exclusion. Such companies include: those that originate and hold CRE interests (such as mortgage participations, mezzanine loans and mortgage-backed securities) and companies that invest in CRE, mortgages and mortgage-related instruments. The SEC staff, in providing guidance on this exclusion, generally has indicated in several No-Action Letters that a company will be considered to be ''primarily engaged'' in the business of purchasing or otherwise acquiring mortgages and other liens on and interests in CRE if at least 55% of the issuer's assets will consist of mortgages and other liens on and interests in CRE (called ''qualifying interests'') and the remaining 45% of the issuer's assets will consist primarily of CRE-type interests, such as Tier 1 CRE mezzanine loan.

The SEC is, at the time of writing, engaged in a review of interpretive issues relating to the status of mortgage-related pools under the Investment Company Act in light of the evolution of mortgage-related pools and the development of new and complex mortgage-related instruments. The review was occasioned by concerns that s.3(c)(5)(C) exclusion has been expanded beyond its originally intended scope by CRE-related investors that have sought to rely on it for exclusions of investments in CRE securities, or other interests that are far afield from classic mortgages and CRE equity interests. This review is unlikely to change the applicability of s.3(c)(5)(C) to traditional CMBS transactions (unless by changing the interpretation of what it means to be ''primarily engaged''), but it may result in a narrow interpretation of its applicability to non-traditional securitisations or to other CRE-related transactions. If s.3(c)(5)(C) were not available, a CMBS transaction with US investors would have to be structured to rely on Investment Company Act r.3a–7 or s.3(c)(7). Rule 3a–7 is an exemption from the registration requirements for securitisations of eligible assets that meet certain requirements relating to ratings, security interests and the like and do not provide for active management of assets for the purpose of realising gains or avoiding losses, while s.3(c)(7) is available for companies that are not contemplating a public offering and whose secu-

rities (or in the case of a foreign issuer, whose securities held by US residents) are held only by ''qualified purchasers'' that have not been formed for the purpose of the transaction in which they are investing and that generally have $5 million or more in investable assets.

20.3.3 ERISA

Most privately sponsored US pension arrangements are subject to the fiduciary responsibility requirements of the Employee Retirement Income Security Act of 1974, as amended (ERISA). These requirements apply to investment advisers and similar persons who manage assets of certain US pension plans, regardless of where that manager is located. The requirements include a fiduciary standard of conduct as well as strict ''prohibited transaction'' restrictions, which bar ERISA investors from dealing with certain specified parties (''parties in interest'') in the absence of a statutory or administrative exemption.[11] ERISA fiduciaries are prohibited from engaging in certain types of transactions involving self-dealing and conflicts of interest with parties in interest. As an example of the breadth of the prohibited transactions prohibitions, an ERISA fiduciary would be prohibited from investing in securities of the plan sponsor in the absence of an exemption. Actions to recover damages for breach of fiduciary duty may be brought in US courts on behalf of an ERISA investor by another fiduciary for that investor or directly by the US Department of Labor.

The managers of certain private funds in which ERISA plans invest may be considered to be fiduciaries of the ERISA plan, and subject to the standard of care and other restrictions described above. As a result, the servicers of asset pools supporting some CMBS instruments could be considered ERISA fiduciaries. For this reason most CMBS issues that are marketed to ERISA plans comply with the requirements of an ERISA exemption, regardless of whether the sponsor or the assets are outside the US. Also, because of the complexity and severity of the ERISA fiduciary requirements, it is often desirable to structure CRE investment funds to avoid their application. In the case of equity real estate funds, this can be accomplished by structuring the fund as a ''real estate operating company'' (or REOC).[12] Under the US Department of Labor's new conflict of interest regulation issued in 2016, seeing or promoting investment services to ERISA investors could constitute fiduciary advice. If this were to occur, an exclusion or exemption will be needed to avoid ERISA ''Prohibited Transactions''. This regulation is

[11] ERISA's fiduciary standard is one of the highest standards of care available under US law. A retirement plan fiduciary must act with prudence and undivided loyalty to the participants in that plan.

[12] A REOC is a company that invests in real estate and issues shares that are traded a public exchange. A REOC is in many respects similar to a real estate investment trust, but there are some differences between the two. For example a REOC must reinvest its profits whereas a real estate investment trust is required to distribute profits to its shareholders. REOCs have a greater degree of flexibility than real estate investment trusts with respect to the types of real estate investments in which they can invest.

likely to have an effect on a much broader scope of professionals who make investment-related recommendations. Investment professionals now need to take into consideration whether their dealings may make them a fiduciary, for the purposes of the regulation.

20.3.4 Tax

Tax efficiency is a key consideration for real estate investors, particularly in international transactions. US investors acquiring interests in European CRE would need to consider the effects on a proposed transaction of applicable tax regimes in Europe and the US.

20.3.4.1 EU tax considerations

US investors in European CRE must be familiar with the applicable tax laws in relevant European jurisdictions affecting investments in real estate transactions, including such matters as whether the underlying asset is eligible for depreciation, and if so the depreciation rate that applies, the treatment of depreciation, whether rental income will be taxed as investment income through withholding or on a net income basis and taxation of capital gains. Relevant considerations for this analysis include whether and under what circumstances rental income from CRE located in the relevant EU Member State and any gain from its sale would be considered source income that is subject to tax in that jurisdiction, whether the US investor's personal tax status has a bearing on the conclusion, and whether that member state has an income treaty with the US (or other countries through which investments may be routed) and whether the tax treaty has a bearing on the US investor's tax treatment. Such considerations may only be resolved by analysing applicable local tax law in the relevant EU jurisdictions together with tax specialists so as to structure an optimum tax structure for the investor. These questions may also be affected by the US tax considerations discussed below.

20.3.4.2 US tax considerations

US investors in foreign real estate must also be concerned about US taxation because US income tax is assessed on net income earned throughout the world, subject to credits for taxes paid in other jurisdictions. The timing of US taxation is subject to complex rules.

20.3.4.2.1 Shareholders in controlled foreign corporations and passive foreign investment companies

Even if a US investor structures its holdings of interests in European CRE or its servicing functions through a local corporation or other entity treated as a corporation for US tax purposes, each US shareholder would need to be concerned about current taxation of its pro rata portion of the entity's ''subpart F income'' related to the entity's ownership or servicing of CRE

interests under the rules governing controlled foreign corporations (CFCs) if the entity is majority owned or controlled by US persons, each of which owns at least 10% of the entity's voting stock.[13] The CFC rules represent an exception from the general rule that US shareholders of a foreign corporation can defer US income tax on the corporation's non-US earnings until the corporation repatriates its earnings to the US shareholders through distribution of a dividend. The taxation of the US shareholders' pro rata share of the income of a CFC is subject to mitigating rules designed to avoid double taxation.

However, if 75% or more of the foreign corporation's gross income is passive income or 50% or more of its assets by value generate or could generate passive income or no income at all, the foreign corporation will be subject to the rules governing ''passive foreign investment companies'' (PFICs). The PFIC rules encourage US shareholders to pay tax on current income (regardless of whether or not it is Subpart F income and treating capital gains as ordinary income for this purpose) by imposing an interest charge on all distributions in excess of 125% of the average distributions for the prior three years and on gain from the sale of PFIC shares, pro rated for each day of the US shareholder's holding period.

A US shareholder may elect out of the punitive PFIC regime by making an election to treat the PFIC as a qualifying electing fund (QEF). By making a QEF election a US shareholder in a PFIC must include in current taxable income its share of the ordinary income and net capital gains of the PFIC, similarly to shareholders of a registered investment company (i.e. a mutual fund), but regardless of whether the PFIC makes an actual distribution. Such election is effective for the year in which it is made and all subsequent years. To the extent such election applies, the PFIC regime is avoided. However, US shareholders making a QEF election may be subject to tax on phantom income to the extent that the PFIC realises taxable income or gain that is not distributed to the electing shareholder. The QEF election can only be made if the PFIC provides information on its earnings to its shareholders each year. A mark-to-market election may also be made to avoid the PFIC regime described above—again at the cost of current inclusion even in the absence of distributions—if shares in the PFIC are regularly traded.

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[13] Subpart F income generally consists of income that is in principle relatively mobile in the sense of being easily moved between taxing jurisdictions in order to benefit from differences in tax rates between jurisdiction. Subpart F income consists of various types of income, including such things as insurance income and foreign-based company income. This latter is a particularly important income category applicable to most foreign corporations. It includes income from passive investments such as dividends, interest, royalties, capital gains and certain types of rents on real property). It also includes income derived in connection with the performance of technical, managerial, engineering, architectural, scientific, skilled, industrial, commercial or ''like services'' for or on behalf of any related person outside the country under the laws of which the CFC is created or organised. It also includes services performed by a CFC in a case where substantial assistance contributing to the performance of such services has been furnished by a related person.

20.3.4.2.2 Real estate mortgage investment conduits

US investors financing CRE investments can obtain significant tax efficiencies under the provisions of US tax law relating to entities that properly elect to be taxed as real estate mortgage investment conduits (REMICs). A REMIC is a SPV that pools qualifying mortgage loans and certain other qualifying assets and issues securities that normally represent beneficial ownership of the pooled assets. By electing to be treated as a REMIC, a mortgage pool ensures that its ''regular interests'' will be treated as indebtedness for US tax purposes and avoids taxation as a taxable mortgage pool (TMP), which is treated as a corporation for US tax purposes.

In order to qualify for inclusion in a REMIC, a CRE interest would have to satisfy certain criteria, including that it consist of a mortgage or other lien on real property, that the holder of the loan have enforcement and foreclosure rights, and that the loan-to-value ratio at the startup of the REMIC be no greater than 80%. The REMIC rules do not distinguish between US and non-US mortgage loans in terms of eligibility for inclusion in a REMIC. However, REMICs have very limited ability to own assets other than qualifying mortgages and assets closely related to them such as mortgage insurance and servicing rights, which may make it difficult for REMICs to use hedging instruments such as swaps.

A REMIC election confers significant advantages, including freedom from corporate taxation at the entity level and treatment of all regular interests in the REMIC (including B-pieces) as debt rather than equity for federal income tax purpose regardless of whether they would qualify as debt under a traditional debt/equity analysis.

However, a REMIC also brings some disadvantages. One of these is that notwithstanding the REMIC's treatment as a flow-through entity that does not pay entity-level taxes, the investors in a REMIC must pay taxes on earnings on their securities issued by the REMIC, and that tax may be assessed at both the state and federal level. Thus investors have little ability to reduce taxes on capital gains. Another disadvantage of a REMIC is that it is required to issue residual interests to entities that are fully taxable in the US as corporations. The REMIC residual interest holders are responsible for paying tax on the income that the REMIC would have paid but for the entity-level exclusion. These residual interests are distinct from B-pieces that represent the economic residual interest but that are treated as regular interests of a REMIC. Because the residual interests in a REMIC are non-economic interests and not entitled to a share of income or gains, they involve the payment of significant amounts of tax on phantom income. In order to sell REMIC residual interests the issuer must pay prospective investors an amount to cover the expected tax liability, with the pricing being based on a prospective residual holder's present valuation of the tax liability over the expected life of the transaction.

Another noteworthy disadvantage of a REMIC is that it is a static pool. Additionally, a REMIC is not permitted to acquire additional assets after the first 90 days from its ''start-up date.'' After that date the mortgage pool is set and the servicer has very little ability to trade or dispose of mortgages. The static pool nature of a REMIC reduces the ability to use pre-funded REMICs to acquire CRE assets opportunistically without a warehouse arrangement. It also makes it difficult to modify or restructure loans, as the REMIC rules generally consider a loan modification to result in a new loan unless the modification is made after default or when default is imminent. A modification that is deemed to be a new loan added to the pool, after the 90-day start up period, will cause the pool to lose its favoured status as a REMIC and to be treated as a TMP. Consequently REMIC structures pose challenges for investors that seek to enhance value from CRE loans by aggressive renegotiation. However, these challenges are not insuperable and can often be managed with knowledgeable advice about US taxation of real estate investments.

20.3.4.2.3 Foreign Account Tax Compliance Act

From 1 January 2013 US investors in European CRE have to be concerned about compliance with the Foreign Account Tax Compliance Act (FATCA), a US law that is designed to clamp down on under-reporting of foreign income by US persons. The implementation will be phased in, and the US Treasury Department has proposed rules and guidance that have raised as many questions as they have suggested solutions.[14]

Under FATCA foreign financial institutions (FFIs) must agree to provide information to the US Internal Revenue Service (IRS) or to their withholding agents for transmission to the IRS about US account holders or substantial US owners. Some countries, where it would be a violation of data protection law to provide such information to the IRS directly, are attempting to negotiate intergovernmental agreements with the US Treasury, pursuant to which FFIs in those countries would provide such information to their own governments, which would provide information in appropriate format to the IRS.

An FFI is broadly defined to include any foreign bank, custodian, broker-dealer, or pooled investment vehicle. The term can also include certain insurance companies. Although direct holdings in real estate would not cause a foreign investment entity to be treated as an FFI, any real estate-related holding that is structured as a security or derivative would cause such an entity to be an FFI.

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[14] The discussion below of the Foreign Account Tax Compliance Act is general and preliminary because the detailed rules implementing this legislation are only in proposed form and are subject to change.

In the absence of an agreement with the IRS, an FFI would be subject to withholding at a rate of 30% on certain US-source payments that it receives. These include US-source payments of passive income, such as dividends, interest and rents, received on or after 1 January 2014, and gross proceeds from the sale or other disposition of US stocks or bonds received on or after 1 January 2015. Under rules that have not yet been issued and that will not apply any earlier than 1 January 2019, a compliant FFI would itself need to withhold on certain distributions—referred to as ''passthru payments''—that it makes to any payee or beneficial owner who does not provide the FFI with a certification that the foreign entity does not have a substantial US owner, or does not provide the name, address and taxpayer identification number (TIN) of each substantial US owner. Although the FATCA regulations have been finalised, the US authorities have postponed publishing an official definition of a passthru payment, making it difficult to discern how foreign passthru payment withholding will actually apply. The IRS has considered a ''US assets based approach'' to withholding, whereby the Service would designate a non-withholdable portion of the passthru payment as a source of taxable income. But it is unclear whether this will be the final rendition of the passthru rule.

FATCA's regulations create two broad categories of certain regulated FFIs consisting of certain qualified investment vehicles and restricted funds that would be ''deemed-compliant'' with FATCA and therefore would have a more streamlined means of complying with FATCA in order to avoid the 30% withholding tax. ''Compliant'' FFIs are not subject to the same requirements as other FFIs. However, note that the scope of such entities is limited and they are still subject to due diligence requirements and registration with the IRS, either directly or through a withholding agent. US investors participating in an investment in European CRE interests now have the additional burden of determining whether the investment vehicle would be deemed compliant under FATCA.

FATCA regulations state that a qualified collective investment vehicle (QIV) may qualify as a deemed-compliant entity if it is an FFI solely because it is an investment vehicle (and not a bank, custodian, or broker-dealer). Under the proposed rules the QIV would have to be regulated in its country of incorporation or organisation as an investment fund and each record holder of debt interests in excess of $50,000 or equity interests in any amount would have to be a participating FFI, a registered deemed-compliant FFI, an exempt beneficial owner, or certain categories of US person (such as a publicly traded company, a regulated investment company, a real estate investment trust). All FFIs in the expanded affiliated group must be participating FFIs or registered deemed-compliant FFIs.

When attempting to allocate risk, US-based CMBS investors should also be wary of the different ways that loan agreements may trigger FATCA's withholding requirements. For example, if the borrower and its guarantor are both a US entity, so that interest payments are US-sourced, the borrower

may be subject to FATCA withholding if interest is paid to a noncompliant lender. Similarly, if the borrower is an FFI that earns some US-source income, and rules are issued during the term of the loan requiring withholding on foreign passthru payments, this may also trigger the withholding requirement. However, an existing agreement with an appropriate gross-up provision may not apply to FATCA withholding on passthru payments if this withholding is imposed pursuant to an agreement with the IRS.

20.4 Emerging trends in fintech and P2P lending

Fintech (''financial technology'') represents a new trend in the banking industry. Marketplace lending describes how fintech companies use innovative technology and advanced online marketing strategies to match borrowers with lenders without an intermediary. Fintech starts are using technology and new business models to upend a market that was believed to be linked solely to traditional banking institutions. The fintech and marketplace lending space comprises, at the time of writing, of clusters of tech-focused financial companies created during the GFC.[15] Since the beginning of 2015, investors have poured over $20 billion dollars into the fintech sector, providing smaller market players with more access to niche markets as well as alternative financing methods in challenging market conditions.[16] Fintech companies are increasingly playing a key role in the CMBS market at home and in Europe as traditional lending models stagnate.

20.4.1 Peer-to-peer lending

2015 saw the completion of the first US securitisation of peer-to-peer (P2P) consumer loans to obtain an investment grade rating. Such activity in the CMBS market is likely a sign of future growth in the P2P space. Peer-to-peer lending is the practice of lending money to individuals or businesses through online services that match lenders directly with borrowers. P2P began after the GFC in 2008, when banks started tightening their consumer lending policies due to the passage of Dodd-Frank. This led to the emergence of P2P online lending sites such as Prosper and Lending Club. P2P originators tend to target high-yield borrowers, with typical loan amounts ranging from $20,000–$30,000. The European markets could be a huge

[15] Oscar Williams-Grut and Ben Moshinsky, Mark Carney's biggest speech of the year is going to be about fintech and the technology behind bitcoin, Business Insider, May 24, 2016, Fintech has been described as the ''Uber moment'' for banks in Oscar Williams-Grut, *Ex-Barclay's exec: Fintech is a 'fundamental shift' to make finance appeal to millennials*, Business Insider, (26 May 2015), *http://www.businessinsider.com/barclays-rich-ricci-says-fintech-is-fundamental-shift-2016-5?r=UK&IR=T* [Accessed 11 August 2016].

[16] Jennifer Van Grove, *PeerStreet brings real estate investing to Main Street*, The San Diego Union-Tribune (26 October 2015), *http://www.sandiegouniontribune.com/news/2015/oct/26/peerstreet-launches-marketplace-for-real-estate/* [Accessed 11 August 2016].

opportunity for P2P lenders, but most sites are focused on the domestic market in the US (with the exception of Funding Circle).

The European P2P lending market is still nascent compared to the US, but has grown significantly overall. According to the UK P2P Finance Association, its members lent £411 million in 2015 up to 30 October, compared with £279 million in 2014. 2016 may evolve into a strong year for the sector. Funding Circle is the first European P2P lender to have loans from its platform securitised, setting a precedent that could attract additional funding to the fast-growing industry. The deal is a securitisation of at least two billion loans to SMEs since 2010 backed by £130 million of loans. Funding Circle's deal highlights the growing role of hedge funds and banks in a P2P market which has the reputation of being populated by retail investors, not sophisticated ones.

It is unclear how Brexit will affect players in the cross-border P2P lending market. Individual investors and small and medium-sized enterprises (SMEs), which are more likely to participate in the market lending or P2P markets, will likely invest less due to a lack of confidence to hedge risk. Brexit could also have an effect on fintech firms and P2P lending companies that rely on EU ''passporting'', as losing the ability to cross-sell across members states without having a physical presence within those member-states may render technology-based cross-border lending models difficult to use.

20.4.2 Crowdfunding

Crowdfunding has become quite popular in real estate circles, providing a new way to raise capital for a miniscule investment. In the pre-crowdfunding era, investing in private real estate required leveraging personal or professional networks or considerable institutional financing. With better access to pre-vetted deals, crowdfunding platforms also make it possible to begin investing with as little as $1,000. Up until recently, only accredited investors who had a net worth of $1 million or more or earned $200,000 a year were able to invest through crowdfunding platforms. In October 2015, the SEC finalised proposed rules for Title III of the JOBS Act, allowing non-accredited investors entry into the real estate crowdfunding arena on a widespread scale.

One of the benefits of crowdfunding platforms is increased transparency; they operate with a goal of offering investors as much detail about an investment as possible. Additionally, crowdfunding has increased the accessibility of the market, because it provides a platform to market deals to a wider segment of the public. The downside of crowdfunding platforms is risk and the potential for loss. By limiting large-scale real estate investments to accredited investors, the SEC was effectively trying to protect smaller investors. Specifically, there's an increased possibility for non-accredited investors to get hurt because they may have less disposable income to put at

risk or may lack the necessary knowledge to make informed investment decisions.

Crowdfunding loans are increasingly appearing in CMBS but remains a largely ''untested ownership structure''.[17] For example, data analytics company CrediFi is creating a CMBS platform called ''CMBS Suite'' to enable its customers to more easily parse through opaque loan structures. The CMBS Suite aims to connect lenders with CMBS and non-securitised loan opportunities. Also in 2015, there were three loans (worth $71 million total) made to Colony Hills Capital secured against a portfolio of five properties. These properties received $12 million dollars of crowdfunding through a small site. The consequence of bundling crowdfunded potentially high-risk ABS into CMBS is unknown, however, and will likely depend on the specific lending platform. Incorporating crowdfunding models into CMBS instruments will also depend on the definition of ''crowdfunding'' being used. For the Colony Hills Capital securitisation, Colony Hills Capital did a series of Regulation D offerings. Only accredited investors can do such offerings, which does not lend itself to attracting the prototype crowdfunding participant.[18]

Examples of Real Estate Fintech companies:

- PeerStreet—a marketplace lending platform for real estate debt.[19]
- LendInvest—an online platform for financing short-term mortgages.[20]
- Patch of Land—originates, underwrites, and services loans in the real estate space.[21]
- LendingHome—issues one-year, first-lien mortgages on one-to-four family homes and passes them on to institutional investors.[22]
- FundingCircle—a peer-to-peer lending platform active across Europe, the UK, and the US.[23]
- SoFi—an online student lender.
- Fundrise—an online crowdfunding platform that offers individual investors a chance to buy shares in commercial real estate projects.[24]

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[17] *https://www.bisnow.com/national/news/other/morgan-stanley-real-estate-is-the-final-crowdfunding-frontier-50579* [Accessed 11 August 2016].

[18] *http://www.businessalabama.com/Business-Alabama/November-2015/Crowdfunded-Development-or-Investment-Bank-Snipe/* [Accessed 11 August 2016].

[19] *http://www.digitaljournal.com/pr/2918067* [Accessed 11 August 2016].

[20] *http://www.businessinsider.com/macquarie-deal-with-lendinvest-2016-4?r=UK&IR=T* [Accessed 11 August 2016].

[21] *https://www.equities.com/news/patch-of-land-s-new-ceo-on-the-opportunities-in-real-estate-crowdfunding* [Accessed 11 August 2016].

[22] *http://therealdeal.com/2016/04/13/lendinghome-launches-crowdfunding-platform/* [Accessed 11 August 2016].

[23] *http://www.cityam.com/240051/peer-to-peer-securitisation-has-arrived-with-landmark-crowdfunding-deal* [Accessed 11 August 2016].

[24] *http://www.cnbc.com* [Accessed 11 August 2016].

20.5 Conclusion

In recent years global economic forces affecting world financial markets have been consistently drawing capital inexorably towards European CRE. The commercial issues and strategic dynamics posed by the movement of money are similar in many respects to those in any relation of buyers and sellers, although the particular strategic positions of particular players may be influenced by geography. However, a unique confluence of legal issues affects structures for European CRE that are offered for sale to US investors. Cross-border investments also raise unique needs for cross-cultural perception and the ability to translate common concepts of real estate finance into the vernacular, not only of different languages but of different legal systems, in order that US investors can usefully compare their rights in European CRE investments with corresponding rights in US CRE investments with which they are most familiar. The comparison does not stop there, because US investors also need to assess how both emerging and inchoate bodies of regulation in the US and Europe as well as the developing current political climate affect, or may affect, in the near future their position and affect the relative merits of an investment in any particular jurisdiction. The uncertain nature of developments in the law, in the economy, in the political landscape and in commercial practice makes cross-border CRE investments complex undertakings and requires great care in their implementation. However, European CRE investments can continue to represent extraordinary opportunities to achieve high yields for those investors who understand the intricacies and can accurately price risk and reward.