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Dr. Steffen Koch, Moderator

hww wienberg wilhelm; Hamburg, Germany

John DiDonato

Huron Consulting Group; New York

David A. Murdoch

K&L Gates; Pittsburgh

James H.M. Sprayregen

Goldman Sachs; New York

**American Bankruptcy Institute
International Insolvency Symposium**

**October 31, 2008
Frankfurt, Germany**

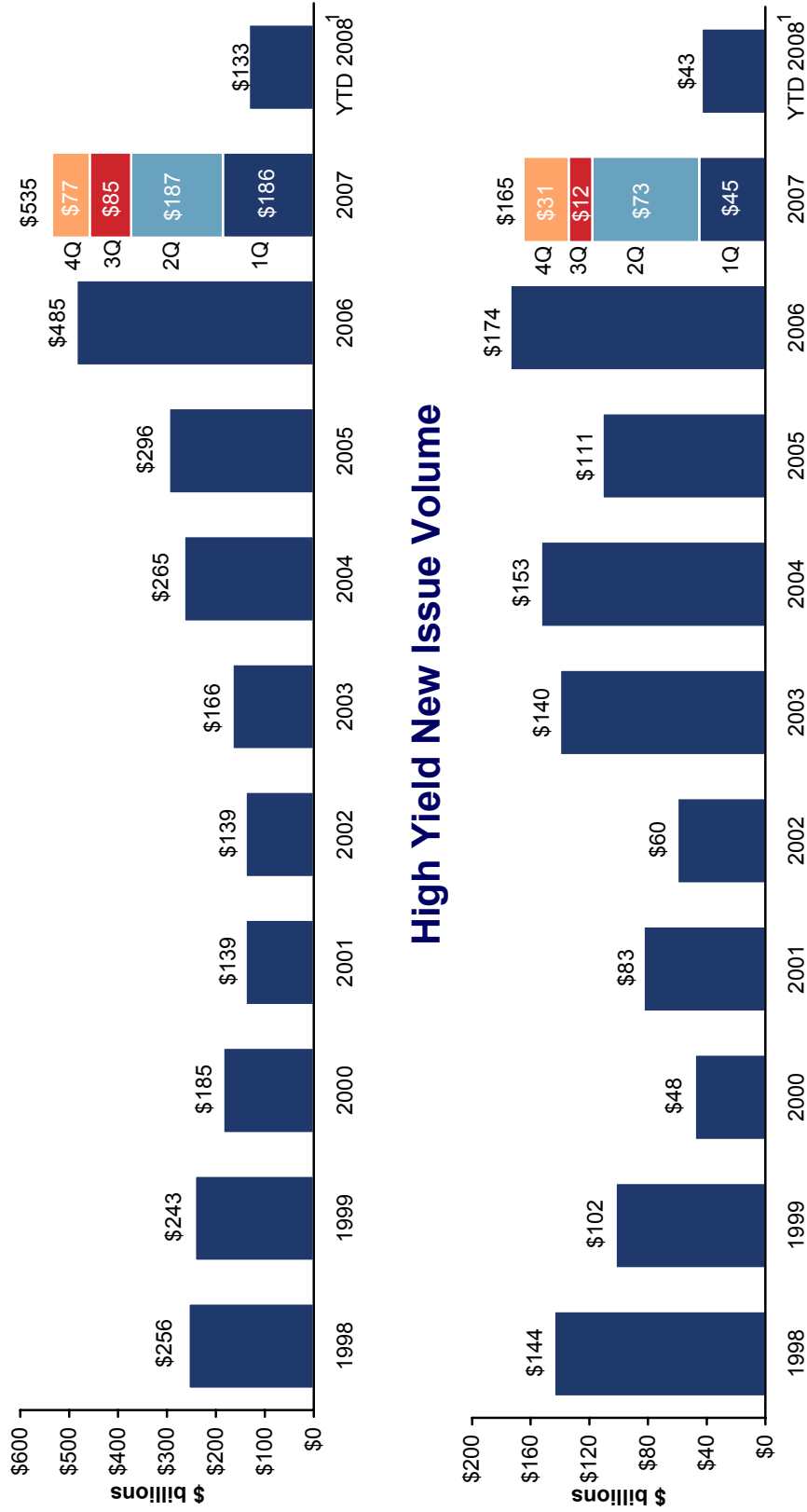
“State of the U.S. Credit Markets”

**James H.M. Sprayregen,
Goldman Sachs & Co.**

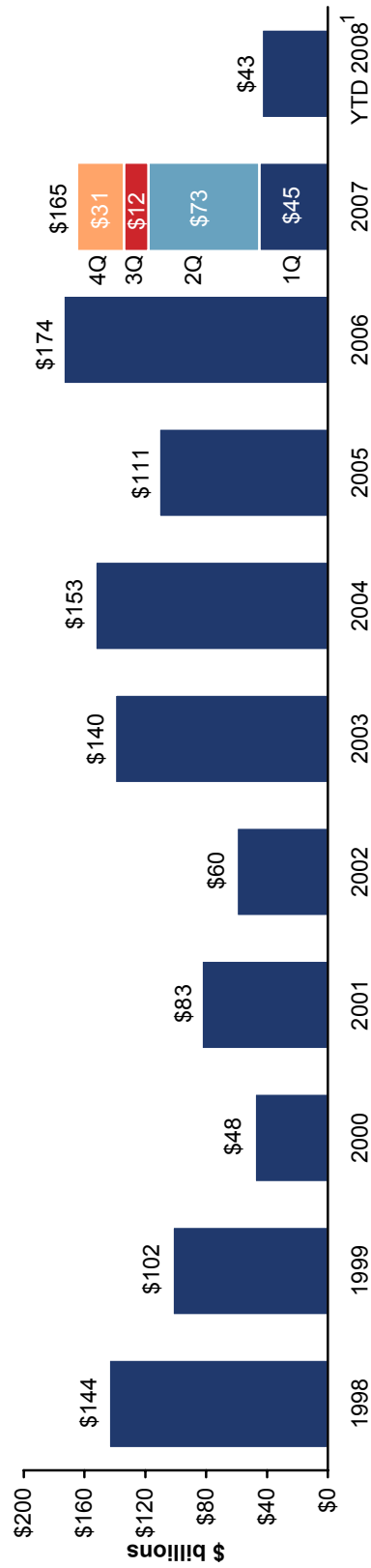
Leveraged Loan and High Yield Markets

An unprecedented amount of leveraged loans and high yield securities have been issued over the past several years

Leveraged Loan Market New Issue Volume

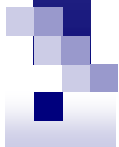


High Yield New Issue Volume



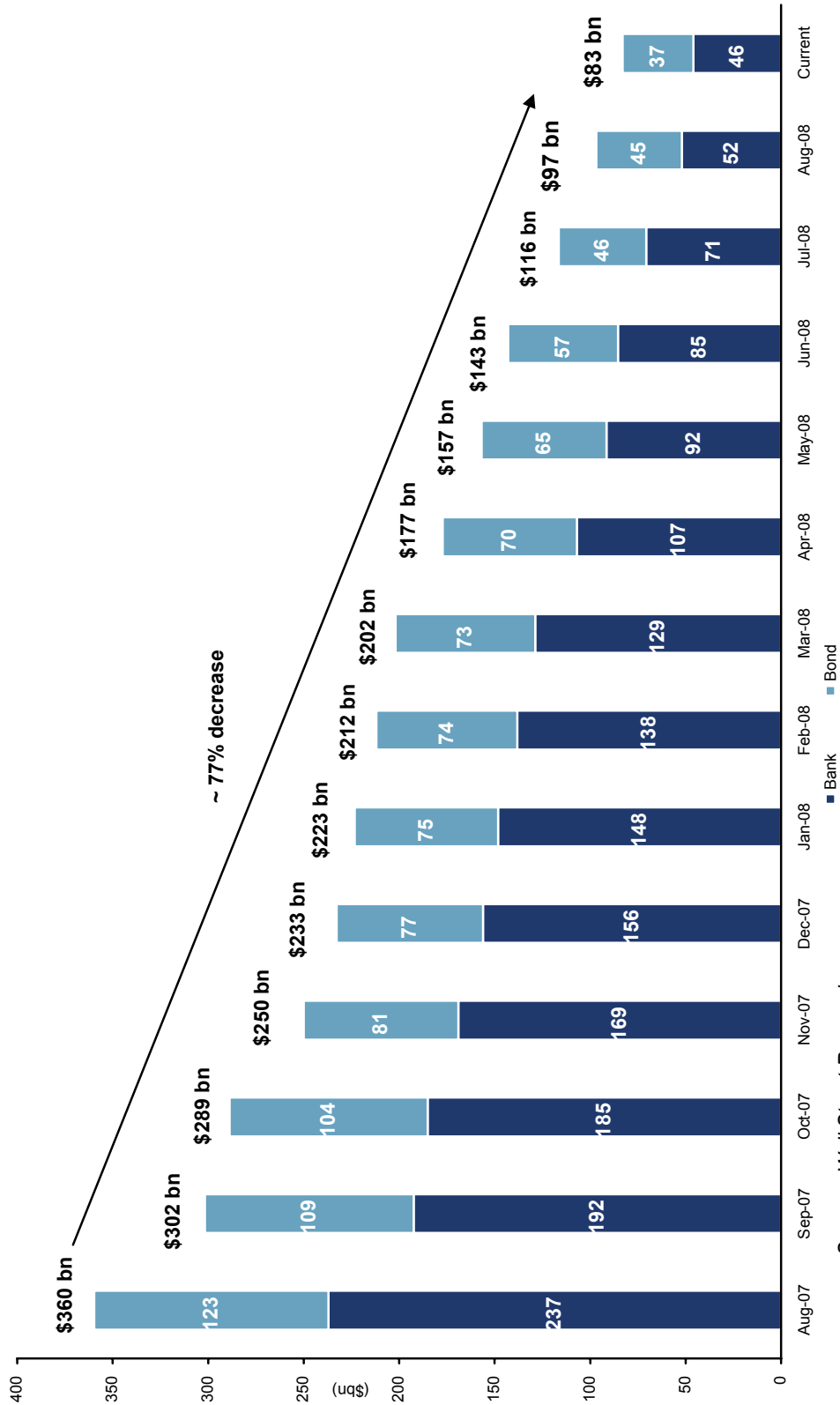
1) As of September 26, 2008

Source: Standard and Poor's and Goldman Sachs Research



Leverage Finance Market Forward Calendar

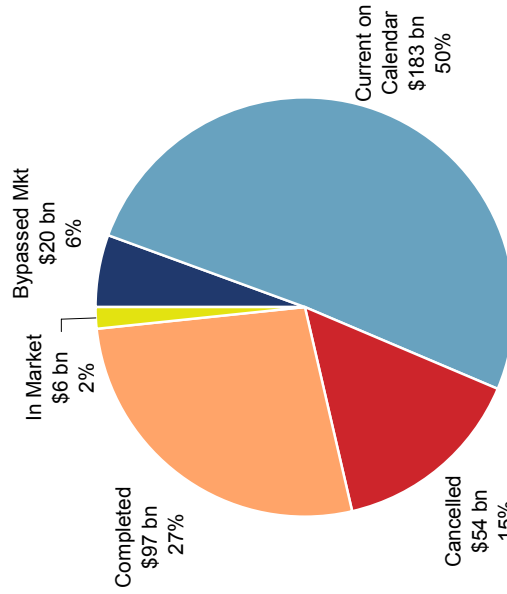
While the forward calendar has decreased dramatically from August 2007, approximately \$83 billion of remaining bonds and loans have yet to be financed



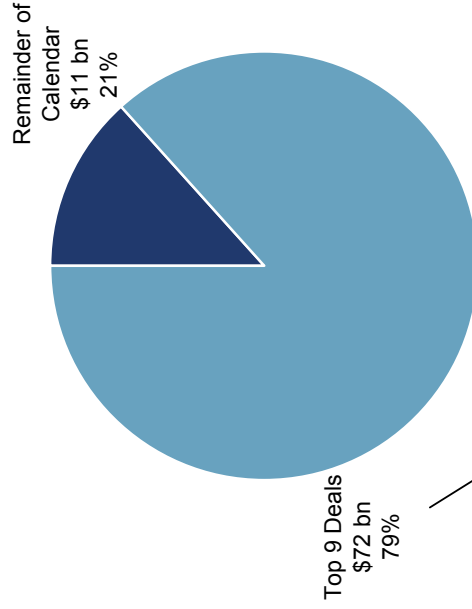
Source: Wall Street Research

Leverage Finance Market Forward Calendar (cont'd)

\$359bn Forward Calendar Composition As of July 2007¹



\$83bn Forward Calendar Composition As of September 2008



Top 8 Deals by Size:

BCE	~\$28bn
Hexion	~\$13bn
Basell	~\$11bn
Chrysler Auto	~\$5bn
CCU	~\$5bn
Avaya	~\$4bn
Home Depot Supply	~\$4bn
CDW Corp	~\$2bn

1) Represents current status of the composition of July's forward calendar volume of \$353bn.
Source: LCDNews

Leveraged Loan Market Investors

CLOs:

- Structured vehicles focused primarily on leveraged loan investing. Regimented investing styles with limited baskets and appetite for non-regular way structures

Hedge Funds and Prop Desks:

- Most sophisticated marginal buyers of credit risk, most flexible vehicles and largest risk takers but also most transitory in terms of commitment to the asset class – as relative value buyers they will migrate if they see more value in alternative markets

Prime Rate Funds:

- Retail oriented loan mutual funds – buyers across ratings and credit spectrum, growth fueled by inflows from retail investors

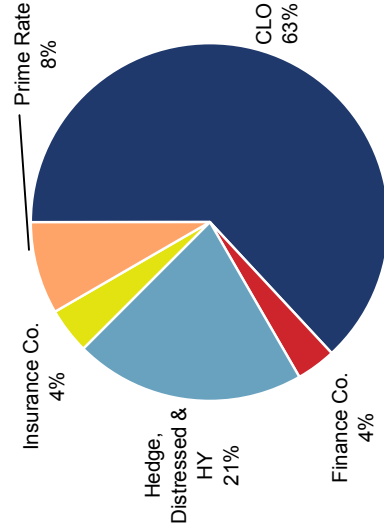
Banks and Finance Companies:

- Historically biased towards transactions with lower leverage, full covenant package, strong asset coverage, deleveraging cash flow profiles

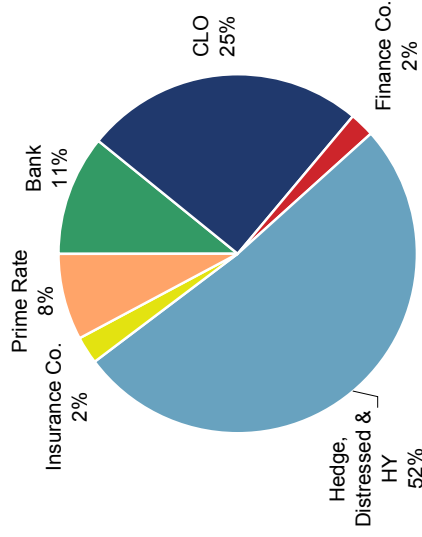
Insurance Companies:

- Buyers of higher-rated funded term loans, credit bias skewed towards higher quality issuers

Primary Loan Investor Composition 1H07



Primary Loan Investor Composition 2H07

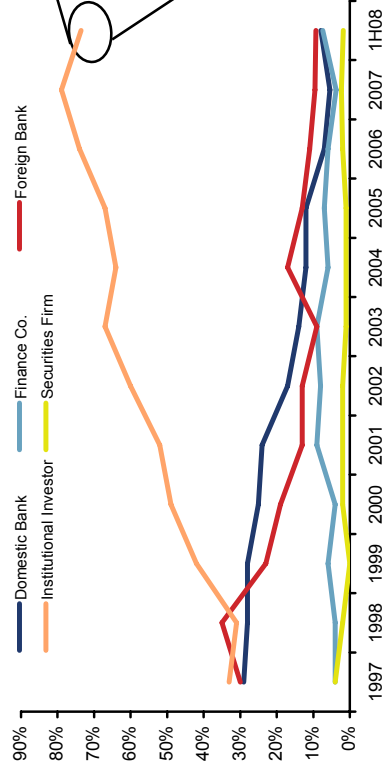


Source: Standard and Poor's Leveraged Commentary & Data

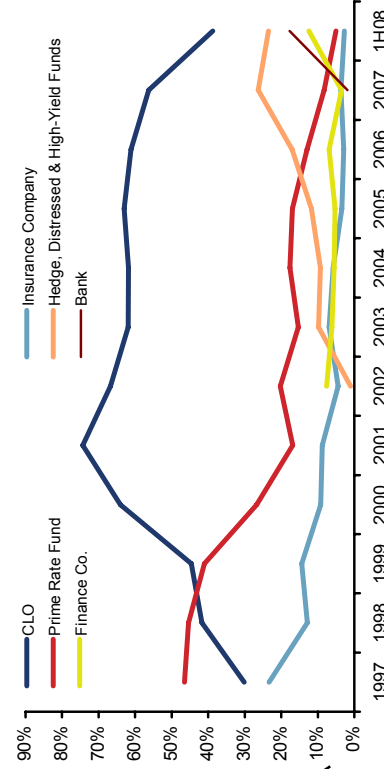
Supply and Demand Imbalance

Robust demand for leveraged loan paper was driven by a reliable bid by CLOs, which accounted for approximately 63% of total demand in 1H07. Recently though, CLO new issuance has decreased dramatically

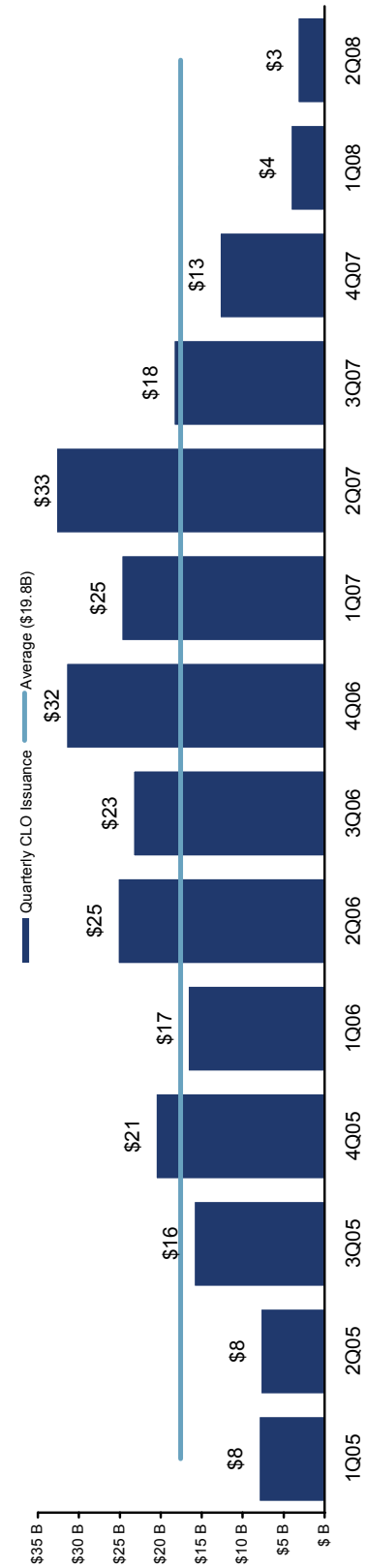
Leveraged Loan Demand by Investor Type



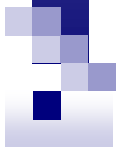
Institutional Market by Investor Type



Historical New CLO Issuance

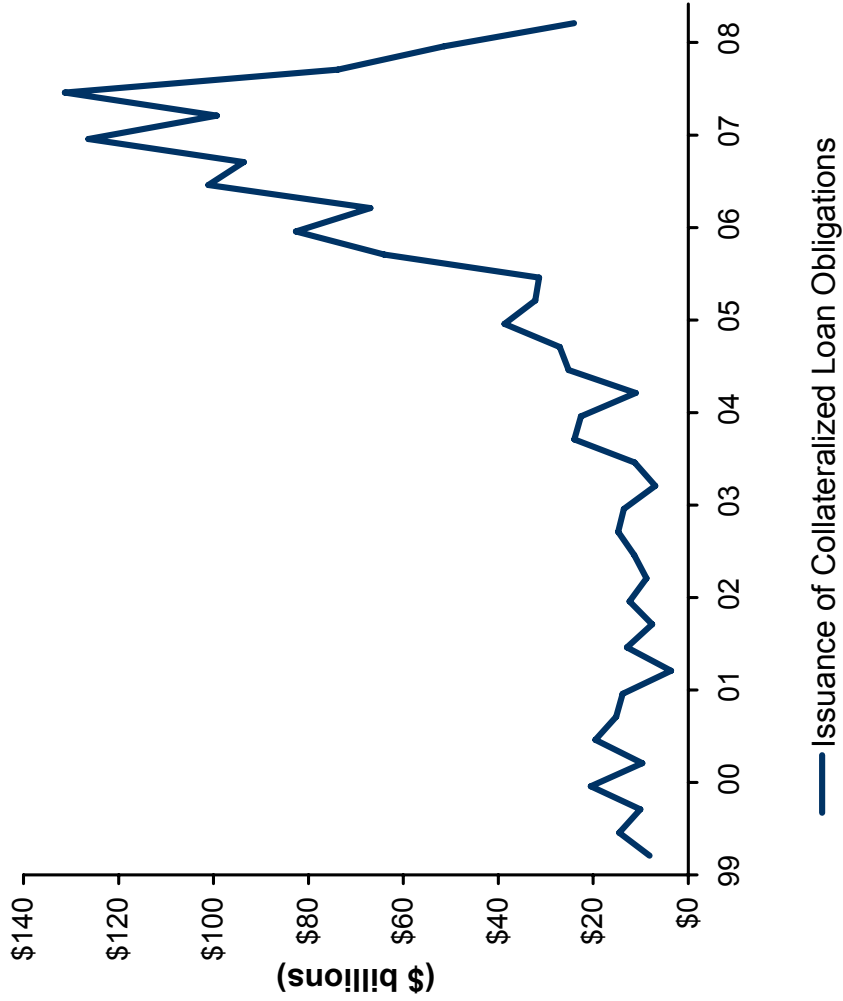


Source: Standard and Poor's Leveraged Commentary & Data



Collateralized Loan Obligation Boom Has Busted

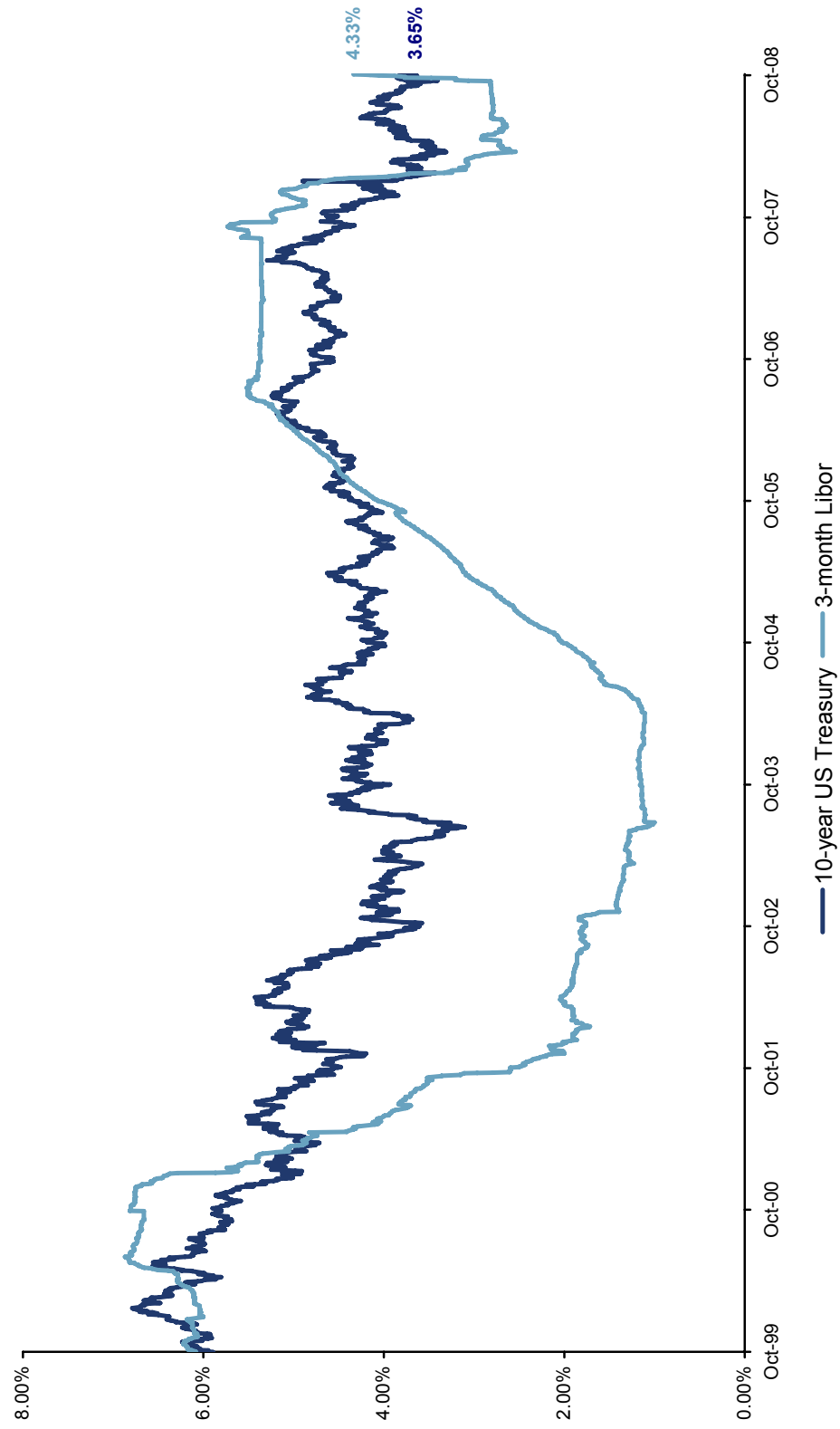
Robust demand for leveraged loan paper was driven by a reliable bid by CLOs, which accounted for approximately \$100 billion in early 2007. Recently though, issuance of CLOs has collapsed

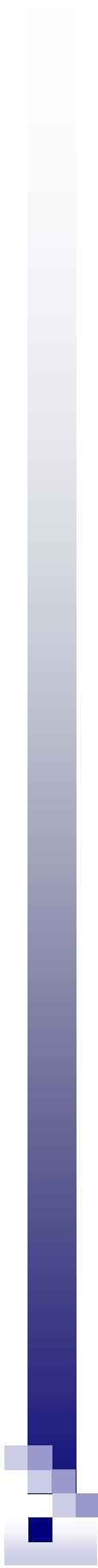


Source: Wall Street Research

Benchmark Rates

The decline in LIBOR has made the loan market **less attractive** to non-traditional investors (high yield accounts) which view yields on a total return basis

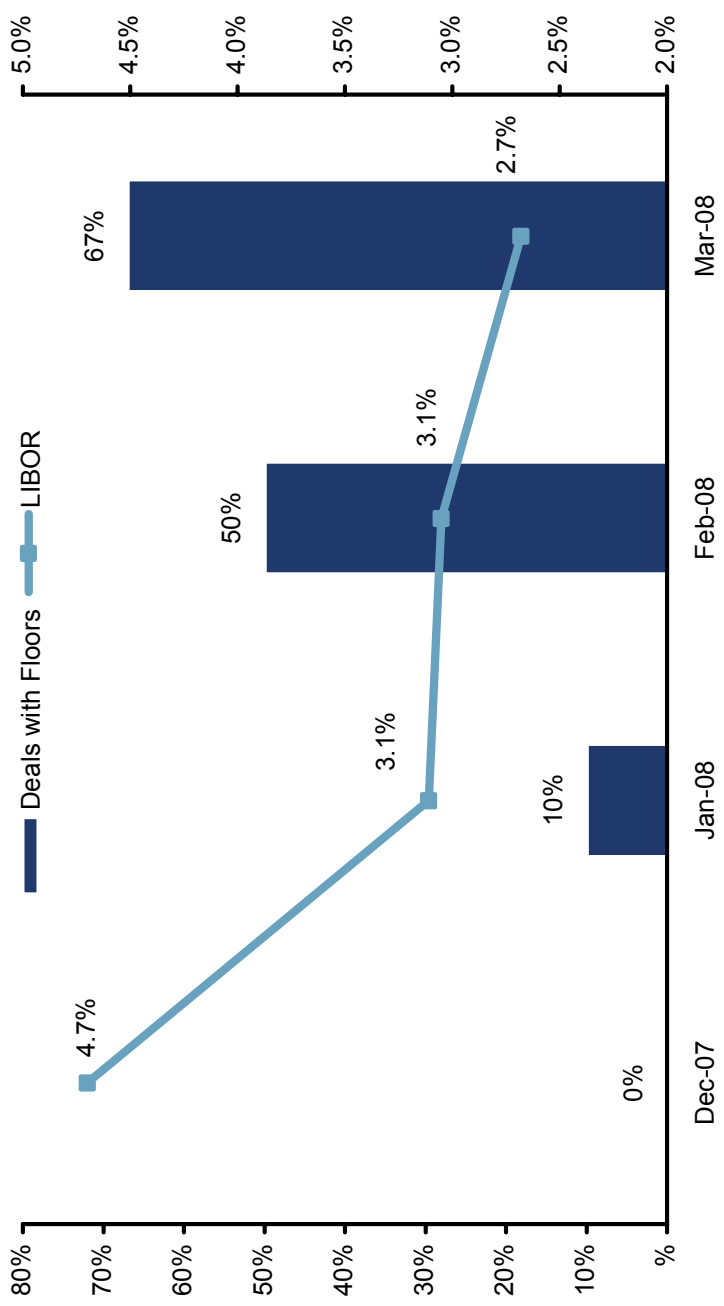




LIBOR Floors

So far in 2008, LIBOR floors were present in **40%** of loans priced, with the vast majority set between 3.25% and 3.50%

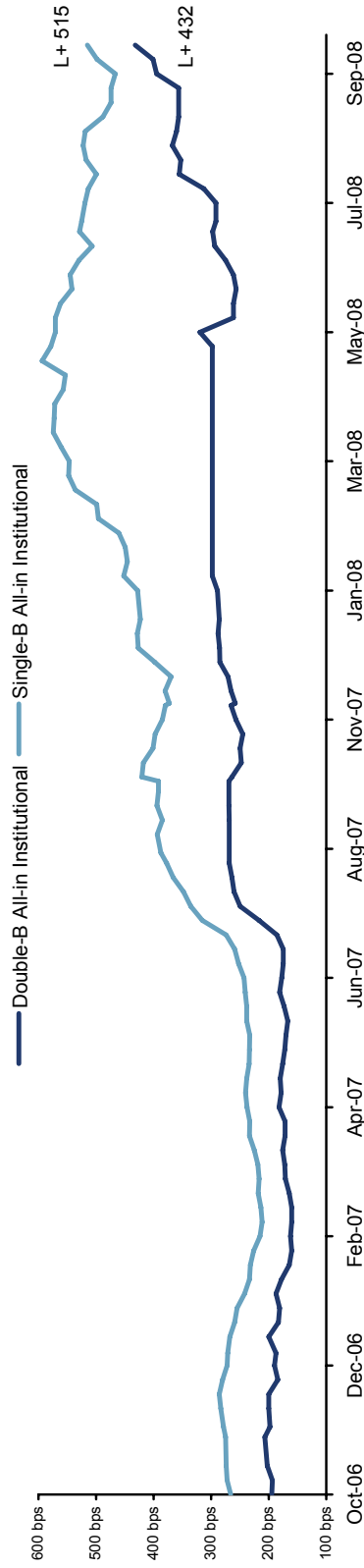
LIBOR floors have become attractive to investors because of the protection it provides from further yield deterioration



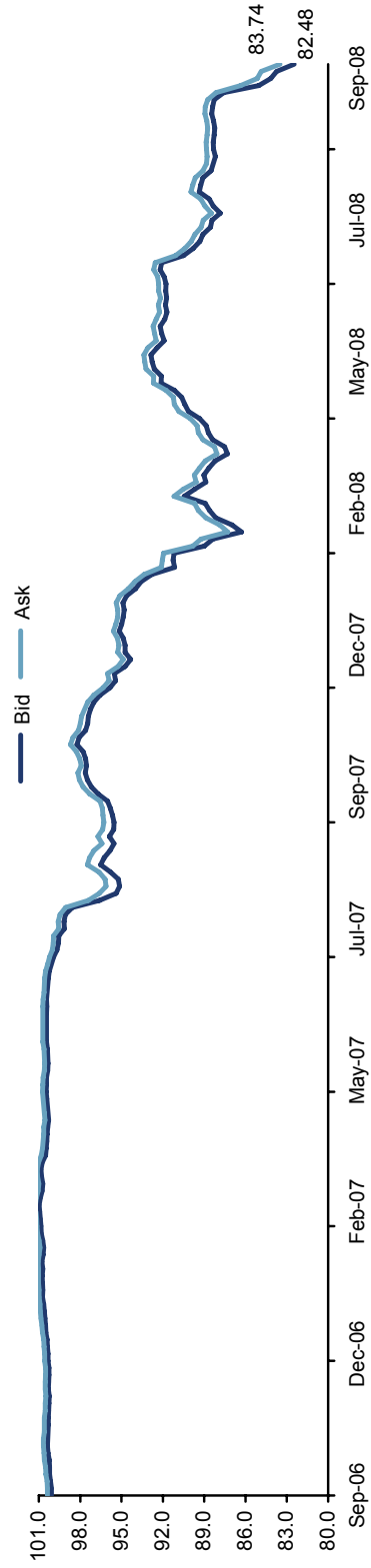
Source: Wall Street Research

Loan Pricing and Spreads

New Issue Spreads



Average Bid Ask

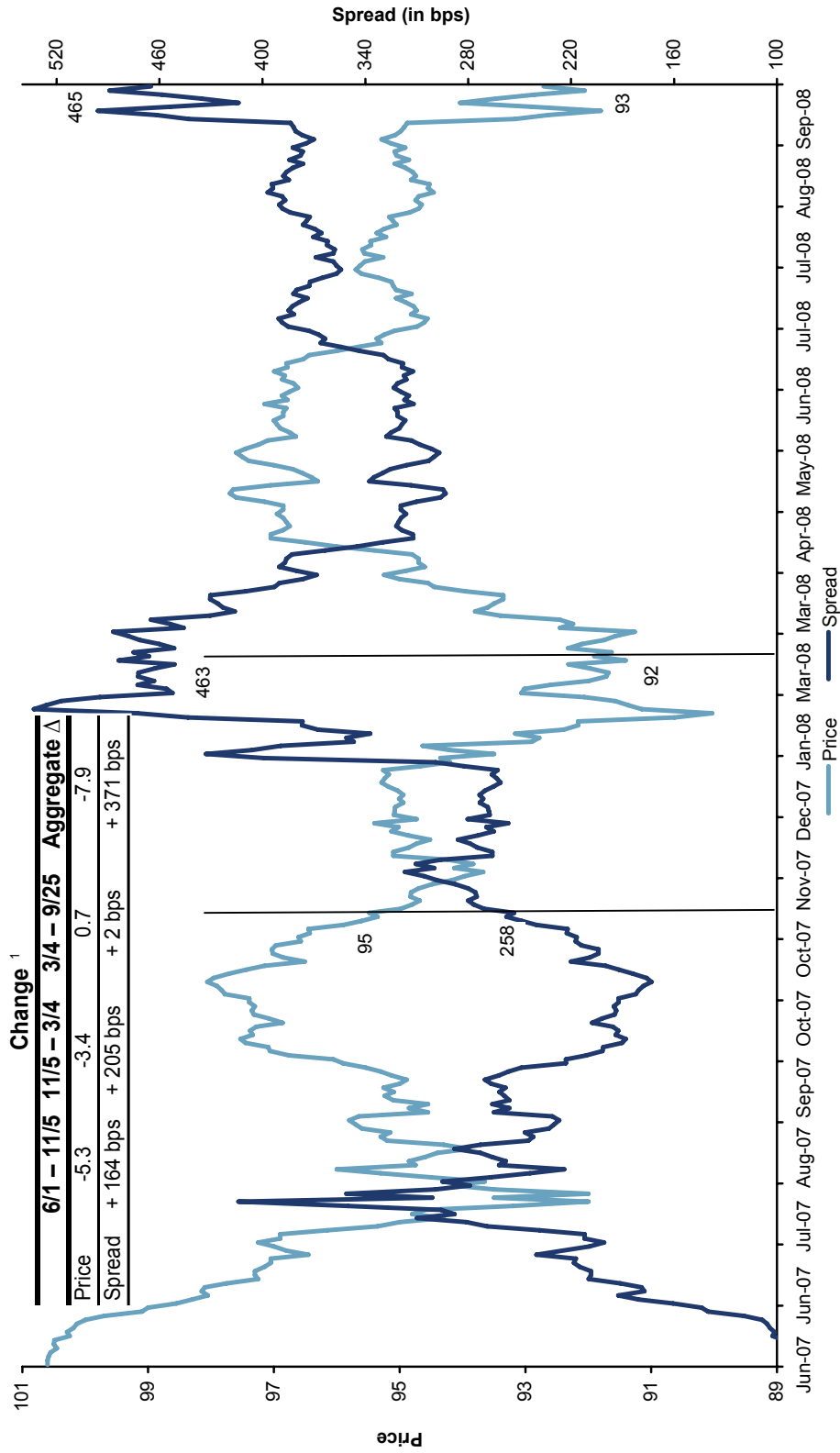


Source: Standard and Poor's Leveraged Commentary & Data



LCDX Index Volatility

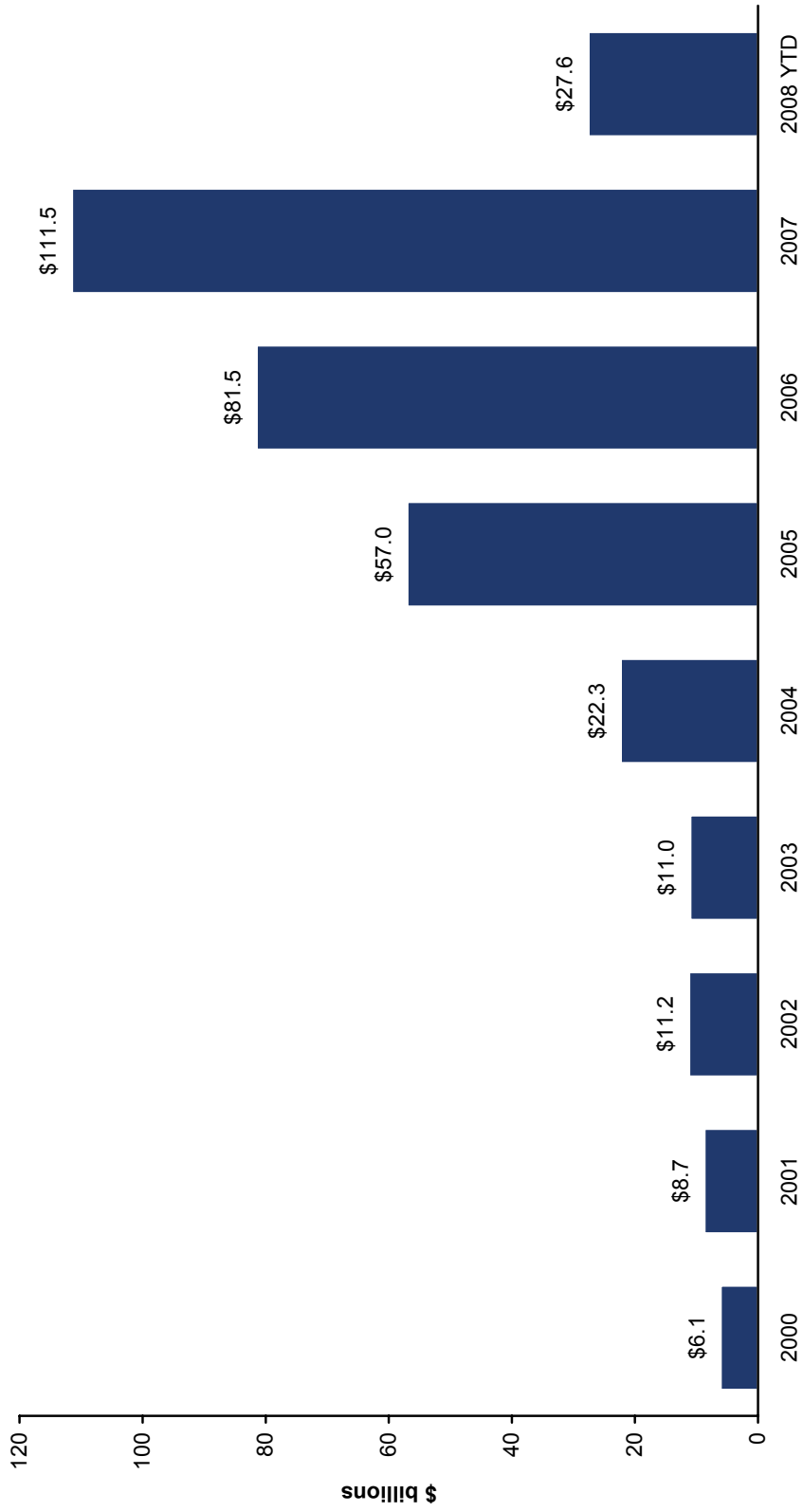
The LCDX Index depicts how loan spreads in the broader market have widened significantly



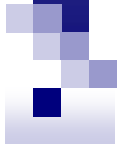
1) The change is not cumulative.
Source: Market Group Limited

2008 European Institutional Volume Has Declined Sharply

Transactions launched during the 1H 08 amounted to a mere \$19.5 billion in new issue volume

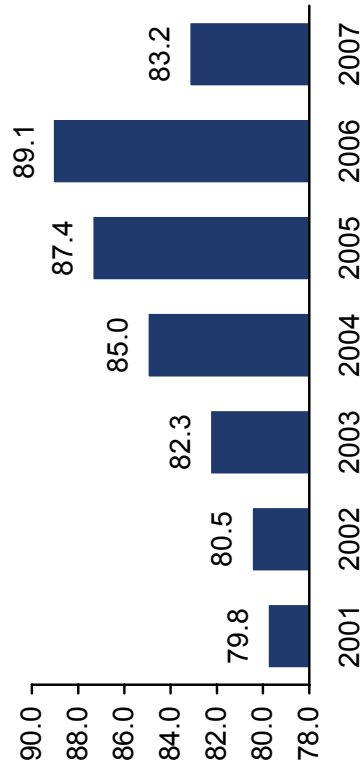


Source: Standard and Poor's Leveraged Commentary & Data

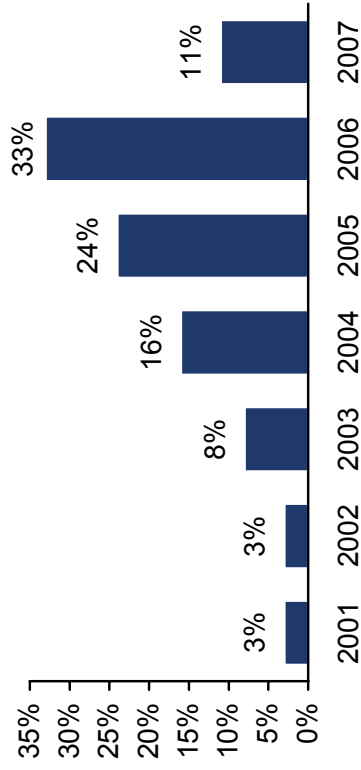


Mortgage Lending Standards Declined from 2001 - 2006

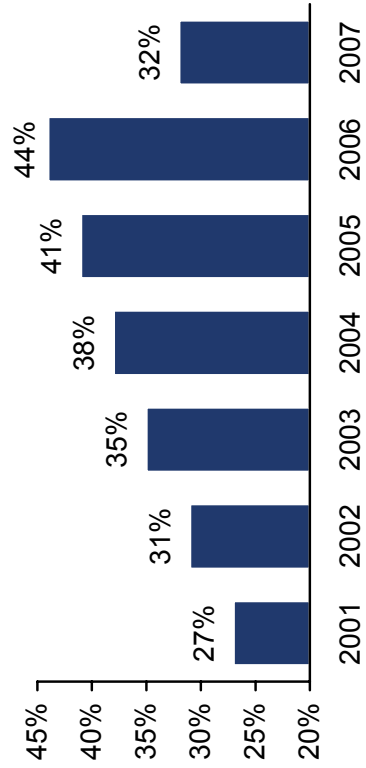
Combined Loan to Value



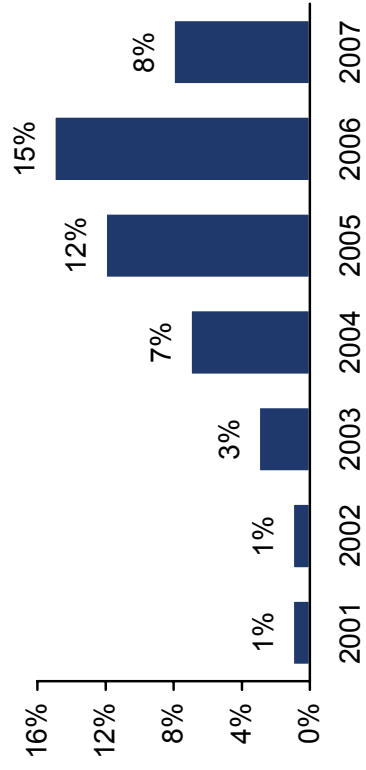
100% Financing



Limited Documentation

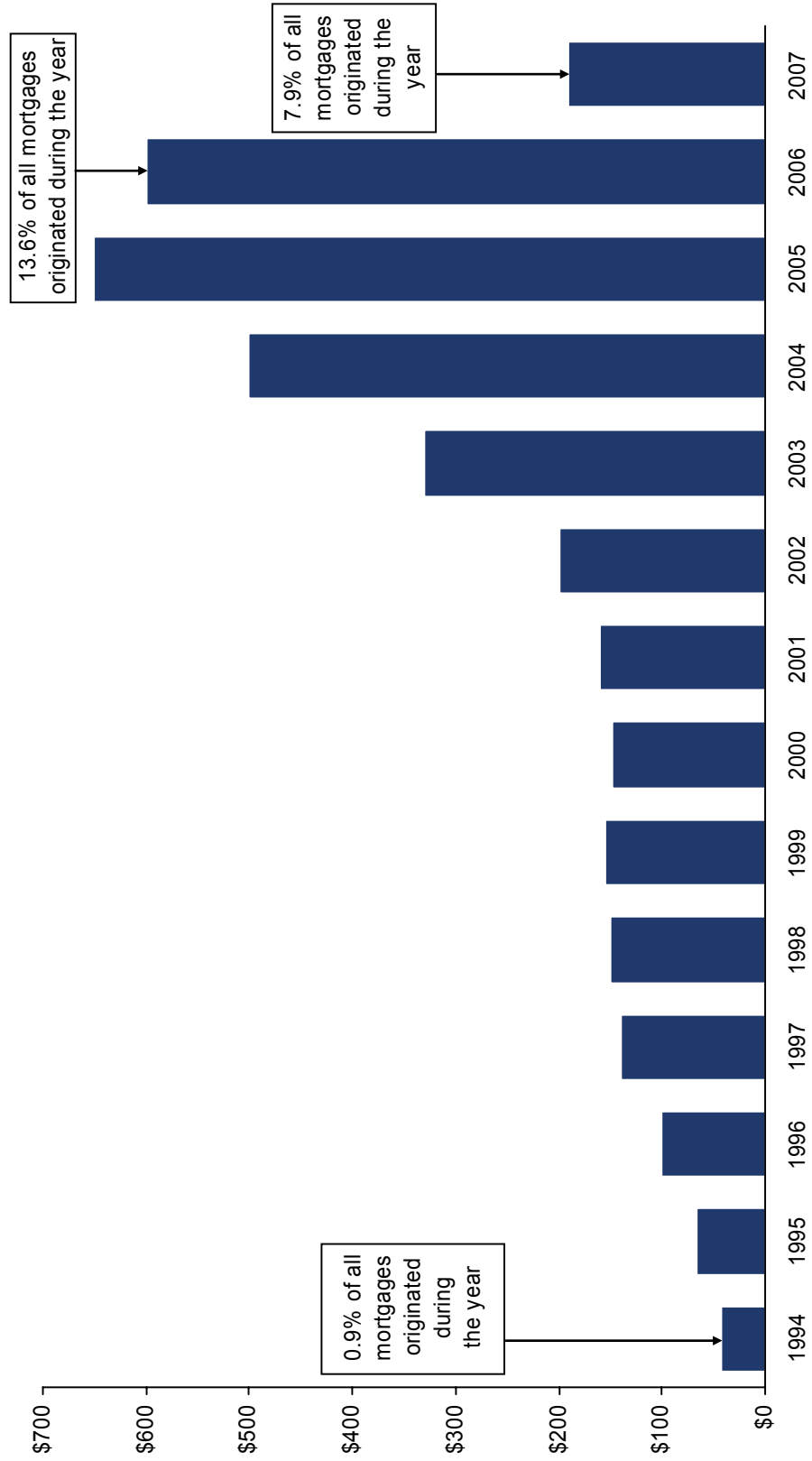


100% Financing & Limited Documentation %



Source: Wall Street Research

Decline in Standards Led to Subprime Mortgage Origination

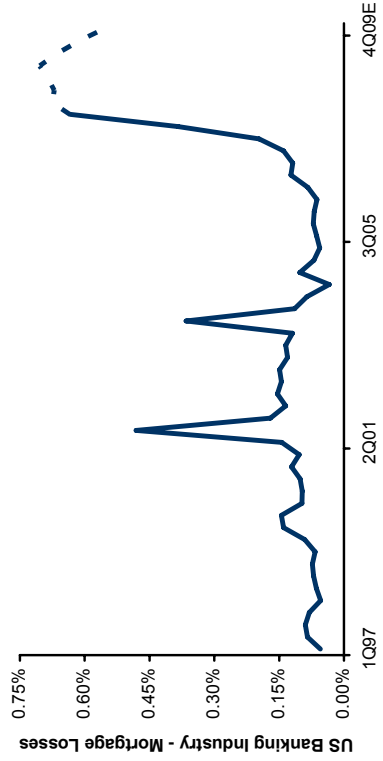


Source: Wall Street Research

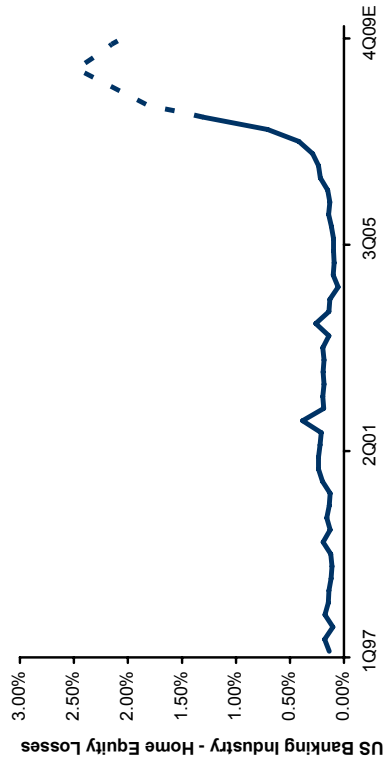


Losses – Actual vs. Estimates

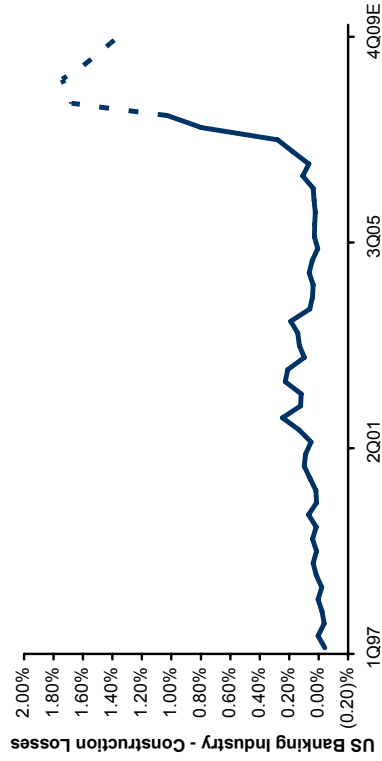
Mortgage Losses – actual vs. estimates



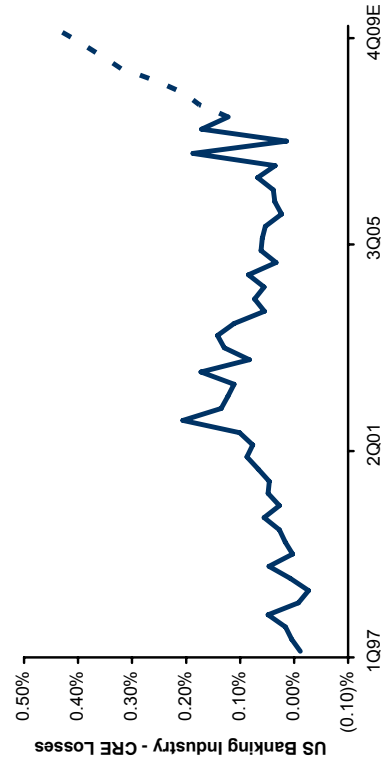
Home Equity Losses – actual vs. estimates



Construction Losses – actual vs. estimates



CRE Losses – actual vs. estimates

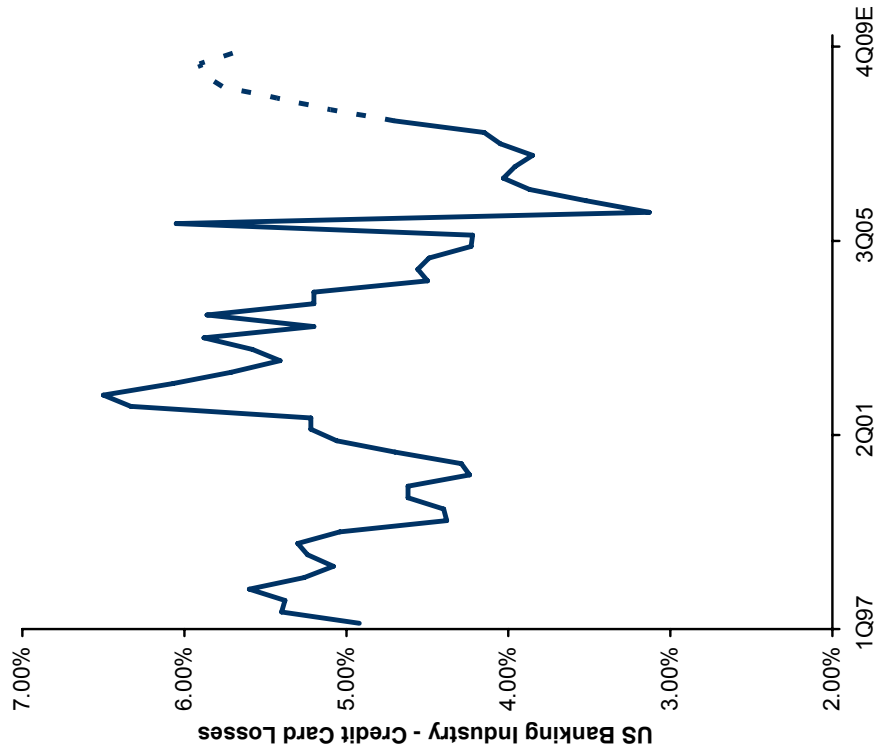


Source: Wall Street Research

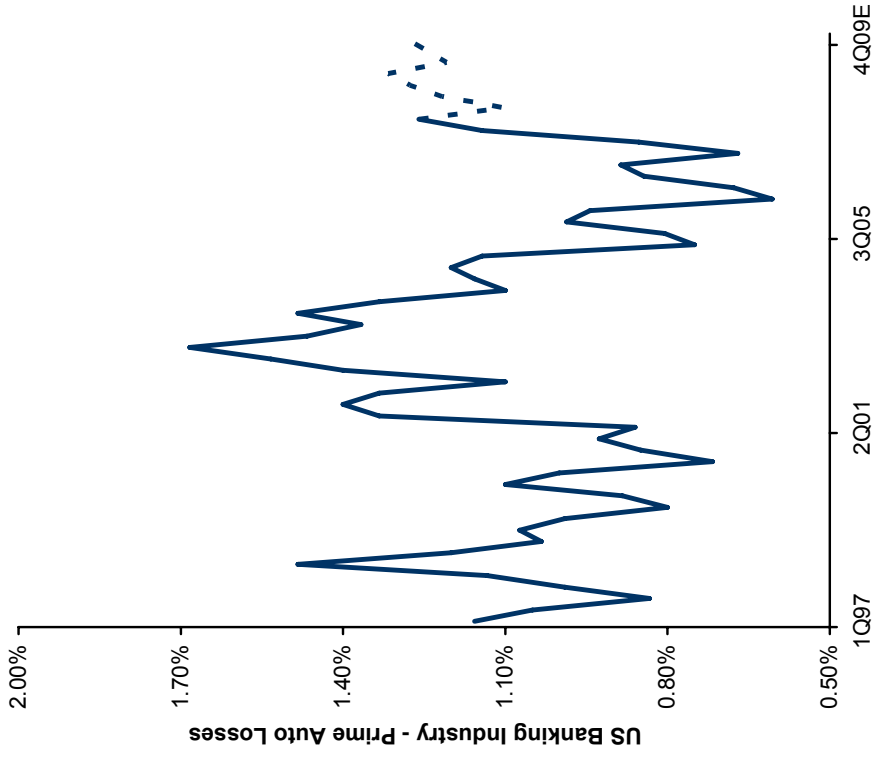


Losses – Actual vs. Estimates (cont'd)

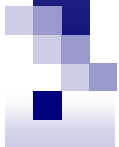
Credit Card Losses – actual vs. estimates



Prime Auto Losses – actual vs. estimates



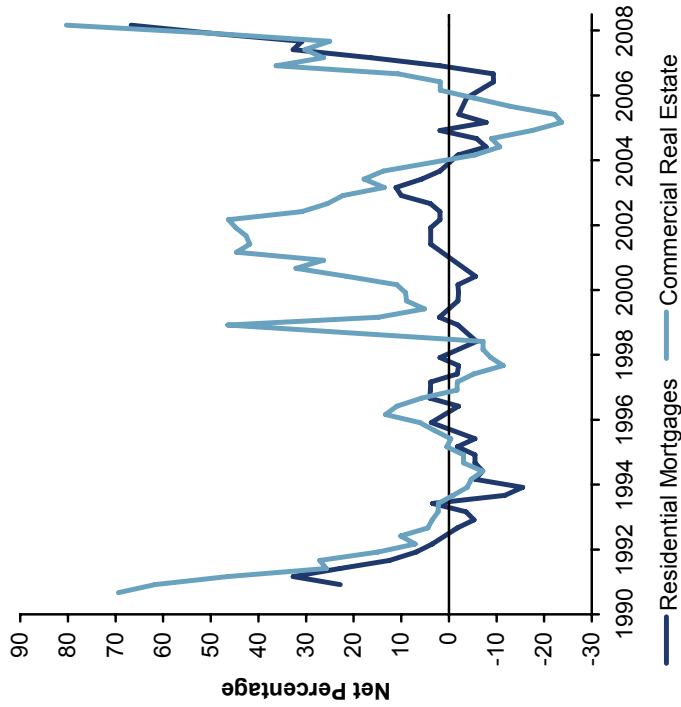
Source: Wall Street Research



Housing and Mortgage Crisis Deepens Further

- A surge in mortgage delinquencies and defaults has led many banks to take huge write-offs.
- To maintain adequate capital ratios, banks have tightened lending standards for residential and commercial mortgage loans in an effort to rein in their loan books

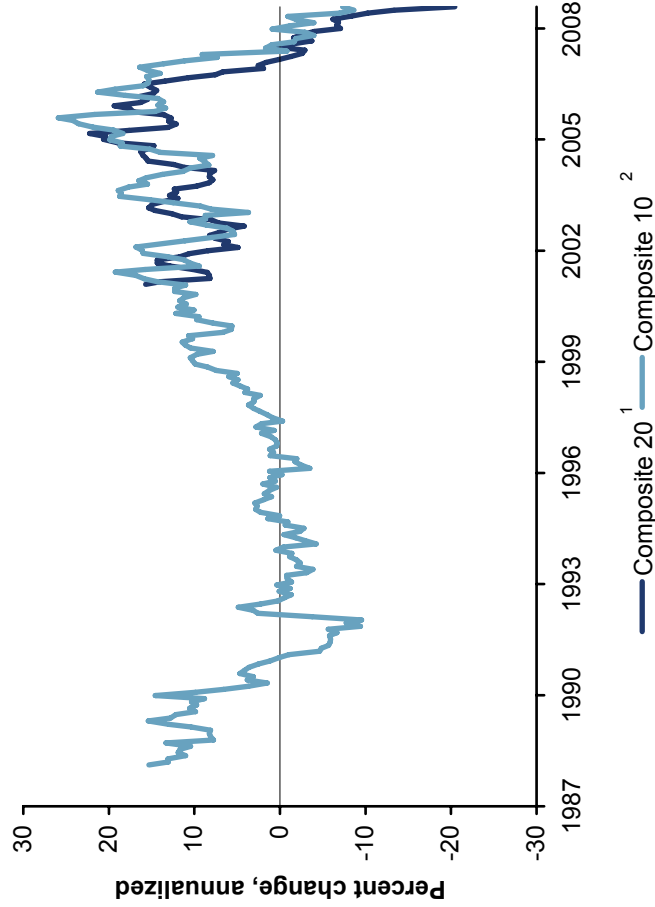
% of Banks Reporting Tightening of Standards



Source: Federal Reserve Board

- The excess supply of housing is pushing down home prices at an accelerating pace
- Home prices fell at an annualized pace of over 16% in June 2008
- The accelerating house price drop is a key determinant of default rates on home mortgages

Housing Price Downturn Intensifies



1) Includes the largest 10 cities in the U.S.
2) Includes the largest 20 cities in the U.S.
Source: Standard and Poor's

More Defaults and Foreclosures on the Way

Nearly 1 in 6 U.S. homeowners owe more on their mortgage than the home is worth

With an ever increasing number of homes for sale and troubles in the borrowing markets, many homeowners are left with no alternative to foreclosure

Metro Area	Price Index is at Lowest Level Since	Price Drop Since Peak	Percentage of Last 5 Years' Purchases Who are Under Water ¹	Price Change needed to restore historical affordability ²
New York	August 2005	(8.2)%	14.2%	18.2%
Atlanta	April 2005	(6.9)	19.5	0.5
Miami	February 2005	(26.9)	44.6 ³	37.7
Phoenix	June 2005	(28.9)	40.1	16.9
Washington	December 2004	(18.6)	33.8	26.6
San Francisco	August 2004	(14.5)	36.8	3.9
Los Angeles	April 2004	(31.3)	39.9	15.0
Las Vegas	March 2004	(31.5)	56.0	15.4
Boston	September 2003	(14.8)	13.3	9.0
San Diego	June 2003	(32.4)	51.3	13.3

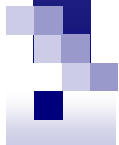
- 29% of homes purchased in the past 5 years are underwater
- 9% of mortgages were a month or more overdue or were in foreclosure
- Mortgage lending is at the lowest level in 8 years – down 44% from a year earlier
- Still not clear how many borrowers the government-backed refinancing plan will help
- In many regions prices are back to pre-housing boom (2003-04) levels

Sources: First American CoreLogic; Zillow.com; Moody's Economy.com, Wall Street Journal

1) Owing more on a home than it is worth.

2) Price change needed to return to average ratio of home prices to household income for 1985-2000.

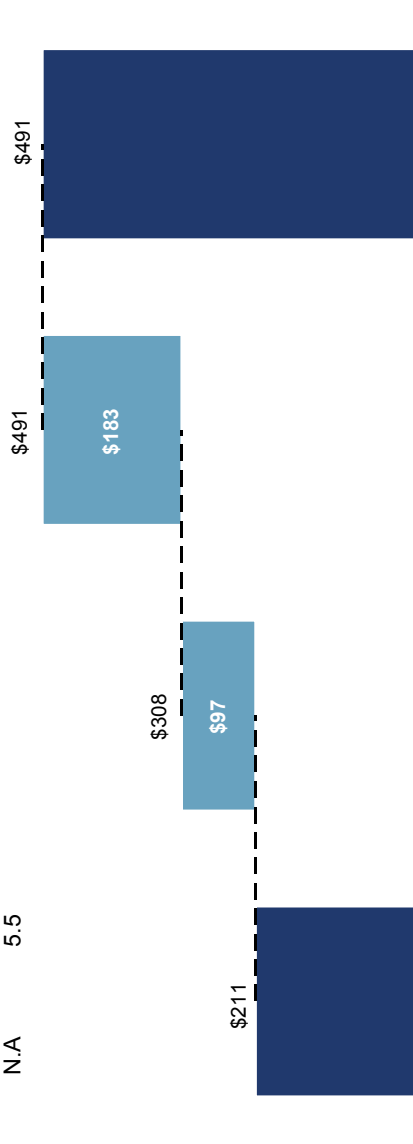
3) For Miami / Ft. Lauderdale metro area.



Mortgage Losses are Not Limited to Subprime

Projected Cumulative Losses

	2004	2007	Avg.
Subprime	5.8%	19.4%	15.7%
Alt-A	0.9	7.1	4.7
HELOC	0.5	3.3	2.3
Option ARM	0.5	3.6	2.6
CRE	N.A	N.A	5.5



	Sub-Prime	Alt-A HELOC Option ARM	Commercial Real Estate	Total
Total Losses	\$211	\$97	\$183	\$491
Bank Losses	103	60	82	245
Total Loans	\$1,344	\$2,871	\$3,309	57%

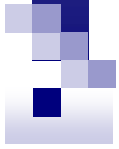
Source: Wall Street Research

US Treasury & FHFA GSE Actions

On September 7, 2008 the US Treasury and the Federal Housing Finance Agency (FHFA) announced four key actions regarding Fannie Mae (FNM) and Freddie Mac (FRE)

1. Placed FNM and FRE into conservatorship under the FHFA
2. Committed to purchase up to \$100 billion of senior preferred stock of each entity if required to maintain a positive net worth
Treasury receives \$1 billion of senior preferred and warrants equal ~79.9% of common stock
3. Provided a new secured lending facility available to FNM, FRE and the Federal Home Loan Banks
4. Initiated a temporary program for the Treasury to purchase GSE MBS

Source: US Treasury Press Release



Treasury Rationale

The Treasury also initiated a temporary program to purchase GSE MBS in the open market to help improve

1. The availability and affordability of mortgage credit
2. Mitigate pressure on the mortgage market

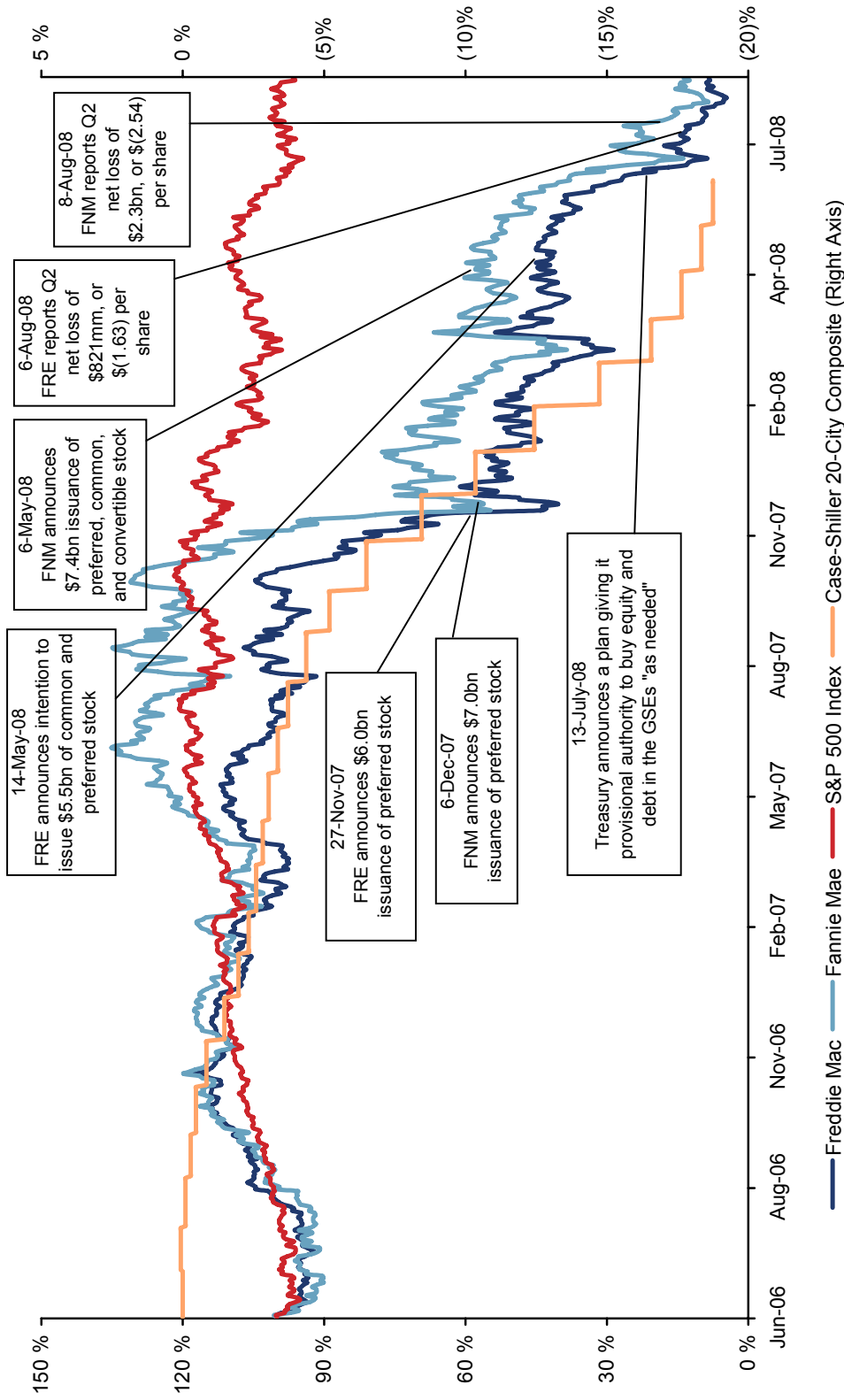
With government support, the GSEs are expected to moderately increase their portfolios through the end of 2009, then gradually decrease by 10% per year, through natural runoff

The Treasury hopes that these efforts will:

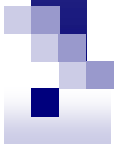
1. Provide stability to the financial markets
2. Support the mortgage and housing markets
3. Protect taxpayers

Source: US Treasury Press Release

GSE Common Stock Price Performance



Source: Bloomberg



A Volatile September

September 14, Lehman Brothers filed for Chapter 11 bankruptcy protection
Merrill Lynch agreed to be acquired by Bank of America

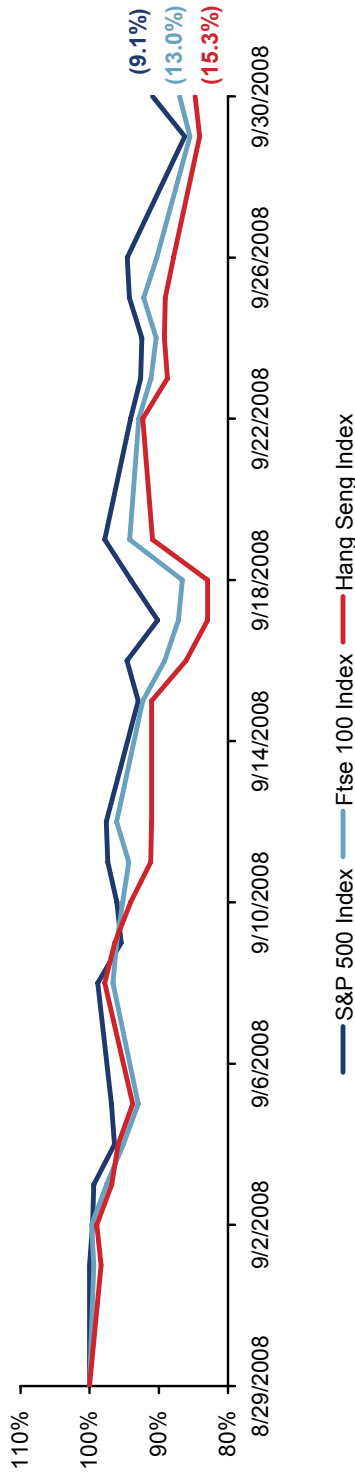
September 16, the Fed announced a \$85 billion loan to AIG in exchange for a 79.9% stake
-US and UK imposed limitations on short selling
-Administration submits \$700 billion proposal to dispose of “toxic” assets

September 25, JP Morgan, with backing of FDIC, acquired assets of Washington Mutual for \$1.9 billion

September 29, Citigroup, with backing of FDIC, agreed to acquire Wachovia’s banking unit for \$2.2 billion and assumption of \$53 billion in debt

On September 29, US Congress voted down the \$700 billion rescue plan by a vote of 228 to 205, sending Dow to a 777 points drop

World Market Response



AIG Bailout

AIG Headwinds

- 1) Rating Downgrades Leading to Additional Collateral Needs
Downgrades forced AIG to provide ~ US\$15 billion in additional collateral
- 2) Further Mark-to-Market Losses on CDS and Investment Portfolio
Market expected ~\$30bn of writedowns on AIG's CDS and investment portfolio
- 3) Real Estate Loans and Credit Insurance
- 4) Limited Access to Liquidity
Public estimates for liquidity needs ranged from \$50 – \$100 billion

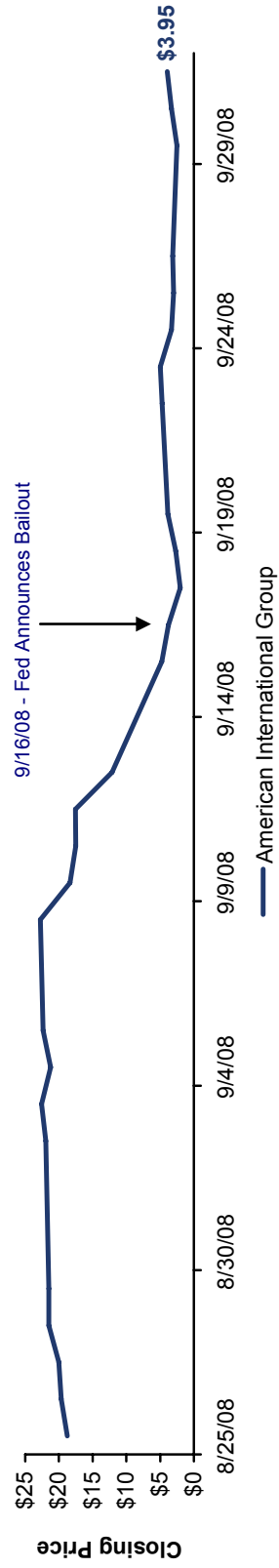
U.S. Treasury/Federal Reserve Rescue

September 16, 2008 - Government intervened with an \$85 billion revolving credit facility

U.S. government will get a 79.9% stake through warrants or equity participation notes

Government intervened only after efforts to raise liquidity in the form of either equity or debt failed

AIG Stock Price Performance





Key Themes in The Market

Lehman Brothers' Implications

- Unprecedented size and complexity of Lehman Brothers' bankruptcy
- Lehman was a major counterparty for derivatives and swaps transactions - may take months to unwind trades

Dramatic Tightening in Financial Conditions

- "Flight to quality" by investors
- Short term lending in the US has seized up as investors look to hoard cash
- Rapidly disappearing liquidity has fueled concerns that other banks may be at risk of bankruptcy or failure

Contagion

- Investors remain concerned about potential contagion of the current crisis
- Due to the sudden decline of Lehman Brothers and the unexpected acquisition of Merrill Lynch, investors are focused on any sign of weakness in other banks
- To date, there have been \$560 billion of write downs

Policy Actions

- Policy actions by the US Government remain a key near-term catalyst
- Policy actions by Asian central banks, and in particular a fiscal stimulus policy by the Chinese government, may provide a needed boost to the region's economies

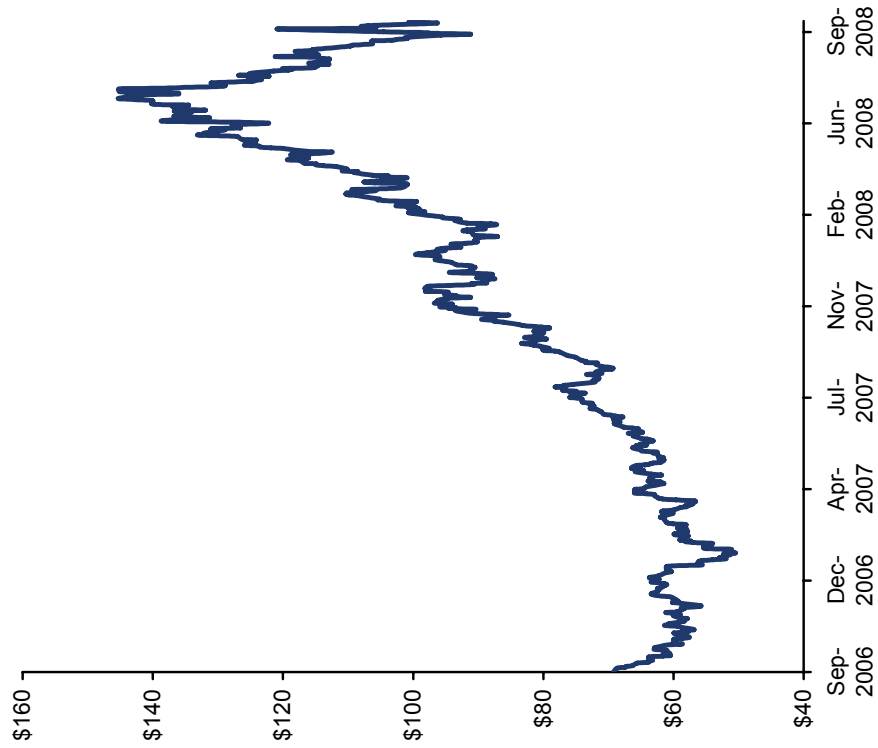
US Government Interventions

- US Treasury submitted a \$700 billion proposal to the Congress to acquire \$700 billion of toxic/troubled mortgage-related assets from financial institutions
 - A chance to trade dilution for certainty: Banks can sell loans and lock in losses
- Effects are still uncertain

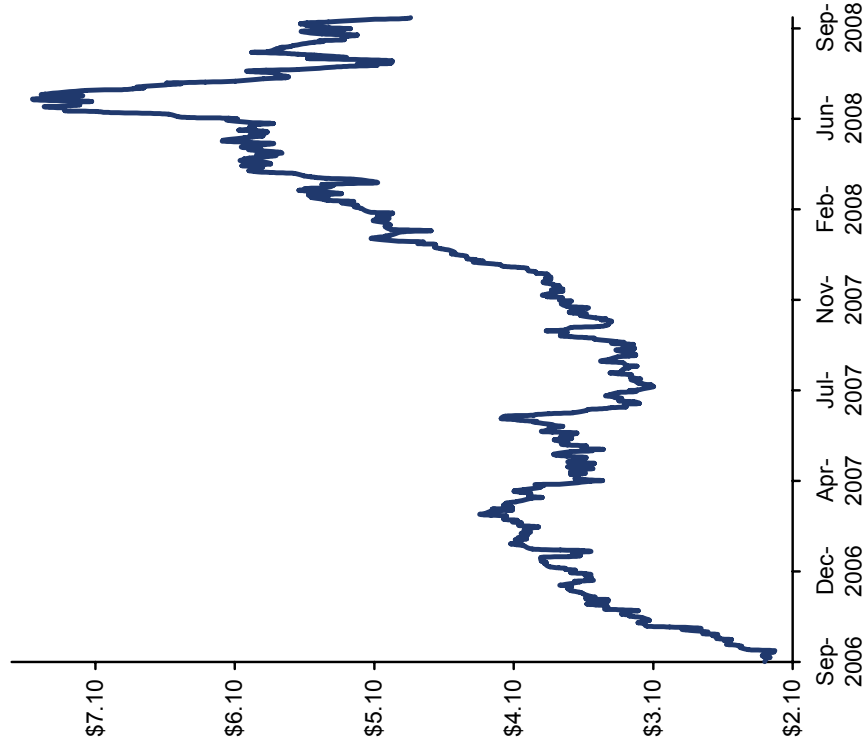


Commodity Price Increases

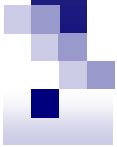
Crude Oil (\$/barrel)



Corn (\$/bushel)



Source: Wall Street Research

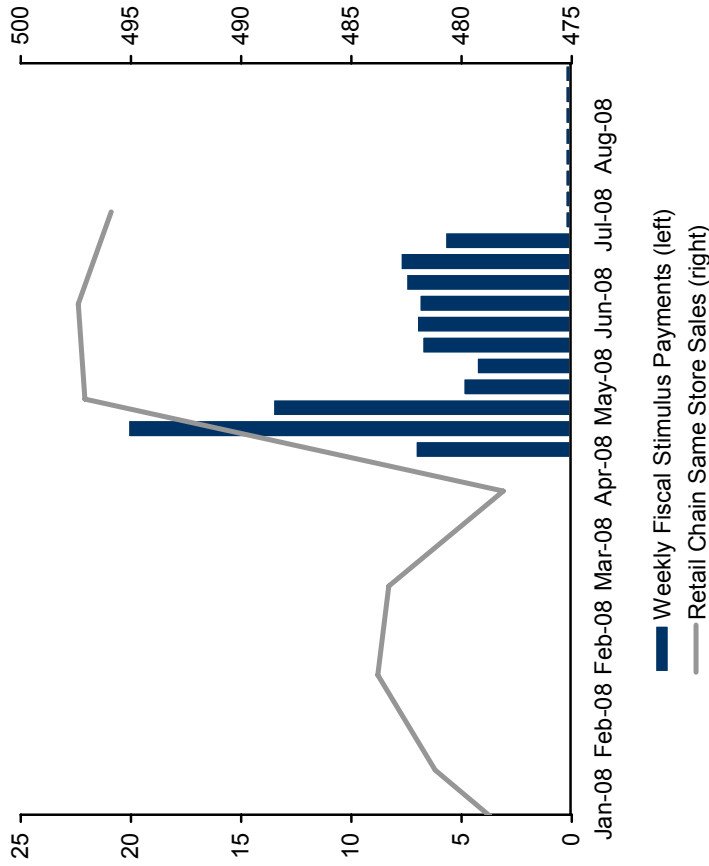


Retail Sales Rose With Stimulus – Will Sales Drop as it Fades?

Upside surprises to growth in same store sales in 2Q 08 were largely due to an earlier than expected payout of tax rebates

However, July reports may indicate softening sales as consumers begin to tighten their wallets without the help of government subsidies

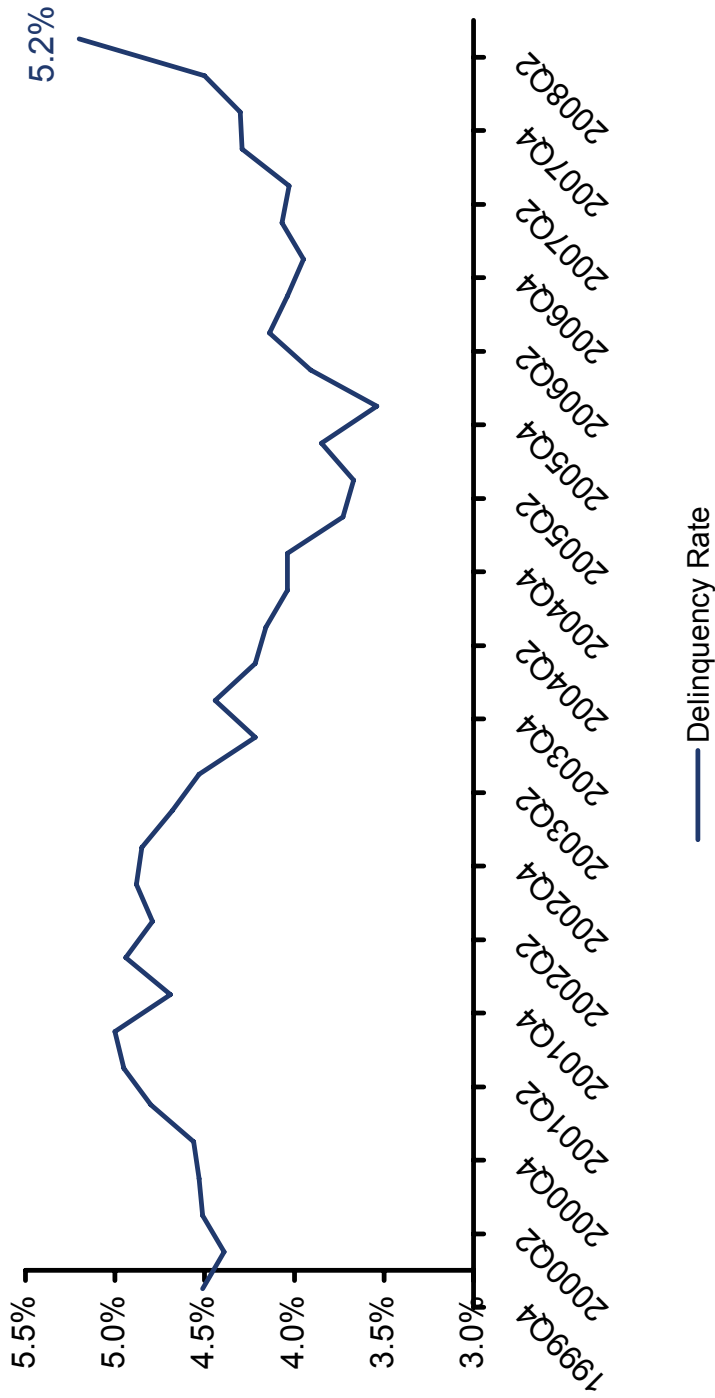
Rebates Spur Spending – Will Same Store Sales Slow Without Further Government Subsidy?



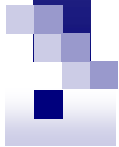
Source: Wall Street Research

Credit Card Loan Delinquencies Are on the Rise

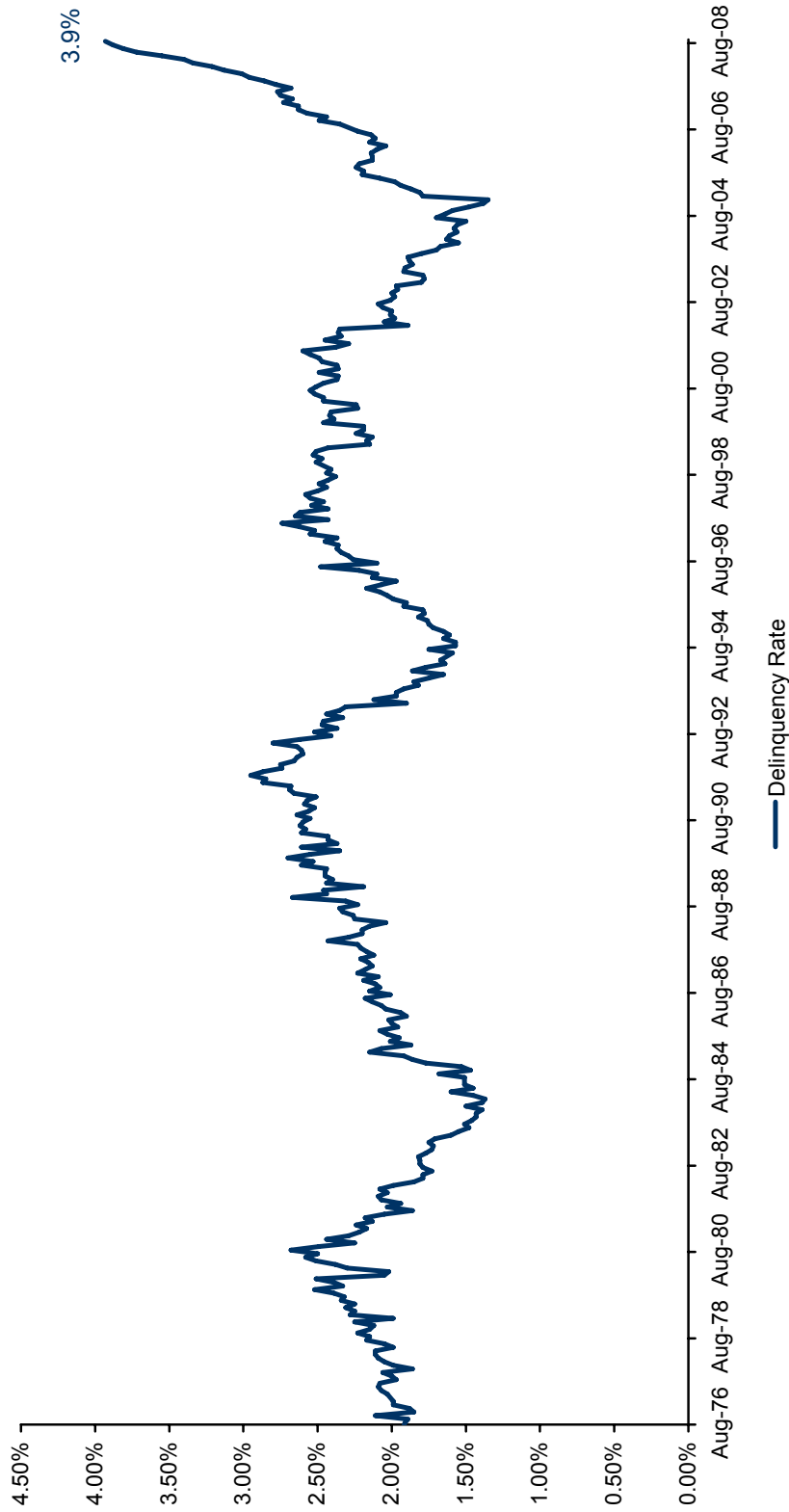
Poor customer credit quality and declining home prices (limiting a borrower's ability to extract home equity to pay off credit card debt) have reduced consumer spending and led to an increase in delinquency / charge-off rates



Source: Wall Street Research



Automotive Loan Delinquencies Are on the Rise



Source: Wall Street Research

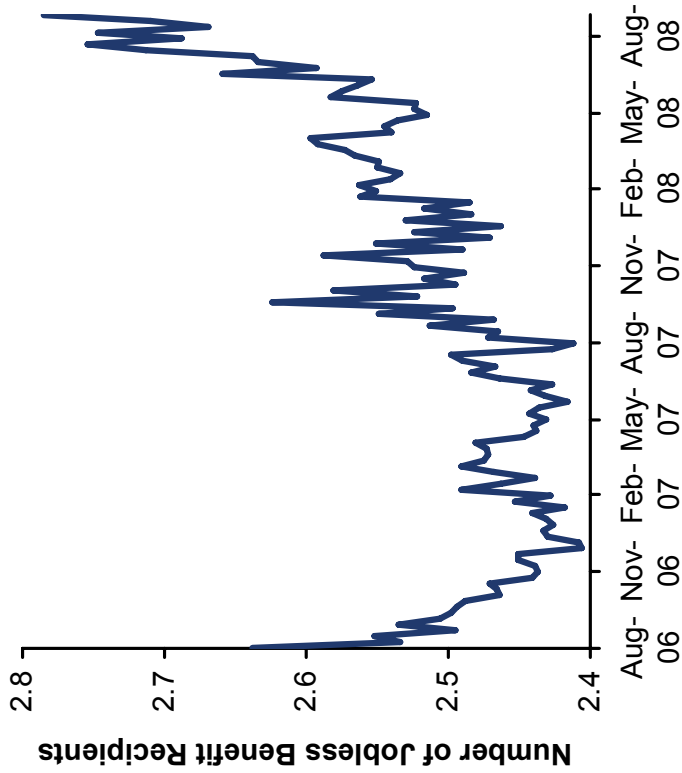
Consumer Confidence and Spending Cycles Down

As unemployment has risen, income growth has slowed, confidence has fallen and consumers have been forced to cut spending

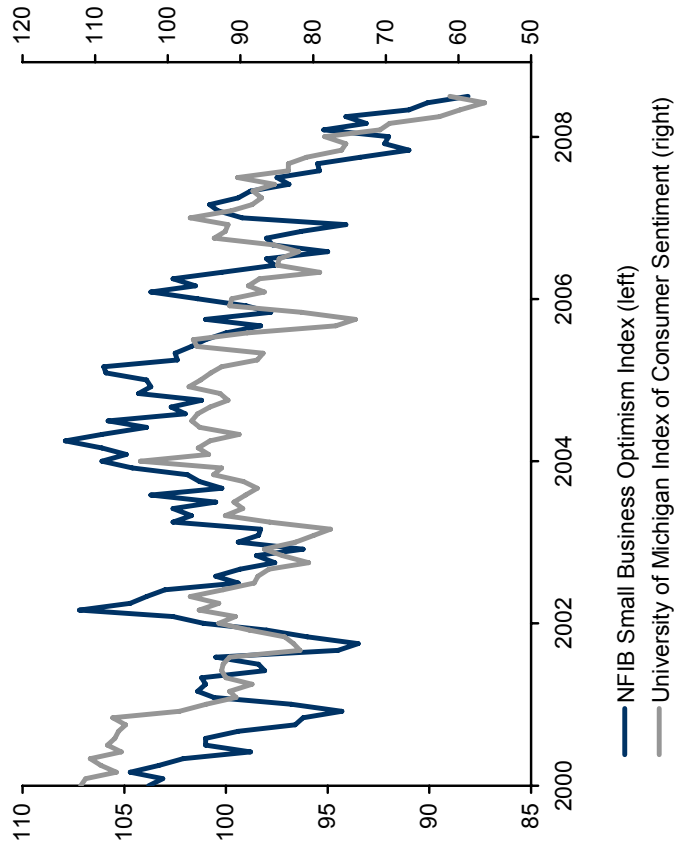
Rising Pool of Jobless



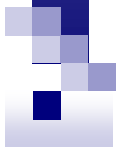
Consumer Sentiment



Source: Department of Labor



Source: University of Michigan Survey



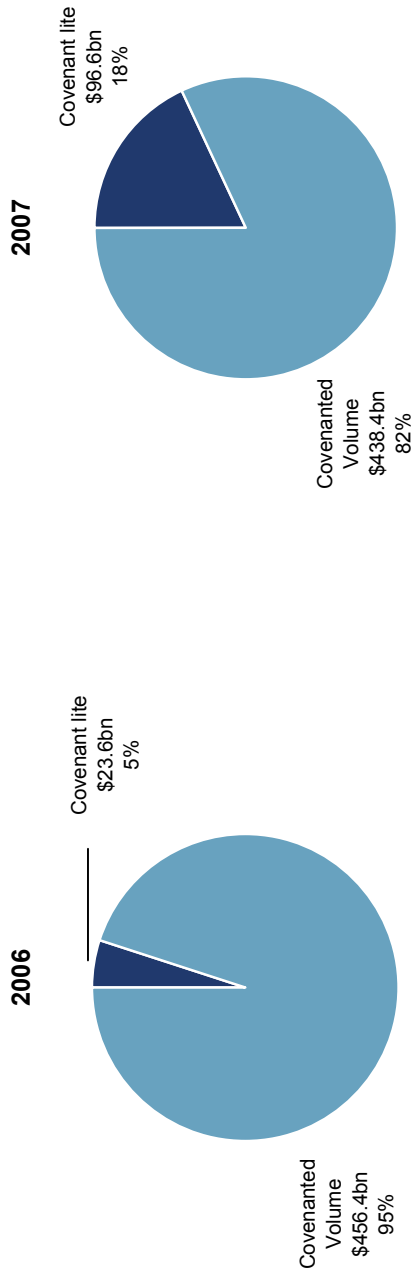
Covenant Lite Deals

Covenant lite deals issued in 2007 were \$96.6 billion in volume, quadruple 2006's total of \$23.6 billion

No covenant lite deals have been committed to since July 2007

During 2007, the average number of incurrence tests in covenant lite loans was approximately 1.30, with 30% at two covenants and 70% at one covenant

Covenant Lite Volume



Source: Standard and Poor's Leveraged Commentary & Data

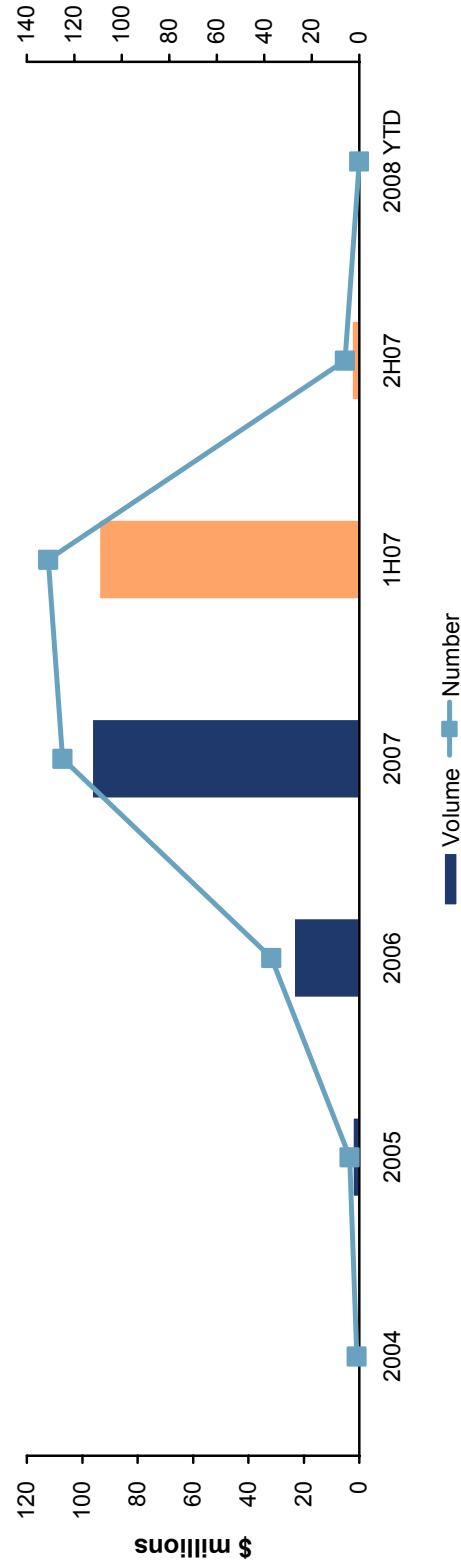
Covenant Lite Loans Have Decreased Significantly

During the 1H07, covenant lite loans grew to approximately 15% of total bank debt outstanding, up from 1% in 2006

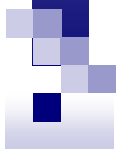
However, during the 2H07, the appetite for covenant lite loans declined significantly, primarily due to the credit crunch and the subsequent market slowdown

Covenant lite loans, which accounted for 34% of institutional new-issue volume in 1H07, accounted for only 3% in 2H07

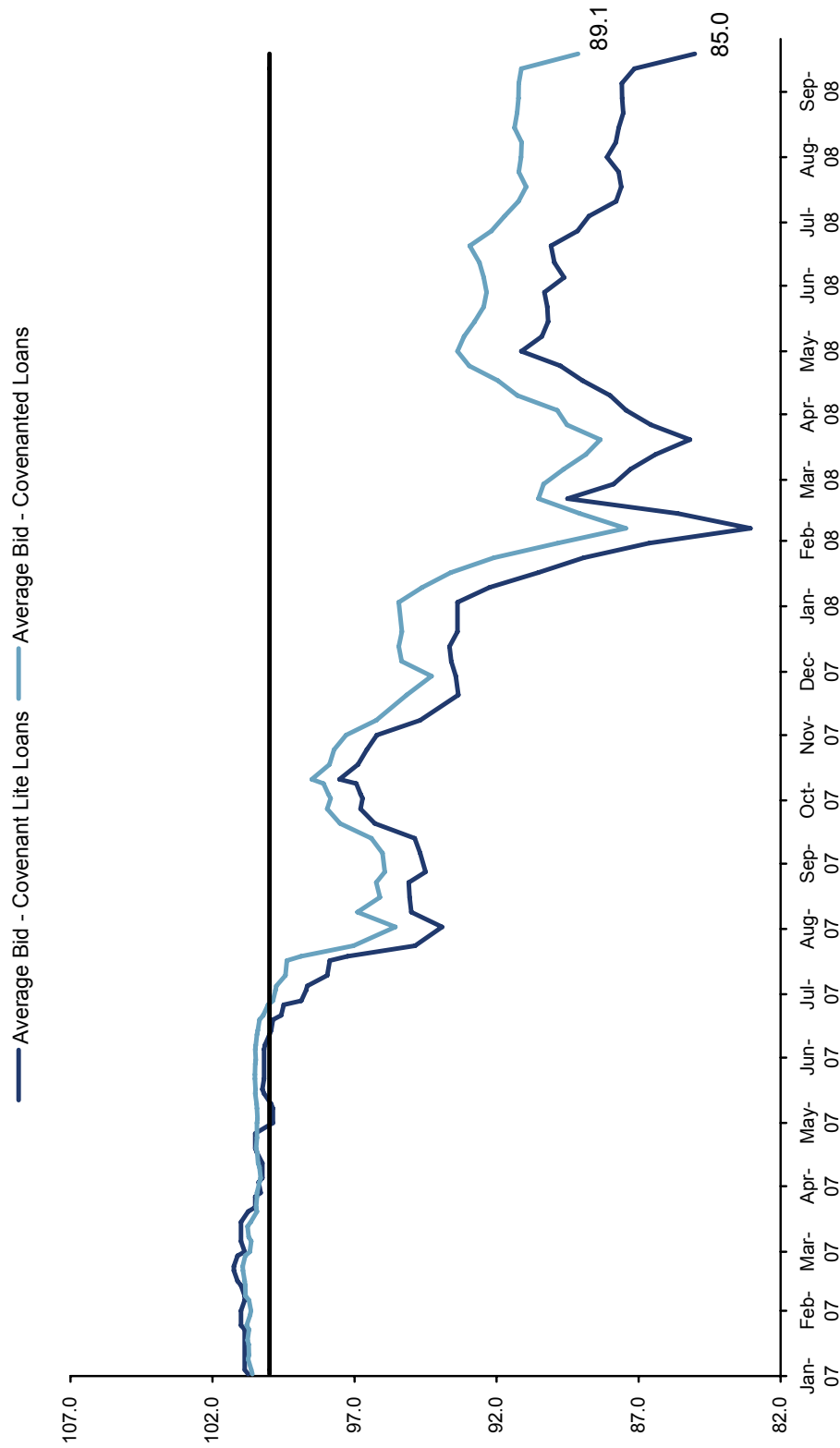
End of Covenant Lite Loans



Source: Standard and Poor's Leveraged Commentary & Data



Covenant Lite vs. Covenant Loans

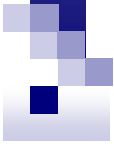


Source: Standard and Poor's Leveraged Commentary & Data

Covenant Lite vs. Covenanted Loans

Company	HCA	Las Vegas Sands	Allison Transmission	Realogy	Aramark	Berry Plastics	Sabre	Celanese	Univision
Transaction Date	Feb-07	May-07	Sep-07	Jun-07	Mar-07	Mar-07	Mar-07	Apr-07	Apr-07
Corporate Rating	B2/B+	Ba3/BB-	B2/B+	B3/B+	B1/B+	B2/B	B2/B+	Ba3/BB-	B1/B
TL Maintenance Cov.	Yes	Yes	Yes	Yes	No	No	No	No	No
Total Debt / EBITDA	6.5 x	-	-	-	6.5 x	5.6 x	6.0 x	2.7 x	12.1 x
Tranche	Term Loan	Term Loan	Term Loan	Term Loan	Term Loan	Term Loan	Term Loan	Term Loan	Term Loan
Term Loan Spread	L + 225	L + 175	L + 275	L + 300	L + 213	L + 200	L + 225	L + 175	L + 225
OID	100.0%	100.0%	96.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Trading Level (June 15, 2007)	101.000%	100.000%	-	100.000%	100.625%	100.000%	99.875%	100.500%	99.750%
Trading Level (Dec. 24, 2007)	96.250%	93.625%	93.250%	87.500%	94.875%	93.250%	91.125%	96.250%	90.500%
Trading Level (Sep. 26, 2008)	89.250%	76.000%	82.750%	72.000%	87.500%	80.000%	70.500%	91.000%	68.750%
Implied Yield (4yr)	L + 493.75	L + 775	L + 706.25	L + 1000	L + 525.5	L + 700	L + 962.5	L + 400	L + 1006.25

Source: Standard and Poor's Leveraged Commentary & Data



PIK Toggle

PIK toggle instruments (which can take the form of bank loans or bonds) allow an issuer to choose, or “toggle,” between paying cash interest and capitalizing the interest to principal for any given interest period. Any interest that is capitalized is paid out upon maturity or prepayment of the debt instrument. Recently, few if any, PIK toggles have been done

Issuers pay a premium for the toggle option in two ways:

- (1) a PIK toggle debt instrument generally prices higher than one without the feature, and
- (2) the issuer must pay a higher interest rate (typically 75 bps) during any period for which it elects to pay interest in kind

Since the recent market adjustment in July 2007, there have been no new PIK loans launched

PIK Toggle (cont'd)

Just recently, Harrah's and Momentive announced that they would begin paying interest on their senior PIK toggle bonds with additional securities instead of cash

Of the 44 bond deals totaling \$26.3 billion that have been completed with a PIK-election feature, 9 of the issues totaling \$4.1 billion are now paying in kind (Harrah's, Berry Plastics, Claire's Stores, Digicel, iPayment, Momentive, National Mentor, Realogy and US Oncology)

Select PIK Toggle Deals

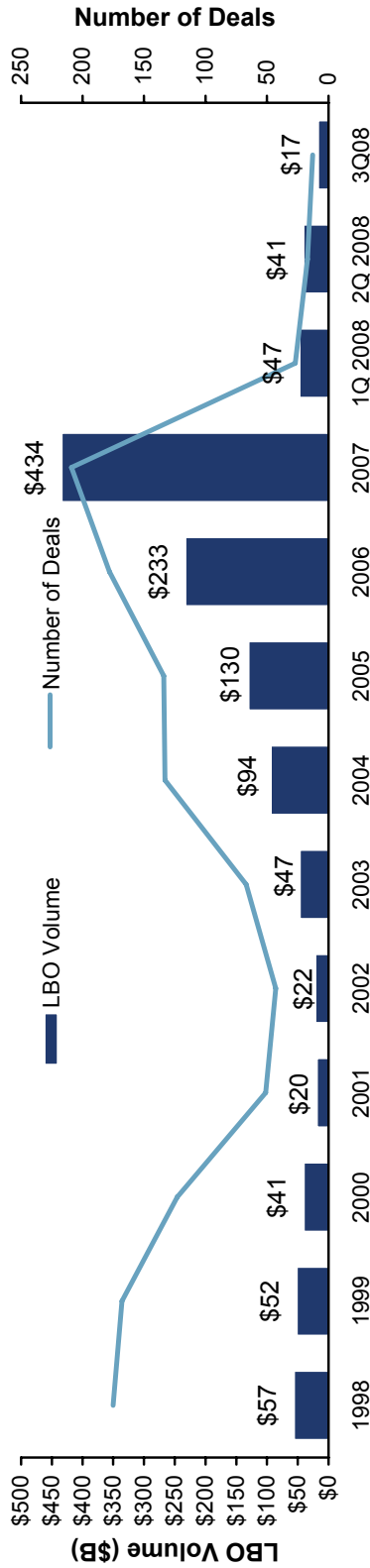
Deal Name	Industry	Deal Size	TL B	2nd Liens	Launch Date
Wilton Industries	Entertainment & Leisure	\$ 225mm		\$225mm / L+650	Jul-07
IWCO Direct	Services & Leasing	\$ 25mm	\$25mm / L+650		Jul-07
Chrysler Financial	Retail	\$ 2,000mm		\$2,000mm / L+650	Jun-07
Wynn Las Vegas	Gaming & Hotel	\$ 1,000mm	\$1,000mm / L+200		Jun-07
Vistar	Food & Beverage	\$ 90mm	\$90mm / L+400		Jun-07
Mitel Networks	Telecom Equipment	\$ 130mm		\$130mm / L+600	Jun-07
Value Creation	Oil & Gas	\$ 425mm	\$425mm / L+750		Jun-07
Clearwire	Telecom	\$ 1,000mm	\$1,000mm / L+600		Jun-07
Bicent Power	Utilities	\$ 130mm		\$130mm / L+400	Jun-07
Bicent Power	Utilities	\$ 330mm	\$330mm / L+200		Jun-07
Dollar General	Retail	\$ 1,700mm	\$1,700mm / L+275		Jun-07
Asurion	Services & Leasing	\$ 580mm		\$580mm / L+650	Jun-07
Nelson Education	Printing & Publishing	\$ 171mm		\$171mm / L+575	Jun-07
Concentra Operating	Healthcare	\$ 155mm		\$155mm / L+550	Jun-07
WideOpenWest	Telecom Equipment	\$ 235mm		\$235mm / L+625	May-07

Source: Goldman Sachs Research and Standard and Poor's

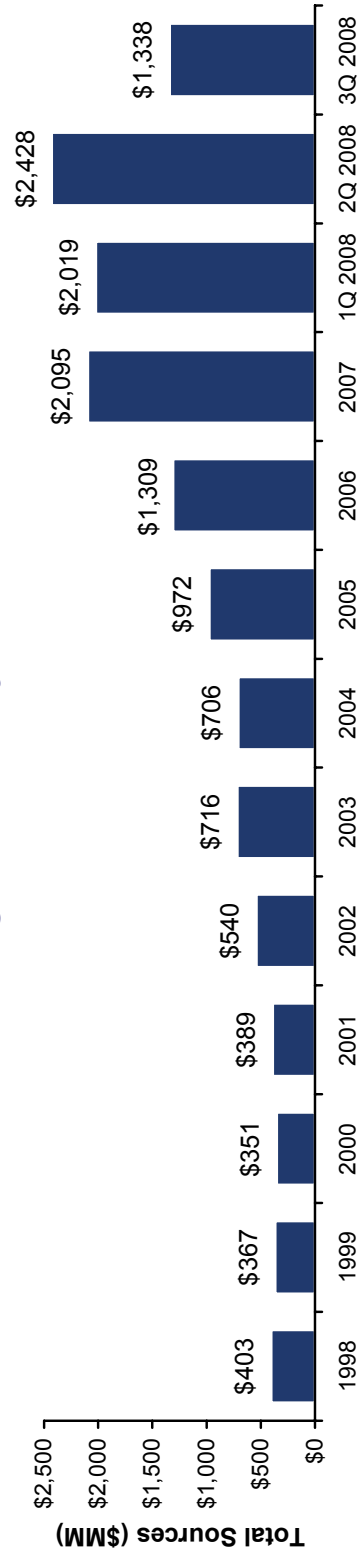
Increasing LBO Volume and Size Through Mid-2007

Total LBO volume and average LBO deal size have both increased significantly over the past five years

US LBO Volume



Average LBO Size by Total Sources

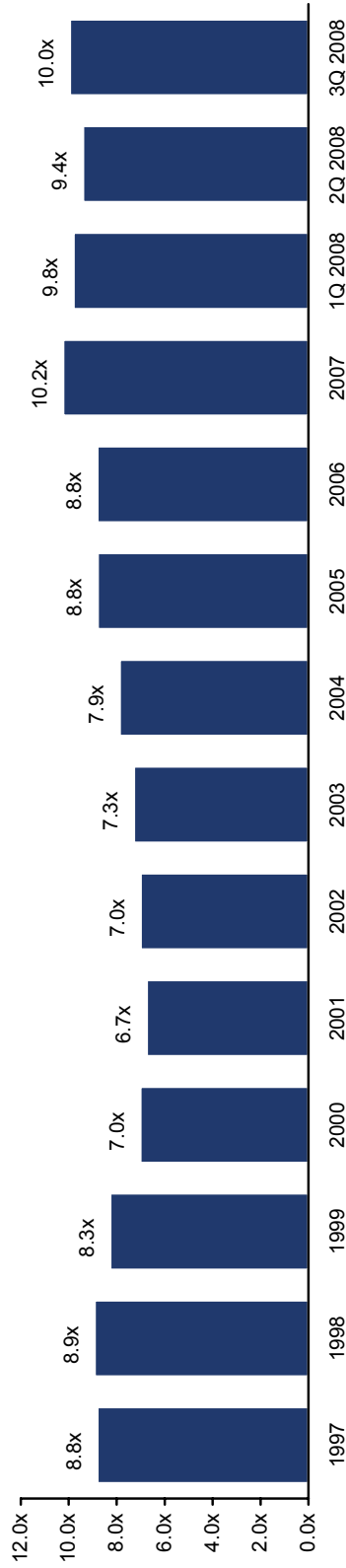


Source: Standard & Poor's

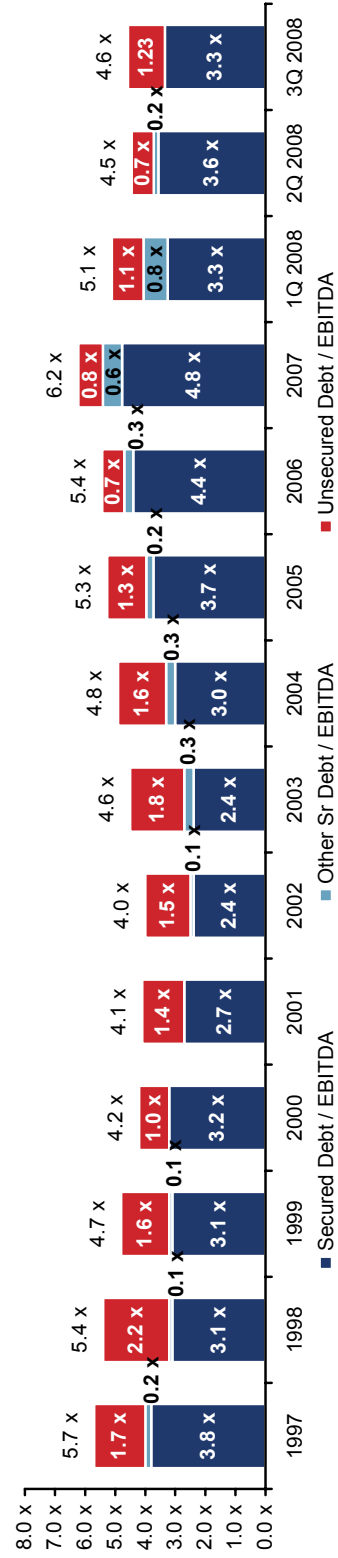
Increasing LBO Valuation and Debt Multiples Through Mid-2007

Throughout most of 2007, LBOs as a class were being consummated at higher multiples and using greater leverage

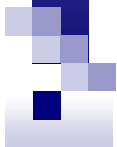
Average Purchase Price Multiples of LBOs with Total Sources of \$500 million or More¹



Average Debt Multiples of LBOs with EBITDA > \$50 million



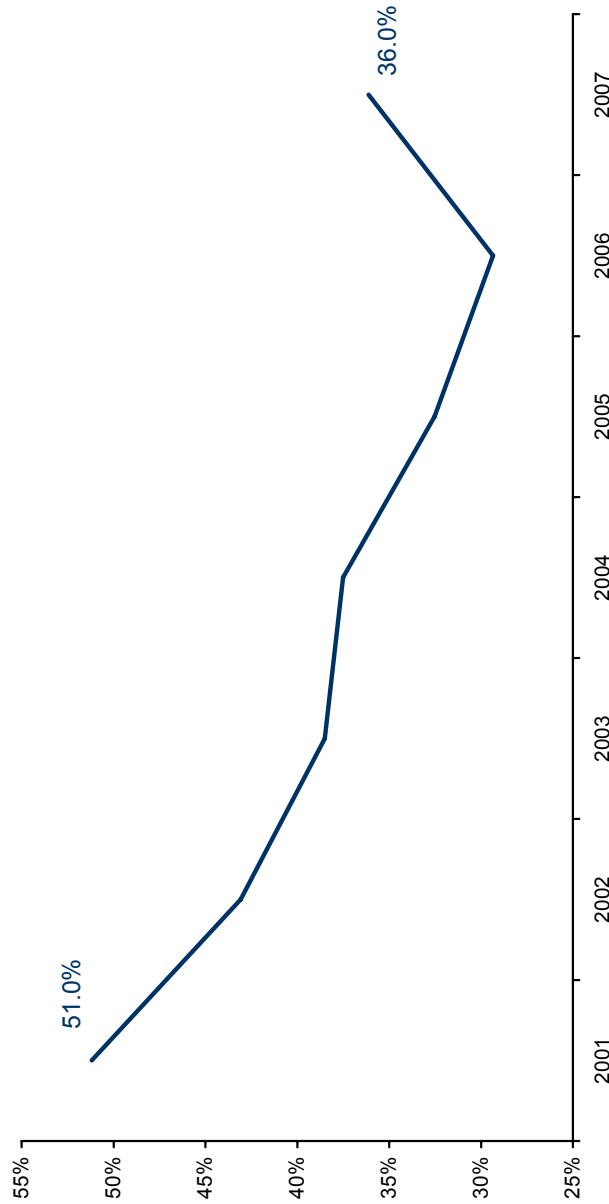
¹) Includes Fees
Source: Standard & Poor's



Debt / EBITDA Lower this Cycle versus Prior Peaks

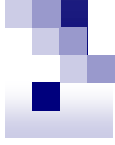
In 2001, 51% of leveraged loans had greater than 5.0x Debt / EBITDA versus 36% at year-end 2007

% of Loans with > 5.0x Debt / EBITDA



	Less than 3.0x	Between 3.0x and 3.99x	Between 4.0x and 4.99x	Between 5.0x and 5.99x	Between 6.0x and 6.99x	More than 7.0x	% > 5X
2001	15%	13%	20%	18%	11%	22%	51%
2002	22%	17%	18%	15%	8%	19%	43%
2003	23%	22%	16%	14%	8%	17%	38%
2004	25%	18%	20%	13%	12%	13%	38%
2005	27%	19%	22%	15%	6%	11%	33%
2006	15%	26%	29%	11%	8%	11%	29%
2007	20%	27%	17%	15%	7%	14%	36%

Source: Wall Street Research



De-Leveraging Buyouts

Easy access to greater amounts of leverage and massive liquidity in the capital markets allowed sponsors to finance buyouts with larger sums of debt and to minimize required equity investments

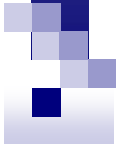
As liquidity dried up, the makeup of buyouts have changed dramatically from the model of ~70% debt and ~30% equity

With the equity and credit markets in a correction, Private Equity firms have been forced to “bridge the gap,” putting more of their own money to work

Thus far in 2008, the average equity contribution in buyout deals soared to **48%**, from 30% last year and versus the prior high of 37% in 2002

At the same time, the average debt multiple has narrowed 1.45x turns, to 4.75x

Source: Standard and Poor's Leveraged Commentary & Data



LBOs Are Not What They Used To Be

gettyimages®

On June 10, 2008, Hellman & Friedman launched a leveraged buyout of Getty Images

Hellman & Friedman funded its \$34-per-share, \$2.4 billion buyout by:

Providing \$941.3 million in equity, roughly **40%** of the deal's purchase price (well beyond the 20% equity check sponsors were writing on similar buyouts just a year ago)

A Barclays Capital, GE and RBS led financing of \$1,045 million

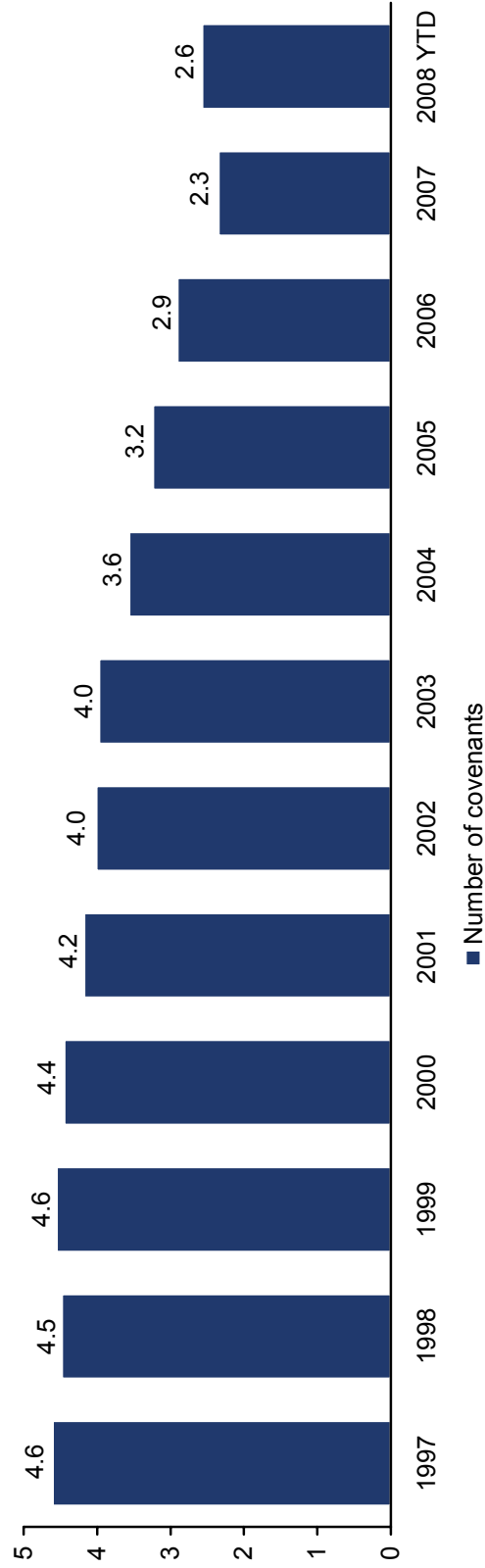
Hellman & Friedman paid roughly 6.5x for Getty Images and the Company will be levered 3.2x post transaction

The structure includes a \$75 million Revolving Credit Facility, a \$705 million Term Loan and a \$265 million Delayed-Draw Term Loan

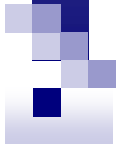
LBO Structures Have Tightened Considerably

Newly minted LBOs have far tighter structures than those of the recent past. In 2007, 35% of large LBO loans were structured with only incurrence tests. However, 2008 deals have had three financial tests on average (the most since 2005) compared to only approximately two tests in 2007.

Average Number of Covenants in First Lien Leveraged Loans



Source: Standard and Poor's Leveraged Commentary & Data

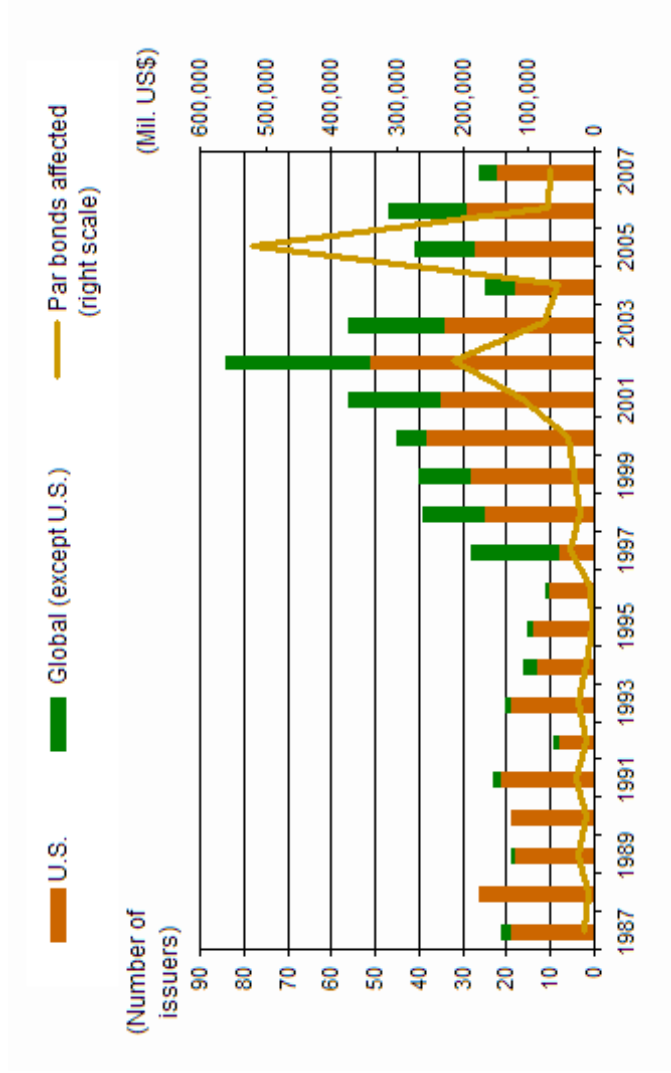


Global Fallen Angels

During 2007, 42 issuers fell to speculative grade ('BB+' and lower), affecting rated debt worth \$131.3 billion

In 2008 YTD, 23 issuers have fallen to speculative grade, affecting rated debt of \$71.0 billion

Global Fallen Angels

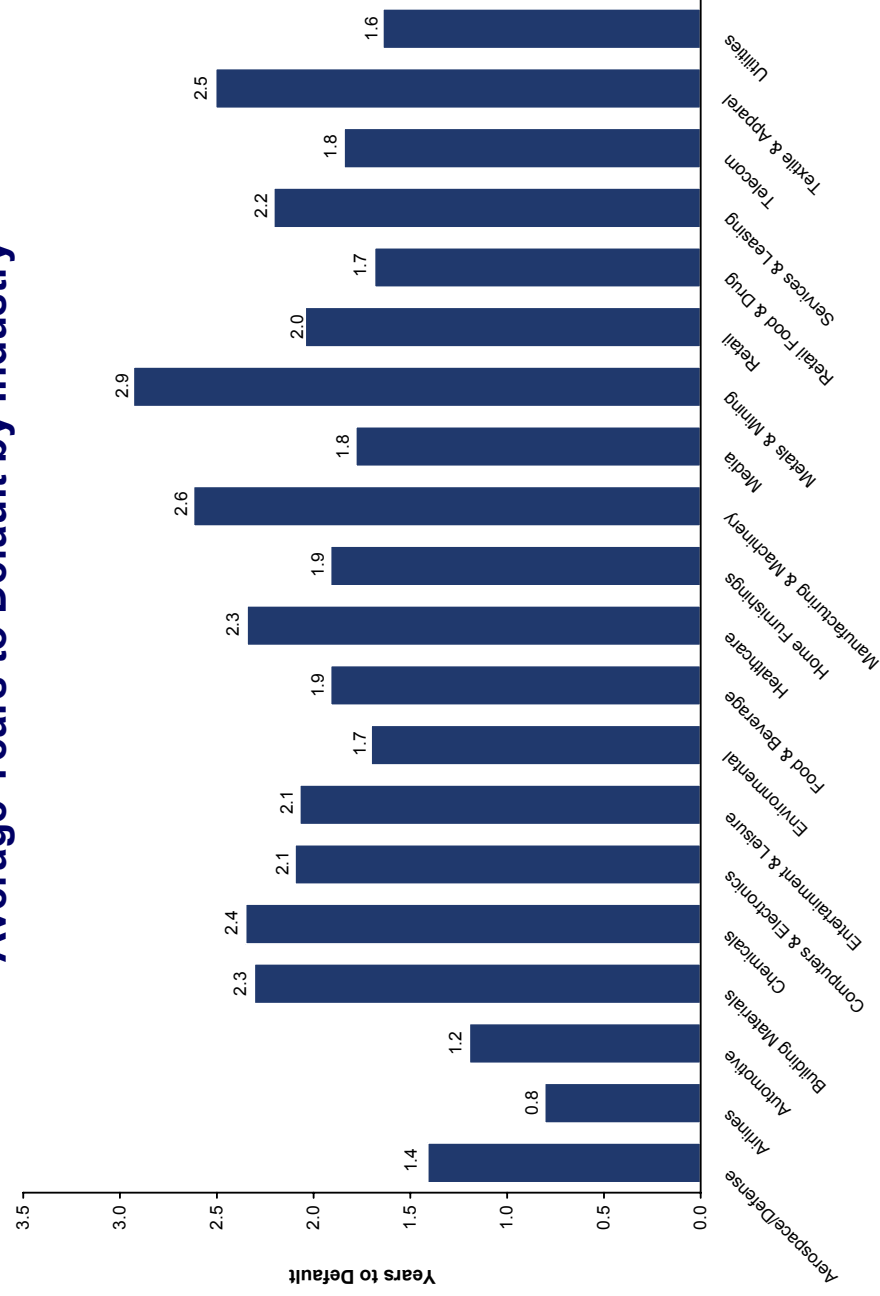


Source: Standard & Poor's Global Fixed Income Research

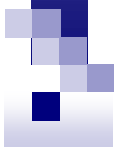
Industry Cyclicalty – Time to Default

Certain industries tend to default earlier than others due to their cyclical nature and their inability to absorb occasional shocks to the economic system

Average Years to Default by Industry¹



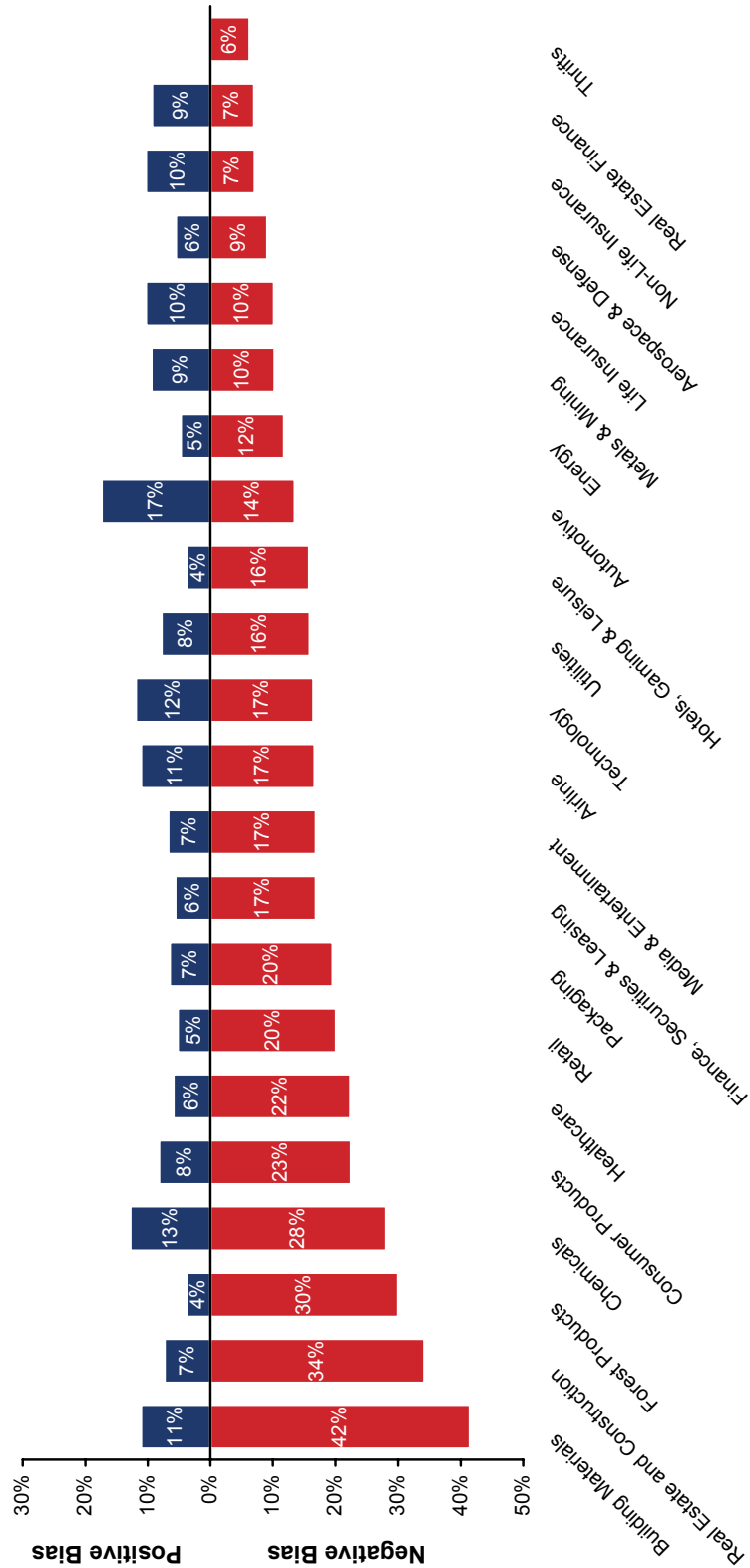
1) Comprises Institutional Loans closed between 1998-2Q08 for Issuers that File Publicly.
Source: LCD Research



Industry Cyclicity – Time to Default

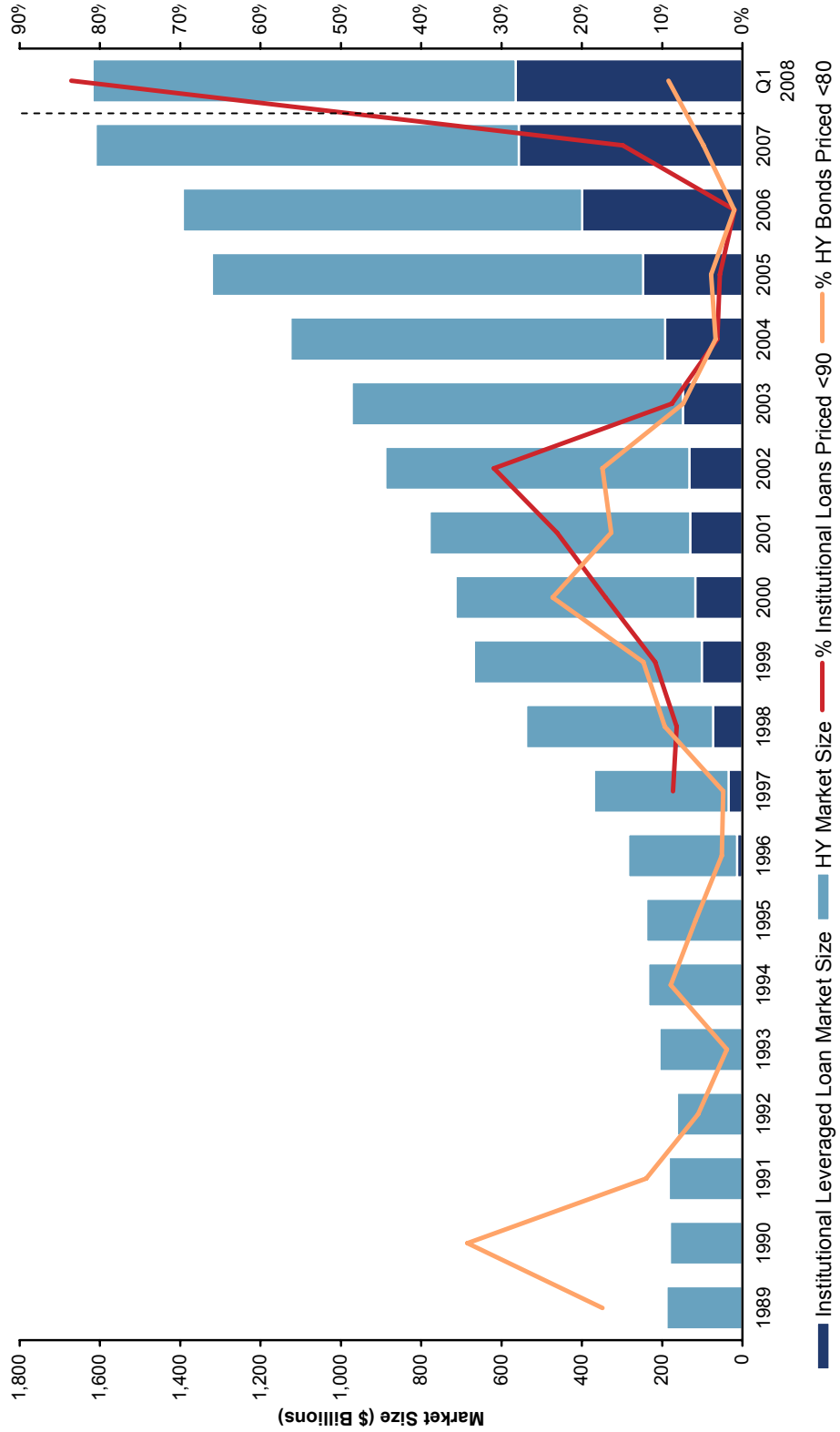
Recent actions by the ratings agencies can help identify which industries might be prone to distress

Ratings Outlook by Industry¹

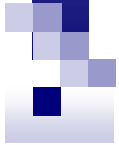


1) "Positive Bias" includes companies with a positive outlook or on watch for an upgrade while "Negative Bias" includes companies with a negative outlook or on watch for a downgrade.
Source: Moody's as of June 2008

Debt Trading at Distressed Levels



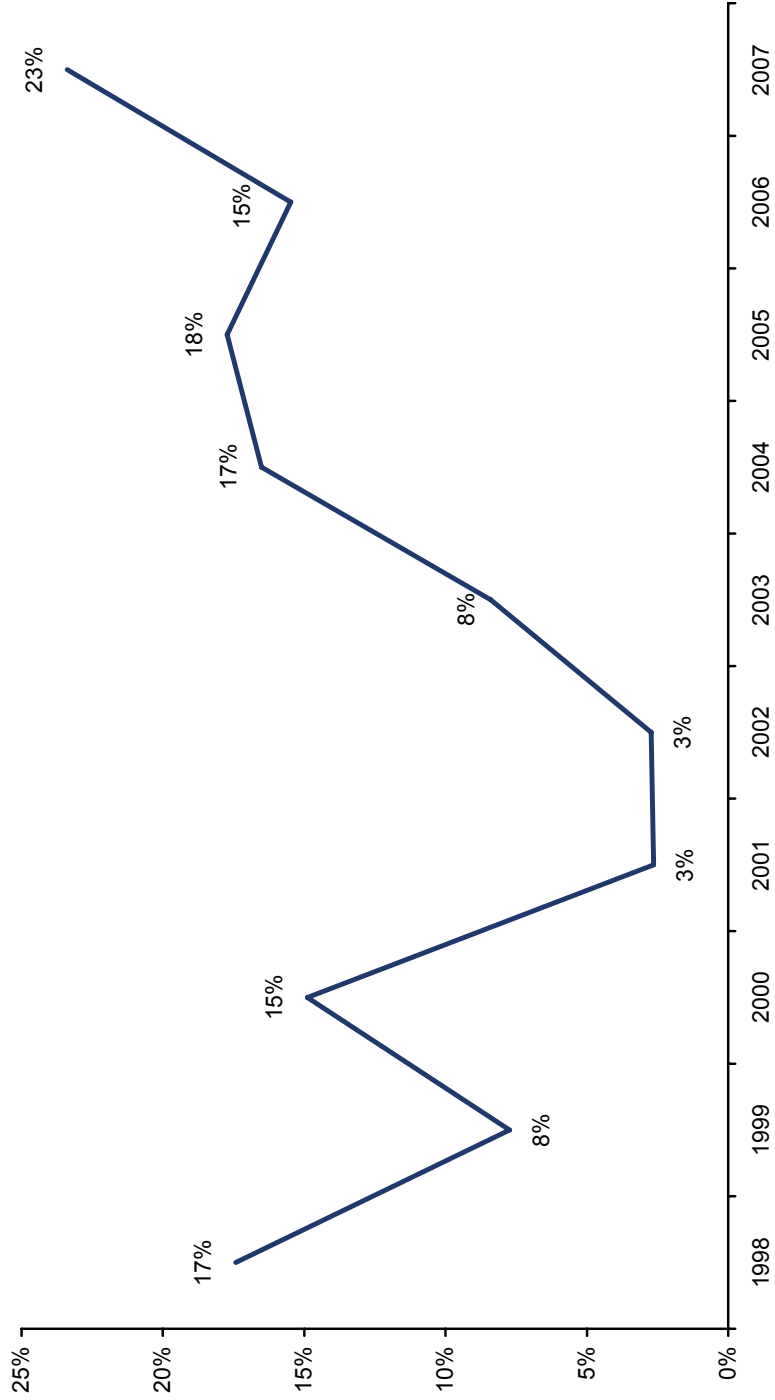
Source: Wall Street Research



Substantial Issuance of Low-Rated Credits

The issuance of high yield Caa1 or below and non-rated credits has increased substantially since 2002

HY New Issuance Rated Caa1 or below and NR as a % of Total HY Issuance



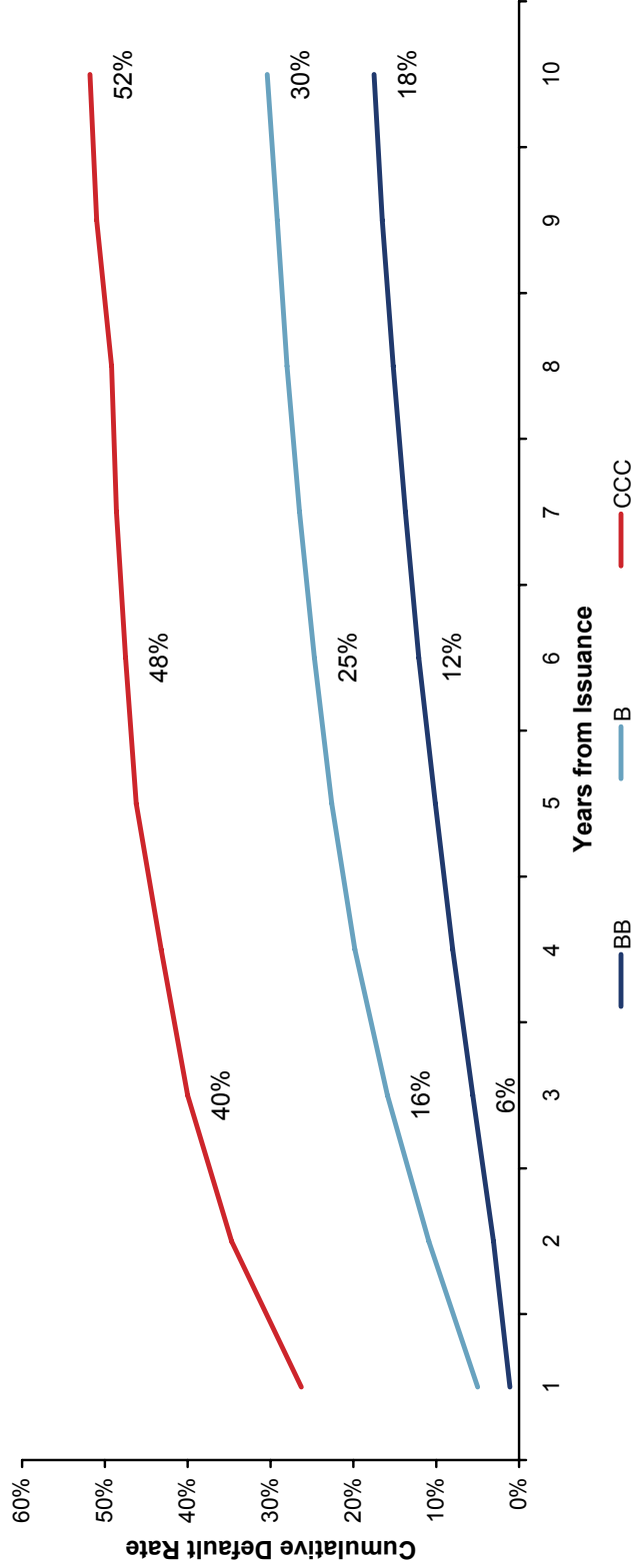
Source: Goldman Sachs Research

Cumulative Default Rates by Original Rating

Default rates and the expected time to default are highly correlated with the rating at issuance

The fact that 29 issuers, or 2.9% on the Indexed universe, have corporate ratings of CCC or lower (compared to an average of 1% over the last two years) suggests a potentially increasing default rate in 2008 - 2010

Cumulative Default Rate¹



1) Based on number of issuers defaulting (not value of defaulted debt).
Source: Standard & Poor's Leveraged Commentary & Data



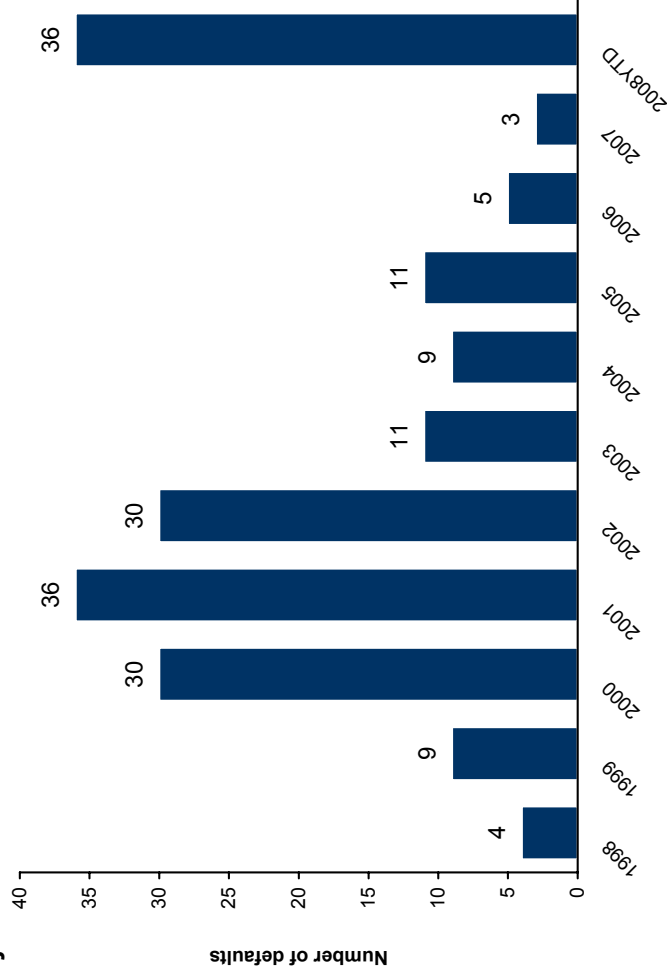
Default Rates Have Increased Significantly in 2008

Despite diminished liquidity and continued volatility in the credit markets, corporate default rates remained at historically low levels throughout 2007

Equity cures, in some cases, have kept default rates lower

Since then, according to Wall Street research, there have been 36 defaults¹ in the leveraged loan market in 2008, driving the institutional loan default rate to a 56-month high of 2.51%

This compares to just 3 defaults in all of 2007 and 5 in all of 2006



1) Includes companies that defaulted, but subsequently received waivers.
Source: Wall Street Research

Default Rates Have Increased Significantly in 2008 (cont'd)

36 Defaults in U.S. Leveraged Loans 2008 YTD

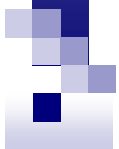
First Half of 2008

Issuers	Industry	Amount (\$mm)
January 2008		
Buffets	Retailing	\$640
Lake Las Vegas	Gaming & Hotel	\$540
Kuilima/Turtle Bay	Gaming & Hotel	\$400
Propex Fabrics Inc	Textile	\$360
Pivotal Promontory	Real Estate	\$350
Tamarack	Gaming/Hotel	\$250
Heartland Automotive	Automotive	\$225
Technical Olympic USA Inc	Construction	\$200
PRC LLC	Business Services	\$160
February 2008		
North American Van Lines	Transportation	\$425
Plastech Engineered Products	Automotive	\$365
Wellman	Chemicals	\$450
Atlantis Plastics	Chemicals	\$75
March 2008		
Kyle Acquisition	Real Estate	\$490
South Edge	Real Estate	\$535
Leiner Health Products Inc	Healthcare	\$290
Legends Gaming	Gaming & Hotel	\$222
April 2008		
Landsource	Construction	\$1,606
May 2008		
Recycled Paper Greetings	Printing & Publishing	\$217
Tropicana	Gaming & Hotel	\$2,150
Hillex Poly	Chemicals	\$255
Greektown Casinos	Gaming & Hotel	\$290
BHM Technologies	Automotive	\$335
June 2008		
JHT Holding	Transportation	\$130
Total 1H 2008		\$10,960

Second Half of 2008

Issuers	Industry	Amount (\$mm)
July 2008		
Gainey	Transportation	\$260
Ginn Clubs	Real Estate	\$675
Syntax-Brilliant	Computers & Electronics	\$250
Progressive Moulded	Automotive	\$270
Greatwide Logistics	Transportation	\$540
Pierre Foods	Food & Beverage	\$290
SemGroup LP	Oil & Gas	\$450
August 2008		
WCI Communities LP	Real Estate	\$300
Intermet Corp	Automotive	\$205
Star Tribune	Printing & Publishing	\$486
GBGH LLC	Utilities	\$143
September 2008		
BLB Investors	Gaming & Hotel	\$495
Total 2H 2008 YTD		\$4,364

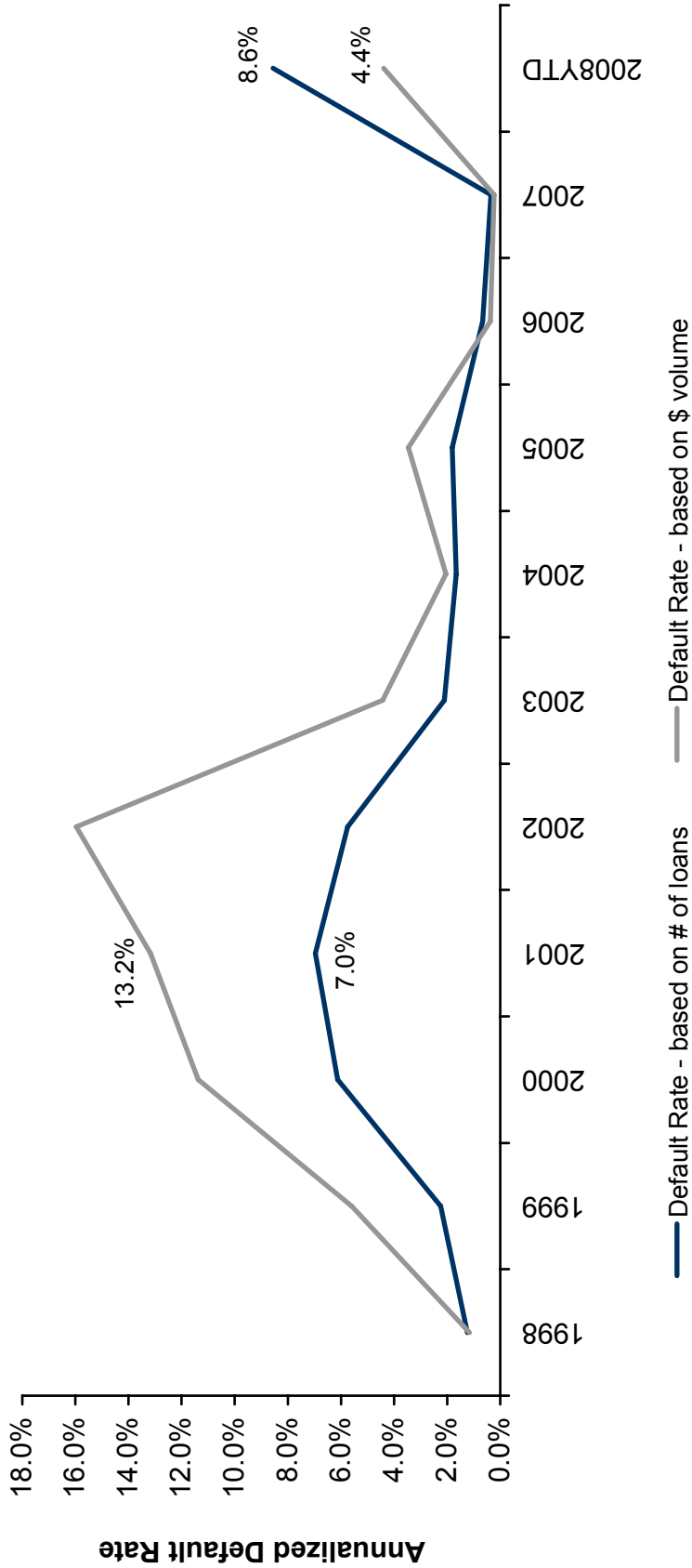
Source: Wall Street Research



A Disconnect Between Number of Defaults and Amount?

Although the 2008 YTD annualized default rate of 8.6% is currently even worse than the 2001 rate of 7.0%, the dollar default rate continues to be much better (4.4% versus 13.2%)

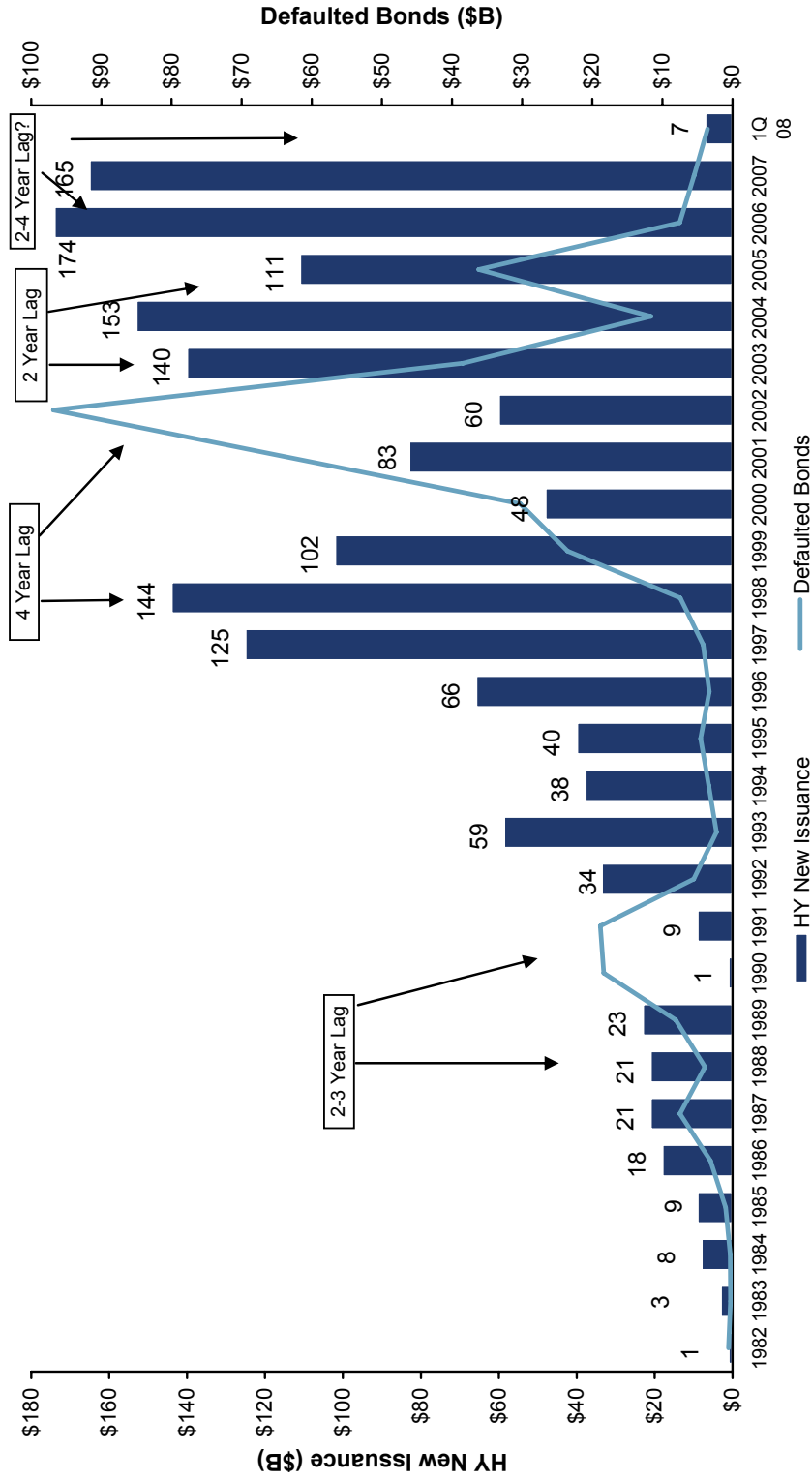
2008 YTD Default Rate Based on Number of Loans and \$ Amount of Loans¹



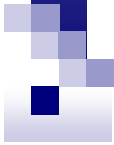
Source: Wall Street Research

Lag in Default Rate

There is usually a two to four year lag between a peak in high yield new issuances and a rise in the default rate



Source: Goldman Sachs Research and Professor Edward Altman, NYU Stern School of Business



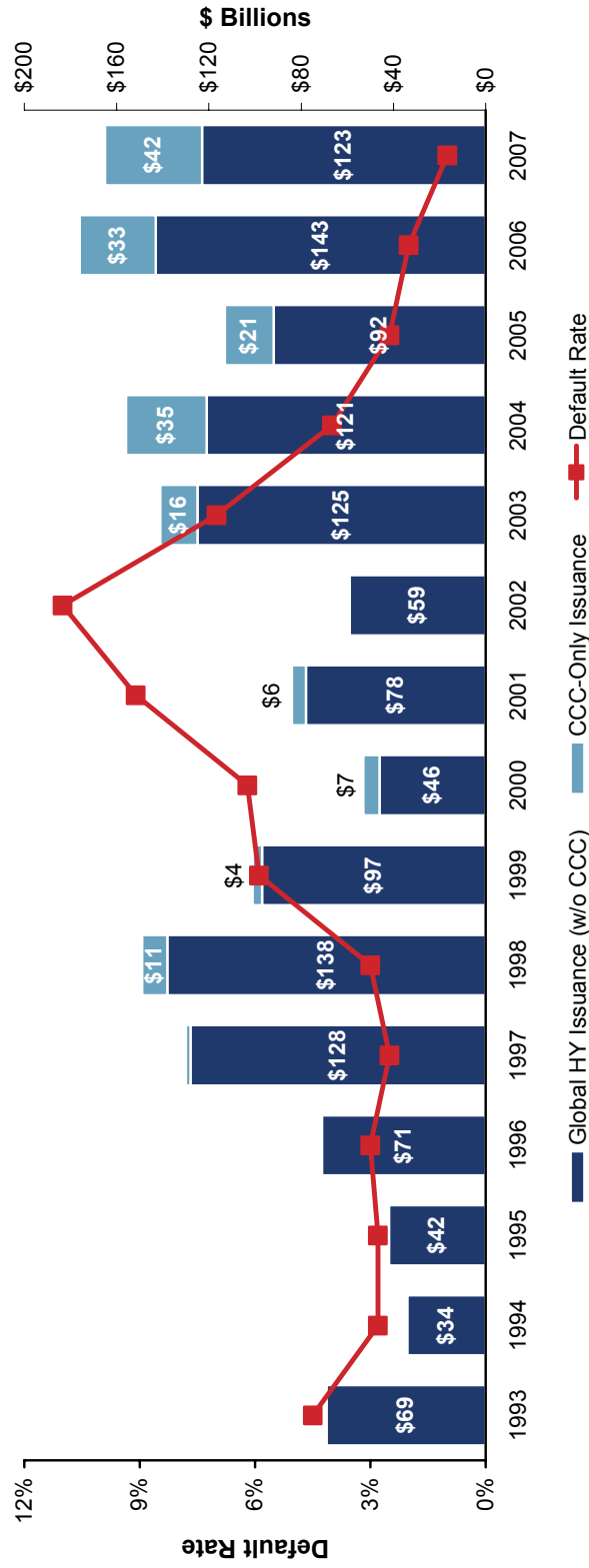
Default Rates Expected to Rise Given Mass of CCC Debt

Global speculative grade corporate default rates were at a record low of 0.9% at 12/31/2007

Moody's says that it expects global speculative grade defaults to rise to 4.8% in 2008 and 5.0% by 2009

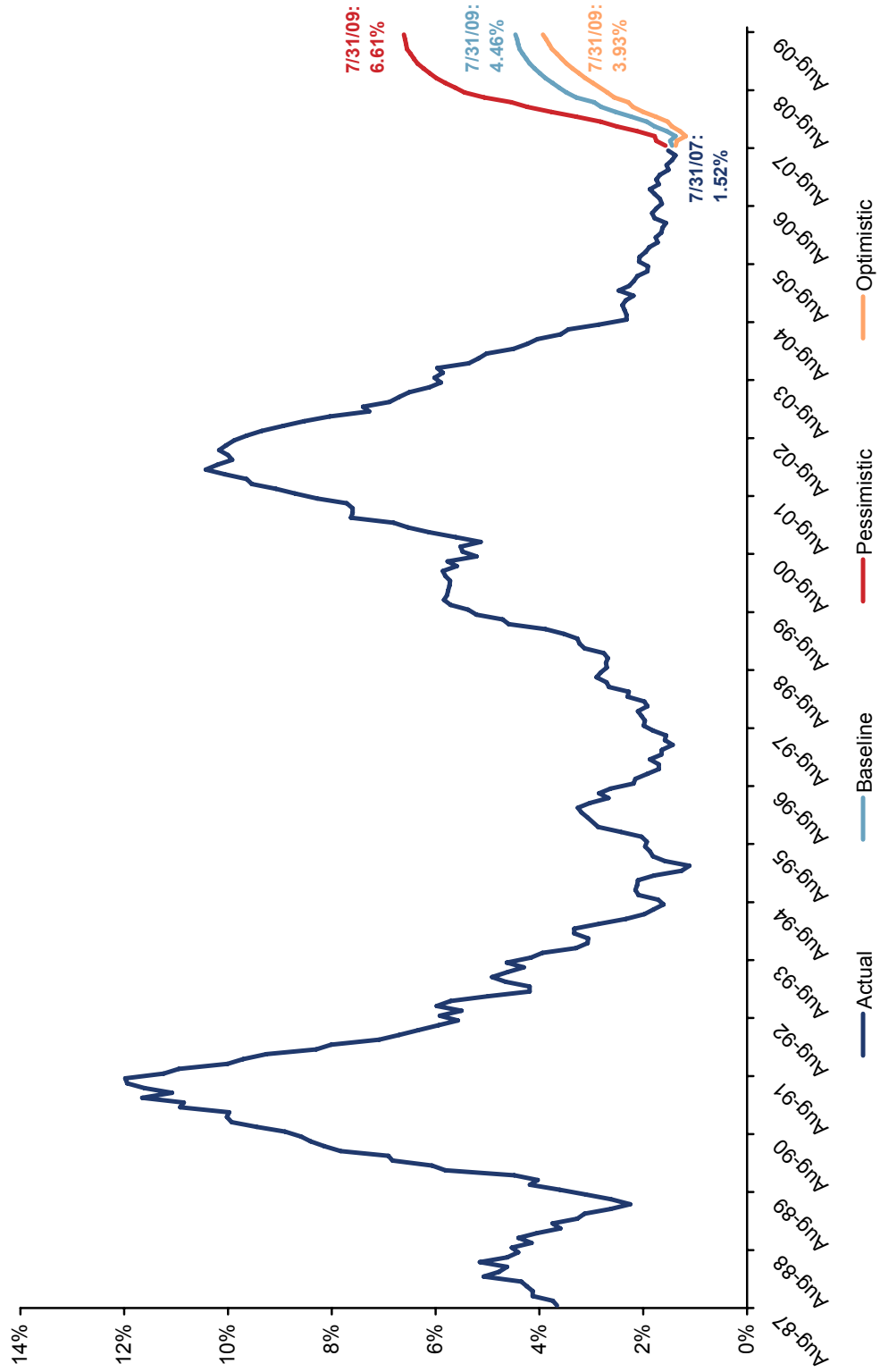
Edward Altman has predicted a nine-fold increase in defaults for 2008 (4.64%) vs. 2006 levels with continued increase in 2009

Global High Yield Issuance vs. Global Default Rates



Source: Moody's Investors Services Data

Global Speculative-Grade Default Rates (Actual and Forecast)



Source: Moody's Investors Service Global Credit Research

ABI International Insolvency Symposium
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Global Automotive Industry

October 31, 2008

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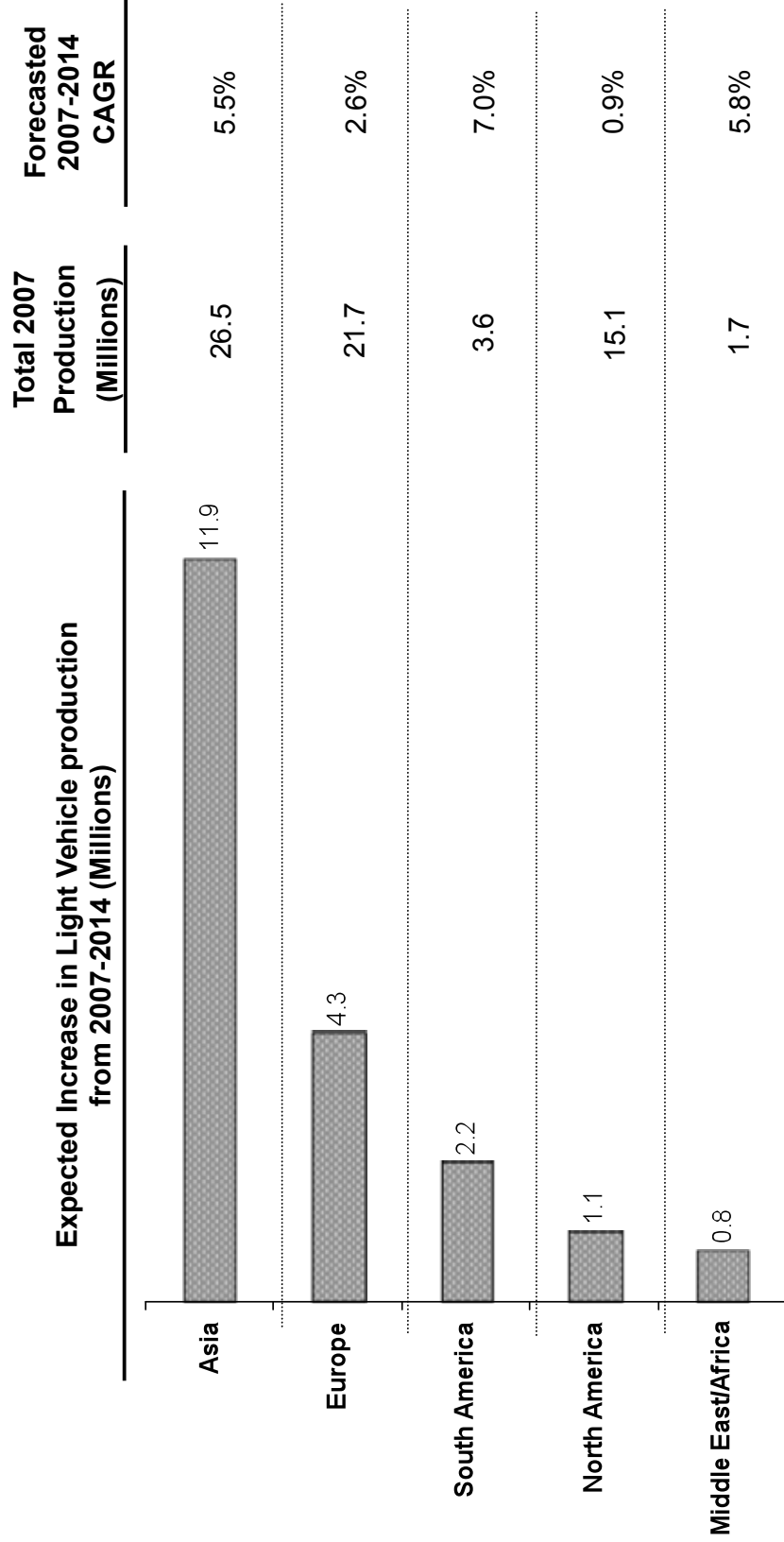
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 - A. Impact by geographic market
 - B. Global suppliers
 - C. North American supplier case studies
- V. Summary and Outlook**

Market Overview

Market Overview – Global Forecasted Production

- Global light vehicle production expected to increase by 20 million vehicles from 2007 – 2014
- Modest growth in global automotive sector with increased demand from emerging markets
 - Sudden slowdown in China and India is threatening to shrink global 2008 market



Source: CSM Worldwide 2008

Market Overview – United States Sales and Production

- Light vehicle sales in U.S. fell 15.3% in August 2008 Y/O/Y
- Year-to-date light vehicle sales in U.S. are down 11.2% in 2008 Y/O/Y
- Year-to-date production of light vehicles in North America is down 14.0% in 2008 Y/O/Y
- Downswing expected to continue beyond 2009

WARD'S U.S. Light Vehicle Sales Summary

	Month				Calendar Year-to-Date			
	August		% Share		DSR.		Vol. % Chg.	
	2008	2007	Current	Year-Ago	2008	2007		
Domestic Cars	418,587	476,059	33.6	32.4	-12.1	3,409,712	3,603,498	-5.4
Import Cars	212,631	207,432	17.1	14.1	2.5	1,710,699	1,630,745	4.9
Total Cars	631,218	683,491	50.7	46.5	-7.6	5,120,411	5,234,243	-2.2
Domestic Light Trucks	518,144	663,801	41.6	45.1	-21.9	3,853,715	4,826,724	-20.2
Import Light Trucks	96,691	123,974	7.8	8.4	-22.0	788,121	931,321	-15.4
Total Light Trucks	614,835	787,775	49.3	53.5	-22.0	4,641,836	5,758,045	-19.4
Domestic Light Vehicles	936,731	1,139,860	75.2	77.5	-17.8	7,263,427	8,430,222	-13.8
Import Light Vehicles	309,322	331,406	24.8	22.5	-6.7	2,498,820	2,562,066	-2.5
Total Light Vehicles	1,246,053	1,471,266	100.0	100.0	-15.3	9,762,247	10,992,288	-11.2

Source is country of manufacture. Domestic are from U.S., Canada, Mexico. Imports are from overseas.

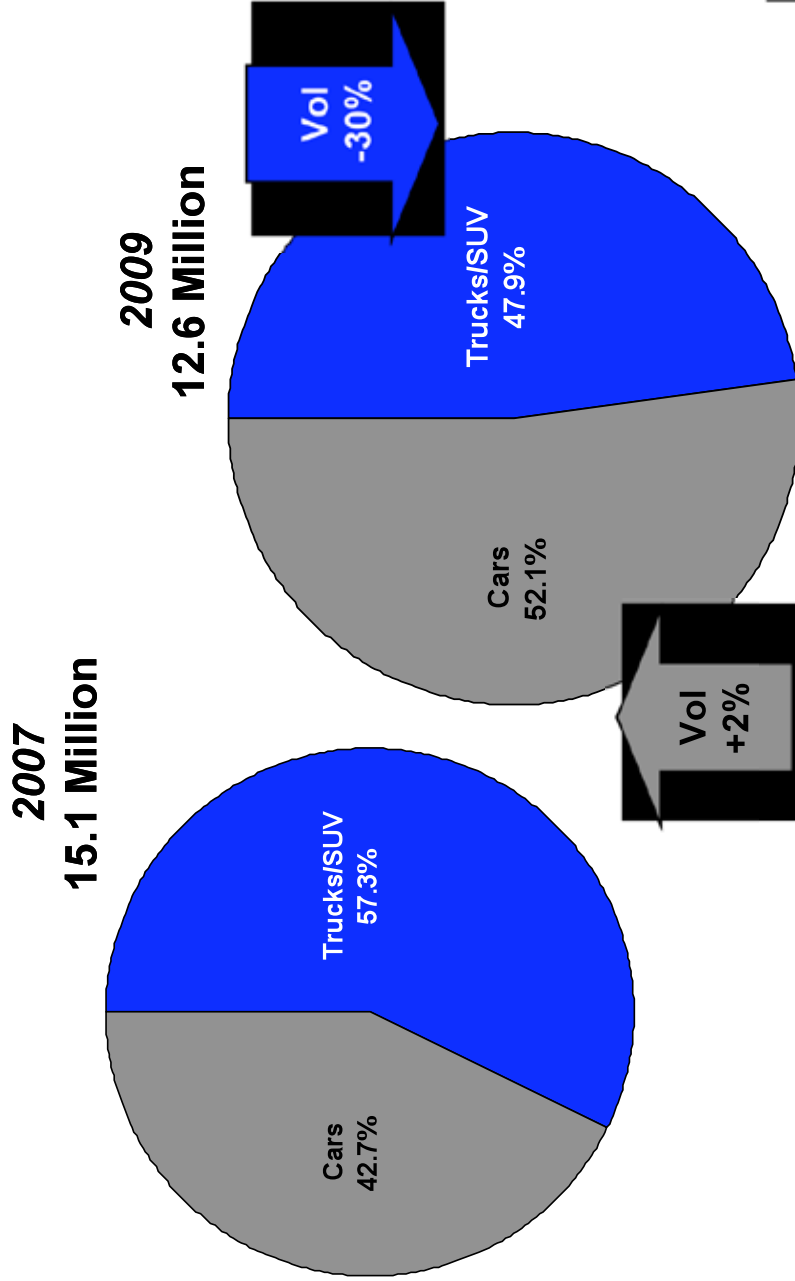
Light vehicles are cars and light trucks (GVW Classes 1-3, under 14,000 lbs.). DSR is daily sales rate.

Source: Ward's AutoInfoBank



Market Overview – United States Sales and Production

- Market for small trucks / SUVs expected to “bottom-out” in 2009 or later
- Production continuing to shift from small trucks / SUVs to smaller, fuel efficient cars



Source: CSM Worldwide 2008

Market Overview - Western Europe Sales and Production

- Car sales in Western Europe fell by 16% in August 2008 Y/O/Y
- As with North America, downswing expected to continue beyond 2009
- Full-year sales expected to be down 6.1% in 2008 and 4.5% in 2009 Y/O/Y

	Sales (units)					
	Aug		Year-to-date		Percent	
	2008	Aug 2007	2008	2007	change	change
WESTERN EUROPE	717,776	854,448	9,614,001	10,050,683	-16.0%	-4.3%
GERMANY	214,386	239,381	2,110,089	2,075,019	-10.4%	1.7%
FRANCE	103,404	111,244	1,415,253	1,375,193	-7.0%	2.9%
ITALY	77,156	105,756	1,540,197	1,753,278	-27.0%	-12.2%
UK	63,225	77,649	1,464,144	1,521,225	-18.6%	-3.8%
SPAIN	58,530	99,662	882,330	1,118,971	-41.3%	-21.1%
OTHER	201,075	220,756	2,201,988	2,206,997	-8.9%	-0.2%

Source: J.D. Power and Associates Automotive Forecasting

Market Overview - Eastern Europe Sales and Production

- ❑ Forecasts in late 2007 anticipated sustained double-digit sales growth
- ❑ Expectations have been tempered but the outlook remains favorable
- ❑ Light vehicle sales for Eastern Europe were up by 10.5% in August 2008 and are up 20.1% year-to-date
- ❑ Forecasts expect production to grow 7-8% annually for both cars and small trucks

	Sales (units)					
	Aug 2008	Aug 2007	Percent change	Year to date 2008	Year to date 2007	Percent change
EASTERN EUROPE	431,443	390,504	10.5%	3,344,383	2,783,912	20.1%

Source: J.D. Power and Associates Automotive Forecasting

Global OEMs

Sales by OEM – United States Through August

- Sales for Detroit “Big 3” OEMs were down 24.9% in August 2008 and 18.9% YTD Y/O/Y
- European and Asian OEMs performed better but sales for most OEMs were down in August

WARD'S U.S. Light Vehicle Sales by Company

	Month				Calendar Year-to-Date			
	August		% Share		DSR.		Vol. % Chg.	
	2008	2007	Current	Year-Ago	2008	2007		
GM	307,379	385,529	25.1	26.8	-20.3	2,130,656	2,600,274	-18.1
Ford	152,118	204,246	12.4	14.2	-25.5	1,438,128	1,700,477	-15.4
Chrysler	109,740	168,203	9.0	11.7	-34.8	1,072,456	1,419,024	-24.4
North America Subtotal	569,237	757,978	46.4	52.7	-24.9	4,641,240	5,719,775	-18.9
BMW	30,931	30,639	2.5	2.1	1.0	217,821	223,341	-2.5
Volkswagen	28,698	29,275	2.3	2.0	-2.0	216,491	216,646	-0.1
Daimler	20,944	20,987	1.7	1.5	-0.2	175,010	157,814	10.9
Europe Subtotal	80,573	80,901	6.6	5.6	-0.4	609,322	597,801	1.9
Toyota	211,533	233,471	17.3	16.2	-9.4	1,649,043	1,788,603	-7.8
Honda	146,855	158,342	12.0	11.0	-7.3	1,083,957	1,066,320	1.7
Nissan	108,501	95,547	8.9	6.6	13.6	726,209	718,926	1.0
Hyundai	41,130	45,087	3.4	3.1	-8.8	312,899	325,193	-3.8
Kia	25,065	26,874	2.0	1.9	-6.7	210,705	207,956	1.3
Mazda	23,680	24,762	1.9	1.7	-4.4	199,239	203,301	-2.0
Subaru	18,932	16,573	1.5	1.2	14.2	129,298	122,165	5.8
Asia Subtotal	575,696	600,656	47.0	41.7	-4.2	4,311,350	4,432,464	-2.7
Subtotal Light Vehicles	1,225,506	1,439,535	100.0	100.0	-14.9	9,561,912	10,750,040	-11.1

Source: Ward's AutoInfoBank

Sales by OEM – Western Europe Through June

- Sales for major European OEMs were down 7.0% in June 2008 and 1.4% YTD Y/O/Y
- North American and Asian OEMs experienced even greater declines in sales in June 2008 and YTD Y/O/Y

WARD'S Western Europe Light Vehicle Sales by Company

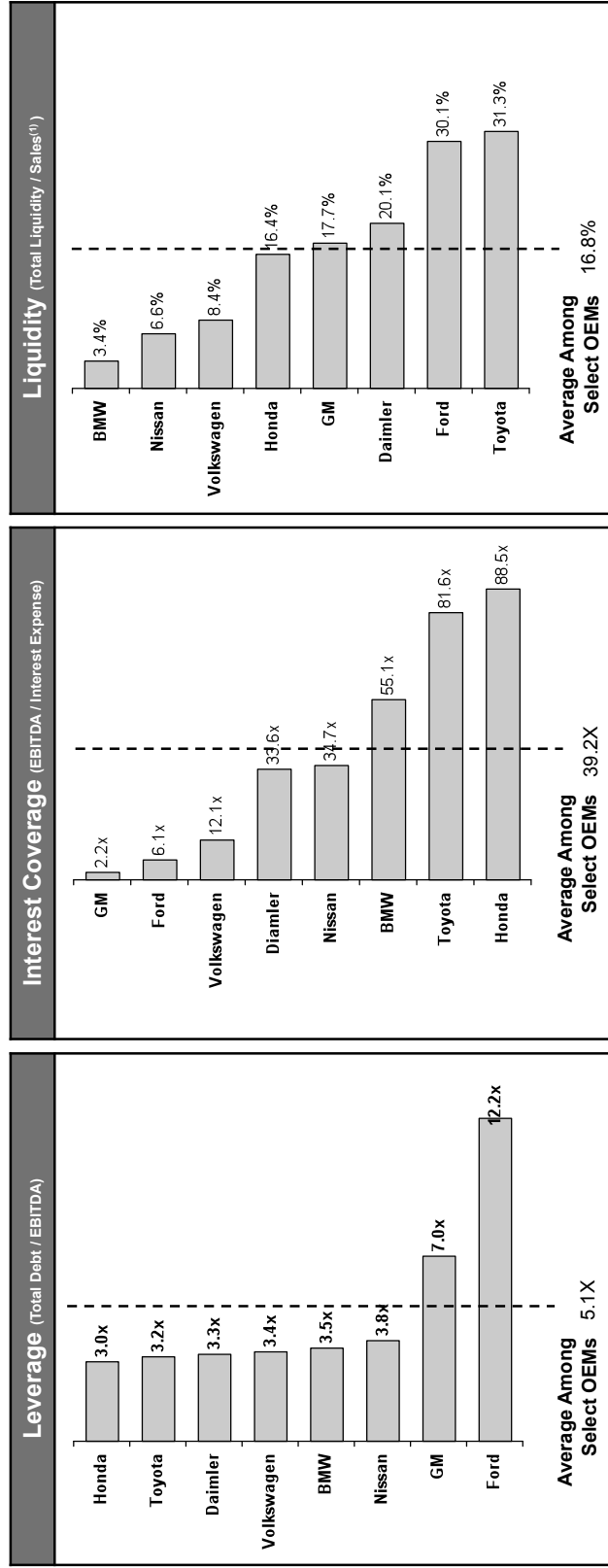
	Month			Year-Ago	DSR. % Chg.	Calendar Year-to-Date		
	June		% Share			January - June		Vol. % Chg.
	2008	2007	Current			2008	2007	
Ford	117,726	120,434	10.3	9.6	-2.2	680,818	711,523	-4.3
GM	114,058	132,634	10.0	10.6	-14.0	637,179	686,712	-7.2
Chrysler	6,462	7,885	0.6	0.6	-18.0	37,942	43,675	-13.1
North America Subtotal	238,246	260,953	20.8	20.8	-8.7	1,355,939	1,441,910	-6.0
Volkswagen	213,770	228,541	18.7	18.3	-6.5	1,213,337	1,228,200	-1.2
Peugeot Citroen	168,347	183,631	14.7	14.7	-8.3	979,761	1,019,998	-3.9
Renault	121,815	131,055	10.6	10.5	-7.1	665,634	671,168	-0.8
Fiat	119,382	131,313	10.4	10.5	-9.1	730,168	762,347	-4.2
Daimler	75,932	83,015	6.6	6.6	-8.5	452,720	444,775	1.8
BMW	67,759	67,553	5.9	5.4	0.3	361,426	338,374	6.8
Europe Subtotal	767,005	825,108	66.9	65.9	-7.0	4,403,046	4,464,862	-1.4
Toyota	44,671	56,041	3.9	4.5	-20.3	278,528	327,487	-14.9
Nissan	24,908	28,157	2.2	2.2	-11.5	160,612	136,703	17.5
Honda	15,680	20,158	1.4	1.6	-22.2	104,811	116,228	-9.8
Hyundai	14,923	15,823	1.3	1.3	-5.7	76,985	91,005	-15.4
Mazda	14,836	15,451	1.3	1.2	-4.0	89,126	88,857	0.3
Suzuki	13,447	15,024	1.2	1.2	-10.5	74,739	80,861	-7.6
Kia	12,443	15,251	1.1	1.2	-18.4	72,169	83,116	-13.2
Asia Subtotal	140,908	165,905	12.3	13.3	-15.1	856,970	924,257	-7.3
Subtotal Light Vehicles	1,146,159	1,251,966	100.0	100.0	-8.5	6,615,955	6,831,029	-3.1

Source: Ward's Auto

OEM Capital Structure

□ Ford and GM have the least favorable leverage and interest coverage ratios

Comparison of Financial Flexibility Among OEMs



Notes: (1) Total Liquidity includes credit facility availability
(2) 2007 financial information not available for Chrysler

Source: Capital IQ – YE 2007 Financial information

Global Automotive Suppliers

Global Automotive Suppliers – Geographic Presence

□ Global North American and European based suppliers rely heavily on European OEMs

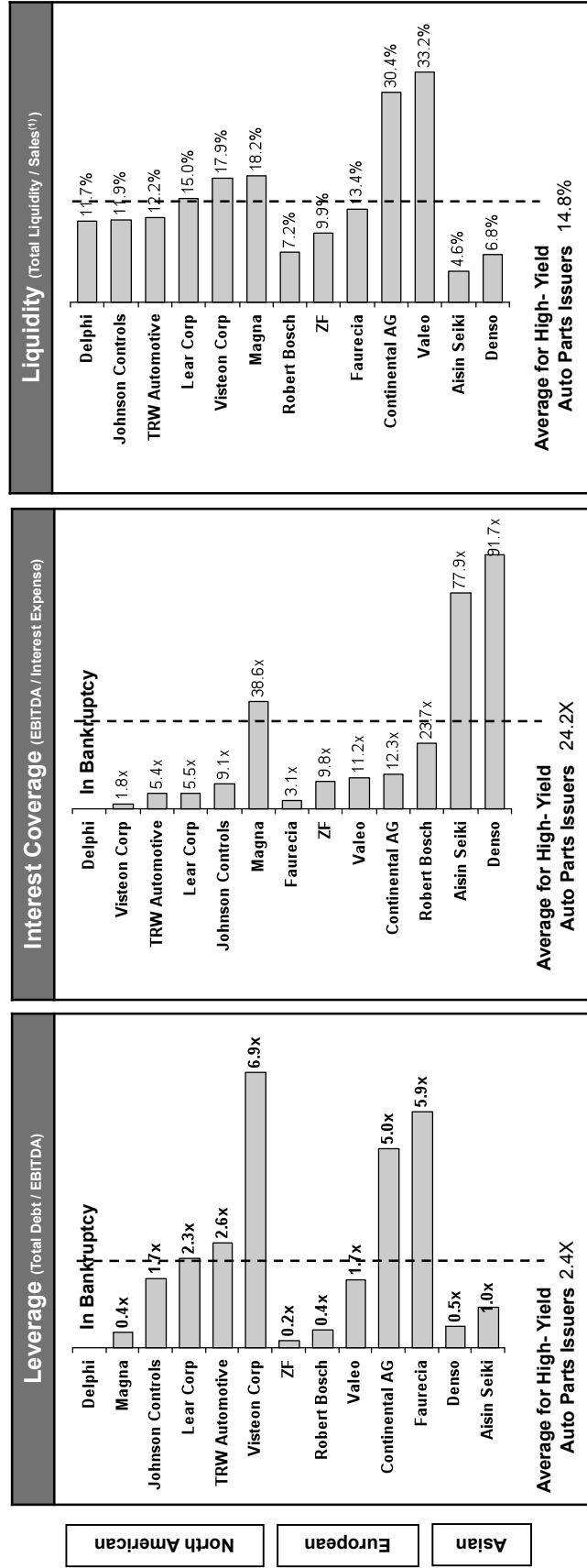
Supplier	Location	2007		2004		2007		Percent of Total Revenue			
		Rank	Rank	Revenue (\$M)	Op. Inc. (\$M)	NA	Europe	Asia	Other		
North America Suppliers											
Magna International	Canada	3	3	26,067	1,152	53%	45%	0%	2%		
Delphi Corp.	Michigan	5	2	22,283	(1,945)	53%	33%	10%	4%		
Johnson Controls	Michigan	7	5	34,624	1,607	41%	48%	11%	0%		
Lear Corp.	Michigan	9	7	15,995	323	45%	43%	0%	12%		
TRW Automotive	Michigan	11	11	14,702	624	30%	57%	9%	4%		
Visteon Corp.	Michigan	16	6	11,266	(168)	32%	37%	27%	4%		
						42%	44%	10%	4%		
Western Europe Suppliers											
Robert Bosch GmbH	Germany	1	1	66,100	4,524	16%	61%	18%	5%		
Continental AG	Germany	4	14	23,716	2,391	21%	68%	8%	3%		
Faurecia	France	8	9	18,067	173	15%	75%	6%	4%		
ZF Friedrichshafen AG	Germany	10	12	18,051	1,266	11%	74%	11%	4%		
Valeo SA	France	12	13	13,635	455	14%	67%	13%	6%		
BASF Group	Germany	13	53	82,698	10,441	21%	56%	16%	7%		
Mahle GmbH	Germany	23	36	7,221	498	19%	55%	14%	12%		
						17%	65%	12%	6%		
Asian Suppliers											
Denso Corp.	Japan	2	4	33,741	2,833	15%	16%	66%	3%		
Aisin Seiki Co., Ltd.	Japan	6	8	22,233	1,225	17%	8%	74%	1%		
Yazaki Corp.	Japan	14	17	N/A	N/A	27%	13%	54%	6%		
Sumitomo	Japan	17	18	22,287	1,203	21%	14%	55%	10%		
						20%	13%	62%	5%		

Source: Automotive News Ranking of Top 100 Global OEM supplier; Company financial reports

Global Automotive Suppliers - Capital Structure

North American and European based suppliers have similar financial ratios

Comparison of Financial Flexibility Among Suppliers



Notes: (1) Total Liquidity includes credit facility availability

Source: Capital IQ – YE 2007 Financial information

Impact on Automotive Suppliers

Impact on Automotive Suppliers – North America

- Sustained downswing of the Detroit “Big 3” OEMs continues to have a material impact on the global supplier base, including European and Asian suppliers
- Financial situation for North American suppliers likely to get worse
 - Financial deterioration of OEMs
 - Fewer accommodation from the Detroit “Big 3” to assist right sizing
 - Global/profitable markets (e.g. Western Europe) are weakening
- Survival depends on industry relevance of products and competitive pricing
 - Align products with long term strategic OEM platforms (fuel efficient vehicles)
 - Modernization, cost containment, and filling plant capacities are critical
- Many suppliers in North America have passed through all of the typical phases of distressed situations:
 - Out-of-court workouts and negotiations
 - Operational turnarounds through chapter 11 (including 363 sales)
 - Liquidations and asset sales

Impact on Automotive Suppliers - Europe

Western Europe

- ❑ Suppliers will be impacted with the recent downturn in the Western European automotive market
- ❑ OEMs will be reducing production volumes and likely will “squeeze” suppliers to cut additional costs from future orders
- ❑ OEM’s financial stability may deteriorate to the point where they are not willing to assist with the restructuring of non-critical suppliers and allow them to fail
- ❑ Restructuring of global suppliers will present significant cross-border jurisdiction and legal challenges

Eastern Europe

- ❑ Although the market remains fairly steady, it has relatively low volumes and likely will not be able to “prop-up” suppliers in distress from the downturn in North American and Western European markets

Summary and Outlook

Summary and Outlook

- Summary of current market conditions:
 - Significant downturns of the North American and Western European automotive markets that are expected to last beyond 2009
 - Current economic slowdowns and credit crises in the United States and Europe are compounding the problem
 - Expected rise in commodity prices over the next 6 years due to strong demand from growing economies and limited supply growth
 - Continued shift in global demand from trucks and SUVs to more fuel efficient cars
- Europe appears to be in the infancy stage of the ensuing turnaround cycle
- Increased likelihood of global, cross-border restructurings of large multi-national suppliers due to a variety of market conditions
- U.S. Congress is in the process of appropriating \$25 billion in low-cost loans to accelerate the changeover to more fuel-efficient vehicles
 - Some analysts view the loans as a short-term net gain but will increase long-term costs and obligations
 - Current plug-in hybrid technology may be too expensive to offer any economic advantages to customers in the form of saved gas

“Retooling” Loans from U.S. Government

- ❑ U.S. Congress in the process of appropriating \$25 billion in low-cost loans to accelerate the changeover to more fuel-efficient vehicles
 - House of Representatives approved funding on September 24, 2008
 - Money expected to begin flowing by the end of 2008
- ❑ Loans expected to assist OEMs and suppliers to meet new fuel-efficiency standards of at least 35 miles per gallon by 2020, a 40% increase
- ❑ Interest rates for the loans will be approximately 5% compared to estimated open market rates of 15-20% due to poor credit ratings
- ❑ Wall Street analysts view the loans as a short-term net gain but will increase long-term costs and obligations
- ❑ Current plug-in hybrid technology considered too expensive to offer economic advantages to customers
- ❑ Industry expected to request additional \$25 billion over the next three years due to high expected costs to retool factories and develop technology

Cross-border Restructuring Challenges

- Increased cross-border restructurings will create significant issues to overcome such as the appropriate jurisdiction and choice of law
 - Debtors will likely push to have cases governed by countries / jurisdictions with laws that allow for debtor-friendly provisions such as a “cram-down” of dissenting creditors
 - Stakeholders in the case will argue for jurisdictions that will protect their specific interests
- Cross-border insolvencies within the EU are governed by the European Insolvency Regulation according to the debtor’s “centre of main interests” (COMI)
 - The location of a company’s COMI has been a source of debate including:
 - Schefenacker (German auto parts supplier) – Solicited consent to relocate the company’s COMI to the UK to avoid rigid German bankruptcy laws
 - Parmalat (Italian dairy producer) – Court’s ruling was based on where a company performs its “head office functions” rather than where it is headquartered
 - Collins & Aikman (US auto parts supplier) – Europe’s biggest-ever COMI filing
- Increasing trend of large Western European countries reviewing and reforming their bankruptcy laws to facilitate large, complex corporate restructurings
- U.S. bankruptcy code Chapter 15, Title 11 (introduced in 2005 BAPCPA) established mechanisms to deal with cross-border issues with a single debtor
 - Schefenacker is the only large automotive supplier to file for Chapter 15

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David A. Murdoch
Emily B. Thomas
Janet M. Serafin
K&L Gates LLP
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222
412.355.6500

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SURFING INSOLVENCY WAVES ON AN OCEAN OF ECONOMIC CHANGE

By: David A. Murdoch, Emily Beach Thomas, and Janet M. Serafin

I. Introduction: A Red September and the Hunt for a Black October

The year 2008 has seen a swell of varying economic global crises, including the American subprime mortgage lending crisis, the collapse of certain banks, major credit crunches, increased demands for governmental regulation, bailout legislation, and governmental intervention.¹ Where there is economic crisis, bankruptcy and insolvency issues surely follow.

This paper addresses three key issues that could greatly impact the future of bank, bankruptcy, or insolvency law in the United States, with global effects: 1) a comparison of the U.S. presidential candidates' approaches to bankruptcy law; 2) the effects the *Bear-Stearns* decision may have on the ability of global companies to seek Chapter 15 protection; and 3) possible increased involvement of the Federal Deposit Insurance Corporation ("FDIC") in the liquidation and merging of failed banks.

II. Sextant for November: Possible Effects of the U.S. Elections on U.S. Bankruptcy Law

As the U.S. election approaches on Tuesday, November 4, 2008, and the U.S. economy continues in crisis, all eyes are on the prospect of a new President in the United States. This year, perhaps more than ever before, economic issues are on the minds of American voters – and the world. This paper first explores the bankruptcy policies of the Presidential candidates by interpreting their past voting records, platforms, and public statements to determine what November might bring under a new administration.

¹ See Appendix A for a "Calendar of Critical Events"

A. Comparing the Candidates' Voting Records

Past positions are no assurance of future political performance. Yet one way to ascertain where a candidate might lead in the future is to look at his or her voting record on the relevant issues. Senators John McCain (“McCain”) and Barack Obama (“Obama”) were both present for the vote on the amendments to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), and on the act itself in 2005. These votes provide insight into the policy differences between the two candidates as they relate to bankruptcy law. A review of the votes on the amendments to BAPCPA shows that McCain and Obama were divided on bankruptcy policy. Of the twenty-eight amendment votes, Obama and McCain voted for opposing positions twenty-four times and found themselves in agreement only four times.

1. Four Points of Agreement on BAPCPA Amendments

Of the four points of agreement, two amendments passed by unanimous consent and were, unsurprisingly, not contentious. Both candidates voted to pass an amendment that restricted access to certain personal information in bankruptcy documents, thereby limiting the personal information that a creditor may publicly file with the bankruptcy court. Both candidates voted in favor of an amendment to increase bankruptcy filing fees to pay for the additional duties of United States trustees and the new bankruptcy judges added by BAPCPA.

Senators Obama and McCain also agreed to vote against a limit to the amount of interest that can be charged on any extension of credit to 30 percent. McCain has not publicly expressed whether he views this interest rate as too high or too low. Obama’s presidential platform states that he supports capping interest rates at 36% for all Americans. Both candidates voted for an amendment that protects disabled veterans from means testing in bankruptcy under certain circumstances.

2. Twenty-Four Remaining Points of Disagreement

Of the votes where Obama and McCain disagreed, Obama voted for (while McCain voted against) twenty-three out of twenty-four of the amendments. In general, Senator Obama supports bankruptcy law changes that aid individuals, small business owners, and consumers. The amendments that he voted for would benefit service-members and veterans, medical patients, their caregivers, victims of identity theft, and divorced persons not receiving alimony and/or child support. Senator McCain voted against these amendments.

For example, Senator Obama voted for (and Senator McCain against), the following amendments:

- a. to protect service-members and veterans from means testing in bankruptcy, to disallow certain claims by lenders charging usurious interest rates to service-members, and to allow service-members to exempt property based on the law of the State of their pre-military residence;
- b. to exempt debtors whose financial problems were caused by serious medical problems from means testing and to provide protection to medical debt homeowners;
- c. to preserve existing bankruptcy protections for individuals experiencing economic distress as caregivers to ill or disabled family members;
- d. to exempt debtors from means testing if their financial problems were caused by identity theft;
- e. to discourage predatory lending practices;
- f. to limit the exemption for asset protection trusts;
- g. to strike certain bankruptcy provisions in the bill that could be adverse to small businesses;
- h. to exempt debtors whose financial problems were caused by failure to receive alimony or child support, or both, from means testing; and
- i. to limit claims in bankruptcy by certain unsecured creditors.

Senator McCain voted for (and Obama against) an amendment to clarify the safe harbor with respect to debtors who have serious medical conditions or who have been called or ordered to active duty in the Armed Forces and low income veterans. However, this language did not appear in the bill ultimately adopted by the U.S. Senate.

With respect to the ultimate vote on BAPCPA, Senator McCain voted for the new law, while Senator Obama voted against it. Prior to the vote, Senator McCain called the bill, "... an important step toward a fair and balanced approach to restoring personal responsibility to our federal banking system." During the January 2008 debates, when he was asked a question about the 2001 and 2005 bankruptcy bills, Senator Obama responded, "I opposed them both. I think they were bad ideas, because they were pushed by the credit card companies, they were pushed by the mortgage companies, and they put the interest of those banks and financial institutions ahead of the interests of the American people. And this is typical." This voting record of the two candidates reveals the contrast between Senator McCain who tended to favor bankruptcy laws that benefit banks and corporations while Senator Obama primarily sought to protect individuals as consumers and borrowers.

B. Comparing the Platforms of the Presidential Candidates

Similarly useful, the candidates' personal platforms, found on each of their websites, provide some insight into where they might take bankruptcy law in the future.² Only Senator Obama's campaign platform actually addresses bankruptcy directly, while Senator McCain's platform does not mention bankruptcy. According to Senator Obama's campaign website, "Obama will reform our bankruptcy laws to protect working people, ban executive

² The candidates' platforms regarding their planned initiatives, should they be elected president, are available at their respective websites. *See* <http://www.barackobama.com/issues/economy/#bankruptcy> (Barack Obama's platform); <http://www.johnmccain.com/Issues/jobsforamerica/> (John McCain's platform).

bonuses for bankrupt companies, and require the disclosure of all pension investments.” To do so, Senator Obama’s platform focuses on these issues:

- **Cap Outlandish Interest Rates on Payday Loans and Improve Disclosure:**

Obama supports extending a 36 percent interest cap to all Americans. Obama would require lenders to provide clear and simplified information about loan fees, payments and penalties, which is why he’ll require lenders to provide this information during the application process.

- **Encourage Responsible Lending Institutions to Make Small Consumer Loans:**

Obama would encourage banks, credit unions and Community Development Financial Institutions to provide affordable short-term and small-dollar loans and to drive unscrupulous lenders out of business.

- **Reform Bankruptcy Laws to Protect Families Facing a Medical Crisis:**

Obama would create an exemption in bankruptcy law for individuals who can prove they filed for bankruptcy because of medical expenses. This exemption will create a process that forgives the debt and lets the individuals get back on their feet.

Senator Obama has also spoken out against Senator McCain’s economic policy.

In a speech outside of Atlanta Senator Obama criticized Senator McCain by saying “He [McCain] would continue to allow the banks and credit card companies to tilt the playing field in their favor, at the expense of hardworking Americans.” And “Like the president he hopes to succeed, Senator McCain does not believe the government has a real role to play in protecting Americans from unscrupulous lending practices.” (July 8, 2008 Speech, Toledo, Ohio)

III. Does Chapter 15 Provide A Safe Harbor after the *Bear Stearns* decision?

Chapter 15 of the Bankruptcy Code strives to let bankruptcy proceedings around the globe work together, rather than in competition. But, is it working? In the post-*Bear-Stearns* world, courts have announced that recognition that a company can exercise its right to invoke the protections of Chapter 15 will not come without tough scrutiny.

A. Chapter 15 Overview

Chapter 15 of the Bankruptcy Code was enacted as part of the comprehensive BAPCPA reforms in 2005. The Chapter governs cross-border bankruptcy and insolvency cases. Under Chapter 15, a duly accredited representative of a foreign debtor may file a petition in a U.S. Bankruptcy Court seeking recognition of a foreign proceeding. A foreign proceeding may be recognized as either a “main” proceeding or a “non-main” proceeding. The classification of a foreign proceeding depends upon the determination of the debtor’s “center of main interest” (“COMI”). A case pending in any given country that contains the debtor’s COMI will be recognized as a main proceeding, while a case pending in a country where the debtor has a “mere establishment” will be recognized as a non-main proceeding.³ Recognition of a foreign

³ § 1521 of the Bankruptcy Code sets forth the following relief available upon recognition as a foreign main or foreign non-main proceeding:

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor’s assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520 (a);

(2) staying execution against the debtor’s assets to the extent it has not been stayed under section 1520 (a);

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520 (a);

(4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;

(5) entrusting the administration or realization of all or part of the debtor’s assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519 (a); and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724 (a).

(b) Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

insolvency proceeding as a main proceeding triggers the automatic stay provision under § 362 of the Bankruptcy Code and provides various other forms of relief to the international debtor. However, if the court does not recognize the foreign proceeding under Chapter 15 as either main or non-main, the entity is not able to take advantage of these beneficial forms of relief included in the chapter. See 11 U.S.C. § 1521.

B. A New Approach: Illustrating the Differences in Section 304 and Chapter 15, and Limiting Access to United States Courts

Under Section 304 of the Bankruptcy Code, before it was amended to add Chapter 15, access to the United States' Bankruptcy Courts by a foreign debtor was determined by subjective factors influenced by comity. Chapter 15 of the Code changed all that. Under Chapter 15, a foreign debtor must seek a court's ruling, or "recognition," regarding whether the nature of its operations qualify it for Chapter 15 protection, which is evaluated through objective criteria.

1. Trends and Developments in Chapter 15 Prior to *Bear-Stearns*

Cases prior to *Bear-Stearns* considered recognition of a foreign proceeding as foreign main or foreign non-main via a determination of COMI. See In re SPhinX, Ltd., 351 B.R. 103, 117-121 (S.D.N.Y. 2006) (first case involving a dispute over COMI

(c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).

(f) The exercise of rights not subject to the stay arising under section 362 (a) pursuant to paragraph (6), (7), (17), or (27) of section 362 (b) or pursuant to section 362 (n) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

under Chapter 15; holding that Cayman Island proceedings were entitled to recognition as foreign nonmain proceedings, despite statutory presumption that COMI is the debtor's place of registration or incorporation) affirmed In re SPhinX, Ltd, 371 B.R. 10 (S.D.N.Y. 2007).

However, *Bear-Stearns* was the first case to illustrate just how much Chapter 15 had changed the game.

2. *Bear-Stearns* – A Pivotal Chapter 15 Case

Bear-Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. and Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Master Fund, Ltd (collectively “Bear Stearns Funds” or “Funds”) are Cayman Islands’ LLCs. Although the Bear Stearns Funds had registered offices in the Cayman Islands, a Massachusetts corporation administered the Funds, served as the funds’ registrar and transfer agent, and provided day-to-day administrative services. Moreover, the books and records of the Funds were maintained by the administrator in Delaware. Likewise, the Funds’ investment manager was incorporated in New York, and the funds managed by that manager were located in New York. Indeed, most if not all of the Funds’ other assets were located in New York.

By May 2007, the Funds suffered significant devaluation as a result of the volatility in the markets triggered by the subprime-mortgage crisis. Eventually, the board of directors of the Funds authorized filing of winding-up petitions in the Cayman Grand Court. The liquidators filed Chapter 15 petitions in New York seeking recognition of the Cayman winding-up proceedings as “main proceedings,” and emergency injunctive relief was granted on August 9, 2007. See In re Bear Stearns Funds., 2007 WL 2479483 (Bankr. S.D.N.Y. 2007), amended and superseded by 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

On August 30, 2007, the Bankruptcy Court issued a ruling finding that the Cayman proceedings qualified as neither a foreign main nor foreign nonmain proceeding to be

recognized under Chapter 15. Id. The court found that the Bear Stearns Funds' COMI was in the United States rather than the Cayman Islands. Indeed, the court held that, “[t]he only adhesive connection with the Cayman Islands that the Funds have is that they are registered there.” Id. Therefore, the court found that the presumption that the COMI is the place of the registered offices had been effectively rebutted. Moreover, the court found that the Cayman Islands proceedings were not nonmain proceedings because the liquidators had not proved that the Funds had even an “establishment” in the Cayman Islands. The liquidators appealed this ruling to the District Court.

On May 22 or 27, 2008, the District Court affirmed the Bankruptcy Court's ruling. In re Bear Stearns Funds, 389 B.R. 325 (S.D.N.Y. 2008). The District Court emphasized that recognition of a foreign proceeding under Chapter 15 “turns on the strict application of objective criteria.” Id. The District Court then concluded that the evidence presented below did not constitute “substantive economic activity in the Cayman Islands,” as required for foreign main recognition, and emphasized that the absence of any objection to the recognition is irrelevant. Id. Moreover, the District Court found that the Bankruptcy Court properly found insufficient evidence of an “establishment” in the Cayman Islands, as required for recognition of a foreign nonmain proceeding.

The Bear-Stearns Funds liquidators elected not to appeal the District Court's ruling.

3. Out to Sea Again: Trends and Developments Since *Bear-Stearns*

The District Court's ruling is decidedly adverse for offshore hedge funds that are shell organizations in foreign jurisdictions but carry out substantially all of their business in the United States. Under *Bear-Stearns*, these companies should not be able to rely on the provisions of Chapter 15, and instead must pursue in the United States the specific protections of a Chapter

7 or Chapter 11 bankruptcy filing. This marks a decided change from the former rules under Section 304, where access to United States' Bankruptcy Courts by a foreign debtor was not dependent upon recognition, but rather was determined on subjective factors influenced by comity.

In the post-*Bear Stearns* era, one thing is clear: courts continue to refuse to rubber stamp a finding of foreign main or foreign nonmain proceedings. Rather, even absent an objection from the parties, courts will conduct a serious factual inquiry into the operations of the corporation to discern where the debtor's COMI *really* lies. See, e.g., In re Basis Yield Alpha Fund, 381 B.R. 37, 40 (S.D.N.Y. 2008) (finding genuine issue of material fact as to whether foreign debtor that had registered under Cayman Islands Company Law only as an "exempted company," under provision that applied to companies whose business was to be conducted "mainly outside the Islands" nonetheless had the Cayman Islands as its COMI, and reaffirming that "recognition under section 1517 is not a rubber stamp exercise."); In re Tradex Swiss AG, 384 B.R. 34, 43 (D. Mass. 2008) (holding that corporation's COMI was in Massachusetts, and therefore foreign proceeding was a foreign non-main proceeding, despite the fact that the corporation's registered office was in Switzerland).

As of the date of the preparation of this paper, October 2, 2008, Lehman Brothers had not yet invoked any relief under Chapter 15, notwithstanding the filing of Chapter 11 proceedings in the Bankruptcy Court of the Southern District of New York for Lehman Brothers, Inc. and Lehman Brothers Private Equity Funds, in addition to United Kingdom insolvency proceedings entered for its United Kingdom subsidiaries, namely Lehman Brothers International (Europe), Lehman Brothers Limited, LB Holdings PLC, and LB UK RE Holdings Limited.

C. Fog Horns in the Mist: Judicial Communication

In addition to the recent developments regarding COMI, Chapter 15 also brings to the forefront issues of judicial communication. There are numerous occasions when judges from courts in different countries addressing cross-border bankruptcy issues may want to communicate with each other in order to avoid inconsistent rulings. Chapter 15 is intended to facilitate these discussions through the recognition of foreign proceedings. Such discussions could be instrumental in determining COMI, preventing conflicts in jurisdiction, and preventing parallel litigation. Indeed, this cross-border judicial communication can enable courts to reach a compromise that would have been otherwise impossible. One example of such a compromise is Judge Rakoff's conditional approval of an Ontario court's order. In re Ephedra Products, 349 B.R. 333 (S.D.N.Y. 2006). Judge Rakoff approved the Ontario court's order on the condition that it be modified to provide for additional procedural requirements. When Judge Rakoff communicated with the Ontario court, the Ontario court consented to the additional procedural requirements.

No matter how well-intentioned cross-border judicial communications can also raise issues of appropriateness. For example, when a United States court sought direct communication with a court in the United Kingdom in order to estimate future asbestos liability of a debtor, the United Kingdom court held that it would not participate in the communication because there was a risk of pre-judging or appearing to pre-judge the possible future English proceedings. In re T&N Ltd., 2004 EWHC 2878. The English court held that a case-by-case balancing of the desirability of inter-court communication with other relevant factors was appropriate. With these concerns in mind, the question remains as to whether Chapter 15's intention for cross-border judicial communication is a practical solution in the real world.

IV. Welcoming Back the Federal Deposit Insurance Corporation: A Lighthouse in the Fog?⁴

The recent appointments of the Federal Deposit Insurance Corporation (“FDIC”) as conservator of IndyMac Bank, as receiver of the First National Bank of Nevada and First Heritage Bank, N.A. (collectively, “FNBN”) and as facilitator in the sale of Washington Mutual, Inc., to JP Morgan Chase (“WaMu”) and in the possible sale of other banks have caused many lawyers to revisit the role of the FDIC and the experience of the now defunct Resolution Trust Corporation (“RTC”) in the liquidation of failed banks and thrifts over 15 years ago. The FDIC and the RTC liquidated the failed institutions and resolved issues with counterparties to contracts in effect at the time the institutions failed. At the same time, FDIC and RTC presented opportunities for those with cash to purchase loans and assets from their receiverships. Those who have servicing or other contracts with failed financial institutions may be concerned about the impact on their relationships, claims, and remedies. Purchasers will seek to buy origination and servicing platforms, servicing rights and whole loans.

We provide here a brief overview of the law applicable to FDIC as receiver or conservator of a failed bank and a sampling of the types of material issues that arose with FDIC and RTC in the past in the belief that the intervening fifteen years have not fundamentally changed the issues. More specifically, we will address two issues: the ability of the FDIC to repudiate contracts and the anticipated protections FDIC might be willing to provide in its sales

⁴ This discussion is based on a K&L Gates LLP Client Alert for Bankruptcy and Insolvency, “Dust Off Your Files: The FDIC Is Back in Town,” prepared by Laurence E. Platt, Eric T. Moser, Richard S. Miller, Stanley V. Ragalevsky, dated August 4, 2008, that can be found at: <http://www.klgates.com/newsstand/Detail.aspx?publication=4807>.

agreements. Although we use mortgage-related assets as an illustrative example of doing business with the FDIC, the laws that apply and the contractual protections that FDIC is likely to give should not depend on asset class.

A. FDIC As Conservator or Receiver

1. Bank Insolvency

The United States Bankruptcy Code governs proceedings relating to the insolvency of businesses and individuals. The Bankruptcy Code does not, however, apply to banks, thrifts, credit unions, and domestic insurance companies. 11 U.S.C. § 109(b)(2). Banks have traditionally been viewed as being more important to the functioning of the United States' economy than non-financial businesses and are therefore, in need of special insolvency laws. When a bank in the United States fails, the process for closing it and winding up its affairs is overseen by its bank regulators. The FDIC is empowered to act as a receiver or conservator for any FDIC “insured depository institution.”

The determination that a bank is insolvent is normally made by its primary bank regulator (i.e., the state bank supervisor for state chartered banks, the Office of the Comptroller of the Currency (“OCC”), or the Office of Thrift Supervision (“OTS”), respectively for federally chartered banks or thrifts, or the Federal Reserve for its member banks). Once the primary regulator determines a bank to be insolvent, FDIC steps in to “resolve” the insolvency by accepting appointment as the bank’s receiver or conservator to value and dispose its assets in an orderly manner so that insured depositors are protected and public confidence in the safety and soundness of the banking system is maintained. Neither a bank itself nor its creditors has the ability to initiate a receivership or conservatorship under bank insolvency laws. Its shareholders or creditors do not have rights to participate in the receivership or conservatorship. Upon appointment as receiver or conservator of a failed bank, FDIC succeeds to all rights of the failed

bank and has the general authority to operate its business, exercise all the failed bank's corporate powers and even merge it with another bank or transfer its assets to a new "bridge bank" as occurred with IndyMac. 12 U.S.C. § 1821(d). FDIC, as receiver, has authority to determine the validity of creditors' claims of a failed bank. 12 U.S.C. § 1821(d)(3). Following the passage of the National Depositor Preference Amendment in 1993, all deposits in a failed bank (including uninsured deposits) are given a statutory priority and preference over other unsecured claims. This means that the failed bank's depositors will be paid before its general unsecured creditors. In most FDIC receiverships, those general unsecured creditors should ordinarily not expect to receive a distribution on their unsecured claims.

2. Powers and Purposes of a Receiver⁵

Once appointed as receiver, the FDIC has a number of special powers to facilitate disposition of the failed bank's assets, including the power to:

- a. repudiate burdensome contracts entered into prior to its appointment within a "reasonable time" after its appointment. 12 U.S.C. § 1821(e);
- b. enforce any contract, other than for directors and officers liability insurance or a depository institution bond, irrespective of any clauses purporting to authorize the termination, default, acceleration, or other exercise of rights based solely upon the failed bank's insolvency or the appointment of a conservator or receiver. 12 U.S.C. § 1821(e)(12);
- c. request a stay of legal actions or proceedings for 90 days. 12 U.S.C. § 1821(d)(12);

⁵ The powers accorded to the FDIC as a conservator are similar, but the purposes of a conservatorship are slightly different. Unlike a receivership, which is designed to liquidate a failed bank, a conservatorship is intended to allow the FDIC to continue operating a distressed financial institution and to preserve, administer, and protect its assets until it can be rehabilitated or closed.

- d. avoid fraudulent transfers made within five years of its appointment if the transfer was made to hinder, delay or defraud the failed bank, the receiver, or any other federal banking agency. 12 U.S.C. § 1821(d)(17);
- e. merge the failed bank with another insured depository institution and transfer all of the failed institution's assets and liabilities without the prior approval of any contract counterparty, court, or government agency. 12 U.S.C. § 1821(d)(2)(G);
- f. allow, disallow, and settle claims against the failed bank. 12 U.S.C. § 1821(d)(3);
- g. marshal the failed bank's assets and use the proceeds to pay creditors in accordance with the priority scheme established by 12 U.S.C. § 1821(d)(11); and
- h. liquidate the failed bank or transfer some or all of its assets to an acquiring institution. 12 U.S.C. § 1821(d)(2)(E)-(G).

B. Repudiation of Contracts

1. Scope of Repudiation Rights

Among the wide-ranging powers granted to the FDIC, the power to repudiate contracts directly affects counterparties to insured institutions. Generally speaking, the FDIC may repudiate or disaffirm any contract to which a failed bank is a party if it: (1) deems performance of the contract or lease to be “burdensome”; and (2) finds that repudiation would promote the orderly administration of the receivership estate. 12 U.S.C. § 1821(e). FDIC's repudiation power is similar to – but broader than -- the power of a debtor in possession or bankruptcy trustee to reject burdensome executory contracts, since the FDIC's power is not necessarily limited to executory contracts.

2. Effects of Repudiation

The repudiation of a contract by the FDIC as receiver or conservator terminates the failed bank's obligation to render any future performance required under the

contract. The FDIC's power to repudiate a contract in a bank receivership is a particularly potent weapon for a number of reasons:

- a. The FDIC can repudiate a contract or lease by letter to the affected counterparty without court approval and with no prior notice.
- b. In the traditional bankruptcy proceeding, only "executory" contracts can be avoided by a trustee in bankruptcy. The FDIC can, however, repudiate any contract it finds "burdensome." The FDIC can repudiate revolving lines of credit, partially funded construction loans and letters of credit.
- c. The damages recoverable against the FDIC for repudiating a contract in a bank receivership are limited to the counterparty's actual direct, compensatory damages. Consequential damages for lost profits, punitive damages and pain and suffering are barred. Furthermore, damages against the FDIC as receiver are generally cut off under the "fixed and certain" rule set forth in 12 U.S.C. § 1821(e)(3)(A) as of the date of the receivership. Any damage claim allowed by the FDIC is paid in the form of a "receiver's certificate". Since claims of unsecured creditors are, under the 1993 National Depositor Preference Amendment, subordinate to depositor claims, the likelihood of a dividend being paid on such a certificate is remote.
- d. While a trustee in bankruptcy cannot reject one part of a contract and assume the rest, in a bank receivership, the FDIC can bifurcate the respective assets and liabilities in contracts by rejecting unfunded commitments on construction loans and suing the borrowers for funds advanced under the notes prior to the date of the receivership.

The FDIC uses its power to repudiate contracts frequently and in a number of different contexts. Borrowers learn that their existing line of credit, construction loan facility, or unsecured letter of credit at a failed bank has been rejected as of the receivership date.

Vendors providing services to a failed bank can be terminated abruptly with little recourse. If, however, a vendor continues to provide the same services to FDIC subsequent to the receivership, it may have a priority administrative claim under 12 U.S.C. § 1821(e)(7)(B) and be paid for those services. Loan participation agreements and intercreditor agreements have

previously been repudiated by FDIC although current FDIC policy seems to be not to reject such agreements.

3. Qualified Financial Contracts

A contract between a failed bank and a counterparty that meets the definition of a “Qualified Financial Contract” under 12 U.S.C. § 1821(e)(8)(D) receives certain protections against the FDIC as receiver. Qualified Financial Contracts (“QFC”) include a “securities contract, forward contract, repurchase agreement, swap agreement” or equivalent. These special protections (a) allow counterparties to a QFC with a failed bank to enforce provisions in their agreements allowing the termination and liquidation of the QFC and enforcement of set off and netting rights, provided, however, that the right to terminate or liquidate the QFC is temporarily suspended from the time the receiver is appointed until the earlier of: (i) the time the counterparty receives notice that the contract has been transferred; or (ii) 5:00 P.M. (ET) on the business day following the date of the appointment of the receiver. 12 U.S.C. § 1821(e)(10)(B)(i); (b) allows the FDIC to dispose of QFC’s only in a manner that will preserve the counterparty’s cross-collateralization, set off, and netting rights; and (c) gives the counterparty a more favorable measure of damages determined as of the actual date of repudiation (and not appointment of a FDIC as receiver), including the cost of cover in the event the FDIC repudiates a QFC.

4. Selected Issues Regarding Repudiation

Questions abound about the scope and implications of the FDIC’s repudiation power. For example, is a secured creditor at risk that its collateral will be stripped away, effectively converting its secured obligation into an unsecured one? Can a counterparty to a repurchase agreement liquidate its position following the appointment of a receiver as it could in a bankruptcy context? Is a loan servicer at risk that its servicing agreement will be unilaterally

terminated without payment of a termination fee? Will a loan servicer be reimbursed for outstanding advances? Will the answer be different depending on whether the advances are made before or after the appointment of a receiver? Should a servicer continue to perform under the servicing agreement pending a determination by the conservator regarding whether to repudiate?

Without writing a treatise on the powers of the FDIC as a conservator or receiver, there are certain important points to highlight.

- a. The FDIC is limited in its ability to repudiate secured loans. It cannot avoid a legally enforceable and perfected security interest, unless the interest was taken in contemplation of the institution's insolvency or with the intent to “hinder, delay, or defraud” the institution or its creditors. 12 U.S.C. § 1821(e)(11); see also FDIC Statement of Policy Regarding Treatment of Security Interests After Appointment of The Federal Deposit Insurance Corporation As Conservator Or Receiver, 58 Fed. Reg. 16833, March 31, 1993 (the “1993 Repudiation Policy Statement”).
- b. The FDIC may avoid the payment of a termination fee under a servicing agreement if the agreement fails to meet the requirements of 12 U.S.C. § 1823(e), which codifies the holding of *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and provides that an agreement will only be enforceable against the FDIC in a bank receivership if it is (1) in writing, (2) executed by both the depository institution and any person claiming an adverse interest under the agreement, (3) approved by the depository institution’s board of directors or loan committee, and (4) an official record of the depository continuously since its execution. Under the so-called *D’Oench Duhme* doctrine, which is codified at 12 U.S.C. § 1823(e), agreements between a failed bank and a counterparty not appearing in the official records of the failed bank or meeting certain other documentation requirements are not enforceable as claims or defenses against FDIC. The protection against unrecorded side agreements of this sort eliminates many lender liability claims against failed banks. *D’Oench, Duhme* protection has also been determined to extend to subsequent purchasers of loans from FDIC receiverships and similarly insulate those purchasers against claims by borrowers that the failed bank breached an agreement.

- c. To the extent a counterparty continues to provide services pending the FDIC's decision to repudiate, it is entitled to be paid for the full contract value of those services as an administrative expense of the receivership. 12 U.S.C. § 1821(e)(7)(B); *see also McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000); *U.S. Bank Nat'l Ass'n v. First Nat'l Bank of Keystone*, 394 F. Supp. 2d 829, 835 (S.D. W. Va. 2005). FDIC's acceptance of performance prior to repudiation does not, however, bar the FDIC from later repudiating the contract. 12 U.S.C. § 1821(e)(7)(C).
- d. As a matter of policy, the FDIC will not "reclaim, recover or recharacterize" any financial assets of an insured depository institution transferred in connection with a securitization or participation, provided that the insured depository institution received adequate consideration for the transfer and the underlying documents evidence the intent to treat the transaction as a true sale and not a secured loan. *See* 12 C.F.R. § 360.6.
- e. Common law set off rights can be valuable to holders of accounts at a failed bank with balances in excess of applicable FDIC insurance limits. The uninsured amount of a deposit at a failed bank can be offset against a performing loan the depositor owes the bank. The FDIC is generally more hospitable to offsets than trustees in bankruptcy. Set off rights, however, can be adversely affected if the FDIC as receiver transfers its loan asset to a bridge bank or third party and thereby destroys the reciprocal nature of the corresponding debts.

C. Sale Procedures: Designs for a New Safe Harbor?

Questions arise regarding the process to purchase assets from failed institutions in which the FDIC is the conservator or receiver. Although the FDIC will develop contemporary policies and procedures for asset sales, those used by the now defunct RTC may be instructive. What follows is not based on written policies and procedures that can be accessed on FDIC websites or in FDIC manuals, but a review of purchases of mortgage companies, servicing rights and whole loans in the early 1990's is instructive.

As a threshold matter, sales were conducted by auction based on standardized formats for bid letters and purchase agreements. The RTC relied on financial advisors or brokers whom the agency retained with a special preference for minority and women-

owned businesses. While a purchaser could propose changes to the promulgated form of the bid letter and purchase agreements, RTC's representative would control the document and had limited authority to make changes without senior management approvals. In the case of depository institution sales, the strong preference was for the purchaser to retain as many employees as possible, and any evaluation of the bids included an accounting for the financial impact of shut down costs if a buyer proposed to purchase only selective assets.

Although the FDIC certainly has the authority to sell assets or stock on an "as is, where is" basis, its desire to maximize sales proceeds may cause it to give enforceable representations and warranties in connection with its sales. Transparency is essential.

In our Firm's experience, the RTC routinely gave generally customary, albeit more limited, loan level representations and warranties about residential mortgage loans and servicing rights. These typically included: good title, compliance with laws, accuracy of balances, payment of taxes and insurance, enforceability of loan documents, completeness of loan files, validity of advances, and compliance with servicing agreements. The circumstances that gave rise to the failure of the thrifts in the early 1990's had little to do with allegedly defective residential loan originations, so the representations and warranties that RTC was willing to give then may not extend to FDIC today with respect to subprime and American Land Title Association ("ALTA") residential mortgage loans. Indeed, the FDIC website presently states that the FDIC makes no representations or warranties in connection with the loans it is offering for sale. In the case of depository institution sales, the purchaser usually entered into ancillary servicing and receivables collection agreements

The remedies available to a purchaser against the FDIC included indemnification for actual and direct, out of pocket losses arising out of or resulting from the

inaccuracy of any representation or warranty in the purchase and sale agreement, or the failure of the seller to perform or observe any term or provision of such agreement; such indemnification generally survived for five years. On a negotiated basis, the RTC would indemnify against the credit risk of loss on recourse servicing and Veterans Administration no bids, with shorter survival periods and ceilings on exposure. The agreements usually contained detailed provisions regarding the obligation of the purchaser to mitigate indemnifiable losses, including the pursuit of loss mitigation strategies such as principal reductions if necessary to reduce the RTC's exposure and the filing of third party claims. In many cases, the remedy of loan repurchase was available only at the election of the RTC.

The most important element of an RTC sale was the provision of a guarantee agreement by RTC in its corporate capacity. Few buyers had any interest in relying on the RTC's indemnification obligations when RTC provided such contractual protections as a receiver or conservator. A condition precedent to the purchase and sales agreements generally included the delivery of the guarantee agreement. Under the guarantee agreement, the RTC in its corporate capacity would guarantee its obligations under the indemnifications provisions of the purchase and sale agreement. Its liability contractually was limited to those amounts: (a) for which the seller was liable under the purchase and sale agreement but unable to pay, (b) for which the seller would have been liable under the purchase and sale agreement but for seller's discharge or release in bankruptcy or receivership, a disaffirmation or rejection of the purchase and sale agreement or a reduction, modification, impairment or limitation of seller's liability or any remedy of purchaser in connection with or as a result of a bankruptcy or receivership. RTC agreed to pay within five business days of the time frame that the seller was obligated to pay under the purchase and sale agreement. The purchaser was not permitted to assign the guaranty

but could pledge it to a creditor that financed the acquisition of the assets or the stock under the purchase and sale agreement; the creditor, as the pledgee, had the right to assign the guaranty agreement to a subsequent purchaser in the event the creditor foreclosed on the collateral and the assignee executed an acknowledgement agreement clarifying the nature of its rights. The form of the guarantee agreement was not negotiable.

RTC's policies on the sale of stock and assets evolved over a few years. It initially hesitated to give full representations and warranties or indemnities, and it had little interest in providing corporate guarantees. Over time, however, the RTC realized that such market standard protections were necessary if it hoped to maximize sales proceeds. One might expect the FDIC to follow suit in connection with any sales arising out of the current banking crisis, but whether the FDIC will look to the prior RTC experience for guidance, remains to be seen.

APPENDIX A –
Calendar of Critical Events:
April, 20 2005 – October 3, 2008

April 20, 2005	Chapter 15 adopted as part of the Bankruptcy Abuse and Consumer Protect Act of 2005 (BAPCPA)
October 17, 2005	BAPCPA’s effective date
July 31, 2007	Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. and Bear Stearns High-Grade Structured Credits Strategies Enhanced Leverage Master Fund, Ltd. filed Chapter 15 Petitions (SDNY 07-12383, 07-12384)
August 30, 2007	Bear Stearns Bankruptcy Court decision
May 27, 2008	District Court affirmed Bankruptcy Court’s ruling in Bear Stearns (Appeal SDNY 07-08730)
May 30, 2008	JP Morgan Chase & Co. acquired The Bear Stearns Companies
July 11, 2008	IndyMac was closed by the Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC) was named Conservator
July 25, 2008	First National Bank of Nevada First, was closed by the Office of the Comptroller of the Currency (OCC). Subsequently, the FDIC was named Receiver. First Heritage Bank in California was closed by the OCC. Subsequently, FDIC was named Receiver.

September 5, 2008	Silver State Bank, Henderson, NV was closed by the Nevada Financial Institutions Division and the FDIC was named Receiver.
September 7, 2008	Freddie Mac and Fannie Mae put in Conservatorship
September 14, 2008	Bank of America acquired Merrill Lynch Lehman Brothers Holdings, Inc. and Lehman Brothers Private Equity Funds filed Chapter 11 Bankruptcy
September 15, 2008	PricewaterhouseCoopers partners appointed joint administrators to Lehman Brothers International (Europe), Lehman Brothers Ltd., LB Holdings PLC, and LB UK RE Holdings Ltd.
September 16, 2008	Federal Reserve Bank of New York agreed to lend up to \$85 billion to AIG and Federal Government received 79.9% equity interest AIG
September 17, 2008	Barclays Plc. agreed to acquire Lehman Brothers Holdings Inc. for \$1.75 billion
September 19, 2008	Treasury Secretary, Henry Paulson, proposed bailout plan, originally called Troubled Asset Relief Program (TARP)
September 21, 2008	Morgan Stanley and Goldman Sachs -- the last two independent major U.S. investment banks -- received approval to convert into bank holding companies.
September 25, 2008	Washington Mutual, Inc. was sold to JPMorgan Chase for \$1.9 billion in a transaction facilitated by OTS and the FDIC

September 28, 2008	Belgium, the Netherlands and Luxembourg agreed to inject 11.2 billion euros (\$16 billion) into Fortis
September 29, 2008	U.S. House of Representative voted to reject \$700 billion Emergency Economic Stabilization Act of 2008 (EESA). The vote against the measure was 228 to 205. Dow Jones Industrial average dropped 777 point (7%) Citigroup announced its willingness to buy Wachovia. The FDIC agreed to a loss sharing agreement under which Citigroup would absorb up to \$42 billion of losses and the FDIC would absorb additional losses
September 30, 2008	France and Belgium agreed to inject 6.4 billion euros (\$9 billion) into Dexia SA
October 1, 2008	U.S. Senate passed \$700 billion financial-rescue plan, pending House approval
October 3, 2008	U.S. House of Representatives passed \$700 billion financial-rescue plan. The vote for the measure was 263 to 171. Announcement that Wells Fargo will merge with Wachovia after Wachovia rejects Citigroup deal.