SECTION 1110 AMENDMENTS

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Section 1110 (dealing with aircraft and ships), as well as Section 1168 (dealing with railroad rolling stock), were amended last month as part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. Most significantly, the amendments overrule the *Westpac* decision in the District of Colorado, which had incorrectly limited the financers' protections to the first 60 days of the bankruptcy case. Section 1110(a)(2)(B)(iii) now provides that defaults that occur after the 60-day period must be cured in compliance with the transactional document.

The amendments made a number of other helpful and clarifying changes:

- Section 1110(a)(3)(A) now specifies that qualification for Section 1110 protection depends upon the debtor holding the requisite operating certificate at the time the transaction is entered into.
- The former requirement that the debtor be a U.S. citizen has been deleted.
- Section 1110(a)(2)(B) eliminates the former potential "rolling 30-day" cure problem by providing the following periods for cures:
 - pre-bankruptcy
 60 days from commencement of bankruptcy
 - post-bankruptcy, before the 60-day period and (ii) 30 days after default

^{1.} Public Law 106-181 (Apr. 5, 2000), § 744. This discussion session focuses on aircraft, although it applies equally to ships and railroad rolling stock. A copy of the amendment is attached.

^{2.} *In re Western Pacific Airlines, Inc.* 221 B.R. 1 (D. Colo. 1998), dismissed as moot 181 F.3d 1191 (10th Cir. 1999).



post-bankruptcy, post 60-day period In compliance with the transactional document³

The amendments also provide helpful provisions (i) specifying that the protected equipment includes its related records and documents that, under the transactional documents, are required to be surrendered upon surrender of the equipment (Section 1110(a)(3)(B)); (ii) clarifying that, if a proper Section 1110 agreement and cure are not timely made, the financer has not only the right of repossession but also the right to enforce its contractual remedies to sell, lease, dispose of, or retain the equipment, which remedies are "not limited or otherwise affected by any other provision of the [Bankruptcy Code] or by any power of the court" (Section 1110(a)(1)); and (iii) clarifying that, if the financer is entitled to repossession, the lease (and the security agreement or conditional sale, if they are executory contracts) is deemed rejected and the bankruptcy trustee is required to immediately surrender and return the equipment (Section 1110(c)).

In response to these amendments Standard & Poor's has eliminated their interim criteria, adopted in March 1998, which, among other things, required counsel to address legal issues raised by the *Westpac* ruling.

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If you have any questions regarding the impact of these amendments on Section 1110 or 1168 generally, please contact any of our partners listed below.

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^{3.} The amendments continue the rule that the "ipso facto" defaults specified in Section 365(b)(2) do not have to be cured, but provide that, except for those, a cure is permitted under Section 1110 only if a cure is permitted under the transactional documents.