Publication Date: May 1, 2003

U.S. CMBS Legal and Structured Finance Criteria

Introduction

The commercial mortgage securitization market has steadily evolved since the publication in 1994 of Standard & Poor's criteria governing commercial mortgage securitization transactions. One result has been that Standard & Poor's has received numerous requests for an update of Structured Finance Ratings, Real Estate Finance—Legal and Structured Finance Issues in Commercial Mortgage Securities. As the commercial mortgage securitization market has seasoned and grown significantly over the last several years, Standard & Poor's felt it was appropriate to re-evaluate the existing criteria and to add further topics that are pertinent to these issues, the evolution of which, in each case, is due to Standard & Poor's addressing novel features or changes that have arisen over the last several years. This guide compiles and updates Standard & Poor's legal criteria for commercial mortgage securitization.

It should be noted that, as the marketplace evolves, the criteria discussed in this publication are subject to revision. Standard & Poor's regularly reviews its criteria to keep current with both changes in the law and market developments in the area of structured finance. As a result, these criteria are not stagnant, but evolve over time. Standard & Poor's welcomes contact and communication with potential as well as current market participants to consult with it for clarification regarding any of the criteria described in this publication, or with any questions regarding future structured transactions and developments as they arise. The goal is to enable easy access and to provide the reasoning behind the rating criteria. To this end, Standard & Poor's will continue to publish its criteria to keep market participants informed of any new approaches to rating structured transactions. As a practical necessity, this publication cannot and does not purport to address every issue that comes up in a loan origination or commercial mortgage securitization transaction. In the absence of clear guidelines, market participants are urged to use a prudent lender standard.

This publication is divided into five sections and 16 appendixes. The first three sections deal with the three basic types of commercial mortgage securitization transactions:

- The property-specific or "stand-alone" transaction (i.e., a loan transaction involving a single property with one borrower, multiple properties with one borrower, cross-collateralized multiple properties with multiple borrowers, a small number of non-cross-collateralized properties with unrelated borrowers that does not constitute a pool) and the large loan transaction (i.e., a large loan included within a conduit or pool transaction or a group of large loans to unrelated borrowers that are pooled together) (see section one);
- The pool transaction (i.e., pools of performing loans, pools of nonperforming loans and conduits) (see section two); and
- The credit lease transaction (see section three).

Each of these types of transactions has a number of variations and may involve any one of several property types, including retail, multifamily, office, industrial, mobile home parks, health care, warehouse and mixed use.

The last two sections address issues that are applicable to each of the three types of commercial mortgage transactions. Specifically, section four deals with Standard & Poor's criteria relating to special-purpose bankruptcy-remote entities (SPEs). Section five describes Standard & Poor's criteria relating to legal opinions. The appendixes deal with certain specific topics in greater detail, as well as providing some of the

standard forms for CMBS transactions.

We would like to express our appreciation to the authors of some of the attached appendices, including Tom Gillis, Tom Murray, Dina Moskowitz, Roy Chun, Shawn Harrington, Nancy Olson, and James Penrose.

Last, a special thanks to Maureen Coleman, Joan Biro and Kim Diamond for their efforts in making contributions and revisons to this publication.

Gale C. Scott, Managing Director, Global Real Estate Finance, (1) 212-438-2601.

Table of Contents

Section One: Property-Specific and Large Loan Transactions....8

Types of Property-Specific and Large Loan Transactions....8
- Single Property Transactions....8
- Multiple Property Transactions....8
- Large Loan Transactions in Pools....8

Transfer of Mortgage Loans vs. Direct Issuance of Debt Structure....8
Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions....9
- General....9
- Qualifying Manager....9
- Transfers....10
- Transfers of Immaterial Portions of Mortgage Property....11
- Casualty and Condemnation....11
- Partial Releases of Unimproved Property....12
- Creation and Amendment of Easements and Related Documents....12
- Alterations to the Mortgaged Property....12
- Security Deposits....13
- Late Charges and Default Interest....13
- Discharge of Impositions, Liens, and Other Items....13
- Cash Management....13
- Letters of Credit in Lieu of Reserves....14
- Insurance Guidelines....14
- Standards for Third Parties....14

Defeasance....15
Tenants in Common....16
Permitted Indebtedness....18
- General....18
- Preferred Equity....19
- Mezzanine Loans to Equity Holders....20
- A/B Loans....22
- Subordinate Mortgages....27

Environmental Criteria....28
- General....28
- Basic Standards....28
- Additional Standards....29
- Environmental Insurance....29
- Rating Test for Environmental Insurers....30
- Environmental Site Assessment Executive Summary....30

Eligible Institutions and Eligible Investments in Property-Specific and Large Loan Transactions....31
- Eligible Accounts and Institutions....31
- Eligible Investments....32

Guarantees in Property-Specific Transactions....32
Representations and Warranties In Property-Specific and Large Loan Transactions....32
- Representations and Warranties Common to Mortgage Loan Sellers, Depositors, Borrowers, Tenants, Trustees, and Servicers....33
- Mortgage Loan Seller Specific Representations and Warranties....33
- Trustee-Specific Representations and Warranties....35
- Servicer-Specific Representations and Warranties....35
- Borrower-Specific Representations and Warranties....35
- Special-Purpose Bankruptcy-Remote Entity Representations and Warranties....37
- Senior Housing and Long-Term Care Facility Representations, Warranties and Covenants....37
- Representations and Warranties in Transactions Involving Hotel Properties....39
- Ground Lease Representations and Warranties....40
- Environmental Representations and Warranties....41
- Remedies for Breach of the Mortgage Loan Seller Representations and Warranties....41

Due Diligence in Property-Specific and Large Loan Transactions....41
- Certified Rent Rolls for Property-Specific and Large Loan Transactions....41

Title Issues....42
Title Insurance....42
Mortgage Recording Taxes....43
Borrower Title Representations and Warranties....43
Permitted Exceptions....43
Estoppel Certificates....43
Ground Leases in Property-Specific and Large Loan Transactions....44
General....44
Ground Provisions....45
Ground Lease Representations and Warranties....46
Landlord Estoppel Certificates....46
Servicing Issues in Property-Specific Transactions....47
Modification of Mortgage Loan....47
General Rules....47
Modifications in REMIC and Grantor Trust Certificates....47
Loan Summaries and Questionnaires....47
Loan Summaries and Interest Rate Cap Agreement Questionnaire....47
Foreign Properties....48
Surveillance Information....48
Certain Structuring Issues....48
Tails/Extensions Periods....48
Interest Rate Cap Agreements....48

Section Two: Pool Transactions....54

Types of Pool Transactions....54
Pools of Performing Loans....54
Pools of Nonperforming Loans....54
Conduits....54
Servicing Issues in Pool Transactions....54
General Servicing Standard....55
Advancing....55
Reimbursement of Nonrecoverable Advances....57
Appraisal Reductions....57
Maintenance of Property Insurance Policies....58
Errors and Omissions Insurance/Fidelity Bonds....58
Modification of Mortgage Loans....58
Modifications in REMIC and Grantor Trust Transactions....59
Enforcement of Due-on-Sale and Due-on-Encumbrance Clauses....59
Defeasance....59
Sale of Defaulted Mortgage Loans and REO Properties....60
Property Inspections....61
Amendments to Pooling and Servicing Agreements....61
Fees....61
Subservicers....61
Successor Servicers and Events of Default....62
Directing Class and Conflicts of Interest....62
Actions Subject to Approval by Directing Class....63
Potential Remedies....63
Servicer Conflicts of Interest....64
WAC Rated Securities....64
Surveillance Information....64
Representations and Warranties in Pool Transactions....64
Representations and Warranties Common to Mortgage Loan Sellers, Depositors, Trustees, Fiscal Agents, and Servicers....64
Mortgage Loan Seller-Specific Representations and Warranties....65
Trustee-Specific Representations and Warranties....65
Servicer-Specific Representations and Warranties....65
Mortgage Loan Representations and Warranties....65
Healthcare, Credit Tenant and Hotel Representations and Warranties....74

Special-Purpose Bankruptcy-Remote Entity Representations and Warranties....74
Environmental Representations and Warranties....75
Remedies for Breach of the Mortgage Loan Representations and Warranties....75
Title Issues in Pool Transactions....76
Title Representations and Warranties....76
Permitted Exceptions....76
Eligible Institutions and Eligible Investments in Pool Transactions....76
Eligible Accounts and Institutions....77
Eligible Investments....77

Section Three: Credit Tenant Loan Transactions....78

Overview....78
Rating of Securities....78
Stand-Alone Credit Tenant Loan Transactions....78
Credit Tenant Loans in Pool Transactions....79
Key Credit Lease Issues....79
Special-Purpose, Bankruptcy-Remote Status of Borrower....79
Transfer of the Property and Merger of the Borrower....79
Form Lease....79
Substitution of Property....81
Title, Impositions, Taxes, and Mechanics Liens....81
Separate Tax Lot....82
Condemnation Risk Analysis....82
Environmental Matters....82
Title Insurance....82
Construction Risk....83
Representations and Warranties in Credit Tenant Loan Transactions....83
Stand-Alone Credit Tenant Loan Transactions....83
Credit Tenants Loans in Pool Transactions....83
The Role of the Servicer in Credit Tenant Loan Transactions....85
Guarantees in Credit Tenant Loan Transactions....85
Eligible Institutions and Eligible Investments in Credit Tenant Loan Transactions....86
Eligible Accounts and Institutions....86
Eligible Investments....86
Condemnation Analysis Guidelines....87

Section Four: Special-Purpose Bankruptcy-Remote Entities....89

Overview....89
Rationale for the SPE in a Commercial Mortgage-Backed Transaction....89
Property-Specific and Large Loan Transactions....89
Pool Transactions....89
Credit Lease Transactions....90
Overview of SPE Criteria....91
Specific SPE Criteria....91
Restrictions on Additional Indebtedness....91
Limitations on the Purpose of an SPE....92
Prohibition on Consolidation and Liquidation; Restrictions on Mergers and Asset Sales....92
Prohibition on Amendments to Documentation....92
SPE Equity Owners of SPE Limited Partnerships, SPE Limited Liability Companies, and Multitiered SPE Structures....92
SPE Equity Owners in SPE Limited Partnerships....92
SPE Equity Owner in SPE Limited Liability Company....93
The "Independent" Director....93
Separateness Convenants....95
Nonconsolidation Opinions....95
Pre-Existing Entities as SPEs....95

Entity-Specific SPE Criteria....96
SPE Corporations....96
SPE Limited Partnerships....96
SPE Limited Liability Companies....97
Conduit SPE Criteria....98
Loans with Less than 5% Borrower Concentration or Less than $20 Million....98
Loans with 5% or Greater Borrower Concentration or $20 Million or Greater Principal Balance....98

Section Five: Legal Opinions....99

True Sale Opinions....99
Nonconsolidation Opinions....105
Security Interest Matters....109
Corporate and Enforceability Opinions....110
Local Counsel Opinions....111
Tax Opinions....112
Interest Rate Cap and Swap Opinions....113

Appendix I: Insurance Criteria for U.S. CMBS Transactions....115

Appendix II: Eligible Investment Criteria for 'AAA' Rated Structured Transactions....122

Appendix III: Revised Article 9 of the Uniform Commercial Code: New Standard & Poor's Criteria....125

Appendix IV: Standard & Poor's Defeasance Criteria for U.S. CMBS Transactions....138

Appendix V: Form of Notice Regarding Defeasance of Mortgage Loan....141

Appendix VI: Intercreditor Agreement....147

Appendix VII: The Credit Impact of Secured Creditor Environmental Insurance on CMBS Transactions....176

Appendix VIII: Large Loan Summary....182

Appendix IX: Standard & Poor's Questionnaires for Interest Rate Cap Agreements....189

Appendix X: Standard & Poor's/Foreign Law Real Estate Issues Summary....211

Appendix XI: Credit-Tenant Loans in Pool Transactions....213

Appendix XII: Sample Guarantee Language....232

Appendix XIII: Revised Legal Criteria for Multi- and Single-Member LLCs.........................234

Appendix XIV: U.S. Legal Criteria for "Recycled" Special-Purpose Entities.......................239

Appendix XV: Typical Factors Considered by Courts in Determining Existence of a True Sale..242

Appendix XVI: Select Specific Opinion Criteria/Language..243

Glossary 244

Section One
Property-Specific and Large Loan Transactions

Types of Property-Specific and Large Loan Transactions

The following criteria apply to "stand-alone property-specific" transactions, as well as to "large loans" included in a pool transaction. There are three basic types of transactions covered by this section: the stand-alone single property transaction; the stand-alone multiple property transaction; and the hybrid of a pool transaction and a stand-alone property-specific transaction where one or more large loans are included in a loan pool.

Single Property Transactions

In a stand-alone single property transaction, the borrower, an SPE, will borrow funds generated by the sale of securities backed by a mortgage lien on the borrower's mortgaged property. The single property transaction is, in many respects, similar to a traditional commercial mortgage loan secured by a lien on the borrower's property. The key difference is that in a commercial mortgage securitization transaction Standard & Poor's rates the mortgage note (or the securities backed by the mortgage loan). Typically, the borrower will do one of two things: execute a note, which is delivered to a depositor who then deposits the note into a trust, which issues pass-through certificates that are rated and sold to third parties; or issue directly one or more notes that are rated and sold to third parties. *(See Transfer of Mortgage Loans vs. Direct Issuance of Debt Structure.)* Usually, the loan is secured by a mortgage, an assignment of rents and leases, financing statements under the Uniform Commercial Code (UCC), and whatever additional collateral is appropriate for the transaction. The proceeds of the purchase of the securities will be used to fund the loan and any reserves or credit enhancements and pay the costs of the transaction.

Multiple Property Transactions

There are several different types of stand-alone multiple property transactions, including the following:

- Single borrower/multiple property;
- Cross-collateralized multiple borrower/multiple property; and
- Noncross-collateralized multiple borrower/multiple property transactions that do not constitute a pool.

Large Loan Transactions in Pools

Large loan transactions typically arise in the context of either a large loan pool consisting of a small number of large loans or as a fusion transaction, which is a pool transaction that includes one or more large loans together with smaller loans. What Standard & Poor's considers to be a "large loan" differs from transaction to transaction. Typically, a loan with a balance in excess of $35 million or which constitutes more than 5% of the pool balance is viewed as a large loan. Standard & Poor's expects large loans in pool transactions to comply with the criteria described in this section for two reasons: in the context of a large loan pool, the relatively small number of loans, lack of diversity (concentration risk), and high loan amounts; and in the context of large loans included in a conduit or pool transaction, the high loan amounts and skewing effect caused by inclusion of large loans in a pool of smaller loans.

Transfer of Mortgage Loans vs. Direct Issuance of Debt Structure

Regardless of the type of stand-alone property-specific transaction used, the structure of the transaction will generally take one of two forms. The first form involves a depositor (often an entity created for the sole purpose of originating the loan) that will acquire or originate either a loan to an SPE borrower secured by one or multiple properties or multiple loans to multiple SPE borrowers secured by multiple properties. The borrower or borrowers, as applicable, will deliver the promissory note(s), mortgage(s), assignment(s) of rents and leases, UCC-1 financing statements, and whatever additional loan documents are appropriate to evidence the loan.

The depositor will subsequently deposit that loan into a trust, and the trust will issue securities based upon the mortgage(s) and the related collateral documents. Sometimes, this type of trust structure is not used and the borrower will issue notes that are rated and sold directly to third-party purchasers. In this form of structure, the borrower will deliver its loan documents directly to a trustee for the benefit of the holders of the rated securities.

Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions

General
In virtually all stand-alone property-specific transactions and large loan transactions, the mortgaged property and the mortgaged property's income stream are the sole source of cash flow for payment of the rated securities. Therefore, value in a stand-alone property-specific or large loan transaction is directly related to the "hard value" of the real estate and the cash flow generated by the mortgaged property.

The mortgage or the loan agreement typically set forth the key provisions governing the loan, many of which have impact on the cash flow generated by the mortgaged property as well as the ability of the trustee to realize upon the mortgaged property in the event of a default by the borrower. Because of the individual nature of each transaction, it is impossible for Standard & Poor's to establish definitive criteria with respect to each provision to be contained in the mortgage or loan agreement.

Standard & Poor's will evaluate each mortgage or loan agreement on a case-by-case basis. However, there are certain provisions typically included in either a mortgage or loan agreement that are critical to protecting the cash flow and value of the mortgaged property and the ability of the trustee to realize upon the mortgaged property. It is instructive to identify some of the key provisions in a mortgage or loan agreement that Standard & Poor's focuses on in stand-alone property-specific and large loan transactions.

Typically, certain standard provisions in a mortgage or loan agreement govern the management and operation of the mortgaged property. Standard & Poor's is concerned with those management and operation provisions that may impact upon the priority of the lien of the mortgage, the cash flow generated by the mortgaged property and, ultimately, the value of the mortgaged property. While there are any number of provisions contained in a mortgage or loan agreement that have impact on such matters, provisions that address the following issues are central to protecting the continued validity and priority of the lien securing the rated securities and value of the mortgaged property.

Qualifying Manager
Because the cash flow is aligned closely with the management of the mortgaged property, property management must be competent, reliable, and consistent with the rating of the transaction. In addition, the management fee and the terms of the property management agreement must be appropriate for the particular transaction. Accordingly, Standard & Poor's will review the business terms of the property management agreement to evaluate their impact on the cash flow of the transaction and will evaluate the manager to consider whether the manager has sufficient experience and manages a sufficient number of other properties similar to the mortgaged property to demonstrate the manager's experience. Depending on the circumstances, the trustee (or the servicer on its behalf) should be able to require the borrower to replace the manager following the occurrence of an event of default by the borrower under the loan or by the manager under the management agreement.

In addition, it is common for the holder of the loan to be able to require the borrower to remove the manager following the occurrence of events that indicate the deterioration in the value of the mortgaged property, such as a decline in the debt service coverage ratio of the mortgaged property below a predetermined level. The management agreement should be assigned to the holder of the loan and such assignment should be consented to by the manager. The manager should also subordinate its fees to the loan. Additionally, Standard & Poor's generally will expect written "ratings confirmation" to be obtained prior to the borrower or servicer terminating or replacing a property manager or amending the management agreement. These ratings confirmations are the mechanism by which Standard & Poor's is assured that a "qualifying manager" (as defined in the next paragraph) or other appropriate property manager manages the property and that the business terms of the management agreement are appropriate over the life of the loan.

A "qualifying manager" for mortgage properties securing a large loan generally should be a property manager of the mortgaged property that:

- Is a reputable management company having at least five years' experience in the management of commercial properties with similar uses as the mortgaged property and in the metropolitan area or other appropriate geographic area in which the mortgaged property is located;

- Has, for at least five years prior to its engagement as property manager, managed at least five properties of the same property type as the mortgaged property;
- At the time of its engagement as property manager has leasable square footage of the same property type as the mortgaged property equal to the lesser of (A) one million leasable square feet and (B) five times the leasable square feet of the mortgaged property; and
- Is not the subject of a bankruptcy or similar insolvency proceeding.

For very large loans, the tests in the second and third clauses should be higher and this general definition should be adapted as necessary for certain types of properties such as luxury hotels, convention centers, regional malls, etc.

Transfers
In a property-specific or large loan transaction, typically, a borrower may not sell, pledge, encumber, mortgage, assign, or otherwise dispose of (any of which are referred to as a "transfer") its interest in the mortgaged property, and a direct or indirect equity owner may not transfer its direct or indirect equity interests in a borrower, including any equity interests in any of a borrower's constituent owners that should (under Standard & Poor's SPE criteria) be single-purpose bankruptcy remote entities without first obtaining a ratings confirmation. These restrictions are generally intended to prevent changes in the borrower's sponsorship that may be adverse to the holders of rated securities and to maintain the bankruptcy-remote status of the borrower.

In the case of a transfer of the mortgaged property or a transfer of equity interests in a borrower to a party not affiliated with the original sponsors, a ratings confirmation will typically be conditioned on Standard & Poor's finding the financial condition of the transferee to be satisfactory. In addition, in the case of all transfers, the rating confirmation is also conditioned upon the borrower and any entities that should (under Standard & Poor's SPE criteria) be single-purpose bankruptcy remote entities being in compliance with Standard & Poor's SPE criteria. This includes the delivery of acceptable nonconsolidation opinions to Standard & Poor's concerning, as applicable, the borrower, the new transferee and/or the appropriate beneficial owners. *(See Section Four, Special-Purpose Bankruptcy-Remote Entities.)* If the transfer is a pledge or encumbrance of a direct or indirect interest in the borrower, the transfer should comply with Standard & Poor's mezzanine debt criteria. *(See Permitted Indebtedness - Preferred Equity and Permitted Indebtedness - Mezzanine Loans to Equity Holders.)*

Notwithstanding the limitations on transfers discussed in the previous paragraph, certain transfers of direct or indirect equity interests in a borrower by constituent owners that need not be SPEs may occur without a ratings confirmation if the sponsorship is not fundamentally changed, the bankruptcy-remote nature of the borrower is not affected, and no additional "pairings" are created that should be addressed in a nonconsolidation opinion.

Ultimately, the particular nature or structure of a given transaction will determine the permitted transfers. The most typical permitted transfers are transfers of direct or indirect equity interests in a borrower by constituent owners that need not be SPEs and that do not result in a change of control of the borrower or the other SPE constituent entities. Typically, control is measured by making a determination among the following:

- Whether a transfer results in direct or indirect equity interests being held by a party that owned less than 50% of the direct or indirect equity interests in the borrower or any other SPE constituent entity at the time of the closing of the loan owning 50% or more of the direct or indirect equity interests in the borrower or any other SPE constituent entity after the transfer;
- Whether in the aggregate, 50% or more of the direct or indirect equity interests in the borrower or any other SPE constituent entity has been transferred; or
- Whether there is a change in the equity owners who possess, directly or indirectly, the power to direct or cause the direction of the management or policies of an entity, whether through the ability to exercise voting power, by contract or otherwise.

In general, a permitted transfer provision that is not subject to ratings confirmation should not include transfers of material interests in the mortgaged property, transfers of direct or indirect equity interests in a borrower by a SPE constituent entity, or transfers of equity interests in a borrower or a SPE constituent

entity resulting in any party owning 50% or more of such interests if such party did not own 50% or more of such interests at the time of the rating of the loan. This is the case even if a transfer is to a transferee that is an affiliate of the transferee or a member of the immediate family of the transferee.

Transfers of Immaterial Portions of Mortgaged Property
In past transactions rated by Standard & Poor's, mortgages and loan agreements have provided for certain transfers of immaterial portions of the mortgaged property without a ratings confirmation of the rated securities. For example, a borrower may be permitted to transfer unimproved, nonincome-producing real estate in certain situations. *(See Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions - Partial Releases of Unimproved Property*). In addition, transfers of mortgaged property in the nature of granting or conveyance of utility easements, rights-of-way, and similar encumbrances generally are permitted where such easements, rights-or-way, and similar encumbrances will not have a material adverse impact on the value, use, or operation of the mortgaged property or the borrower's ability to pay the mortgage loan.

As noted above, certain transfers (but not encumbrances) of equity interests in a borrower or its constituent entities generally are permitted without a ratings confirmation provided that this transfer does not result in a change of control or a change in any SPE constituent entity. In certain loans, a borrower may request that the loan documents include approval in advance of certain transfers. Standard & Poor's will review each such request in light of the nature of the property and the parties to the transaction. (*See Property-Specific and Large Loan Transactions - Permitted Indebtedness - Mezzanine Loans to Equityholders, for Standard & Poor's criteria related to encumbrances of equity interests in a borrower*.)

Casualty and Condemnation
In rating any transaction, there is a need to assure that there are sufficient protections for continued cash flow during the term of any restoration of the mortgaged property and proper disbursement of insurance or condemnation proceeds for this restoration or, in the event that restoration is inappropriate, repayment of the loan. While each mortgage loan transaction is unique, the casualty and condemnation sections of mortgages that Standard & Poor's has reviewed have typically included the following terms. (These terms do not necessarily represent Standard & Poor's criteria, although they are probably appropriate for many transactions. Alternative terms and provisions will be assessed by Standard & Poor's depending upon the nature of the transaction.)

- ***Borrower to Restore.*** The borrower, at its expense, shall restore the mortgaged property to a status at least equivalent to the quality and character of the mortgaged property immediately prior to the casualty or condemnation. The proceeds may be made available by the trustee to the borrower to be applied to the restoration if certain conditions are met.
- ***Prepayment of Loan.*** Unless the trustee (or the servicer on its behalf) agrees otherwise, the trustee (or the servicer on its behalf) will have the right to apply the proceeds to prepayment of the loan if an event of default is continuing or if, in the reasonable judgment of the trustee (or the servicer on its behalf), one or more of the following conditions exists: (1) the casualty or condemnation involved an actual or constructive loss of more than 15% (in the case of a condemnation) or 30% (in the case of a casualty) of the fair market value of the property, and rendered untenantable more than 15% (in the case of a condemnation) or 30% (in the case of a casualty) of the rentable area of the property; (2) the property cannot be restored prior to the expiration of business interruption insurance, or prior to the date that is at least six months prior to the maturity date of the loan; (3) after such restoration the fair market value and cash flow of the property is expected to be less than the fair market value of the property or cash flow immediately prior to such condemnation or casualty (assuming the affected portion of the property is relet within a reasonable period after the date of such casualty or cancellation); or (4) leases covering in the aggregate at least 65% of the rentable square footage of the property shall not remain in full force and effect during and after the completion of restoration. If restoration is permitted then, to the extent the proceeds are projected to be insufficient to complete the restoration, the borrower shall provide sufficient additional collateral in the form of cash or cash equivalents to pay all costs of such restoration and keep the loan current during the restoration period.
- ***Disbursement of Proceeds.*** If proceeds are not applied to repayment of the loan, the trustee should make the proceeds available to the borrower to be applied to the restoration of the mortgaged property. Typically, if the total amount of the proceeds is less than 5% of the total amount of the portion of the loan allocable to the mortgaged property suffering the condemnation or casualty, the

trustee may disburse the proceeds to the borrower without complying with any disbursement procedures. In all other cases, the trustee should disburse to the borrower portions of the proceeds upon presentation of pertinent documentation regarding expenses incurred by the borrower in conducting the restoration. Depending on the transaction, this documentation may include (1) an independent architect's certificate certifying (a) that the portion of the restoration has been completed in accordance with plans and specifications previously provided to the trustee, (b) the estimated percentage of restoration completed and the sum necessary to complete the remaining restoration, and (c) compliance of the restoration with all legal requirements; (2) applicable lien waivers; and (3) an endorsement to the title insurance policy insuring the continued priority of the lien of the mortgage. The trustee should retain a set percentage of the requested advances to be disbursed upon final completion of the restoration as certified by an independent architect and receipt of certificates of occupancy, waivers of liens, and an endorsement to the title insurance policy insuring the continued priority of the mortgage. If at any time during the restoration, the proceeds are less than the estimated cost to restore the mortgaged property, the borrower should provide the trustee with cash or cash equivalents in an amount equal to the shortfall. Depending upon the transaction, excess proceeds remaining after completion of the restoration may be applied to repayment of the rated securities or disbursed to the borrower.

Partial Releases of Unimproved Property
It is often the case that some part of the mortgaged property is unimproved, nonincome-producing real estate. Borrowers frequently request the right to obtain a release of the unimproved, nonincome-producing real estate (the "release property") from the lien of the mortgage. If the release property is not income-producing and was not considered in rating the securities, such a release may be permissible provided that the mortgage includes conditions to the release that assure that there will not be an adverse impact upon the value of the mortgaged property and the cash flow. These conditions typically include the following:

- Adequate release payments;
- Transfer of the release property to a separate entity;
- Use of the release property will not materially and adversely affect the use, operation or value of, or cash flow from, the remaining mortgaged property or the borrower's ability to perform its obligations under the loan;
- Continued access for the remaining mortgaged property to public streets and utility services
- No default under the mortgage;
- Release property and the remaining mortgage property constitute separate tax and zoning lots and remain in compliance with applicable laws; and
- Delivery of appropriate tax opinions to the trustee.

Creation and Amendment of Easements and Related Documents
A borrower will often want the ability to amend, waive, modify, or enter into easements or other similar agreements affecting title. Typically, the borrower is permitted to enter into these agreements provided they do not materially and adversely affect the use, operation, or value of the mortgaged property or the borrower's ability to pay its obligations under the loan. This limitation on the type of easements and similar encumbrances is consistent with the permitted exceptions and the representations regarding such permitted exceptions obtained at the closing of the loan. (*See Due Diligence in Property-Specific and Large Loan Transactions - Title Issues and Representations and Warranties in Property-Specific and Large Loan Transactions - Borrower - Specific Representations and Warranties.*)

Alterations to the Mortgaged Property
A mortgage or loan agreement typically contains limitations on the borrower's right to make changes or alterations to the mortgaged property, often prohibiting any material changes or alterations. A borrower, however, may want the right to make certain alterations to the property. Standard & Poor's has accepted provisions in loan documents that permit alterations, provided that these alterations do not materially adversely affect the borrower's financial condition, the value of the mortgaged property, or the ability of the borrower to make scheduled debt service payments and that certain other provisions with respect to the construction of the alterations are met.

These provisions are intended to limit impairment to the net cash flow available to pay the debt service on the loan rated securities. If the cost of these alterations is in excess of a predetermined threshold amount,

typically 5% of the loan amount, the borrower typically should post collateral in the form of cash or cash equivalents in an amount equal to the difference between the threshold amount and the estimated cost of the alterations. In the case of a loan with multiple properties that are cross-collateralized, the threshold amounts should be specified for each individual property based on a percentage of each property's allocated loan amount and on an aggregate basis based on the aggregate loan amount.

Security Deposits
Unfunded security deposits can cause economic difficulty for a borrower when it must refund a security deposit to a tenant. To address this risk, the loan documents would typically include a representation and warranty by the borrower that the borrower is holding all relevant security deposits in the manner required by applicable law, and, at a minimum, in a segregated account, as well as a covenant that the borrower will do the same with respect to all future security deposits. (*See Property-Specific and Large Loan Transactions - Representations and Warranties in Property-Specific and Large Loan Transactions - Borrower-Specific Representations and Warranties.*)

Late Charges and Default Interest
Late payments by the borrower are an additional source of concern for Standard & Poor's because its rating addresses, in part, the timeliness of interest payments on the rated securities. Standard & Poor's reviews the mortgage or loan agreement to assess whether the late charges and default interest appear to be adequate to properly motivate the borrower to make timely payments. Analysts will also evaluate whether any grace period for debt service payments granted to the borrower extends beyond the payment date for the rated securities or the date a servicer is required to make an advance with respect to a delinquent debt service payment. Additionally, late fees and default interest should be adequate to pay the servicer interest on any debt service or property protective advances the servicer may make with respect to the loan and compensate the servicer for its collection efforts.

Discharge of Impositions, Liens, and Other Items
Unpaid impositions, liens, or other charges that affect the mortgaged property could have a negative impact on the continued priority of the lien that secures the rated securities and on the value of the mortgaged property. For this reason, Standard & Poor's expects the borrower to do everything necessary to fully preserve the first priority of the lien of the mortgage (subject only to the permitted exceptions). Loan documents typically require a borrower to pay promptly, or cause to be paid, all "impositions" relating to the mortgaged property and to pay when due all claims and demands of any mechanics, materialmen, or laborers that, if unpaid, might become liens against the mortgaged property. (*See Property-Specific and Large Loan Transactions - Due Diligence in Property-Specific and Large Loan Transactions - Title Issues and - Permitted Exceptions.)*

Standard & Poor's realizes that, in certain circumstances, a borrower may wish to contest an imposition or other liens or charges that may be imposed on the mortgaged property. Standard & Poor's generally expects that a borrower may postpone the payment or the discharge of an imposition or other liens or charges only if:

- The borrower, in good faith, is diligently contesting the validity, amount, or application of that imposition, lien, or charge;
- During such contest there is no action to enforce collection of such contested amount; and
- The borrower posts with the trustee, for the benefit of the holders of the rated securities, cash or cash equivalents in an amount acceptable to the trustee (or a servicer on its behalf) (typically, 125% of the disputed amount).

Cash Management
Standard & Poor's will review the cash management structure of any property-specific and large loan transaction closely. In most stand-alone property-specific and large loan transactions, Standard & Poor's prefers the use of a "hard lockbox". In a "hard lockbox" arrangement, at origination of the loan, the borrower will typically direct the commercial tenants or, in the case of hotels, the credit card companies, to remit monies payable to the borrower directly into lender-controlled lockbox accounts.

These lockbox accounts (if not already eligible accounts pledged to, and under the control of, the holder of the mortgage loan) are swept on a regular basis (preferably, daily) into eligible accounts pledged to the trustee for the benefit of the holders of the rated securities maintained by the master servicer. The master

servicer then applies sums to fund adequate reserves for ground rents, if applicable, real estate taxes, insurance premiums, monthly debt service, capital expenditure/FF&E reserves, tenant rollover reserves, and such other reserves as are necessitated by the applicable transaction.

After these applications, provided the loan is not in default, excess funds are remitted to the borrower. If preferred equity or mezzanine financing exists with respect to a mortgaged property, excess funds will typically be remitted to the holder of the preferred equity or mezzanine financing. In this case, the loan waterfall should have a "bucket" for operating expenses in accordance with a budget approved by the trustee (or the servicer on its behalf) prior to the remittance of any funds to the holder of the preferred equity or mezzanine financing.

Letters of Credit in Lieu of Reserves
In many property-specific and large loan transactions, to address a borrower's desire to decrease the amount of cash held for reserves for the loan, letters of credit might be used. In these circumstances the letter of credit and the related loan documents should provide that any such letter of credit must be a "qualified letter of credit". What constitutes a qualified letter of credit might vary depending on the nature of the transaction and the size and importance of the letter of credit.

Generally, a qualified letter of credit is a clean, irrevocable, unconditional, transferable, evergreen letter of credit with respect to which the borrower has no reimbursement obligation, payable on sight draft only, in favor of the holder of the mortgage loan. It entitles the holder of the mortgage loan to draw thereon in a convenient location, such as New York City and is issued by a domestic bank or the U.S. agency or branch of a foreign bank, with a long-term unsecured debt rating of not less than 'A' and a short-term unsecured debt rating of not less than 'A-1'.

Since the reimbursement obligation under the qualified letter of credit will typically be an obligation of, or guaranteed by, the borrower's sponsor and not the borrower, any obligation by the borrower itself would constitute additional debt and the non-consolidation opinion provided in connection with the loan should address this fact. *(See Section Five, Legal Opinions).* The following additional terms and conditions should generally apply to each qualified letter of credit:

- Each qualified letter of credit should expressly provide that partial draws are permitted.
- Each qualified letter of credit should expressly provide that it is freely transferable to any successor or assignee of the holder of the mortgage loan without cost.
- The holder of the mortgage loan should be entitled to draw on a qualified letter of credit immediately and without further notice (a) upon the occurrence and during the continuance of any event of default under the loan documents; (b) if the borrower fails to deliver to the holder of the mortgage loan, no less than 30 days prior to the expiration date of a qualified letter of credit (including any renewal or extension thereof), a renewal, or extension of the qualified letter of credit or a replacement qualified letter of credit; or (c) if the rating of the issuing bank falls below the ratings set forth above and the borrower fails to deliver to the holder of the mortgage loan a replacement qualified letter of credit within 30 days of the date that the rating of the issuing bank falls below the ratings set forth above.

Insurance Guidelines
For Standard & Poor's Insurance Guidelines, see Appendix I.

Standards for Third Parties
The mortgage or loan agreement may provide that certain third parties perform services with respect to the mortgaged property. Standard & Poor's evaluates these third parties to assess whether they are independent of the parties to the transaction and possess sufficient experience and expertise. Standard & Poor's generally expects that this party will not have a financial interest (including acting as an officer, director, or employee) in the borrower or any of its direct or indirect beneficial owners. In addition to being independent, third parties should meet the following standards:

- ***Architect.*** An architect must generally be licensed to practice in the state in which the mortgaged property is located and have at least five years' experience as an architect. This is appropriate where, for example, an independent architect must prepare plans and specifications for restoration of the mortgaged property after a casualty.

- ***Accountant.*** An accountant must generally be a nationally recognized firm of certified public accountants. This is appropriate where, for example, an independent accountant must prepare the borrower's financial statements or confirm cash flow from defeasance collateral.
- ***Appraiser.*** An appraiser must generally be a member of the Appraisal Institute, have at least five years of experience in the valuation of commercial property of the same type and in the same real estate market as the mortgaged property, and be licensed in the state where the mortgaged property is located. This is appropriate where, for example, an independent appraiser must determine the fair market value of the mortgaged property.
- ***Qualified engineer.*** A qualified engineer must generally be duly licensed in the state where the mortgaged property is located and have five years of experience evaluating building systems, estimating casualty insurance claims, and costs of rebuilding. This is appropriate where, for example, an independent engineer must determine the adequacy of property insurance coverage or estimate costs of repairs or rebuilding in the event of a casualty.
- ***Seismic engineer.*** A qualified seismic engineer must generally be duly licensed as an engineer in the state where the mortgaged property is located and have five years' experience as a seismic engineer. This is appropriate where, for example, a seismic engineer must estimate the probable maximum loss from an earthquake for a mortgaged property in a zone of high earthquake activity.

Defeasance

Frequently loan documents restrict a borrower's right to prepay a mortgage loan but may permit a collateral defeasance, in which real estate collateral securing a mortgage loan is released from the lien of the mortgage and replaced by U.S. government securities pledged to the lender.

Standard & Poor's generally accepts as defeasance collateral securities that:

- Constitute "government securities" within the meaning of Treasury Regulation section 1.860G-2(a)(8)(i);
- Are listed under paragraphs 1, 2, or 3 of Standard & Poor's criteria on eligible investments (see Appendix II, Eligible Investments Criteria for 'AAA' Rated Structured Transactions).
- Are rated 'AAA' by Standard & Poor's;
- Provide for interest at a fixed rate;
- Provide for principal due at maturity that cannot vary or change; and
- Are not subject to prepayment, call, or early redemption.

The defeasance collateral must provide a revenue stream sufficient (without regard to income from reinvestment) to pay, when due, each scheduled principal and interest payment (including any balloon payment) on the defeased loan through the maturity date or, for loans with anticipated repayment dates, the anticipated repayment date (including the principal amount outstanding on the anticipated repayment date). The timing of the payments to be received from the defeasance collateral should match as closely as possible (but always be in advance of) the payment schedule for the loan being defeased.

If a mortgage loan secured by multiple properties permits a portion of the real estate to be defeased, the defeasance collateral must be sufficient to pay a portion of all scheduled debt service payments calculated on a principal amount generally equal to 125% of the loan amount allocated to the mortgaged properties defeased.

Cash Flow Verification

The defeasing borrower must provide written certification from an independent certified public accountant comparing projections of cash flow from the defeasance collateral (without regard to income from reinvestment) to the payment schedule for the defeased loan (or the portion being defeased) and verifying that the revenue stream matches the debt service schedule of the defeased loan through the maturity date (or anticipated repayment date) as to timing and amount. The certification should also confirm that revenues from defeasance collateral will be applied within four months after receipt to scheduled debt service payments, the securities are not subject to prepayment, call or early redemption and that interest income to the borrower or the successor borrower, as applicable, from the defeasance collateral will not in any tax year exceed the interest expense associated with the defeased loan.

First Priority Perfected Security Interest
The trustee must have a valid first priority perfected security interest in the defeasance collateral and in all its proceeds. This is generally accomplished by a transfer of the securities' entitlements to a securities intermediary, and a control agreement. The borrower must make representations with respect to the validity, perfection, and priority of such security interest. (*For Standard & Poor's criteria in connection with UCC Article 9 representations and warranties and security interest matters generally, see Appendix III.*)

Legal Opinions
The defeasing borrower should provide opinions that the defeasance will not adversely affect the status of the trust as a real estate mortgage investment conduit (REMIC), if applicable, and that the defeasance agreements are the legal, valid, and binding obligation of the borrower, enforceable in accordance with their terms *(see Section Five, Legal Opinions).*

Cash Management, Eligible Institutions, and Eligible Investments
The defeasance collateral must be held in a segregated, eligible account, and the securities intermediary that holds the defeasance collateral must be at all times an eligible institution. If proceeds of the defeasance collateral are permitted to be re-invested by the securities intermediary, they must be invested only in eligible investments. The securities intermediary should agree to make timely distributions of the defeasance collateral proceeds directly to the account of the trustee to cover debt service when due. *(See Eligible Institutions And Eligible Investments In Property-Specific and Large Loan Transactions.)*

Successor Borrower
In each defeasance where the original borrower will retain title to the defeased real property, a successor borrower must be formed to hold title to the defeasance collateral for the balance of the loan term. The successor borrower must satisfy the Standard & Poor's criteria for SPEs. (*For Standard & Poor's criteria with respect to SPEs, see section four.*) A successor borrower entity may hold defeasance collateral for more than one loan in a single pool, but if that successor borrower (with all of its affiliates) holds defeasance collateral for loans (whether fully or partially defeased) in one pool aggregating more than $20 million or more or more than 5% of the pool balance, ratings confirmation should be obtained. The defeasing borrower must transfer the defeasance collateral to the successor borrower, which must assume all of the original borrower's payment obligations under the loan. Recourse against the successor borrower may be limited to its interest in the defeasance collateral except for misrepresentations, any transfer or encumbrance of the defeasance collateral, dissolution, termination, bankruptcy or other insolvency actions of the successor borrower, and failure of the successor borrower to at all times satisfy the special purpose and bankruptcy-remoteness covenants in the defeasance documents. The defeasing borrower should deliver opinions as to the enforceability of the defeasance agreements against the successor borrower and, if appropriate, substantive consolidation as to the successor borrower *(see Section Five, Legal Opinions)*.

Servicer Certification in Lieu of Ratings Confirmation
Prior to completion of any defeasance, a ratings confirmation should be obtained. However, for any pooled loan that is not one of the ten largest loans in the pool, and has a principal balance at the time of the defeasance of less than $20 million and less than 5% of the pool balance, the servicer may at its option complete the defeasance without obtaining a ratings confirmation if it delivers to Standard & Poor's a defeasance certification in the form included in Appendix V.

Additional Defeasance Guidelines
For additional criteria in connection with defeasance, see Appendix IV, CMBS Defeasance Criteria.

Tenants in Common
Standard & Poor's is occasionally asked to review mortgage loans secured by property held by multiple owners as tenants-in-common. The tenancy in common ownership structure presents unique issues in the context of commercial loan transactions, which can be broadly categorized as:

- Multiple ownership issues,
- Property management issues,
- Partition issues, and
- Additional documentation issues.

These issues and Standard & Poor's recommendations for resolving them are outlined below.

Nature of Tenant in Common Interest
Subject to such state law variation as may exist, a tenant in common owns an undivided interest in the whole property. This interest is often expressed as a percentage, and the tenants in common typically agree among themselves to proportional liability for property-related obligations. Because each tenant in common is an owner of the property, each tenant-in-common owner of a property should be a borrower under the loan documents. While the tenants in common may agree as among themselves to proportional liability, under the loan documents each tenant in common should be jointly and severally liable for the loan.

Special-Purpose Entity (SPE)
Because each tenant in common of a mortgaged property will be a borrower, each tenant in common should be a SPE *(see Section Four, Special-Purpose Bankruptcy-Remote Entities)*. Nonconsolidation opinions and, to the extent that the tenants in common are Delaware limited liability companies without an SPE member, the so-called "Delaware single member" opinions, should be provided with respect to each tenant in common (*see Section Five, Legal Opinions)*.

Property Management Issues
Each tenant in common has the rights of an owner of the property, subject to the rights of the other tenants in common. Typically, the governing tenancy in common and property management agreements contain provisions for the management of the property. In a commercial mortgage transaction, it is important that the mortgaged property is efficiently operated and managed and that the lender does not have to deal with multiple parties on relatively routine matters. Therefore, Standard & Poor's recommends the following:

Appointment of a Qualifying Manager
The tenants in common should appoint a property manager responsible for the day-to-day management and operation of the property and for ordinary course interaction with the lender. If the property is expected to have frequent leasing activity, the property manager should have either actual or, through various covenants in the loan documents and the property management agreement, effective authority for leasing the property. The property manager should control the operating and other bank accounts with respect to the property, subject to lender's cash management requirements. *(See Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions - Cash Management.)* The property manager should be a qualifying manager. *(See Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions - Qualifying Manager.)*

Centralized Notice
The loan documents should provide one centralized notice address for all of the tenants in common.

Partition Issues
Subject to variations in state law, each tenant in common generally has a right of partition. Standard & Poor's recommends that each tenant in common waive its right of partition for at least the life of the loan and provide a legal opinion as to the enforceability of such waiver. Standard & Poor's recognizes that there is some uncertainty regarding whether a waiver of the right of partition destroys the tax deferral under Section 1031 of the Internal Revenue Code. Tax deferral under Section 1031 is a primary motivator for the use of tenancy in common structures. Under the guidelines issued by the IRS in March 2002, tenants in common need to retain the right of partition. However, restrictions on partition required by a lender that are consistent with customary commercial lending practices are permitted. It is unclear if a partial waiver for the life of the loan would violate the tax rules. If a consensus develops that such a waiver violates the tax laws, then other restrictions on partition should be imposed. These might involve language in the loan documents prohibiting any tenant in common from bringing any partition action. The tenancy-in-common agreement should provide that any tenant in common desiring to bring a partition action must offer to sell its interest in the property to the other tenants in common before filing such an action. Often the loan documents require the other tenants in common or the deal sponsor to purchase such interests. The filing of any partition action or the failure to purchase any such interests will generally constitute an immediate event of default under the loan documents. Often the loan documents impose personal recourse upon any tenant in common that files a partition action or any person that fails to perform such purchase obligation.

Lien Waiver
Under state law, a tenant in common may have lien rights against another tenant in common's interest in the property if the other tenant in common fails to perform its obligations under the tenancy in common agreement or at law. Standard & Poor's recommends that each tenant in common waive any and all such lien rights at least until the loan has been paid in full.

Subordination of Remedies
Often the tenancy in common and property management agreements will contain rights of indemnity. Such rights of indemnity are generally permissible to the extent that they are similar to those typically found in property management agreements or organizational documents, or that relate to tenants in common as owners of the property. Standard & Poor's recommends that all such indemnities and all other rights and remedies of the tenants in common and property manager be subordinate to the mortgage loan. Standard & Poor's also recommends that each tenant in common and the property manager (other than an unaffiliated third party property manager) agree to stand still with respect to the enforcement of any of its rights and remedies for as long as the loan is outstanding.

Subordination of Rights of First Refusal and Options to Purchase
Any options to purchase or rights of first refusal with respect to another tenant in common's interest in the property and any other similar rights should be subject and subordinate to the mortgage and other loan documents, including the transfer restrictions.

Mortgage and Assignment of Tenancy in Common Interests
All rights, title, and interests of the tenants in common as tenants in common and all their rights in, to, and under the tenancy in common and property management agreements should be mortgaged, pledged, and assigned to thelender, including any rights of first refusal, options to purchase, and similar rights, including any right of first refusal arising under Section 363(i) of Section 11 of the United States Bankruptcy Code.

Lender as Third-Party Beneficiary
The tenancy-in-common and property management agreements should name the lender as a third-party beneficiary of those provisions intended to benefit the lender, including those providing for the lien waiver referred to above, the subordination of various rights, remedies, and interests to the mortgage loan, and the delegation to the property manager of day-to-day operation of the property and authority to interact with the lender. The loan documents should prohibit the amendment or termination of the tenancy in common agreement or the property management agreement without the lender's prior written consent.

Securities Law Representation
Where the tenants in common have acquired their interests through a syndication or similar transaction, each should provide a representation, warranty, and covenant that no securities laws have been or will be violated in connection with the acquisition or any future transfer of its interest. In appropriate cases, they should also provide legal opinions confirming the same.

Permitted Indebtedness

General
In a stand-alone property-specific transaction or large loan transaction, the borrower's right to incur additional debt, whether secured or unsecured, should generally be severely limited. The limitations are necessary because the existence of either unsecured or secured junior creditors could have an adverse effect on the trustee's senior lien position by creating a significant class of junior or unsecured creditors with interests that are not necessarily the same as the interests of the holders of the rated securities. Typically, when Standard & Poor's rates securities backed by commercial mortgages, it assumes that there are only three basic classes of permitted indebtedness of the borrower:

- The senior mortgage debt,
- Obligations to tenants under leases, and
- Trade debt and equipment financing.

In order to limit the borrower's economic exposure to the permitted indebtedness, Standard & Poor's favors two basic mechanisms to promote timely payment of the permitted indebtedness. The first is a "hard" lockbox. In a hard lockbox arrangement, tenants pay their rent directly to an account controlled by a trustee (or the servicer on its behalf) for the benefit of the senior debt holders. *(For Standard & Poor's criteria in connection with lockboxes, See Commercial Mortgage and Loan Agreements in Property-Specific and Large Loan Transactions - Cash Management.)*

The second mechanism is a limitation on the incurrence of debt other than the mortgage loan. Limited amounts of trade debt and equipment financing related to the ownership and operation of the property are

generally permitted. Trade debt should be unsecured, should not be evidenced by a note, and should be incurred in the ordinary course of business. In addition, the trade debt should be short-term obligations that are payable within a specific time of the date incurred (generally not to exceed 60 days).

Equipment financing should be limited to equipment related to the ownership and operation of the property whose removal would not materially damage or impair the value of the mortgaged property (for example, copy machines), should not be evidenced by a note, should be secured only by the financed equipment, and should be incurred in the ordinary course of business. The borrower should covenant to pay trade debt and equipment financing charges on time. Finally, Standard & Poor's criteria typically provide for a limitation on the aggregate amount of trade debt and equipment financing (generally between 1% and 4% of the loan amount).

Additional Debt
Borrowers frequently desire to obtain financing in addition to the senior mortgage loan and the permitted trade debt described above. Forms of additional financing include:

- Preferred equity in the borrower;
- Mezzanine loans to the direct or indirect equity holders of the borrower;
- A/B loans in which a single loan is participated or divided into a senior and junior tranche with the "A" interest (the senior tranche) deposited into the securitization trust, and the "B" interest (the junior tranche) held outside of the securitization trust (or within the securitization trust as a nonpooled component); and
- Subordinated mortgage loans.

Standard & Poor's will evaluate the impact of these types of additional financing transactions pursuant to the following guidelines.

Preferred Equity

In a preferred equity arrangement, the financing source makes a capital contribution to the borrower in exchange for an equity share in the borrower that is preferred in right of payment over the other common equity in the borrower. Typically, the preferred equity takes the form of a limited partnership interest or limited liability company membership interest in the borrower. This equity interest entitles the holder of the preferred equity to receive all or a portion of the borrower's "excess cash flow" until the equity investment and a predetermined return is repaid.

Limitation on Amount of Preferred Equity
The amount of the preferred equity should be limited. The acceptable amount of the preferred equity will depend on the amount of the senior indebtedness and the value of the mortgaged property. This policy is intended to assure Standard & Poor's that the existing common equity will retain a meaningful continuing investment in the property.

Priority of Payment
The terms governing the preferred equity arrangement should provide that the preferred equity will not receive any distributions until each of the following is paid: taxes, insurance premiums, debt service, ground rents, capital reserves, leasing commissions and tenant improvements, operating expenses, and extraordinary capital and other unexpected expenses necessary to adequately maintain the property. These restrictions are intended to limit interference with the borrower's ability to operate and adequately maintain the property and service the senior mortgage debt.

A hard lock box with adequate reserves should also be utilized (*see Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions - Cash Management)*. The absence of any of such provisions or a hard lock box with adequate reserves may result in either Standard & Poor's issuing a lower rating of the particular senior mortgage debt, or the inability to issue a rating of the senior mortgage debt.

Limitation on Transfer
Generally speaking, the preferred equity may not be transferred without a ratings confirmation unless:

- The transferee is a qualified transferee. (For an appropriate definition of a qualified transferee, see the definition of "Qualified Transferee" contained in *Appendix VI*);
- The property is managed by a qualifying manager;
- The senior mortgage debt uses hard cash management and adequate reserves for taxes, insurance, debt service, ground rents, capital repair and improvement expenses, tenant improvement expenses, leasing commissions, and operating expenses are being maintained; and
- If the transfer will result in a Change of Control* of the borrower, either (A) a non-consolidation opinion satisfactory to Standard & Poor's, opining that the assets and liabilities of the borrower will not be consolidated with the assets and liabilities of the transferee in the event of the bankruptcy of the transferee, is delivered to Standard & Poor's prior to the date of the transfer of the equity, or (B) if the opinion described in clause (A) above was delivered at the time the senior mortgage debt was securitized, a letter from counsel originally issuing the opinion stating that the opinion is still valid and will not be affected by the transfer of the equity, is delivered to Standard & Poor's prior to the transfer*. (For Standard & Poor's criteria in connection with legal opinions, see Section Five.)*

*"Change of Control" means (i) any direct or indirect change in equity ownership of the borrower (or any constituent equity owner required to be an SPE) that results in any person or entity having more than a 49% direct or indirect equity interest in the borrower (or any constituent equity owner required to be an SPE) where such person or entity did not have more than a 49% equity interest prior to the transfer, or (ii) otherwise results in a change in the equity owners who possess, directly or indirectly, the power to direct or cause the direction of the management or policies, whether through voting power, by contract or otherwise of the borrower (or any constituent equity owner required to be an SPE).

Control Rights

Typically, the preferred equity holder is given the same passive rights as a limited partner in a limited partnership or a nonmanaging member of a limited liability company. The preferred equity holder should not have actual or effective control over normal operation of the borrower or the property. However, the preferred equity holder often wants additional rights to protect its investment in the borrower. Because there may be a conflict of interest between the interest of the preferred equity holder and the senior debt holder, Standard & Poor's will analyze any control rights that benefit the preferred equity holder to the detriment of the senior debt holder.

Identity of Preferred Equity Holder

Since the preferred equity holder often has rights beyond those typically given to a limited partner or a nonmanaging member, Standard & Poor's will assess the real estate investment experience of the preferred equity holder. In general, Standard & Poor's expects the initial preferred equity holder to at least meet the standards of a qualified transferee.

Mezzanine Loans to Equity Holders

A second form of additional financing is through a mezzanine loan to equity holders of the borrower (including situations where the equity is pledged to secure reimbursement obligations under letters of credit or other contingent obligations). Frequently these loans are secured by a pledge of equity interests in the senior mortgage debt borrower. Standard & Poor's will also analyze so called "second tier" mezzanine financing where the equity interests in the borrower are not directly pledged to the mezzanine lender, but the equity in an entity that directly or indirectly owns the equity of the borrower is pledged as collateral for such second tier mezzanine financing, and that entity does not have a substantial source of revenue to repay such second tier mezzanine financing other than the distributions it receives as an indirect owner of the borrower.

Identity of the Obligor

The obligor in a mezzanine financing arrangement should not be the borrower or any SPE constituent entity. For example, Standard & Poor's SPE limited partnership criteria provide that the limited partnership should have an SPE general partner. By definition, an SPE general partner may not incur additional indebtedness. Accordingly, in the case of a limited partnership, the obligor on the mezzanine financing may not be an SPE general partner, although a direct or indirect parent of the SPE general partner of the borrower may be an obligor if such constituent equity owner is not itself an SPE constituent entity. Similarly, an SPE member of a limited liability company borrower may not be an obligor of the mezzanine loan. An equity owner of the borrower that is an SPE constituent entity should also not pledge its interest to secure a

mezzanine loan, even if it is not an obligor, because a foreclosure of the pledge could result in the elimination of such SPE, impairing the bankruptcy-remote status of the mortgage borrower.

Limitation on Amount and Term

As with preferred equity, Standard & Poor's criteria provide for a limit on the amount of the mezzanine loan. The acceptable amount of the additional indebtedness will depend on the amount of the senior indebtedness and the value of the property. This policy is intended to assure Standard & Poor's that the existing equity will retain a meaningful continuing investment in the property. The term of the mezzanine financing should generally be co-terminus with the senior indebtedness.

Identity of the Mezzanine Lender

The mezzanine lender will be evaluated by Standard & Poor's. Since the mezzanine lender may succeed to the ownership of the equity interest of his borrower, Standard & Poor's will assess whether the initial mezzanine lender appears to be adequately capitalized and has substantial real estate investment experience, particularly in cases where the mortgage borrower is controlled by a strong sponsor. In general, Standard & Poor's expects the initial mezzanine lender to at least meet the standards of a qualified transferee.

Limitations on Transfer of the Mezzanine Loan and on Equity Interests Securing the Mezzanine Loan

There are two aspects to Standard & Poor's guidelines for transfers relating to mezzanine loans to equity holders. First, in general and subject to the exceptions set forth below, the mezzanine loan itself or interests therein, including participation interests, may not be transferred without a prior ratings confirmation. Second, in general and subject to the exceptions set forth below, if the mezzanine loan is secured by a pledge of equity (as is usually the case), the mezzanine lender's rights under the pledge may not be exercised without a prior ratings confirmation.

Notwithstanding the foregoing, Standard & Poor's criteria generally do not require the mezzanine lender to obtain ratings confirmations for transfers, in the aggregate, of 49% or less of the mezzanine lender's interest in the mezzanine loan. In addition, a ratings confirmation is not required if the transferee is a qualified transferee, and the transferee executes an assignment and assumption agreement whereby the transferee assumes all of the obligations of the mezzanine lender under the intercreditor agreement between the senior lender and the mezzanine lender. If a ratings confirmation is not required, prior notice of the transfer and an officer's certificate from an officer of the transferee certifying that the foregoing conditions have or will be satisfied by the date of the transfer should be provided to the senior debt holder and to Standard & Poor's prior to the transfer.

If the mezzanine loan is secured by a pledge of direct or indirect equity in the borrower, the mezzanine lender's rights under the pledge may be exercised without a ratings confirmation if:

- The new equity owner is a qualified transferee;
- The property is managed by a qualifying manager;
- The senior mortgage loan uses hard cash management, and adequate reserves for taxes, insurance, debt service, ground rents, capital repair and improvement expenses, leasing commissions, tenant improvement expenses, and operating expenses are being maintained or will be implemented within a reasonable time following the transfer if requested by the senior debt holder; and
- If the transfer will result in a change of control of the borrower (or any SPE constituent entity) either (A) a non-consolidation opinion satisfactory to Standard & Poor's, opining that the assets and liabilities of the senior borrower (or any SPE constituent entity) will not be consolidated with the assets and liabilities of the new equity owner in the event of the bankruptcy of the new equity owner, is delivered to Standard & Poor's within 10 business days of the date of the transfer of the equity, or (B) if the opinion described in clause (A) above was delivered at the time the senior mortgage debt was securitized, a letter from counsel originally issuing the opinion stating that the opinion is still valid and will not be affected by the transfer of the equity is delivered to Standard & Poor's within 10 business days of the date of the transfer.

If a ratings confirmation is not required, prior notice of the transfer and an officer's certificate from an officer of the new equity owner certifying that all conditions set forth above have been satisfied or will be satisfied prior to the transfer should be provided to the senior debt holder and Standard & Poor's prior to the transfer.

Control Rights
Generally speaking, because the mezzanine financing is in the nature of a loan to equity holders in the borrower, and not the borrower itself, the mezzanine lender will not have any direct control rights over the borrower. However, the mezzanine lender typically obtains indirect control rights over the borrower through various covenants and agreements made by the mezzanine borrower in the mezzanine loan documents. Indirect control rights relating to important issues, such as budget approvals and replacing the property manager, should be addressed in an intercreditor agreement in a manner that will not impede the continued effective operation of the property and the mortgage borrower's ability to perform its obligations under the senior mortgage loan.

Purchase Option and Cure Rights
The mezzanine lender may have the right to purchase the senior mortgage loan if the senior mortgage debt goes into default, for a price equal to the sum of the following:

- The outstanding principal amount of the senior mortgage loan and all accrued and unpaid interest thereon;
- The reimbursement of all principal and interest advances and servicing advances made by the servicer of the senior mortgage loan, together with interest thereon; and
- All other costs outstanding and attributable to the senior mortgage loan. The purchase option should terminate upon foreclosure of the senior mortgage loan (or acceptance of debt-in-lieu of foreclosure). The mezzanine lender may also have the right to cure within a commercially reasonable period of time (generally not more than five business days) monetary defaults and certain other defaults under the senior mortgage debt if the value of the property or the operations thereof are not impaired during such cure period. Acceptable cure periods are reflected in the form of the intercreditor agreement attached as Appendix VI.

Modifications of the Mortgage Loan and the Mezzanine Loan
The intercreditor agreement between the mezzanine lender and the senior mortgage lender should not contain significant restrictions on the ability of the servicer or special servicer to modify or restructure a defaulted senior mortgage loan after the mezzanine lender's cure period has expired. In addition, the intercreditor agreement should restrict the mezzanine lender from making significant modifications to the mezzanine loan if the mezzanine loan is not in default.

Subordination of the Mezzanine Loan
The intercreditor agreement between the mezzanine lender and the senior mortgage lender should contain customary subordination provisions. The mezzanine lender should not be permitted to accept any payments derived directly or indirectly from the collateral securing the senior mortgage loan during any period when the senior mortgage loan is in default and the mezzanine lender's cure period has expired.

Intercreditor Agreement
An intercreditor agreement between the senior lender and the mezzanine lender incorporating the criteria discussed here and other customary matters should be provided to Standard & Poor's prior to the time of the securitization of the senior mortgage debt, and should be transferred to the trustee in connection with the securitization of the senior mortgage debt. The intercreditor agreement should be binding on all successors and assigns of the mezzanine lender.

The intercreditor agreement should not be amended without a ratings confirmation. A form of intercreditor agreement that is acceptable to Standard & Poor's for most commercial mortgage transactions with mezzanine loans is attached as Appendix VI. (If possible, the issuer should provide a copy of the intercreditor agreement for the particular mezzanine loan blacklined against this form to expedite Standard & Poor's review of the intercreditor agreement). The failure to provide an acceptable intercreditor agreement may result in either Standard & Poor's issuing a lower rating of the senior mortgage debt, or the inability to issue a rating of the senior mortgage debt.

A/B Loans
The A/B structure is essentially a variation of a participation loan.* The A/B structure customarily involves a single mortgage that secures a single note in which the senior mortgage lender has granted a subordinate participation interest therein to a participant. The main distinction between the standard participation loan

and an A/B structure is in payment priority and loss allocation. Unlike the standard participation loan, where the payments to the participants are generally *pari passu*, the A/B structure is a senior/subordinated structure whereby the B interest acts as credit support for the A interest. Upon the occurrence of a monetary event of default or a material nonmonetary event of default, all collections or recoveries on the A/B loan are sequentially paid first to the holder of the A interest, until it has received its accrued interest and payment in full of the entire outstanding principal amount of the A interest, before any payments are made to the holder of the B interest. Any losses incurred with respect to the loan, on the other hand, are allocated first to the B interest, and second to the A interest.

*Standard & Poor's recognizes that in certain public securitizations a multiple note A/B structure is required because of certain securities laws. Standard & Poor's criteria generally provides for the rating of a multiple note A/B structure (wherein the B interest holder is issued a separate note(s)) in pool transactions; however, Standard & Poor's will consider adjustments to the applicable subordination levels to reflect the increased risk associated with multiple note A/B structures. A multiple note structure should nevertheless be structured with a single mortgage securing the multiple notes.

The criteria set forth below are intended, among other things, to reduce the risks of competing claims by the B interest holder in the event of a bankruptcy of the borrower. They are also intended to reduce interference with or disruption of the servicing and administration of the A interest. As discussed more fully in the section on subordinate mortgages below, the existence of a competing claim of the B interest holder could adversely affect the treatment of the A interest holder's claim. This risk is not present with a preferred equity or mezzanine loan structure because any claim of a preferred equity holder or mezzanine lender would not likely be characterized as a "claim" of a creditor of the mortgage borrower in the bankruptcy of the mortgage borrower. Since the borrower under a mezzanine loan is an equity owner of the mortgage borrower and not the mortgage borrower itself, the mezzanine lender would not be a creditor of the mortgage borrower in the bankruptcy of the mortgage borrower. In the case of preferred equity, the holder of preferred equity would be treated as an equity holder and not a creditor of the mortgage borrower in such bankruptcy proceedings. Thus, preferred equity and mezzanine loan structures present fewer concerns regarding the treatment of the senior lender's claim.

Standard & Poor's also recognizes that loan servicing is more complex in an A/B structure. In particular, the servicer's obligation to service the loan on behalf of the A and B interest holders creates a duty to the holder of the B interest that is not present in either the mezzanine loan or preferred equity structure. Due to greater risks of impairment to the senior interest in the event of a bankruptcy of the borrower or the holder of the B interest, and increased servicing obligations associated with A/B structures, the A/B structure is generally less favored by Standard & Poor's than mezzanine loan and preferred equity structures.

Transfer Restrictions
The B interest generally may not be transferred or subparticipated without a ratings confirmation, unless the following conditions are satisfied:

- The transferee is a qualified transferee;
- Prior to the transfer, the B interest holder delivers an officer's certificate from the transferee certifying that the transferee is a qualified transferee; and
- At the time of the transfer, the transferee delivers to the A interest holder a copy of an assignment and assumption agreement whereby the transferee assumes all of the obligations of the B interest under the participation agreement between the A interest holder and the B interest holder.

Transfers of up to 49% in the aggregate of the principal amount of the initial B holder's interest are generally permitted without a ratings confirmation or satisfaction of the conditions of the first two of the preceding clauses. Transfers of any interests to the borrower or any of its affiliates are generally not permitted under any circumstances if:

- The holder of the B interest has any cure rights, purchase, options, or significant approval rights with respect to the mortgage loan; or
- The A/B loan is structured with two notes as opposed to a senior/subordinate participation structure.

A purpose of the transfer restrictions is to reduce the likelihood of a bankruptcy by a B interest holder, which

could interfere with the servicing of the underlying mortgage loan. Specifically, it is possible that, in the event of a bankruptcy of a B interest holder, bankruptcy court approval would be required in order for the servicer to take certain actions with respect to the mortgage loan, including enforcement actions that could adversely impact the B interest or actions that require notice to, or the consent of, the B interest holder.

Identity of the B Interest Holder

The initial B interest holder will be evaluated by Standard & Poor's. In light of the bankruptcy risks discussed in the previous section, the initial B interest holder should be adequately capitalized. In addition, if the B interest holder is given the right to appoint an operating advisor or has significant approval rights with respect to the A/B loan, Standard & Poor's will assess the real estate investment experience of the initial B holder. In general, Standard & Poor's expects the initial B interest holder to meet the standards of a qualified transferee.

Limitation on Amount of the A/B Loan

Standard & Poor's criteria provide for a limit on the amount of the A/B loan. As discussed with respect to preferred equity and mezzanine loan financings, the principal amount of the A/B loan should not exceed an amount that would prevent the borrower and its equity owners from retaining a meaningful continuing investment in the property.

In addition, Standard & Poor's will analyze the amount of the total debt in light of the additional bankruptcy risks inherent in an A/B structure. Unlike a mezzanine loan structure, an A/B structure results in the additional debt being secured by the property, and the debt is a direct obligation of the borrower. In the event of a decline in property values, there is a greater likelihood that the total amount of the debt would exceed the value of the property. Furthermore, in the event of the borrower's bankruptcy, the entire loan could be under-secured. This may result in the loan (including the A interest) being treated less favorably in a bankruptcy plan of reorganization.

Administration and Servicing of the A/B Loan

Servicing and administration of the A/B loan should be handled exclusively by the master servicer and special servicer of the A interest. The participation or intercreditor agreement between the A interest holder and the B interest holder should expressly provide that:

- The A interest holder (and any servicer of the A Loan) is fully entitled to exercise or omit to exercise any rights that arise under the A/B loan (including any rights with respect to the B interest);
- The B interest holder has no rights against the borrower, including, without limitation, the right to file and/or prosecute a claim in any bankruptcy proceeding of the borrower, the right to vote a claim in any bankruptcy proceeding of the borrower, the right to appoint a receiver, or the right to take any enforcement action against the borrower;
- The B interest holder has no right to accelerate or cause the A interest holder to accelerate the A/B loan or exercise any other right under the A/B loan (including any rights with respect to the B interest);
- The B interest holder grants the A interest holder an irrevocable power of attorney, coupled with an interest, for the purpose of exercising any and all rights and taking any and all actions that the B interest holder has or may take with respect to any bankruptcy proceeding of the borrower, including, without limitation, the right to file and/or prosecute any claim, the right to vote to accept or reject a plan, the right to appoint a receiver and the right to seek to modify the automatic stay;
- After an event of default under the mortgage loan documents or a servicing transfer event under the pooling and servicing agreement or trust agreement that results in the A interest or the A/B loan becoming a specially serviced loan, the A interest holder has the right (without the consent of the B interest holder) to (A) modify or waive any of the terms of the mortgage loan documents, including any terms of the B interest; (B) consent to any act or failure to act by the borrower or any other party to the mortgage loan documents; (C) encumber additional collateral; (D) cross-default the mortgage with any other documents; (E) enter into a work-out relating to the A/B loan; and (F) take action to enforce or protect the interests of the A interest holder and/or the B interest holder, including without limitation, accelerating the A/B loan and foreclosing and/or selling the property; and
- The B interest holder irrevocably waives all rights it has with respect to the A/B loan or the B interest, except those rights specifically enumerated in the participation or intercreditor agreement.

The participation or intercreditor agreement typically provides that the servicers of the A interest will service the mortgage loan on behalf of both the A and B interest holders, as a collective whole, in accordance with the servicing standard set forth in the pooling and servicing agreement or trust agreement governing the A interest, during the period that the A interest is in the securitization trust. If the A interest is paid in full or is no longer in the securitization trust, the participation or intercreditor agreement should provide for an alternative servicing agreement to govern the servicing of the A/B loan.

The participation or intercreditor agreement should provide that the B interest holder will reimburse the securitization trust holding the A interest for its pro rata share of property protection or servicing advances and interest thereon and unreimbursed trust fund expenses, and that if the B interest holder fails to pay such amounts, the A interest holder can deduct such amounts, with interest, from payments otherwise distributable to the B interest holder. The participation or intercreditor agreement should also specifically provide that any waiver or forgiveness of amounts due or any modifications resulting in a reduction in the principal amount or interest rate of the A/B loan, the A interest or B interest shall be allocated first to the B interest up to the entire principal amount of its interest and accrued interest thereon.

Approval Rights of the B Interest Holder
For large loans with substantial B interests, the holder of the B interest may have the right to appoint an operating advisor with respect to the A/B loan and approve certain actions with respect to the A/B loan (subject to a servicing standard override), as well as replace the special servicer for the A/B loan (subject to receipt of a ratings confirmation), as long as appraisal reduction amounts and realized losses with respect to the entire A/B loan do not exceed 75% of the then outstanding principal amount of the B interest. (*For a description of how appraisal reduction amounts are calculated, see Section Two, Servicing Issues in Pool Transactions, Appraisal Reductions.*) In all other situations, the B interest holder should not have any rights to approve actions to be taken by the servicer or special servicer with respect to the A/B loan or direct the servicer or special servicer to take any action.

Purchase Option
The B interest holder may have the right to purchase the A interest if the A/B loan goes into default for a price equal to the sum of the following:

- The outstanding principal amount of the A interest and all accrued and unpaid interest thereon;
- The reimbursement of all advances made by the servicer of the A interest together with interest thereon; and
- All other costs outstanding and attributable to the A interest. The purchase option should not continue after the date the mortgage securing the A/B Loan is foreclosed or the A interest holder accepts a deed in lieu of foreclosure.

Characterization of the B Interest
The participation agreement between the A interest holder and the B interest holder should specifically state the following:

- That the A/B loan constitutes a single loan and the B interest holder is purchasing a participation in the A/B loan,
- That the A/B loan is a single claim against the borrower within the meaning of the bankruptcy code, and
- That the B interest holder is not a creditor of the borrower.

In addition, to the extent feasible, the A/B loan should be structured with a single mortgage securing a single note, rather than a structure in which one note is issued to the A interest holder and another note is issued to the B interest holder. This should further reduce the likelihood that the B interest holder will have independent standing in a bankruptcy of the borrower because the holder of a junior participation should be treated as merely having contractual rights against the holder of the A interest and not as a direct creditor of the borrower.*

*In a bankruptcy of the borrower, the subordinate mortgage holder would have a separate claim against the borrower. If the subordinate mortgage holder and the borrower were able to agree on a plan of reorganization, the holder of the subordinate mortgage would be entitled to vote its claim in favor of such

plan. This could result in a plan of reorganization being "crammed-down" on the senior mortgage holder (i.e., a bankruptcy court might order a modification of the senior mortgage debt over the objection of the holder of the senior mortgage). A "cram-down" plan would likely be adverse to the senior mortgage debt, and could result in a bifurcation and reduction of the principal balance of the senior mortgage debt, an extension of the maturity date, and the reduction and/or forgiveness of interest. This may cause a misalignment between the terms of the certificates and the terms of the restructured senior mortgage debt resulting in interest shortfalls or realized losses of principal or interest to the holders of the certificates or delayed payments on the certificates. First, all classes of certificates may be impacted with respect to the timing of their receipt of principal if the loan term is extended. Second, a reduction of the borrower's payment obligations will reduce the amount available to distribute to certificate-holders. Finally, while the most senior classes may ultimately be paid in full, the funds available to other classes may be adversely affected by the servicer's right to repayment (from monies otherwise payable to certificate-holders) for (i) interest advances made during the borrower's bankruptcy, when the borrower may not be required to pay any interest, (ii) interest advances made to the most senior classes, which may exceed the debt service payment received in a particular month on the restructured loan, and (iii) interest on such advances.

Cure Rights

The B interest holder may have the right to cure, within a commercially reasonable period of time (generally not more than five business days), scheduled debt service payments or other defaults that can be cured with the payment of money. The B interest holder generally should not have cure rights for nonmonetary defaults (aside from the right to cure within the borrower cure period).

Unlike the situation involving a mezzanine lender, which may be able to quickly gain control over the mortgage borrower by foreclosing its pledge on the equity interests in the mortgage borrower, the B interest holder generally will not be in a position to control the mortgage borrower and cure a nonmonetary default. In addition, nonmonetary cure rights are less important in the context of an A/B loan because the servicer of the A/B loan generally must act in accordance with the servicing standard with respect to both the A interest and the B interest (as a collective whole). Further, the B interest holder often has the right to appoint an operating advisor with respect to the A/B loan.

Principal and Interest Advances on the B Interest

If the B interest is held outside the securitization trust containing the A interest, servicer advances of delinquent scheduled debt service payments on the B interest are generally not permitted. However, in situations where the B interest is being separately securitized on a stand-alone basis in a transaction rated by Standard & Poor's, principal and interest advancing may be necessary to provide the liquidity to support the ratings on securities backed by the B interest. In these situations principal and interest advancing on the B interest (based on the amount of the scheduled payments that would have been due to the B interest if the A/B loan were not in a sequential pay period) may be permitted if repayment of advances and interest thereon is limited to collections on the A/B loan that are allocable to the B interest pursuant to the terms of intercreditor agreement (i.e., recovery of principal and interest advances on the B interest is fully subordinate to collections or recoveries on the A interest, as well as to repayment of property-protective servicing advances on the A/B loan and interest thereon and repayment of all principal and interest advances on the A interest and interest thereon.

Reverting to Pro Rata Distributions After an Event of Default

If distributions to the holders of the A interest and the B interest have shifted to sequential pay from pro rata pay in connection with a monetary event of default or a material nonmonetary event of default on the A/B loan, distributions may revert to pro rata pay if the event of default is subsequently cured or waived by the master servicer or special servicer of the A interest. However, certain adjustments to the pro rata distribution priorities may be necessary to prevent payment shortfalls on the A interest because of special servicing compensation and because of possible interest rate mismatches between the interest rate on the A/B loan and the weighted average interest rates on the A and B interests resulting from more rapid principal paydowns on the A interest during the sequential pay period. Therefore, the pro rata pay distribution priorities should provide that the A interest holder receives accrued and unpaid interest and its pro rata share of any principal payments before the B interest holder receives its interest and its pro rata share of principal.

Participation or Intercreditor Agreement

A participation or intercreditor agreement between the A interest holder and the B interest holder containing the limitations discussed above and other customary matters should be provided to Standard & Poor's prior

to the securitization of the A interest and should be transferred to the trustee in connection with the securitization of the A interest. The participation or intercreditor agreement should be binding on all successors and assigns of the B interest. The participation agreement should not be amended without a ratings confirmation. The failure to provide an acceptable participation agreement may result in Standard & Poor's issuing a lower rating of the senior mortgage debt, or in an inability to issue a rating of the senior mortgage debt.

Subordinate Mortgages

A subordinate mortgage is a separate loan to the borrower that is secured by a lien on a property that is subordinate in priority to the first mortgage lien. All forms of additional debt generally increase the credit risks associated with a transaction, including:

- Risks related to the decreased amount of the meaningful equity interests held by the sponsor,
- Risks related to the additional debt service required to pay the subordinated debt,
- Risks that necessary maintenance of the property will be delayed to allow the borrower to pay off the subordinated debt,
- Risks that the borrower will have a greater incentive to repay the subordinated debt first, and
- Increased refinancing risks.

The existence of an additional secured creditor, however, even if the subordinate mortgage is subject to a subordination and standstill agreement and adequate reserves are required and maintained, introduces other risks. These risks would be less problematic if the additional financing were in the form of mezzanine debt, preferred equity, or an A/B loan. In a bankruptcy proceeding of the borrower, the subordinate debt holder could assert a claim that is adverse to the interests of the senior debt holder. This could negatively impact the treatment of the senior debt holder's claim.* In contrast, as discussed above, any claim of a preferred equity holder or mezzanine lender would not constitute a "claim" in the bankruptcy of the senior mortgage borrower.

*Standard & Poor's recognizes that some bankruptcy courts may not enforce certain waivers of the subordinate mortgage holder's rights, including granting the senior mortgage holder the right to vote the subordinate mortgage holder's claim in a bankruptcy of the borrower. See, e.g., in re 203 North LaSalle Street Partnership, 246 B.R. 325 (Bankr. N.D. Ill. March 10, 2000) (holding a subordinate creditor's granting of its right to vote its claims in a bankruptcy proceeding of the borrower to a senior creditor to be unenforceable).

In addition, any claim under an A/B loan properly structured as a senior/subordinate participation would likely be characterized as a single claim controlled by the A interest holder. Moreover, if the additional secured creditor files for bankruptcy or has been placed in involuntary receivership, enforcement of remedies under the senior mortgage debt could be delayed by the automatic stay. Finally, the law with respect to the enforceability of certain provisions typically found in subordination and standstill agreements, including waivers of voting rights on a bankruptcy plan of reorganization, is uncertain and could lead to more adverse treatment of the senior mortgage debt in a bankruptcy of the borrower.

Therefore, depending on the circumstances of the transaction, Standard & Poor's may not be able to rate senior mortgage debt in a stand-alone property-specific transaction if the collateral is also subject to a subordinate mortgage. Furthermore, if a subordinate mortgage structure is used in a pool transaction it is likely to have an adverse effect on the capital structure.

Stand-Still and Subordination Agreement

A customary stand-still and subordination agreement between the first mortgage holder and the subordinate mortgage holder should be provided to Standard & Poor's prior to the securitization of the first mortgage debt. In addition, the stand-still and subordination agreement should be transferred to the trustee in connection with the securitization of the first mortgage debt. The stand-still and subordination agreement should also provide that the subordinate mortgage may not be transferred without a ratings confirmation unless:

- The transferee is a qualified transferee,

- Prior to the transfer, the holder of the subordinate mortgage delivers to the holder of the senior mortgage a certificate from the transferee certifying that the transferee is a qualified transferee, and
- At the time of the transfer, the transferee delivers to the holder of the senior mortgage loan a copy of an assignment and assumption agreement whereby the transferee assumes all obligations of the subordinate mortgage holder under the stand-still and subordination agreement.

The stand-still and subordination agreement should be binding on all successors and assigns of the subordinate mortgage. Further, the agreement should not be amended without a ratings confirmation.

Environmental Criteria

General
Environmental risks can have serious and material effects on the credit quality of rated transactions. Accordingly, Standard & Poor's evaluates the effect of environmental issues on all real property transactions. Given the technical nature of environmental issues for certain transactions, Standard & Poor's may use outside legal and technical environmental professionals to advise and assist it in this effort.

Standard & Poor's requests that all issuers provide environmental site assessment reports for each real estate property. Standard & Poor's has continued to evaluate the quality of environmental information provided in the assessment reports prepared in response to its Environmental Site Assessment Requirements Protocol, and the need for standardization of these reports. In addition, Standard & Poor's continues to review whether it would be appropriate to use reports issued in accordance with the American Society of Testing Materials' Standard E 1527-94*,* as amended (the ASTM ESA).

Standard & Poor's recognizes that many issuers rely on the ASTM ESA in their own due diligence reviews. Given the apparent widespread use of the ASTM ESA, and to ensure consistency in the format and scope of assessments submitted to Standard & Poor's, Standard & Poor's has adopted an enhanced ASTM ESA, titled the "Standard & Poor's Plus Protocol," for environmental site assessments. There are environmental issues not addressed by the standard ASTM ESA that are relevant to Standard & Poor's evaluation of real property, including asbestos, lead-based paint, lead in drinking water, mold, radon, wetlands, and in some instances, compliance status. Standard & Poor's will continue to request that these issues be addressed because environmental issues can affect the marketability or value of the collateral. Environmental information submitted to Standard & Poor's must address these concerns.

Standard & Poor's will continue to review developments in the environmental area to determine whether further revisions to this protocol are necessary.

Basic Standards
Although assessments need not be limited to items specified in the Standard & Poor's Plus Protocol, they should include all information specified within the protocol, as described below. To meet the requirements of the Standard & Poor's Plus Protocol, environmental site assessments, at a minimum, should satisfy the requirements in the ASTM Standard E 1527-97. Assessments should also include within the body of the report, or by separate report or addendum, an expanded evaluation of the following matters:

- ***Surrounding area.*** The historical uses of properties in the surrounding area should be reviewed.
- ***Hydrogeology.*** The hydrogeology of the property, including any well records available for the subject and adjacent properties, should be reviewed.
- ***Underground storage tanks.*** The condition of any underground storage tanks located on the property should be described. If the underground storage tanks are in operation, the assessment should evaluate the integrity of the tanks, including a review of any recent tightness or soil or groundwater testing results, and note the status of the tank registration. If underground storage tanks are no longer in operation, the assessment should describe how these tanks were closed (whether they were removed or abandoned in place), whether the closure was under the supervision of a government agency, and whether a clean closure letter or no further action letter was provided by any government agency or the consultant conducting the closure.
- ***Aboveground storage tanks.*** The condition of any aboveground storage tanks located on the property and the area surrounding the tanks or any former tanks should be described. In addition,

the status of tank registrations should be noted.

- ***PCB items.*** The ownership and condition of any potential PCBs or electrical equipment containing PCBs on the property should be described. The assessment also should identify whether there is any evidence of leakage on or around the equipment and provide any information regarding PCB concentrations, including test results if available.
- ***Records.*** A regulatory records review should be performed and the results should be included in the assessment or by addendum. The ASTM ESA provision for waiver of this requirement in case of time constraints is not acceptable to Standard & Poor's.
- ***Environmental database search.*** If the environmental database search identifies the existence of an off-site environmental condition that could impact the condition, value, or use of the subject property, then the assessment should include reasonably ascertainable information regarding the identity of potentially responsible party(ies) and the scope and status of any investigation, remediation, or other response concerning this off-site environmental condition.

Additional Standards

The Standard & Poor's Plus assessment should also include in the body of the report, or by separate report or addendum the following matters that are not addressed by the ASTM ESA:

- ***Wetlands.*** Any observations or other evidence of potential wetlands should be noted and, if determined necessary by the consultant, confirmed through review of relevant maps and surveys. If construction is contemplated for areas of the property that may be wetlands, then the consultant should determine whether a formal wetlands delineation is necessary or appropriate given the proposed plans for construction.
- ***Lead-based paint.*** The potential for the presence of lead-based paint should be discussed in light of the age of the building, dates of renovation, and the current and proposed uses of the building. The condition and quantity of suspected lead-based paint should be described as well as whether the property has or needs an operation and maintenance plan to address lead-based paint issues.
- ***Lead in drinking water.*** The potential for lead in drinking water should be discussed in light of the age of the building and associated piping and dates of any renovation. All test results should be provided.
- ***Asbestos.*** The potential for friable asbestos-containing materials should be discussed in light of the age of the building, dates of renovation, and other relevant information. The condition and quantity of the potential asbestos-containing material should be described as well as whether the property has or needs an operation and maintenance plan to address the asbestos-containing material. If there are significant quantities of potential asbestos-containing material that are friable, the report should include a detailed estimate of the cost to remove all friable asbestos-containing material. Standard & Poor's may request such an estimate for removal of all potential friable asbestos-containing material. The estimate may be based on a separate asbestos survey, including samples.
- ***Radon.*** The potential for radon to exist within any facility on the property at levels in excess of four picocuries should be discussed, given the construction and use of the facility.
- ***Ozone-depleting substances.*** The potential need for renovation or replacement of any refrigeration or air conditioning system or substance should be discussed in light of the potential for the existing system to use ozone-depleting substances such as freon.
- ***Compliance assessment.*** The consultant should generally assess, based on experience, interviews, and reasonably available information, whether any facility located on the property complies with applicable permitting and other requirements of environmental laws, rules, and regulations, including those relating to air and water discharges as well as waste handling and disposal practices. A more comprehensive compliance audit may be requested, depending on the use of the facility and the nature of the transaction.
- ***Test results.*** The consultant should discuss any testing or sampling results reviewed in connection with the assessment describing the circumstances of, and the methodology used in, the sampling and testing.
- ***Mold***. The potential for mold contamination that could pose a health or safety risk should be discussed in light of the location and condition of the building and the nature of the building occupants.

Environmental Insurance

Over the last several years, the emergence of several forms of environmental insurance has attracted

industry interest. As an increasing number of commercial real estate loans are pooled and securitized, borrowers and lenders are seeking new ways to mitigate the risks of liabilities arising from environmental contamination at a property site. Some industry participants also point to the incompleteness of Phase I and Phase II Environmental Site Assessments and the conflicting interpretations of these reports as the reasons behind the need for this additional form of protection. These policies, known variously as secured creditor insurance, environmental collateral protection insurance, or collateral impairment and risk liability insurance, offer varying degrees of protection to lenders and borrowers from these risks.

Standard & Poor's believes that environmental insurance can play a role in fostering the growth of real estate securitization. Therefore, Standard & Poor's will assess environmental insurance that is provided in conjunction with Phase I and/or Phase II Environmental Site Assessments. For mortgage loans, which do not exceed the lesser of $20 million or five percent (5%) of the pool balance, Standard and Poor's will accept a secured creditor insurance policy, which meets its environmental insurance criteria in lieu of a Phase I Environmental Site Assessment. If an environmental insurance policy is provided, Standard & Poor's will request that it be accompanied by a detailed summary of all relevant provisions, including:

- Key definitions;
- Identity of the insured party;
- Properties covered;
- Potential liabilities and claims covered;
- Type of coverage provided;
- Amount of coverage provided for each potential liability and claim, including deductibles and the limits (individually and in the aggregate);
- Any exclusions/or restrictions and limitations;
- Term of the coverage;
- Conditions regarding property transfers; and
- Conditions under which the policy can be renewed, changed, or canceled.

(*For a further discussion, see Appendix VII, The Credit Impact of Secured Creditor Environmental Insurance on CMBS Transactions.)*

Rating Test for Environmental Insurers
Environmental insurance providers should be rated not less than one rating category below the highest rating on a transaction, but in no event should they have a rating below 'BBB'.

If the insurer meets the rating test and the insurance policy fully protects a property against expected environmental risk, then Standard & Poor's may expedite its analysis of a property's environmental conditions.

Environmental Site Assessment Executive Summary
The environmental site assessment report should be accompanied by an executive summary that identifies, by reference to the underlying report and addendum, any recognized environmental conditions that are defined in the ASTM ESA Protocol, or other environmental issues identified under the additions to the ASTM ESA outlined earlier. In addition, the executive summary should contain the consultant's opinion of the potential significance and impact of these conditions. The executive summary also should confirm that the report has been prepared in accordance with, and meets or exceeds, the Standard & Poor's Plus standards.

The executive summary should include recommendations, if any, for further investigation and/or remediation necessary in the consultant's professional judgment to reasonably assess or respond to these environmental conditions. The consultant should provide an estimate of the cost of undertaking such investigation and/or remediation and the time necessary to complete the work. Standard & Poor's may request that the executive summary also contain an estimate of the cost of responding to significant environmental conditions, such as suspect friable asbestos-containing material, suspect lead-based paint in poor condition, underground storage tanks, and electrical equipment containing PCBs unless sampling or testing has been performed that would allow the consultant to eliminate or more narrowly define the areas of concern. For multifamily dwellings or for facilities with planned substantial renovations, this estimate should be provided with respect to the costs of responding to all suspect lead-based paint notwithstanding the

condition.

All cost estimates should be adequately supported. If the consultant is unable to provide a cost estimate relating to any environmental condition, then the executive summary should explain why a cost estimate could not be developed, and identify any additional information that would be necessary for the consultant to develop this cost estimate.

The executive summary should affirmatively state that the underlying environmental site assessment report and addendum have included an evaluation of all items specified in Standard & Poor's Plus or identify those items not evaluated and explain why the evaluation was not possible or not relevant. Finally, the consultant should confirm that Standard & Poor's has a right to rely on the assessment and addendum.

The executive summary should be accompanied by a statement identifying the environmental consultant's qualifications to perform the Standard & Poor's Plus assessment. The consultant should also certify that it is an independent contractor, not an employee of either the issuer or borrower, and that its compensation was not based on the findings or recommendations made in the assessment or on the closing of any business transaction.

Standard & Poor's expects that for identified or potential conditions where testing or sampling is conducted after the initial assessment, the results of the testing and sampling would be provided to confirm or rebut the existence of the condition or to delineate the scope of any required response. This information should include amended recommendations, including cost estimates, for further action on the property.

Eligible Institutions and Eligible Investments in Property-Specific and Large Loan Transactions

Often in stand-alone property-specific and large loan transactions, the transaction documents will provide for deposit accounts to be established at the closing of a transaction to serve as accounts in which payments on the mortgage loans are deposited and reserve funds are to be held. (*See Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions - Cash Management.*) The accounts in which the reserves and payments are held often contain significant sums held over a substantial period of time.

Standard & Poor's is concerned that these funds be maintained with a creditworthy institution, thereby avoiding the potential inability to access such funds in the event of an insolvency of the institution. Accordingly, these funds should be deposited in institutions that meet particular criteria ("eligible institutions") or invested in investments issued by creditworthy issuers and for periods of time sufficient to insure the availability of the funds as and when needed.

In addition, Standard & Poor's criteria for eligible institutions and eligible investments is intended to isolate a transaction's payments, cash proceeds, and distributions from the insolvency of each entity that is a party to the transaction. Standard & Poor's relies on its legal and structured finance criteria to ensure that a transaction's cash flows are protected at every link in the cash flow chain.

Eligible Accounts and Institutions

The cash collateral account, any subaccount thereof, any other reserve accounts, and all other accounts maintained by the master servicer, special servicer, or trustee in a stand-alone property-specific or large loan transaction must be "eligible accounts", which are either:

- An account or accounts maintained with a federal or state-chartered depository institution or trust company that complies with the definition of eligible institution (as discussed below); or
- A segregated trust account or accounts maintained with the corporate trust department of a federal depository institution or state-chartered depository institution subject to regulations regarding fiduciary funds on deposit similar to Title 12 of the Code of Federal Regulations Section 9.10(b), which, in either case, has corporate trust powers, acting in its fiduciary capacity.

In stand-alone property-specific or large loan transactions containing 'AAA' rated tranches, "eligible institutions" means institutions with the following:

- Commercial paper, short-term debt obligations, or other short-term deposits are rated at least 'A-1' by Standard & Poor's, if the deposits are to be held in the account for 30 days or less; or
- Long-term unsecured debt obligations are rated at least 'A-' by Standard & Poor's, if the deposits are to be held in the account more than 30 days.

If an account is held by an eligible institution, following a downgrade, withdrawal, qualification, or suspension of such institution's rating, each account must promptly (and in any case within not more than 30 calendar days) be moved to a qualifying institution or to one or more segregated trust accounts in the trust department of such institution, if permitted. No eligible account should be evidenced by a certificate of deposit, passbook, or other instrument.

Each eligible account should be a separate and identifiable account from all other funds held by the holding institution. All eligible accounts must be established and maintained in the name of the trustee, bearing a designation clearly indicating that the funds deposited therein are held for the benefit of the holders of the rated securities. The trustee should possess all right, title, and interest in all funds on deposit from time to time in the account and in all its proceeds. The account must be under the sole dominion and control of the trustee for the benefit of the holders of the rated securities, and should contain only funds held for their benefit. The trustee should agree that it shall have no right of setoff or banker's lien against, and no right to otherwise deduct from, any funds held in the account for any amount owed it by the trust, any securityholder, or any credit support provider.

Please contact Standard & Poor's regarding criteria for rating categories below 'AAA'.

Eligible Investments

Funds in eligible accounts may only be invested in eligible investments. The rationale for limiting investments in eligible accounts is to ensure that the issuers of these investments are creditworthy and funds will be available as and when needed. (*For Standard & Poor's criteria on eligible investments and a list of eligible investments, see Appendix II, Eligible Investment Criteria for 'AAA' Structured Transactions.*)

Please contact Standard & Poor's regarding criteria for rating categories below 'AAA'.

Guarantees in Property-Specific Transactions

Most stand-alone property-specific and large loan transactions that Standard & Poor's rates are nonrecourse transactions without personal liability or guarantees. With some limited exceptions, such as fraud, voluntary bankruptcy, theft of rents, waste, etc., recourse is generally limited to the mortgaged property and its rent stream. However, occasionally, a rated entity will guarantee some portion of the debt. For example, a rated company that is a direct or indirect equity owner in a borrower may be willing to guarantee some portion of the borrower's obligations in order to facilitate financing for the borrower. If Standard & Poor's relies on the guarantee in its rating of the transaction, the guarantee should comport with Standard & Poor's guarantee criteria. *(For Standard & Poor's guarantee criteria, see Section Three, Guarantees in Credit Tenant Loan Transactions.)*

Representations and Warranties In Property-Specific and Large Loan Transactions

Representations, warranties, and covenants are an integral consideration in a property-specific transaction. In issuing a rating, Standard & Poor's relies on representations and warranties made by the underlying borrower, issuer, trustee, servicer, and other participants in the transaction.

Depending upon the particular transaction, the nature and scope of various representations, warranties, and covenants will vary. Accordingly, Standard & Poor's will review them on a case-by-case basis. The list below is published to provide guidelines to those structuring stand-alone property-specific and large loan transactions. Standard & Poor's will review those representations and warranties proposed (which may be more or less extensive than the list set forth below) and evaluate whether the proposed representations and warranties are sufficient for, and consistent with, the rating on the transactions.

To the extent a party must make an exception or qualification to a representation and warranty, the exceptions and qualifications should be provided to Standard & Poor's at least five business days prior to the date preliminary ratings are due to allow Standard & Poor's sufficient time to evaluate the impact of such qualification or exception on Standard & Poor's analysis of the transaction. Each exception to a

representation and warranty should be set forth on a schedule or exhibit attached to the relevant transaction document and include proper reference to the excepted representation, the respective loan, and sufficient detail of the exception and relevant factors mitigating that exception.

Representations and Warranties Common to Mortgage Loan Sellers, Depositors, Borrowers, Tenants, Trustees, and Servicers
The mortgage loan seller, the depositor, the borrower, each servicer, a tenant in a credit lease transaction, and the trustee typically make the following representations and warranties:

- ***Due organization, valid existence.*** Each is duly organized, validly existing, in good standing, and possesses all licenses and authorizations necessary to carry on its business.
- ***Power and authority.*** Each has full power and authority to carry on its business as now being conducted and to enter into the transaction documents and the transactions contemplated thereby.
- ***Execution and delivery.*** The transaction documents have been duly executed and delivered by such party.
- ***Enforceability.*** The transaction documents constitute valid, legal, binding, and enforceable obligations of such party (subject to bankruptcy, insolvency or creditor rights laws generally, and principles of equity generally) without offset, defense, or counterclaim.
- ***No conflict.*** The execution, delivery, and performance of the transaction documents by such party will not cause or constitute, including due notice or lapse of time or both, a default under or conflict with organizational documents or other agreements or otherwise materially or adversely affect performance of duties.
- ***No violation of laws.*** The execution, delivery, and performance of the transaction documents by such entity will not violate any law, regulation, order, or decree of any governmental authority.
- ***Consents obtained.*** All consents, approvals, authorizations, orders, or filings of or with any court or governmental agency or body, if any, required for the execution, delivery, and performance of the transaction documents by such entity have been obtained or made.
- ***No litigation.*** There is no pending action, suit, or proceeding, arbitration or governmental investigation against such entity, an adverse outcome of which materially affects performance under the transaction documents.

Mortgage Loan Seller Specific Representations and Warranties
The mortgage loan seller typically makes the additional representations and warranties set forth below. If a loan in a stand-alone property-specific transaction has been held for a significant period of time before being securitized, it may be appropriate to rely more on representations from the mortgage loan seller rather than from a borrower. Further, the mortgage loan seller may be asked to make additional representations and warranties similar to those made in pool transactions. Each transaction should provide the following:

- That all representations and warranties are made for the benefit of, and will inure to, the trustee for the benefit of the holders of the rated securities; and
- That all representations and warranties survive the sale of the mortgage loans and continue in full force and effect, notwithstanding any restrictive or qualified endorsement in any related document, and notwithstanding subsequent termination of the related documents.

For large loans included in pool transactions, the mortgage loan seller will customarily make the representations and warranties similar to those made in a pool transaction. (*See Section Two, Pool Transactions- Representations and Warranties in Pool Transactions*). The following is a list of representations and warranties that are typically made by the mortgage loan seller including, with respect to certain representations and warranties, samples of language and explanations for illustrative purposes:

- ***Title.*** The mortgage loan seller has good title to, and is the sole owner and holder of the mortgage loan. It is generally acceptable to limit the timing on this representation and warranty with "Immediately prior to the transfer of the mortgage loans to the transferee".
- ***No liens.*** The mortgage loan is transferred to the trust free and clear of any and all liens, pledges, charges, security interests, or other encumbrances.
- ***No participations.*** The mortgage loan is not a participation interest in a mortgage loan, but is a whole

loan.

- ***No modifications.*** Except by a written instrument that has been delivered to the transferee or its designee as part of the mortgage file, there has been no waiver, modification, alteration, satisfaction, cancellation, subordination, or any instrument executed that would cause or result in the foregoing, and there has been no release of the mortgaged property or borrower or the lien on the mortgaged property, in whole or part, or the execution of any instrument that would cause or result in the foregoing.
- ***Past due payments.*** No scheduled payment under any note or mortgage is more than 30 days past due (as of the cutoff date).
- ***No default.*** No monetary default, breach, violation or event of acceleration, and, to mortgage loan seller's knowledge, no non-monetary default, breach, violation, or event of acceleration, and no event that, with the passage of time or with notice or expiration of any grace or cure period, would constitute any of the foregoing exists under the loan documents, no waiver of any of the foregoing exists, and no person other than the holder of the note may declare any of the foregoing.
- ***Servicing and collection.*** The origination, servicing, and collection practices used by the mortgage loan seller or any prior holder of the note have been in all respects legal, proper, and prudent and have met customary industry standards.

The following is sample language with a knowledge qualifier with respect to any predecessor or prior servicer of the mortgage loan (there should not be a knowledge qualifier for mortgage loan seller's origination, servicing, and collection practices). For example:

The origination (or acquisition, as the case may be), servicing and collection practices used by the mortgage loan seller or, to the knowledge of the mortgage loan seller, any predecessor or prior servicer with respect to the mortgage loan, have been in all respects legal, proper, and prudent and in accordance with customary commercial mortgage lending standards.

- ***Qualification to do business.*** To the extent required under applicable law, each holder of the note was authorized to transact and do business in the jurisdiction where the mortgaged property is located while each was holder. Typically, this representation will include an exception where failure to be qualified to do business does not adversely affect the enforceability of the mortgage loan.
- ***Valid assignment.*** The assignment of mortgage and related assignment of the assignment of leases executed and delivered in favor of the trustee, is in recordable form to validly and effectively convey the assignor's interest therein and constitutes a legal, valid, binding and, subject to bankruptcy, insolvency, or creditor rights laws generally, and principles of equity generally, enforceable assignment of such mortgage and related assignment of leases from the assignor to the trustee.
- ***Real estate mortgage investment conduit (REMIC) rules.*** The mortgage loan and mortgage collateral comply in all respects with REMIC rules and regulations (if applicable).

The following is sample language:

Each mortgage loan constitutes a "qualified mortgage" within the meaning of Section 860G(a)(3) of the Internal Revenue Code (but without regard to the rule in Treasury Regulation Section 1.860G-2(f)(2) that treats a defective obligation as a qualified mortgage or any substantially similar successor provision) and all prepayment premiums and yield maintenance charges constitute "customary prepayment penalties" within the meaning of Treasury Regulation Section 1.860G-1(b)(2).

The mortgage loan is directly secured by a mortgage on a commercial property or multifamily residential property, and (2) the fair market value of such real property, as evidenced by an appraisal satisfying the requirements of FIRREA conducted within 12 months of the origination of the mortgage loan, was at least equal to 80% of the principal amount of the mortgage loan (a) at origination (or if the mortgage loan has been modified in a manner that constituted a deemed exchange under Section 1001 of the Internal Revenue Code at a time when the mortgage loan was not in default or default with respect thereto was not reasonably foreseeable, the date of the last such modification) or (b) at the date hereof; provided that the fair market value of the real property must first be reduced by (A) the amount of any lien on the real property interest that is senior to the mortgage loan and (B) a proportionate amount of any lien that is in parity with the mortgage loan (unless such other lien secures a mortgage loan that is cross-collateralized with such mortgage loan, in which event the computation described in (a) and (b) shall be made on an aggregated basis).

- ***Solvent.*** Mortgage loan seller is solvent and the sale of mortgage loans will not cause the mortgage loan seller to become insolvent.
- ***No fraud.*** The sale of the mortgage loans is not intended by the mortgage loan seller to hinder, delay, or defraud any of its creditors.
- ***Fair consideration.*** The consideration received by the mortgage loan seller upon the sale of the mortgage loans owned by it constitutes fair consideration and reasonably equivalent value for such mortgage loans.

Trustee-Specific Representations and Warranties
The trustee typically makes the following additional representation and warranty:

- ***Errors and omissions insurance.*** The trustee maintains errors and omissions insurance coverage for all persons involved with the performance of its duties under the transaction documents.

Servicer-Specific Representations and Warranties
Each servicer typically makes the following additional representations and warranties:

- ***Errors and omissions insurance.*** The servicer maintains errors and omissions insurance coverage for all persons involved with the performance of its duties under the transaction documents.
- ***Reasonable servicing fee.*** The servicer acknowledges and agrees that the servicing fee represents reasonable compensation and that the entire servicing fee shall be treated for accounting and tax purposes as compensation for the servicing and administration of the mortgage loans.
- ***Subservicing agreements.*** The servicer has examined each existing, and will examine each future, subservicing agreement and is familiar with the terms thereof and the terms of such agreements will not be materially inconsistent with the provisions of the transaction documents.

Borrower-Specific Representations and Warranties
The following is a list of representations and warranties that are typically made by the borrower including, with respect to certain representations and warranties, samples of language and explanations for illustrative purposes:

- ***No litigation.*** There are no pending actions, suits or proceedings, arbitrations, or governmental investigations against the mortgaged property, an adverse outcome of which would materially affect the borrower's performance under the transaction documents or the use, value, or operation of the property.
- ***Title.*** The borrower has good and marketable fee simple title to the mortgaged property, and good title to the personal property, subject to no liens, charges, or encumbrances other than the Permitted Exceptions.
- ***Permitted exceptions.*** The permitted exceptions do not and will not materially and adversely affect (1) the ability of the borrower to pay in full the principal and interest on the mortgage note in a timely manner or (2) the use of the mortgaged property for the use currently being made thereof, the operation of the mortgaged property as currently being operated or the value of the mortgaged property. (*See Property-Specific and large Loan Transactions - Due Diligence in Property-Specific and Large Loan Transactions - Title Issues - Permitted Exceptions.*)
- ***First lien.*** Upon the execution by the borrower and the recording of the mortgage, and upon the execution and filing of UCC-1 financing statements or amendments, the trustee will have a valid and enforceable first lien on the mortgaged property and a valid and enforceable security interest in the personal property subject to no liens, charges, or encumbrances other than the permitted exceptions.
- ***ERISA.*** The borrower (i) has no knowledge of any material liability that has been incurred or is expected to be incurred by the borrower that is or remains unsatisfied for any taxes or penalties with respect to any "employee benefit plan," within the meaning of Section 3(3) of ERISA, or any "plan," within the meaning of Section 4975(e)(1) of the Internal Revenue Code or any other benefit plan (other than a multiemployer plan) maintained, contributed to, or required to be contributed to by the borrower or by any entity that is under common control with the borrower within the meaning of ERISA Section 4001(a)(14) (a "Plan") or any plan that would be a Plan but for the fact that it is a multiemployer plan within the meaning of ERISA Section 3 (37); and (ii) has made and shall continue to make when due all required contributions to all such Plans, if any. Each such Plan has been and will be administered in compliance with its terms and the applicable provisions of ERISA, the Internal Revenue Code, and any other applicable federal or state law; and no action shall be taken or fail to be taken that would result in the disqualification or loss of tax-exempt status of any such Plan intended to be qualified and/or tax-exempt.

- ***Contingent liabilities.*** The borrower has no known material contingent liabilities.
- ***No other obligations.*** The borrower has no material financial obligation under any indenture, mortgage, deed of trust, loan agreement, or other agreement or instrument to which the borrower is a party or by which the borrower or the mortgaged property is otherwise bound, other than obligations incurred in the ordinary course of the operation of the mortgaged property and other than obligations under the mortgage and the other transaction documents.
- ***No other debt.*** The borrower has not borrowed or received other debt financing that has not been heretofore repaid in full.
- ***Fraudulent conveyance.*** The borrower (1) has not entered into the transaction or any transaction document with the actual intent to hinder, delay, or defraud any creditor and (2) received reasonably equivalent value in exchange for its obligations under the transaction documents. Giving effect to the transactions contemplated by the transaction documents, the fair saleable value of the borrower's assets exceeds and will, immediately following the execution and delivery of the transaction documents, exceed the borrower's total liabilities, including, without limitation, subordinated, unliquidated, disputed, or contingent liabilities. The fair saleable value of the borrower's assets is and will, immediately following the execution and delivery of the transaction documents, be greater than the borrower's probable liabilities, including the maximum amount of its contingent liabilities or its debts as such debts become absolute and matured. The borrower's assets do not and, immediately following the execution and delivery of the transaction documents, will not constitute unreasonably small capital to carry out its business as conducted or as proposed to be conducted. The borrower does not intend to, and does not believe that it will, incur debts and liabilities (including, without limitation, contingent liabilities and other commitments) beyond its ability to pay such debts as they mature (taking into account the timing and amounts to be payable on or in respect of obligations of the borrower).
- ***Investment Company Act.*** The borrower is not (1) an "investment company" or a company "controlled" by an "investment company," within the meaning of the Investment Company Act of 1940, as amended; (2) a "holding company" or a "subsidiary company" of a "holding company" or an "affiliate" of either a "holding company" or a "subsidiary company" within the meaning of the Public Utility Holding Company Act of 1935, as amended; or (3) subject to any other federal or state law or regulation that purports to restrict or regulate its ability to borrow money.
- ***Access/utilities.*** The mortgaged property has adequate rights of access to public ways and is served by utilities, including, without limitation, adequate water, sewer, electricity, gas, telephone, sanitary sewer, and storm drain facilities. All public utilities necessary to the continued use and enjoyment of the mortgaged property as presently used and enjoyed are located in the public right-of-way abutting the mortgaged property, and all such utilities are connected so as to serve the mortgaged property without passing over other property. All roads necessary for the full utilization of the mortgaged property for its current purpose have been completed and dedicated to public use and accepted by all governmental authorities or are the subject of access easements for the benefit of the mortgaged property.
- ***Zoning.*** All improvements on the mortgaged property comply with applicable zoning laws and set-back ordinances.

The zoning representation may have an exception for non-compliance with zoning laws that do not have a "material and adverse effect on the use, value, or operation of the mortgaged property".

- ***Special assessments.*** Except as disclosed in the title insurance policy, there are no pending or, to the knowledge of the borrower, proposed special or other assessments for public improvements or otherwise affecting the mortgaged property, nor, to the knowledge of the borrower, are there any contemplated improvements to the mortgaged property that may result in such special or other assessments.
- ***Flood zone.*** The mortgaged property is not located in a flood hazard area as defined by the Federal Insurance Administration.

If true, the foregoing representation remains applicable. However, if the property is located in a flood hazard area, then the representation should be made as to the flood insurance in place for such property. Typically, the flood insurance representation will be part of the "Insurance" representation. A sample of a flood insurance representation is as follows:

If any portion of the improvements on a mortgaged property securing a mortgage loan was, at the time of origination of such mortgage loan, in an area identified in the Federal Register by the Flood Emergency Management Agency as a special flood hazard area (Zone A or Zone V), then a flood insurance policy

meeting the requirements of the guidelines of the Federal Insurance Administration is in effect with a Standard & Poor's qualified insurer (*see Appendix I, Insurance Criteria for U.S. CMBS Transactions for insurer qualifications*), in an amount representing coverage not less than the least of (1) the minimum amount required, under the terms of coverage, to compensate for any damage or loss on a replacement basis, (2) the outstanding principal balance of the mortgage loan, and (3) the maximum amount of insurance available under the applicable National Flood Insurance Administration Program. Such insurance coverage is not less than the estimated probable loss from flood, as determined by an independent, qualified professional engineer.

- ***Misstatements of fact.*** No statement of fact made in the transaction documents contains any untrue statement of a material fact or omits to state any material fact necessary to make statements contained herein or therein not misleading. There is no fact presently known to the borrower that has not been disclosed that adversely affects, nor as far as the borrower can foresee, might adversely affect the business, operations, or condition (financial or otherwise) of the representing party.
- ***Title insurance***. The mortgaged property is covered by an American Land Title Association (ALTA) (or comparable) lender's title insurance policy insuring that the mortgage is a valid first lien on the mortgaged property subject only to the permitted exceptions, and the following are true with respect to such policy: (i) the policy is in full force and effect, (ii) the policy is freely assignable to and will inure to the benefit of the transferee (subject to recordation of assignment of mortgage) without the consent or any notification to the insurer, (iii) the premium for such policy was paid in full, (iv) such policy is issued by a title insurance company licensed to issue policies in the state in which the related mortgaged property is located, (v) no claims have been made under any title insurance policy and no other action has been taken that would materially impair such policy and (vi) such policy contains no exclusions for any of the following circumstances, or it affirmatively insures (unless the related mortgaged property is located in a jurisdiction where such affirmative insurance is not available), (a) that the related mortgaged property has access to a public road, and (b) that the area shown on the survey, reviewed or prepared in connection with the origination of the related mortgage loan, is the same as the property legally described in the related mortgage.
- ***No condemnation.*** There is no proceeding threatened or pending for the total or partial condemnation, appropriation, or recapture of any material portion of the mortgaged property that would materially affect such borrower's performance under the loan documents, or the use, value, or operation of the property.
- ***Environmental representation.*** The mortgaged property is in compliance with all applicable federal, state, and local environmental laws, and no notice of violation of such laws has been issued by any governmental agency or authority; no action has been taken that would cause the mortgaged property to not be in compliance with all federal, state, and local environmental laws pertaining to environmental hazards; and no hazardous material is present at the mortgaged property.
- ***Compliance with laws.*** The property and the borrower's operations at the property comply in all material respects with all applicable federal, state, or local law, rules, regulations, or ordinances.
- ***Permits.*** The borrower, lessee and/or operator is in possession of all licenses, certificates of occupancy, permits, and authorizations required for use of mortgaged property which are valid and in full force and effect.
- ***Security deposits.*** All security deposits collected in connection with the mortgaged property are being held (i) in accordance with all applicable laws and (ii) in a segregated eligible account.
- ***Condition of property.*** Each related mortgaged property is (a) free and clear of any damage that would materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan, (b) in good repair and condition so as not to materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan, and (c) all building systems contained therein are in good working order so as not to materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan.
- ***Tax parcels***. Each mortgaged property constitutes one or more separate tax parcels.

Special-Purpose Bankruptcy-Remote Entity Representations and Warranties
Each SPE should represent and warrant that it is an SPE and covenant that for as long as the rated securities remain outstanding, such entity shall remain an SPE. The SPE representations and warranties should be in both the loan documents and the organizational documents. (*For Standard & Poor's criteria with respect to SPE's, See Section Four.*)

Senior Housing and Long-Term Care Facility Representations, Warranties and Covenants
In stand-alone property-specific and large loan transactions, borrowers who own senior housing facilities

that secure the rated securities, including assisted living, personal or residential care, elderly housing with services or other similar facilities, typically make the representations, warranties, and covenants listed below:

- ***Compliance with laws***. Each facility operator or manager, each borrower, and each senior housing, nursing, or skilled nursing facility is in compliance with all applicable federal, state, and local laws, regulations (including any government payment program requirements and disclosure of ownership and related information requirements), quality and safety standards, accepted professional standards, and principles that apply to professionals providing services in such facilities, accreditation standards, and requirements of the applicable state department of health and all other federal, state, or local governmental authorities including, without limitation, those requirements relating to the facility's physical structure and environment, licensing, quality, and adequacy of medical care, distribution of pharmaceuticals, rate setting, equipment, personnel, operating policies, additions to facilities, and services and fee splitting. For as long as the rated securities are outstanding, each facility that is owned, leased, or operated by a borrower or an operator or manager shall be operated in compliance with such laws and requirements.
- ***Licenses***. All governmental licenses, permits, regulatory agreements, or other approvals or agreements necessary or desirable for the use and operation of each facility as intended are held by the applicable borrower, operator, or manager in the name of the borrower and are in full force and effect, including, without limitation, approved provider status in any approved provider payment program and a valid certificate of need or similar certificate, license, or approval issued by the applicable state department of health (or any subdivision thereof) or the state licensing agency, as applicable, for the requisite number of beds (collectively, the "licenses"). As long as the rated securities remain outstanding, each borrower shall operate its facility or cause its facility to be operated in a manner such that the licenses shall remain in full force and effect.
- ***Ownership of licenses***. The licenses, including without limitation, the certificate of need: may not be, and have not been, transferred to any location other than the facility; have not been pledged as collateral security for any other loan or indebtedness; and are held free from restrictions or known conflicts that would materially impair the use or operation of the facility as intended, and are not provisional, probationary, or restricted in any way.
- ***Effectiveness of and amendments to licenses and bed capacity***. So long as the rated securities remain outstanding, no borrower, operator, or manager shall: rescind, withdraw, revoke, amend, modify, supplement, or otherwise alter the nature, tenor, or scope of the licenses, or applicable provider payment program participation, for any facility; amend or otherwise change any facility's authorized bed capacity and/or the number of beds approved by the applicable state department of health or other applicable state licensing agency; or replace or transfer all or any part of any facility's beds to another site or location.
- ***Medicare/Medicaid compliance***. Each senior housing facility is in compliance with all requirements for participation in Medicaid, including without limitation, the Medicare and Medicaid Patient and Program Protection Act of 1987, and each nursing or skilled nursing facility is in compliance with all requirements for participation in Medicare and Medicaid. Each facility is in conformance in all material respects with all insurance, reimbursement, and cost reporting requirements, and has a current provider agreement that is in full force and effect under Medicare and Medicaid, as applicable.
- ***Third-party payors***. There is no threatened or pending revocation, suspension, termination, probation, restriction, limitation, or nonrenewal affecting any borrower, operator, manager, or facility of any participation or provider agreement with any third-party payor, including Medicare, Medicaid, Blue Cross and/or Blue Shield, and any other private commercial insurance managed care and employee assistance program (such programs, the "Third-Party Payor Programs") to which any borrower, operator or manager presently is subject. All Medicare, Medicaid, and private insurance cost reports and financial reports submitted by each borrower, operator or manager are and will be materially accurate and complete and have not been and will not be misleading in any material respects. No cost reports for any facility remain "open" or unsettled, except as otherwise disclosed.
- ***Governmental proceedings and notices***. No borrower, operator, manager, or facility is currently the subject of any proceeding by a governmental agency, and no notice of any violation has been received from a governmental agency that would, directly or indirectly, or with the passage of time, have a material adverse impact on any borrower's ability to accept and/or retain patients or result in the imposition of a fine, a sanction, a lower rate certification, or a lower reimbursement rate for services rendered to eligible patients; modify, limit or annul, or result in the transfer, suspension, revocation, or imposition of probationary use of any borrower's licenses; or affect any borrower's continued participation in Medicare, Medicare, or Third-Party Payor Programs, as applicable, or any successor programs thereto, at current rate certifications.

- ***Physical plant standards***. Each facility and the use thereof complies in all material respects with all applicable local, state, and federal building codes, fire codes, health care, nursing facility, and other similar regulatory requirements and no waivers of such physical plant standards exist at any of the facilities.
- ***Past violations of senior housing facilities***. No senior housing facility has received a statement of charges or deficiencies and no penalty enforcement actions been undertaken against any such facility, its operator, manager, or borrower, or against any officer, director, or stockholder thereof, by any governmental agency during the last three calendar years, and there have been no violations over the past three years that have threatened any such facility's, operator's, manager's, or borrower's certification for participation in any Third-Party Payor Programs.
- ***Past violations of nursing and skilled nursing facilities***. No nursing or skilled nursing facility has been cited with a "G" level deficiency or higher. No statement of charges or deficiencies has been made and no penalty enforcement action has been undertaken against any such facility, its operator, manager, or borrower, or against any officer, director, or stockholder thereof, by any governmental agency during the last survey cycle. Furthermore, no nursing or skilled nursing facility has been the subject of a "double G" determination for the last three years.
- ***Audits***. There are no current, pending, or outstanding Medicare, Medicaid, or Third-Party Payor Programs reimbursements audits or appeals pending at any of the facilities, and there are no years that are subject to audits.
- ***Recoupment***. There are no current or pending Medicare, Medicaid, or Third-Party Payor Programs recoupment efforts at any of the facilities. None of the borrowers are participants in any federal program whereby any governmental agency may have the right to recover funds by reason of the advance of federal funds, including, without limitation, those authorized under the Hill-Burton Act.
- ***Pledge of receivables***. No borrower has pledged its receivables as collateral security for any other loan or indebtedness.
- ***Patient care agreements***. There are no patient or resident care agreements with patients or residents or with any other persons that deviate in any material adverse respect from the standard form customarily used at the facilities.
- ***Patient records***. All patient or resident records at each facility, including patient or resident trust fund accounts, are true and correct in all material respects.
- ***Management and operating agreements***. Any existing agreement relating to the management or operation of any facility with respect to any facility is in full force and effect and is not in default by any party thereto. In the event any management or operating agreement is terminated or in the event of foreclosure or other acquisition of a facility by the trustee for the benefit of the holders of the rated securities, the applicable borrower, the trustee, any subsequent operator, manager, or any subsequent purchaser need not obtain a certificate of need prior to applying for and receiving a license to operate such facility or prior to receiving Medicare or Medicaid payments, as applicable.
- ***Payment procedures***. No facility, operator, manager, or borrower shall, other than in the normal course of business, change the terms of any of the Third-Party Payor Programs or its normal billing payment or reimbursement policies and procedures with respect thereto, including without limitation the amount and timing of finance charges, fees and write-offs.

Representations and Warranties in Transactions Involving Hotel Properties
In stand-alone property-specific and large loan transactions, borrowers who own hotel properties that secure the rated securities typically make the additional representations listed below:

- ***Licenses.*** The borrower or the franchisor is in possession of all liquor, hotel, and restaurant licenses necessary and required by all applicable laws for the ownership and operation of the mortgaged property and all licenses are valid and in full force and effect.
- ***Leases.*** There are no leases, occupancy agreements, or license agreements with respect to residential space or hotel rooms in the related mortgaged property with terms of more than thirty days.
- ***Franchise agreement.*** The franchise agreement, if any, is in full force and effect, and no default or event that, with the passage of time or the giving of notice or both, would constitute a default, has occurred under such franchise agreement.
- ***First perfected security interests.*** To the extent perfection may be effected pursuant to applicable law by recording or filing, the UCC-1 financing statements executed by borrower in favor of lender are in form and substance acceptable for filing and/or recording in all appropriate public filing and recording offices all UCC-1 financing statements necessary to create a first priority perfected security interest in and lien on all equipment, including, without limitation, room furnishings, all inventory, and all personal property located at

the related mortgaged property owned by the related borrower that is necessary to operate such mortgaged property as a hotel, together with a first priority perfected security interest in and lien on all accounts receivable, hotel rents, revenues, and receipts arising from the operation of such mortgaged property. (*For Standard & Poor's criteria in connection with UCC Article 9 representations and warranties and security interest matters generally, see Appendix III.*)

Ground Lease Representations and Warranties
Borrowers who finance their leasehold interests in real property typically make the following representations and warranties with respect to any mortgage that is secured in whole or in part by the interest of a borrower as a lessee under a ground lease (the applicability of these representations and warranties will vary depending on whether or not the ground lessor's fee interest is subordinated to the lien of the mortgage):

- ***Fee encumbered.*** The mortgage loan is also secured by the related fee interest in the mortgaged property and the mortgage does not by its terms provide that it will be subordinated to the lien of any other mortgage or other lien upon such fee interest, and upon the occurrence of an event of default under the terms of the mortgage by borrower, the mortgagee has the right to foreclose or otherwise exercise its rights with respect to the fee interest within a commercially reasonable time. This representation is applicable if the related mortgage does encumber the related lessor's fee interest in such mortgaged property. This representation frequently is not applicable. (However, in such cases, the remainder of the ground lease representations remain applicable.)
- ***Recording.*** The ground lease or a memorandum thereof has been duly recorded, the ground lease permits the interest of the lessee to be encumbered by the related mortgage, and there has not been a material change in the terms of the ground lease since its recordation, with the exception of written instruments that are part of the related mortgage file.
- ***No senior liens.*** Except for the permitted exceptions, the ground lessee's interest in the ground lease is not subject to any liens or encumbrances superior to, or of equal priority with, the related mortgage, other than the related ground lessor's related fee interest.
- ***Ground lease assignable.*** The borrower's interest in the ground lease is assignable to the trustee upon notice to, but without the consent of, the lessor (or, if any such consent is required, it has been obtained prior to the closing date) or, in the event that it is so assigned, it is further assignable by the trustee and its successors and assigns upon notice to, but without a need to obtain the consent of, the lessor.
- ***Default.*** As of the closing date, the ground lease is in full force and effect and no default has occurred under the ground lease and there is no existing condition that, but for the passage of time or the giving of notice, would result in a default under the terms of the ground lease.
- ***Notice.*** The ground lease requires the lessor to give notice of any default by the lessee to the mortgagee; or the ground lease, or an estoppel letter received by the mortgagee from the lessor further provides that notice of termination given under the ground lease is not effective against the mortgagee unless a copy of the notice has been delivered to the mortgagee in the manner described in the ground lease.
- ***Cure.*** The mortgagee is permitted a reasonable opportunity (including, where necessary, sufficient time to gain possession of the interest of the lessee under the ground lease) to cure any default under the ground lease that is curable, after the receipt of notice of any the default, before the lessor may terminate the ground lease.
- ***Term.*** The ground lease has a term that extends not less than (i) in the case of a mortgage loan that fully amortizes by its maturity date, ten years beyond the maturity date of the related mortgage loan; (ii) in the case of a mortgage loan that has a balloon payment on its maturity date, twenty years beyond the maturity date of the related mortgage loan; and (iii) in the case of a mortgage loan that has a maturity date by which the loan substantially amortizes but has an anticipated repayment date on which the borrower is expected and entitled to repay the loan to avoid an increase of the interest rate after the anticipated repayment date, 10 years beyond the final maturity date.
- ***New lease.*** The ground lease requires the lessor to enter into a new lease with the lender upon termination of the ground lease for any reason, including rejection of the ground lease in a bankruptcy proceeding, provided that the lender cures any defaults that are susceptible to being cured by the lender.
- ***Insurance and condemnation proceeds.*** Under the terms of the ground lease and the related mortgage, taken together, any related insurance proceeds will be applied either to the repair or restoration of all or part of the related mortgaged property, with the mortgagee or an appointed trustee having the right to hold and disburse the proceeds as the repair or restoration progresses, or to the payment of the outstanding principal balance of the mortgage loan together with any accrued interest thereon.
- ***Subleasing.*** The ground lease does not impose restrictions on subletting that would be viewed as

commercially unreasonable by a prudent commercial mortgage lender.

- ***Amendments.*** The ground lease provides that no amendments, changes, cancellations, alterations, surrender, or modifications may be made to the ground lease without the consent of the mortgagee.
- ***Transfer notices***. To the extent required by any loan documents, or the ground lease, or the ground lessor estoppel certificate, all notices of the transfer of the loan to the trustee for the benefit of the holders of the rated securities have been delivered or will be delivered contemporaneously with the closing of the securitized transaction.

Environmental Representations and Warranties

Property-specific and large loan transactions can take many forms. However, in each such transaction, Standard & Poor's credit analysis focuses on the specific property that is collateral for the loan. In any property-specific or large loan transaction, a Phase I Environmental Assessment and, if warranted, a Phase II Environmental Assessment, should be submitted. (*See Environmental Criteria.*) Accordingly, it is unlikely that the environmental representations and warranties will be the primary source of environmental due diligence. The environmental assessments will be evaluated to identify any environmental conditions with the potential to impair the cash flow or the value, marketability, or refinanceability of the mortgaged property. If further investigation does not rule out the possibility of impairment, the impairment will be considered in determining the credit quality of the transaction.

As to the documentation, in property-specific and large loan transactions the borrower's mortgage and/or loan agreement sets forth the key provisions governing the transaction, including environmental provisions. Generally, the environmental representations and warranties in the mortgage and loan agreement cover the same general subjects as described for pool transactions, such as environmental conditions that would impair the cash flow generated by the mortgaged property or the value, marketability, and refinanceability of the mortgaged property. In addition, the documentation usually has provisions designed to address environmental conditions (including environmental provisions) that could affect the ability of the trustee to realize upon the mortgaged property in the event of a default by the borrower. (*See Section Two, Pool Transactions - Representations and Warranties in Pool Transactions - Environmental Representations and Warranties.*)

Remedies for Breach of the Mortgage Loan Seller Representations and Warranties

Typically, in property-specific and large loan transactions, a breach by the mortgage loan seller of the mortgage loan seller representations and warranties or a document defect in connection with the delivery of the required documents to the transferee will trigger a repurchase obligation. (*See Section Two*, *Pool Transactions- Representations and Warranties in Pool Transactions - Remedies for Breach of the Mortgage Loan Representations and Warranties.)*

Due Diligence in Property-Specific and Large Loan Transactions

In a stand-alone property-specific or large loan transaction, Standard & Poor's analysis involves due diligence regarding the specific mortgaged property. The due diligence may take the form of reviewing the mortgage or loan agreement to assess whether there are specific provisions designed to protect the holders of the rated securities. Additionally, Standard & Poor's will request certain documentary items to help evaluate the mortgaged property involved in a transaction. (*For additional property evaluation criteria, go to RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com. The criteria are also available on Standard & Poor's Web site at www.standardandpoors.com.)*

Certified Rent Rolls for Property-Specific and Large Loan Transactions

Standard & Poor's analyzes numerous property characteristics in determining a rating in a property-specific or large loan transaction. One of the more important characteristics is the mortgaged property's leases. In most cases, the leases generate the only cash flow that the borrower has available to pay debt service on the rated securities. The short-term lease outlook is important to Standard & Poor's analysis of the borrower's ability to pay monthly debt service. The long-term lease outlook is important in Standard & Poor's analysis of the borrower's ability to refinance the mortgaged property in the future.

The basic factors that weigh into Standard & Poor's analysis of each lease are its term, rental rate, escalations, landlord obligations, and tenant credit quality. However, for Standard & Poor's to analyze the leases fully and properly, it must receive detailed information with respect to the leases in the form of a certified rent roll.

For stand-alone property-specific transactions, a certified rent roll should be provided to Standard & Poor's. The rent roll should specify, as to each lease, the following matters:

- A description (by rentable square feet and location) of the leased space;
- The name of the original and current tenant, licensee, subtenant, or any other occupant of the space;
- The commencement and expiration dates of the original lease and any renewal terms thereof;
- The basic, additional, and percentage rents, all pass-throughs of taxes, expenses, or other items, and all other sums payable by the tenant to the lessor or licensor (including, without limitation, utility charges) during the original and any renewal terms thereof (collectively, "rents"), and a specification of the dates on which each payment is due and through which each has been paid and the extent of any delinquencies;
- All rents prepaid by the tenant;
- All concessions, allowances, credits, and abatements to which the tenant is entitled;
- All options that the tenant has, including without limitation, options to expand or change the leased space, to extend or renew the term, or to purchase;
- The security deposit given by the tenant and interest accrued;
- The identification of any security given to secure the tenant's obligations including, without limitation, the identity of any guarantor of any lease;
- Any unpaid obligation for a brokerage fee or other commission, whether fixed or contingent;
- Any tenant improvements that are incomplete or the cost of which are not paid in full on the date of closing, whether pursuant to construction contracts or otherwise; and
- The terms of any reciprocal easement agreements, operational agreements, operating covenant agreements, and covenants, conditions, or restrictions affecting the mortgaged property that permit the tenant to terminate operations on the leased premises and whether such terms require the tenant to continue paying rents under the lease.
- Copies of all leases or lease summaries should be provided to Standard & Poor's upon request.

Title Issues
In almost all stand-alone property-specific and large loan transactions, the rated securities are secured by a first priority lien on and security interest in the mortgaged property. Therefore, Standard & Poor's seeks verification that, if a default occurs on the mortgage loan, the trustee, on behalf of the holders of the rated securities, will have the right, prior to all other parties, to realize upon the mortgaged property and all of its proceeds. Accordingly, to verify such matters, Standard & Poor's traditionally relies on certain documentation and covenants, representations, and warranties in the mortgage or loan agreement that provide assurances and evidence that the trustee will have first priority lien on and security interest in the mortgaged property.

The following represents a sample of the type of title issues that arise in a property-specific or large loan transaction and Standard & Poor's criteria with respect to such issues. Naturally, because each stand-alone property-specific or large loan transaction is unique, additional issues may arise that are particular to the transaction and the mortgaged property.

Title Insurance
Title insurance provides the trustee, on behalf of the holders of the rated securities, with assurances that the mortgaged property will be protected against any clouds on title that might affect the value of the mortgaged property and, ultimately, the value of the cash flow servicing the rated securities. In stand-alone property-specific and large loan transactions, borrowers should obtain new mortgagee title insurance policies dated as of the date of closing issued in the name of the originator and its successors and assigns insuring that the originator and its successors and assigns have a valid first priority lien on the mortgaged property for the benefit of the holders of the rated securities, subject to certain permitted exceptions set forth in the mortgage or loan agreement and discussed below. The title insurance should be issued by a reputable, financially sound title insurance company and should be effective as of the closing date.

The title insurance policy should contain a deletion of the "standard" exceptions. Additionally, the title insurance policy should include those endorsements traditionally obtained by commercial lenders advancing funds in the jurisdiction in which the mortgaged property is located. In single property transactions, the insurance policy should be issued in an amount equal to the amount of the underlying

debt. In multiple property transactions, Standard & Poor's will consider allocations of title insurance coverages to specific properties on a case-by-case basis. In any event, if the transaction involves multiple properties, the borrower should obtain the maximum amount of insurance obtainable through the use of "tie-in" endorsements or similar endorsements or policies. In the event a "tie-in" endorsement is not available in a particular jurisdiction, Standard & Poor's will expect that the amount of insurance to be higher than the allocated loan amount (typically, between 125% and 150% of the allocated loan amount).

Mortgage Recording Taxes
Certain jurisdictions impose significant mortgage recording taxes, which usually are calculated based on a percentage of the principal amount of the mortgage loan secured by the mortgaged property in such jurisdiction. In most of these jurisdictions, the lender in a foreclosure is limited in its recovery of principal to the principal amount on which such mortgage recording tax was paid (or the maximum secured principal amount specified in the related mortgage instrument). In rating a loan transaction involving a multiple cross-collateralized properties, Standard & Poor's typically is relying on the benefit of cross-collateralization, so that if the recovery on a certain property does not equal or exceed such property's allocated loan amount, recoveries on other properties may make up such shortfall.

However, to the extent that a mortgage on an individual property secures only a portion of the total loan amount because of mortgage recording tax considerations, this benefit of cross-collateralization is lost. In an effort to balance a borrower's desire to limit its costs and Standard & Poor's desire for the ultimate benefits attributable to cross-collateralization, Standard & Poor's has rated cross-collateralized multiple property transactions in which a mortgage on an individual property secures an amount less than the full loan amount but higher than the allocated loan amount for such property (typically, 150% of the allocated loan amount). Nevertheless, any limits on the amount secured by a mortgage on an individual property may have an impact on the rating of a transaction.

Borrower Title Representations and Warranties
The representations and warranties made by the borrower in the loan documents typically include certain representation and warranties with respect to title issues, lien validity, title insurance, and permitted exceptions. (*See Property-Specific and Large Loan Transactions - Representations and Warranties in Property-Specific and Large Loan Transactions - Borrower-Specific Representations and Warranties.*)

Permitted Exceptions
While each transaction is unique, the only "permitted exceptions" generally allowed under the mortgage will be those that do not adversely impact upon the senior lien position held by the trustee for the benefit of the holders of the rated securities, the value of the mortgaged property, or the cash flow generated by the mortgaged property. The term "permitted exceptions" is typically defined to mean only the following types of liens, charges or encumbrances:

- Liens for real property taxes, assessments, vault charges, water, and sewer rents not yet due and payable;
- Statutory inchoate liens of mechanics and materialmen imposed by law incurred in the ordinary course of business for sums not yet due or delinquent; *provided, however*, that the borrower pays or bonds and removes from record any mechanic's lien filed for sums that have become due;
- Rights of tenants, as tenants only, under leases in existence on the closing date and any leases entered into thereafter in accordance with the requirements of the loan documents;
- Easements, rights-of-way, restrictions, minor encroachments, or other similar encumbrances not impairing the marketability of the mortgaged property and not interfering with the use of the mortgaged property for uses permitted under the loan documents or in the ordinary conduct of the business of the borrower; and
- Liens created by the loan documents.

Estoppel Certificates
In analyzing the cash flow generated by a mortgaged property, one of the important elements is the lease. The basic factors that weigh into Standard & Poor's analysis of leases are their term, rental rate, escalations, landlord obligations, and tenant credit quality. Standard & Poor's should be provided with copies of certified rent rolls prepared by or on behalf of the borrower that set forth certain information regarding the mortgaged property's leases. This is supplemented by delivery to Standard & Poor's in stand-

alone property-specific (other than loans secured by multifamily properties) transactions of estoppel certificates prepared by or on behalf of the tenants. Generally, estoppel certificates should be provided for the following:

- All anchor tenants;
- Every tenant whose rent stream accounts for 5% or more of gross rents; and
- Enough tenants to account for 75% of the remaining gross leased area of the mortgaged property. If a borrower is unable to provide estoppel certificates prior to closing, Standard & Poor's will address exceptions on a case-by-case basis.

The estoppel certificates should be executed by the applicable tenant and identify and certify, as to such tenant's lease, the following matters:

- A description (by square feet and location) of the leased premises;
- The commencement and expiration dates of the original lease and any renewal terms;
- The basic, along with additional and percentage, rents, all pass-throughs of taxes, expenses, or other items, and all other sums payable by the tenant to the landlord including, if applicable, utility charges during the original and any renewal terms of the lease;
- That the lease contains all of the understandings and agreements between the tenant and landlord, and is in existence in full force and effect, without modification, addition, extension, or renewal. Any such modifications to the lease should be specifically described;
- That there are no options, rights of first refusal, termination, renewal or extension rights, exclusive business rights, or other rights to extend or otherwise modify the lease. Any such options or rights should be specifically described;
- That the tenant is not in default under the lease and is current in the payment of the rents. Any such default should be specifically described;
- That the landlord is not in default under the lease. Any such defaults should be specifically described;
- That the tenant has not assigned the lease or sublet the leased premises. Any such assignment or subletting should be specifically described;
- That the tenant has accepted and is in possession of the leased premises, and any painting, repairs, alterations, and other work required to be furnished pursuant to the lease have been fully delivered by landlord and accepted by tenant without exception;
- That the tenant's obligation to pay rents has commenced, and no rents have been paid by tenant in advance except for the monthly rental that became due for the current month;
- That the tenant has no defense, set-off, basis for withholding of rent, claims, or counterclaims against the landlord for any failure of performance of any of the terms of the lease, and to the best of tenant's knowledge there are no defaults or breaches by landlord under the lease. Tenant has no actual knowledge of any claims by others against landlord relating to the mortgaged property or its use; and
- That the tenant has not at any time since the commencement of the lease, and does not presently, use the leased premises for the generation, manufacture, refining, transportation, treatment, storage, or disposal of any hazardous substance or waste or for any purpose that poses a substantial risk of imminent damage to public health or safety or to the environment.

Ground Leases in Property-Specific and Large Loan Transactions

General

Most stand-alone property-specific and large loan transactions that Standard & Poor's rates involve rated securities backed by a loan or loans secured by a mortgage on a borrower's fee simple interest in the real property. Certain transactions, however, involve leasehold financing where the mortgage loan is secured by a mortgage on the borrower's leasehold interest in the real property rather than the fee interest.

In a typical leasehold financing, the borrower leases the mortgaged property from a landlord, pursuant to a ground lease. The landlord owns fee simple title to the real estate and leases it to the borrower. Depending on the circumstances, the buildings and improvements may be owned by the landlord and leased to the borrower, or owned by the borrower directly. The rights of the mortgagee (as well as the trustee on behalf of

the holders of the rated securities) with respect to the real property are derived through the borrower's interest in the ground lease and are dependent upon the continued existence of the ground lease. If the ground lease expires prior to payment in full of the related mortgage loan, the mortgage loan backing the rated securities could become unsecured.

The risk that the mortgage loan backing the rated securities will not be secured as a result of the termination of the ground lease is alleviated when the landlord subordinates and subjects its fee simple interest in the real property to the interests of the mortgagee by executing the mortgage. As a practical matter, this situation is similar to the situation where the borrower owns fee simple title to the real estate and the buildings and improvements and mortgages that fee simple interest. In the event the borrower defaults on its obligations, the mortgage holder may exercise its right to foreclose on the real property and extinguish the landlord's interest in the real property.

Ground Lease Provisions

Frequently, however, a landlord is unwilling to subordinate and subject its fee simple interest in the real property to a leasehold mortgage. If the landlord does not subordinate and subject its fee simple interest in the real property to the leasehold mortgage, certain provisions must be included in the ground lease or a separate document to protect the mortgagee (and the holders of the rated securities) from the risk of termination of the ground lease prior to payment in full of the related mortgage loan or liquidation of the collateral securing such mortgage loan. Accordingly, Standard & Poor's may review the ground lease (or an abstract thereof) in stand-alone property-specific and large loan transactions to assess whether such adequate protections exist.

Although the following list is by no means exhaustive or mandatory in every case, it includes those items that Standard & Poor's typically expects to be satisfied in a stand-alone property-specific or large loan transaction involving mortgages securing leasehold interests.

- ***Memorandum of lease.*** In most jurisdictions, the ground lease or a memorandum of lease must be recorded in the applicable local land records.
- ***Recognition of borrower as tenant.*** If the borrower is not the original tenant under a ground lease, the borrower must have acquired its interest in the ground lease in accordance with the terms of the ground lease and the borrower must be recognized by the landlord.
- ***Term.*** The ground lease has a term that extends not less than (i) in the case of a mortgage loan that fully amortizes by its maturity date, ten years beyond the maturity date of the related mortgage loan; (ii) in the case of a mortgage loan that has a balloon payment on its maturity date, twenty years beyond the maturity date of the related mortgage loan; and (iii) in the case of a mortgage loan that has a maturity date by which the loan substantially amortizes but has an anticipated repayment date on which the borrower is expected and entitled to repay the loan to avoid an increase of the interest rate after the anticipated repayment date, ten years beyond the final maturity date. This increases the likelihood that there will be sufficient value remaining in the leasehold interest to allow for a sale or refinancing that will generate sufficient proceeds to repay the mortgage loan at maturity.
- ***Notice of default.*** Because the landlord's ability to terminate the ground lease typically arises upon the borrower 's default in its obligations under the ground lease, the landlord should give the trustee, on behalf of the holders of the rated securities, written notice of the borrower 's default prior to and as a condition of the landlord's exercising any remedy under the ground lease (including, but not limited to, a termination of the ground lease). This notice permits the trustee, on behalf of the holders of the rated securities, to monitor the borrower's actions under the ground lease and to prevent a termination of the ground lease.
- ***Right to cure.*** The landlord should grant the trustee, on behalf of the holders of the rated securities, a right to cure the borrower 's default under the ground lease. Again, this gives the trustee, on behalf of the holders of the rated securities, the ability to prevent a termination of the ground lease.
- ***Termination-option to execute new lease.*** The landlord should agree that it will enter into a new ground lease with the trustee, on behalf of the holders of the rated securities, in the event the ground lease is "terminated" for any reason, including, but not limited to, a rejection of the ground lease in the event of a bankruptcy of the borrower. This provides the trustee, on behalf of the holders of the rated securities, with the additional protection against the termination of the ground lease.
- ***Assignment and subletting.*** The borrower should be entitled to assign the lease to the trustee, on behalf of the holders of the rated securities, and to mortgage its leasehold interest in favor of the

trustee, on behalf of the holders of the rated securities. There should not be any commercial unreasonable limitations on the right of the ground lessee to enter into leases with tenants of space in the improvements.

- ***Insurance and condemnation proceeds.*** The trustee, on behalf of the holders of the rated securities, should be entitled to participate in any settlement regarding insurance and condemnation proceeds and to supervise and control the receipt of such proceeds. The landlord and the borrower should not be able to cancel the ground lease for damage or destruction as long as the leasehold mortgage is outstanding.
- ***No cancellation.*** The landlord should agree that the ground lease cannot be cancelled, surrendered, amended, altered, or modified without the prior written consent of the trustee, on behalf of the holders of the rated securities.

Ground Lease Representations and Warranties
For a list of representations and warranties that should be delivered in a ground lease transaction, see Representations and Warranties in Property-Specific and Large Loan Transactions - Ground Lease Representations and Warranties.

Landlord Estoppel Certificate
As a supplement to a review of the ground lease, Standard & Poor's may, depending on the circumstances, request the delivery of an estoppel certificate from the landlord. This serves as a means for verifying certain terms of the ground lease and verifying that, as of the closing of the transaction, there is not a default by the borrower under the ground lease. If executed by the landlord and the borrower, the estoppel certificate may be expanded to include covenants and obligations undertaken by the landlord that are not included in the ground lease but are listed above as features that should be included in the ground lease. The estoppel certificate should be executed by the landlord and identify and certify, as to the ground lease, the following matters:

- A description of the leased premises;
- The commencement and expiration dates of the ground lease and any renewal terms thereof;
- The basic, along with additional and percentage, rents, all pass-throughs of taxes, expenses, or other items, and all other sums payable by the borrower to the landlord including, if applicable, utility charges during the original and any renewal terms of the ground lease;
- The amount of any escrows and deposits held by the landlord under the ground lease;
- That the landlord recognizes and consents to the mortgage in favor of the trustee, on behalf of the holders of the rated securities;
- That the ground lease contains all of the understandings and agreements between the borrower and the landlord, and is in existence in full force and effect, without modification, addition, extension, or renewal. Any such modifications to the ground lease should be specifically described;
- That there are no options, rights of first refusal, termination, renewal, or extension rights, exclusive business rights, or other rights to extend or otherwise modify the ground lease. Any such options or rights should be specifically described;
- That the borrower is not in default under the ground lease and is current in the payment of the rents. Any such default should be specifically described;
- That the landlord is not in default under the ground lease. Any such defaults should be specifically described;
- That neither the landlord nor the borrower has assigned the ground lease or sublet the leased premises. Any such assignment or subletting should be specifically described;
- That the borrower has no defense, set-offs, basis for withholding of rent, claims, or counterclaims against the landlord for any failure of performance of any of the terms of the ground lease. The landlord has no actual knowledge of any claims by others against the borrower relating to the mortgaged property or its use;
- That the landlord has not assigned, conveyed, transferred, sold, encumbered, or mortgaged its interest in the ground lease or the leased premises and there are not mortgages, deeds of trust or other security interests encumbering the landlord's fee interest in the leased premises. No third party has any option or preferential right to purchase all or any part of the leased premises;
- That the landlord has not received written notice of any pending eminent domain proceedings or other governmental actions or any judicial actions of any kind against the landlord's interest in the

leased premises; and

- That the landlord has not received written notice that it is in violation of any governmental law or regulation applicable to its interest in the leased premises and its operation including, without limitation, any environmental laws or the Americans with Disabilities Act, and has no reason to believe that there are grounds for any claim of any such violation.

Servicing Issues in Property-Specific Transactions

While certain stand-alone property-specific transactions do not use a servicer (usually only in single-tranche property-specific credit tenant loan transactions), Standard & Poor's generally recommends that a servicer is used on stand-alone property-specific transactions. In general, servicing of a stand-alone property-specific transaction should be handled in the same manner as for pool transactions. *(For a discussion of servicing issues see Section Two, Pool Transactions - Servicing Issues in Pool Transactions.)* However, there are limitations on modifications of a mortgage loan in stand-alone property-specific transactions that differ from those generally found in pool transactions.

Modification of Mortgage Loans

Another important servicing function is determining when and whether a workout, amendment, waiver, modification, or extension (collectively, "modifications") of a mortgage loan should be made. Standard & Poor's realizes that servicers need some flexibility and discretion to engage in modifications in order to protect and preserve the value of the serviced mortgage loans.

General Rules

In stand-alone property-specific transactions, Standard & Poor's concerns regarding modifications are heightened because payments to the holders of the rated securities come from specific mortgage loans rather than a general pool of assets. Accordingly, stand-alone property-specific transactions typically provide that certain significant modifications that may have a substantial and adverse impact on holders of the rated securities may be agreed to by the servicer only upon consent of (i) each of the holders of the rated securities affected by the proposed change and (ii) the holders of the securities with 66 2/3% (or 100% in the case of an extension of the maturity date that reduces the "tail" period) of the aggregate voting rights of the related securitization. Changes of this nature might include:

- The extension of the mortgage loan's maturity date that reduces the "tail" period for the transaction;
- A reduction or forgiveness of principal or interest owing under the mortgage loan;
- A reduction in the monthly payment or interest rate payable under the mortgage loan; and
- The substitution or release of collateral.

In circumstances when the consent of less than 100% of the holders of the rated certificates is required, a ratings confirmation should be obtained for any modification of a mortgage loan in a property-specific transaction. Prior notice of any modification should be provided to Standard & Poor's.

Modifications in REMIC and Grantor Trust Transactions

In a transaction structured as a REMIC or a grantor trust, the servicer should confirm that any modification of a mortgage loan will not result in a violation of the REMIC or grantor trust rules.

Loan Summaries and Questionnaires

In connection with rating a transaction, Standard & Poor's should be provided with information regarding the loans included in stand-alone property-specific transactions and large loans included in pool transactions. Additionally, over the past several years Standard & Poor's has received inquires regarding the inclusion of large loans secured by mortgage properties located in a jurisdictions other than in the United States in pools. In an effort to address its need for consistent information regarding any loan and to respond to inquiries as to foreign mortgaged properties, Standard & Poor's has developed various questionnaires designed to elicit the legal information necessary to Standard & Poor's evaluation of a particular loan.

Loan Summaries and Interest Rate Cap Agreement Questionnaires

To expedite the rating process and to enable Standard & Poor's to give preliminary evaluations of stand-alone property-specific transactions and large loan transactions, Standard & Poor's requests that the originator of the loan supply Standard and Poor's with a summary of the key economic and legal terms of the loan. The format of such large loan summary is attached as Appendix VIII.

In addition, Standard & Poor's may request that the relevant party complete an interest rate cap agreement questionnaire addressing key provisions in the confirmation, schedule and loan agreement. *(See Property-Specific and Large Loan Transactions - Certain Structuring Issues - Interest Rate Cap Agreements for a further discussion of interest rate cap agreements and Appendix IX for the forms of the interest rate cap agreement questionnaires.)*

Foreign Properties
To expedite the evaluation of whether it is appropriate to include a loan secured by a property located outside of the United States in a U. S. securitization and the impact on an evaluation of the securitized transaction, Standard & Poor's generally requests that the originator of the loan have legal counsel in the foreign jurisdiction prepare a summary regarding various legal issues relating to real estate and insolvency laws in the jurisdiction in which the proposed mortgage property is located. The format of such foreign law summary is attached as Appendix X. Please note that the summary is merely the starting point of Standard & Poor's evaluation. Depending upon the information contained in the summary, additional information may be requested.

Surveillance Information
The borrower, trustee, and/or the servicer should provide Standard & Poor's with the information considered necessary by Standard & Poor's to provide ongoing surveillance of property-specific transactions. The type and frequency of the information varies depending upon the transaction. Standard & Poor's will provide a list and/or format for the information to be provided during the rating or surveillance process.

Certain Structuring Issues

Tails/Extension Periods
One mechanism by which Standard & Poor's addresses bankruptcy risks in stand-alone property-specific transactions is by requiring a "tail period" beyond the scheduled maturity date of the mortgage loan. The tail period is the difference between the maturity date of the underlying loan and the rated final distribution date of the rated securities. On stand-alone property-specific transactions, the tail period will usually be five years after the stated maturity date of the mortgage loan. The five-year tail period is the period of time that Standard & Poor's estimates is necessary for the trustee to ultimately realize upon the collateral securing the rated securities if the borrower fails to repay the loan at maturity. For certain stand-alone property specific transactions, such as those that have an additional debt component, the tail period might be longer than five years because of the potential delay to ultimate realization inherent in transactions with additional debt.

In certain cases, the parties will request that the servicer on a stand-alone property-specific transaction be permitted, in accordance with the servicing standard and without the vote of 100% of the holders of the rated securities, to extend the maturity date of a loan. If the servicer is given the discretionary right to extend the maturity date of a mortgage loan, the tail period will be five years after the latest date that a servicer is allowed to extend the maturity date of a loan without the consent of 100% of the holders of the rated securities.

Interest Rate Cap Agreements
Standard & Poor's has rated a number of short-term stand-alone property-specific transactions and pools containing large loans where the mortgage loans bear interest at a floating rate, (the "floating rate") plus a spread. In rating such deals, the structure of the transaction will need to address the variability of the interest rate. Typically, Standard & Poor's will rely upon either an imbedded interest rate cap set forth in the securitization documents or an interest rate cap agreement from a sufficiently rated entity. The cap provider will pay interest on the rated securities to the extent that the floating rate is in excess of another predetermined interest rate (the "strike rate").

Standard & Poor's rating addresses timely payment of interest and ultimate receipt of principal by the rated final maturity date. In stand-alone property-specific transactions, it is thus necessary to either have an interest rate cap agreement in place at the time of closing that covers the period through the tail period, or to have an interest rate cap in place for the period through the maturity of the loan and have a subsequent imbedded interest rate cap on the rated securities that commences on the maturity date of the loan.

An interest rate cap agreement is an agreement whereby a party (the "counterparty") agrees to make

periodic payments to another party based on a specified principal amount (*i.e.*, a notional amount) in the event that the floating rate exceeds the strike rate. The securitization may be structured such that, upon the expiration of an interest rate cap agreement on the loan maturity date on which the related loan has not been paid in full, the pass-through rate for floating-rate certificates may be capped by an imbedded interest rate cap to preserve ratings during the period following the termination of the interest rate cap agreement.

An imbedded interest rate cap is a cap on the pass-through rate for floating-rate certificates issued in a securitization. Because an imbedded interest rate cap places a cap on the pass-through rate of the floating-rate certificates and does not set a cap on the interest rate accruing on the loan, recovered interest on the loan may exceed the (capped) weighted average pass-through rate on the certificates and the interest may be paid to the certificateholders after the capped amount is paid, but recovery of this interest would not be covered by the ratings of the certificates.

By purchasing an interest rate cap agreement, securities can be issued that bear interest at a floating-rate based on a floating-rate index. This alleviates the risk of an increase in the interest rate above a level supportable by the cash flow from the mortgaged property. In the event that a transaction makes use of an interest rate cap agreement, Standard & Poor's generally will assess counterparty risk (*i.e.*, the ability of the counterparty to make the required payments under the cap agreement) and review the terms of the cap agreement itself.

Counterparty Risk
In most stand-alone property-specific transactions using a cap agreement, Standard & Poor's is relying upon the payments from the counterparty to make required payments on the rated securities to the extent that the floating rate exceeds the strike rate. In such cases, the ratings assigned to the securities by Standard & Poor's is partially dependent upon the credit rating of the counterparty. If the counterparty is not rated or the counterparty's rating is inadequate, the counterparty's obligations may be guaranteed by an entity that satisfies Standard & Poor's counterparty criteria. In these cases, the guarantee should comply with Standard & Poor's guarantee criteria set forth in Section Three. The guarantee is referenced in the cap agreement as a "Credit Support Document."

Form of Cap Agreement

General
Standard & Poor's review of cap agreements places particular emphasis on conditions precedent, payment obligations, defaults, and termination provisions.

Virtually all cap agreements for commercial mortgage-backed securities transactions are written on the standard agreements published by the International Swap Dealers Association Inc. (ISDA). In addition to the published 1992 ISDA Master Agreement (Local Currency-Single Jurisdiction) (the "Local Agreement") and the 1992 ISDA Master Agreement (Multicurrency Cross Border) (the "Cross Border Agreement" together with the Local Agreement, the 1992 ISDA Agreements"), ISDA has recently published the 2002 ISDA Master Agreement (Local Currency-Single Jurisdiction) (the "2002 Local Agreement") and the 2002 ISDA Master Agreement (Multicurrency Cross Border) (the "2002 Cross Border Agreement" and together with the 2002 Local Agreement, the "2002 ISDA Agreements"). Some major changes reflected in the 2002 ISDA Agreements relate to the use of a Close Out Amount as a single methodology to calculate damages, the addition of a termination event for force majeure events, a reduction of grace periods related to certain events of default and a set-off provision. As these changes are incorporated into transactions and the 2002 ISDA Agreements are utilized, Standard & Poor's will continue to monitor the market use and rate deals utilizing the 2002 ISDA Agreements. Due to the changes reflected in the 2002 ISDA Agreements, additional scheduled items may be necessary (See Appendix IX for a form of interest rate cap questionnaire for the 2002 ISDA Agreements). Because of the current, extensive use of the 1992 ISDA Agreements in the market, the section below will comment on and refer to relevant sections of the 1992 ISDA Agreements as they relate to commercial mortgage loan securitizations.

Each of the 1992 ISDA Agreements is composed of three parts: the basic agreement (the "Base Agreement"), a schedule to the Base Agreement (the "Schedule") and a confirmation (the "Confirmation"). The Base Agreement is a form printed by ISDA that contains the standard terms and conditions for cap agreements. The purpose of the Base Agreement (as supplemented by a Schedule and the Confirmation) is to provide an agreement between two parties so that they may enter into any number of cap transactions

that will be governed by the Base Agreement. As the names imply, the Local Agreement is to be used where both parties are domiciled in the U.S. and the Cross Border Agreement is to be used where at least one of the parties resides in a foreign jurisdiction. Consequently, the Cross Border Agreement contains additional provisions not found in the Local Agreement (such as sections dealing with withholding taxes and agreements to provide tax forms). Generally, the Base Agreement does not change and is amended or supplemented by use of the Schedule and the Confirmation.

The Schedule amends and supplements the Base Agreement by revising, adding, or deleting terms in the Base Agreement as agreed by the parties. Part 1 of the Schedule for both of the 1992 ISDA Agreements includes supplementary definitions to the Base Agreement and states whether certain provisions of the Base Agreement (*e.g.,* cross-default), will apply to the parties. Part 2 of the Schedule for the Cross Border Agreement provides for the making of certain representations for tax purposes. Part 2 of the Schedule for the Local Agreement (Part 3 for the Cross Border Agreement) lists documents (such as legal opinions, tax forms or officers' certificates) to be delivered by each party at the closing of the transaction.

Part 3 (Part 4 of the Cross Border Agreement) addresses other miscellaneous issues not addressed in the other Parts such as modification of the assignment provisions of the Base Agreement and addresses for notices. Part 4 of the Schedule for the Local Agreement (Part 5 for the Cross Border Agreement) is reserved for any other provisions the parties may wish to include in their agreement.

The Confirmation is a short agreement of one or two pages and contains the economic terms of a specific cap transaction. The Confirmation sets forth the method for calculation of payments, the notional amount upon which payment dates are calculated, the payment dates and certain other information. Any number of confirmations may be entered into by the parties to an ISDA Agreement once the Base Agreement, as amended by the Schedule, has been executed.

Conditions Precedent

Under the 1992 ISDA Agreements, each party's obligation to make the payments specified in the Confirmation is subject to the performance of a number of conditions precedent. Therefore, it is important to establish whether all conditions precedent have been performed before the first payment by the counterparty has fallen due under the cap agreement. Often, these conditions precedent are satisfied at the time the agreement is executed. Standard & Poor's may seek evidence that such conditions precedent will be or have been performed. Generally, the most significant condition precedent is the payment by the borrower, on or prior to the closing date, of the premium to the counterparty.

Payment Obligations

As noted above, the scheduled amounts payable under a cap agreement and the timing of such payments generally are set forth in the Confirmation. The amounts payable by the counterparty, together with those required by the borrower up to the strike rate, plus the spread, will need to be at least as much as are required to make scheduled payments on the securities. In the case of payments based on LIBOR, the 1992 ISDA Agreements provide that the calculation can be performed on a number of different bases.

For example, LIBOR may be a rate derived from the Reuters Monitor Money Rates Service or a rate calculated by several designated "reference banks." The method of calculating LIBOR for the cap agreement should not be different from the manner in which the LIBOR interest rate is calculated for purposes of determining interest due under the loan documents or on the rated securities. All three aspects of the transaction (i.e., the underlying note, the rated securities, and the cap agreement) should have the same floating rate, calculated in the same manner, on the same determination date, and with the same interest accrual period.

The timing of payments under the cap agreement is equally important. Payments from the counterparty must be received prior to the dates on which the securities are required to be paid. For this reason, the definitions of "business day" used in the cap agreement, the loan documents and the securitization transaction documents should not conflict. Because payments under the cap agreement are necessary for the timely payment of interest and the servicer generally is advancing only to the strike rate, plus the spread, the grace and cure periods available to the counterparty under Section 5 of the 1992 ISDA Agreements should be deleted or reduced in order to be sure all funds will be available on a timely basis for distribution to the holders of the rated securities.

In a cross-border cap agreement, there is a danger that a shortfall in payments may occur if the counterparty is required to deduct any kind of withholding tax. While there may be no requirement to deduct any withholding tax at the time of execution of the cap agreement, a change in either party's circumstances or a change in tax law may bring about a requirement to deduct at a later date. A change in circumstances could arise where a party is initially exempt from the requirement to withhold because it is able to make certain representations or because it provides an appropriate tax form. Under Section 3 of the Cross Border Agreement, payee tax representations are deemed to be made at all times throughout the term of the cap and are, therefore, at risk of becoming incorrect due to a change in circumstances.

Section 2(d)(i)(4) of the Cross Border Agreement requires the payor to "gross up" in respect of any "indemnifiable tax" (defined in Section 14 of the Cross Border Agreement) unless such tax (i) arises because the payee failed to supply any of the tax forms, documents, or certificates listed in Part 3 to the related Schedule; or (ii) arises because a tax representation made by the payee in Part 2 of the Schedule is breached other than as a result of a change in tax law or because the payee failed to notify the payor that a payee tax representation was no longer true.

An indemnifiable tax is generally defined as any tax that is imposed on payments being made by the payor other than a tax arising due to a present or former connection between the payee and the jurisdiction of the taxing authority imposing such tax. Where Standard & Poor's is relying on the amounts payable under the cap agreement to meet payment obligations on the rated securities, the counterparty must agree unconditionally to gross up in the event that a withholding tax is imposed on payments being made by it to the issuer. Standard & Poor's will normally ask that the definition of indemnifiable tax be widened to cover any withholding tax whatsoever.

Moreover, since the counterparty is excused from having to gross up following a change in circumstance (other than a change in tax law) resulting in the breach of an issuer's tax representation, and because payee tax representations are deemed made at all times, Standard & Poor's may review a borrower's tax representations before deciding whether a counterparty should be excused from grossing up in such a case.

The Cross Border Agreement also contains two other tax indemnities. Section 2(d)(ii) protects the payor where it makes a payment without deduction for taxes for which there is no obligation to gross up under Section 2(d)(i)(4) and is later required to pay those taxes itself. Again, a borrower should not be obligated to make such payments to a counterparty because it is unlikely to have available funds for that purpose. However, the issuer should be compensated by the counterparty for any taxes it has paid on behalf of the counterparty.

The second tax indemnity can be found in Section 4(e), which provides for each party to the cap agreement to indemnify the other for any stamp, registration, or other documentary tax levied by one party's taxing authority on the other party where the other party is located outside that party's jurisdiction. In case of doubt, Standard & Poor's may request a local tax opinion confirming that no such stamp duty or other documentary tax will be payable by the borrower except to the extent that it is provided with funds for paying such tax.

Early Termination

The 1992 ISDA Agreements provide that any cap agreement may be terminated following the occurrence of either an "Event of Default" or a "Termination Event."

Events of Default

Events of default are defined in Section 5 of the 1992 ISDA Agreements and include failure to pay which is not remedied within three days of notice of such failure, a breach of the agreement, a default under a credit support document (*i.e.*, a guarantee), a misrepresentation (in the Cross Border Agreement, other than a payor or payee tax misrepresentation), a default under one or more other specified cap agreements, a default under other specified agreements (*i.e.*, a cross default), the bankruptcy of a party, or a merger without assumption by the surviving entity. Upon the occurrence of an event of default, the nondefaulting party will be entitled to give notice designating a date on which the agreement is to terminate. If the parties have elected "Automatic Early Termination," where the event of default is bankruptcy, the agreement terminates automatically as of the date of, or immediately before, the relevant act of insolvency.

In the event that a party fails to make a payment because it has become illegal for it to do so, Section 5(c) provides that this failure will not constitute an event of default but, instead, an illegality giving rise to a termination event described below.

Events of default with respect to a borrower are problematic. If a borrower defaults under the cap agreement in connection with a transaction where the payments from the cap agreement are necessary for the payments on the rated securities, the counterparty may terminate the agreement and holders of the rated securities may incur a loss. Consequently, the events of default applicable to the borrower must be severely limited.

On the other hand, any event of default on the part of the counterparty that jeopardizes the likelihood that the counterparty will continue to make scheduled payments to the trustee should give rise to a right on the part of the trustee (or the servicer on its behalf) to terminate the cap agreement. Consequently, virtually all of the events of default (other than cross default) should apply to the counterparty. If the counterparty's obligations are guaranteed, the appropriate events should apply to the guarantor as well.

Termination Events

The 1992 ISDA Agreements also contain a number of other events known as "Termination Events" which give rights to one or both parties to bring about an early termination of the cap. Termination events include a change in law rendering the cap agreement illegal for a party and a "Credit Event upon Merger." In a cap agreement, a credit event upon merger is defined as a merger by a counterparty or a credit support provider with another party a result of which the long-term unsecured debt rating of the surviving entity is lower than that of the original party. In addition, the 1992 Agreements provide that the parties may agree on the other events that will constitute termination events.

Because the rating of the rated securities in a stand-alone property-specific transaction using a cap agreement are based upon the rating of the counterparty, an additional termination event should include the failure of the counterparty to maintain a specified rating appropriate for the transaction. Standard & Poor's has accepted agreements that permit a counterparty that has suffered a downgrade, withdrawal, or qualification of such rating to provide the trustee with collateral in amounts that Standard & Poor's confirms in writing will not result in the downgrade, withdrawal, or qualification of the then-applicable rating of the rated securities, in lieu of such event becoming a termination event.

If the counterparty fails to provide this collateral within a specified period of time, a termination event should be deemed to exist. If the counterparty fails to maintain the appropriate rating and does not post the appropriate collateral in a timely manner, the counterparty should, at its expense, obtain a new interest rate cap agreement in a form and with a counterparty that Standard & Poor's confirms in writing will not result in a downgrade, withdrawal, or qualification of the then-applicable rating on the rated securities.

Generally, unless the termination event can be avoided, the agreement may be brought to an end on a day designated as the early termination date. Shortly afterwards, a settlement amount will be *prima facie* payable in the termination currency stated in the Schedule by one party to the other by reference to a prescribed formula. Standard & Poor's reviews the early termination events of cap agreements with particular care. Other than in the case of an illegality, only the trustee should generally be permitted to bring about an early termination of a cap agreement.

Assignment

Under Section 7 of the 1992 ISDA Agreements, neither party can assign its interest in a cap agreement without the prior written agreement of the other party. In commercial mortgage-backed transactions, the borrower will need to assign its rights in the agreement to the trustee. The Schedule, therefore, should include a provision permitting such assignment. Additionally, the Schedule should state that all directions to the counterparty will be from the trustee (or the servicer on its behalf) and the counterparty should not recognize directions from the borrower. Finally, all payments by the counterparty should be made to the trustee (or the servicer on its behalf) and not to the borrower. Standard & Poor's will only allow a counterparty to be released from its obligations under a cap agreement following an assignment where such obligations are assumed by an institution with the required ratings.

Legal Opinions

(See Section Five, Legal Opinions for Standard & Poor's criteria for legal opinions to be provided in

transactions with cap agreements.)

Interest Rate Cap Agreement Questionnaires
See Appendix IX for the forms of interest rate cap questionnaires that may be requested by Standard & Poor's in connection with a cap transaction.

Section Two
Pool Transactions

Types of Pool Transactions

Pool transactions can be divided into two types depending upon the nature of the loans involved: performing loans and nonperforming loans. In a pool transaction the asset-specific analysis is generally less stringent than that utilized in a property-specific transaction except with respect to any large loans in the pool, since Standard & Poor's puts more emphasis on the overall pool than on individual assets in the pool.

Pools of Performing Loans

In a traditional pool transaction involving performing loans, either an originator of mortgage loans sells a portfolio of loans directly to a trust, or an originator of mortgage loans sells a portfolio of loans directly to an SPE, which is referred to as a depositor (usually established by the originator or the underwriter). The SPE in turn deposits the mortgage loans into a trust.

In each case, the transfer of the mortgage loan is accompanied by reserve funds, security deposits, insurance policies, letters of credit, guarantees, or other forms of credit enhancement for the loans. In exchange for the transfer of the loans into the trust, the originator or depositor, as applicable, will receive the proceeds from the sale of the securities that are issued by the trust and secured by the mortgages. Simultaneously with the transfer of the loans to the trust, the proceeds from the sale of the securities are used to purchase the mortgage loans (if applicable), establish any necessary reserve funds, purchase any necessary credit enhancement for the securities, and pay for the costs of the transaction. Traditionally, the trust is a real estate mortgage investment conduit (REMIC) under the Internal Revenue Code.

Pools of Nonperforming Loans

One of the requirements of the REMIC rules is that the loans in a pool transaction must be performing loans. Accordingly, if an entity holds a pool of nonperforming loans, a REMIC trust is not used. Rather, an SPE that owns the nonperforming loans will issue debt directly. This debt typically takes the form of collateralized mortgage notes that are rated and then sold. This SPE will deliver the loans and all related collateral to a trustee that holds them for the benefit of the purchasers of the notes.

Conduits

A conduit is a variation on the traditional pool transaction. Traditional pool transactions were motivated by owners of large pools of existing mortgage loans which in many cases had been held by their originators or assignees for several years. In conduit transactions, new loans are originated with the specific intent to securitize them. Generally, all of the loans in the conduit pool meet standard underwriting criteria established by the conduit lender.

Servicing Issues in Pool Transactions

As with property-specific transactions, loan servicing is an important part of pool transactions. The "servicer" may perform any of a number of different functions ranging from collection of loan payments from the borrower to the work-out or foreclosure of a defaulted loan. In addition, the servicer usually advances funds as liquidity support for the transaction. The following discussion is intended to highlight Standard & Poor's concerns with respect to servicers in pool transactions. Before presenting the issues, it is useful to define some of the terms that are frequently used to describe the different servicing functions:

- ***Servicer.*** Historically, a single servicer was the entity that performed all servicing activities with respect to loans-from collections of payments to workouts and foreclosures. As a number of "defaulted loan specialists" began to appear on the market, servicing activities began to be segregated between the activities relating to performing loans and activities relating to defaulted or soon to be defaulted loans (generally referred to as "specially serviced loans"). Today the term "servicer" is used generically to refer to both special servicers that service specially serviced loans and master servicers that service performing loans.
- ***Special servicer.*** The special servicer is the servicer that has the responsibility for dealing with defaulted or soon to be defaulted mortgage loans. Frequently, the special servicer is a party who is different from the master servicer, and most transactions provide for a master servicer and a special servicer.

- ***Subservicer.*** The subservicer is the party that has been contracted to perform servicing activities for the master servicer or special servicer.
- ***Master servicer.*** The term "master servicer" is a term used to define the servicer who is responsible for servicing performing loans, including ultimate responsibility for servicing performing loans where subservicers are used in the transaction.

General Servicing Standard
The rights and obligations of the servicer, special servicer, or master servicer generally are governed by a pooling and servicing agreement (or other applicable servicing agreement). This agreement should provide that each servicer must service and administer the mortgage loans for the sole benefit of the holders of the rated securities with the higher of the following standards of care:

- The same care, skill, prudence, and diligence with which the servicer services and administers similar mortgage loans for other third-party portfolios, giving due consideration to customary and usual standards of practice of prudent institutional commercial mortgage lenders servicing their own loans and to the maximization of the net present value of the mortgage loans, and
- The same care, skill, prudence and diligence that the servicer uses for loans that the servicer owns.

Servicers must adhere to this servicing standard notwithstanding any potential conflicts of interest that may arise during the course of the transaction, including, without limitation:

- Any relationship that the servicer or any of its affiliates may have with the related borrower or any of its affiliates, depositor, or other parties to the transaction or any of their respective affiliates;
- The ownership by the servicer or any of its affiliates of any certificates or other interests in the mortgage loans, any related other indebtedness secured by the related mortgaged property, or any mezzanine loan;
- The servicer's right to receive compensation or other fees for its services rendered pursuant to the servicing agreement;
- The servicer's (or any other party's) obligations to make principal, interest, or property protection advances or otherwise incur servicing expenses with respect to the mortgage loans;
- The ownership, servicing, or management for others of any other mortgage loans or mortgaged property; and
- Any obligation of the servicer (as the seller or an affiliate of the seller of the mortgage loans) to pay any indemnity with respect to, or repurchase any, mortgage loan.

Advancing
In most commercial mortgage transactions, particularly commercial mortgage pools, there is a possibility that, absent the presence of a liquidity feature, the timing of payments on the underlying mortgage loans will not "match" the timing of the payments on the rated securities. This mismatch generally results from defaults on the underlying mortgage loans. As a result of this potential mismatch, a party with appropriate ratings by Standard & Poor's (i.e., a party that meets both the long-term and short-term guidelines specified below), must agree to advance delinquent payments on the underlying mortgage loans to the holders of the rated securities. Typically, this party is the servicer.

If the servicer does not have the necessary ratings, another party having such ratings must act as the "backup" advancer. In many cases, the trustee serves as a "backup" advancer if it has sufficient long-term and short-term ratings. Otherwise, a fiscal agent with appropriate ratings is appointed. The minimum Standard & Poor's ratings for the advancing party or its backup advancer are a long-term unsecured debt rating of not less than 'A+' and a short-term unsecured debt rating of not less than 'A-1'.

The purpose of the servicer advances is not to provide credit support; advances are meant to provide liquidity only. For example, when Standard & Poor's rates a commercial mortgage pool transaction, it understands that some of the loans may become delinquent or even be foreclosed. A substantial portion of underlying mortgage loan payments may not be made on time. However, the ratings are assigned only after analyzing the mortgaged properties and determining that, despite expected delinquencies, the underlying mortgaged properties have adequate value to ultimately pay the rated securities by the rated final payment or distribution date. This determination, together with the liquidity provided by servicer advances, enables

Standard & Poor's to rate such transactions.

Subject to appraisal reductions and the "recoverability standard," the advancing party typically must advance the amount of unpaid principal and interest (other than balloon payments) with respect to each mortgage loan, as well as expenses necessary to protect or preserve any mortgaged property. The advance bears interest at a rate set forth in the transaction documents. The advancing party will be obligated to advance an amount sufficient to cover the foregoing items to the extent that the advancing party determines, at the time when made and in the reasonable judgment of the advancing party, that such advance ultimately will be recoverable from future payments, insurance or liquidation proceeds, and net income from or relating to the mortgage loan or related mortgaged property. In addition, the servicer should make protective advances even if the advances would be non-recoverable if the servicer determines, in accordance with the servicing standard, that such advance would be in the best interest of the holders of the rated securities.

This recoverability standard means that the advances are meant to provide liquidity only, not absolute credit support. Subject to the recoverability standard, the advancing party typically will be obligated to make advances with respect to any mortgage loan until the liquidation of the mortgage loan or the related mortgaged property. Any default interest and late payment fees collected with respect to a loan should first be applied to pay the advancing party or reimburse the trust for any interest on advances prior to disbursement of such payments for another purpose, such as additional servicer compensation.

The servicer should reimburse the advancing party for outstanding advances made by the advancing party as soon as possible after funds available for that purpose are deposited in the collection account. The servicer's reimbursement of the advancing party for any advance of delinquent principal and interest payments should be limited to late collections of interest on, and principal of, the particular loan relating to the advance or liquidation proceeds for the particular loan.

Any property protective or servicing advance should be reimbursable from collections from the particular borrower for the related item for which such advance was made or liquidation proceeds with respect to the related loan. Advances should not be reimbursable from payments or collections from the related borrower or mortgaged property that are allocable as current scheduled principal and interest payments.

Often the loan documents will provide a borrower with a cure period if the borrower fails to remit a scheduled debt service payment. All grace periods for payments on the underlying mortgage loans in a pool should expire prior to the date on which the rated securities are to be paid, or the date the advancing party is required to make an advance for delinquent payments. Standard & Poor's seeks to avoid the potential advance interest expense to the holders of rated securities associated with advances that are made for delinquent debt serice payments because a borrower has a right to pay after the monthly date on which the servicer is required to make an advance for a delinquent debt service payment. This issue should be addressed by either setting a distribution date for the certificates after expiration of all grace periods, or by prohibiting the advancing party from accruing interest on any advance for delinquent debt service payments on the mortgage loan until the expiration of the grace period.

If a holder of a related "B" interest or mezzanine loan has a cure period for the related senior mortgage interest, the related intercreditor agreement should not excuse the holder of the interest from paying default interest (or interest that may have accrued on any principal and interest advance on the senior mortgage interest) in order to effect a cure.

To the extent that the advancing party determines that a particular advance would not be recoverable, it typically delivers to the trustee a certificate, signed by an officer of the advancing party, which sets forth in detail the basis for the determination of nonrecoverability. Attached to this officer's certificate should be the documents on which the advancing party based its decision, including, but not limited to, an updated appraisal of the mortgage loan or mortgaged property, as applicable, current income and expense statements, rent rolls, property inspection reports, and other pertinent documentation. Other factors considered may include current and projected occupancy status, market conditions, and the existence of any environmental conditions relating to the mortgaged property.

All entities servicing commercial mortgage transactions, whether advancing or not, must be approved by Standard & Poor's as a master servicer or special servicer, as applicable.

In any transaction involving a backup advancer, Standard & Poor's is particularly concerned that adequate time and notices be built in to the advancing mechanisms to ensure that all backup advances will be made on time. If, prior to any distribution date, the advancing party fails to make any required advance, sufficient notice and information should be given to the backup advancer so that it will have adequate time both to make a recoverability determination and to make any required advance by the scheduled distribution date.

Reimbursement of Nonrecoverable Advances
Most pooling and servicing agreements provide that, if a servicer or the trustee makes an advance that was determined to be recoverable when made but is later determined to be non-recoverable (generally because of an unanticipated decline in the value of the property or because the net proceeds from a liquidation of the property were less than anticipated), the servicer or the trustee, as applicable, may be reimbursed for the nonrecoverable portion of the advance from pool collections that would otherwise be payable to the holders of the rated securities. This is permissible since the servicer or trustee advances are not intended to be credit enhancement for the loans, but rather to provide liquidity or preserve the value of the collateral.

A problem arises if the size of the nonrecoverable advance and the timing of the servicer's or trustee's reimbursement to itself for the advance would result in a shortfall of current interest payments to investment-grade rated classes. Standard & Poor's will review the procedures for recovery of nonrecoverable advances in the pooling and servicing agreement and consider whether there are mechanisms in place to mitigate to the extent practical the effects on investment-grade rated certificates.

For example, if a recovery of a nonrecoverable advance can be structured so that the servicer or trustee, as applicable, is reimbursed over time (rather than in a single payment) and such a reimbursement structure will prevent shortfalls to the investment-grade rated classes, this is preferable to a structure where the servicer or trustee is required to reimburse itself in one lump sum, possibly resulting in shortfalls of current interest payments to the investment grade rated classes. This is not intended to limit the right of the servicer and trustee to be reimbursed for nonrecoverable advances and interest thereon, but rather to limit the effects of such reimbursement on the investment-grade rated securities.

Appraisal Reductions
Many transactions rated by Standard & Poor's have incorporated features that limit the amount of advances of scheduled debt service payments when the value of the underlying mortgaged property has declined. The most common feature used is the appraisal reduction mechanism pursuant to which, upon the occurrence of an "appraisal reduction event," the servicer should decrease the interest component of advances of delinquent scheduled debt service payments on the related loan.

Appraisal reduction events typically require the servicer to obtain an appraisal of the related mortgage property (or an update of an existing appraisal) from an independent appraiser who is a Member of the Appraisal Institute (MAI), in the following circumstances:

- Sixty days after an uncured delinquency occurs in respect of a mortgage loan;
- Sixty days after the date on which a reduction in the amount of the monthly payments on a mortgage loan or a change in any other material economic term of a mortgage loan (including an extension of the scheduled maturity date) becomes effective as a result of a modification of such mortgage loan;
- Sixty days after a receiver has been appointed;
- Immediately after the voluntary or involuntary bankruptcy of a borrower; or
- Immediately upon a mortgage property becoming REO property.

The servicer should obtain the appraisal within 60 days of the occurrence of the appraisal reduction event and calculate the "appraisal reduction amount". For small balance loans of less than $2 million, however, the servicer may perform an internal evaluation instead of obtaining an appraisal if the small balance loans in the pool do not make up a significant percentage of the total pool balance.

If the servicer does not obtain an updated appraisal within 120 days following the event that triggered the appraisal reduction event, the pooling and servicing agreement should provide that there will be a deemed appraisal reduction (usually an amount equal to 25%-30% of the principal amount of the related loan) until the appraisal is obtained.

The appraisal reduction amount typically is an amount equal to the excess of (a) the outstanding principal balance of such loan, plus the sum of:

- Unpaid interest on such loan (to the extent not advanced previously),
- All unreimbursed advances plus interest at the advance rate thereon,
- All currently due and unpaid real estate taxes, assessments, insurance premiums, ground rents, condominium fees, and other amounts due and unpaid under the mortgage loan, and
- The amount of all subordinate mortgages, over (b) 90% of the appraised value of the mortgaged property plus the amount of all cash reserves held by the servicer. By using the appraisal reduction mechanism, the servicer is able to anticipate losses in value to the mortgaged property prior to realization of such losses, thereby reducing losses associated with advancing sums that might not be recovered in a foreclosure and liquidation of the mortgaged property.

Maintenance of Property Insurance Policies

An additional responsibility of the servicer is to ensure that insurance is maintained by each borrower covering each mortgaged property in accordance with the applicable mortgage documents. Insurance coverage typically includes, at a minimum, "all risk" extended coverage fire and casualty, general liability, and rental interruption insurance. It may also include flood and earthquake coverage, depending on the location of a particular mortgaged property. If a borrower fails to maintain the required insurance coverage or the mortgaged property becomes REO, the servicer, in accordance with the servicing standard, is obligated to obtain the necessary insurance which, in pool transactions, may be provided by a blanket policy covering all pool properties. Generally, the blanket policy must be provided by an insurance provider with a financial strength rating of at least 'BBB' or, for pools that include large loans, a financial strength rating of at least 'A'.

Errors and Omissions Insurance/Fidelity Bonds

Each servicer, special servicer, subservicer, trustee, and custodian should maintain a fidelity bond and a policy of insurance covering loss occasioned by the errors and omissions of its officers and employees in connection with its obligations under the transaction documents. All fidelity bonds and policies of errors and omissions insurance should name the securitization trust as an additional insured and be issued by insurance carriers that are rated by Standard & Poor's with a claims-paying ability rating no lower than two categories below the highest rated security in the transaction, but no less than 'BBB'. In those instances where a party seeks to self-insure, it must have a rating not lower than two categories below the highest rated security then outstanding on the transaction, but in no event below 'BBB'.

Modification of Mortgage Loans

An important servicing function is determining when and whether a workout, amendment, waiver, modification, or extension (collectively, "modifications") of a mortgage loan should be made. Generally, in pool transactions the servicer has relatively broad latitude to engage in modifications. However, because ratings address the likelihood of timely payments on the rated securities, Standard & Poor's is concerned that there be adequate limitations on the servicer's ability to modify or extend mortgage loans after balloon payment defaults.

Standard & Poor's wants each loan (including any modified or extended loans) to be fully paid or liquidated by a date that will permit all amounts due and payable on the rated securities to be paid prior to the rated final distribution date of the rated securities. For this reason, the extension of any maturity date should not be beyond the date which is two years prior to the rated final distribution date (or, in cases involving pools of large loans, not later than the date which is at least five years prior to the rated final distribution date). The rated final distribution date in a pool transaction is generally the date two years after the end of the longest amortization period for any loan in the pool. However, in the case of pools of large loans with short term maturities, the rated final distribution date might be five years (or longer under certain circumstances such as if the loans have additional debt in the form of a "B" interest or mezzanine debt.) after the latest maturity date of any loan in the pool (taking into consideration any extension rights a borrower may have).

Loans secured by leasehold estates should not be extended beyond a date that is typically twenty years prior to the expiration of the ground lease, although a servicer may extend a loan to a date as late as 10 years prior to the expiration date if it gives due consideration to the remaining term of the ground lease. In making any modification, the servicer must determine that the modification is reasonably likely to produce a greater recovery on a net present value basis than immediate liquidation.

The servicer generally should not agree to a modification that would affect the amount or timing of any related payment of principal or interest, materially impair the security for the mortgage loan, or extend the maturity date unless:

- A default has occurred or is reasonably foreseeable,
- The servicer has made a determination in accordance with the servicing standard that the modification would produce a greater recovery for holders of the rated securities on a present value basis, and
- The modification would not violate any REMIC or grantor trust rules.

Ratings confirmation should be sought for any modification that involves the substitution, addition, or release of a material portion of collateral. Standard & Poor's should be notified in writing of any modification (and, with respect to certain other modifications, ratings confirmation may be required in the transaction documents.)

Modifications in REMIC and Grantor Trust Transactions
In a transaction structured as a REMIC or a grantor trust, the servicer should confirm that any modification of a mortgage loan will not result in a violation of the REMIC or grantor trust rules.

Enforcement of Due-on-Sale and Due-on-Encumbrance Clauses
In a pool transaction, the servicer typically will make the determination whether to enforce provisions usually found in mortgage loans that permit the holder of the mortgage loan to accelerate the mortgage loan upon the sale or encumbrance of the mortgaged property by the borrower or the transfer, or encumbrance of direct or indirect controlling interests in the borrower.

Standard & Poor's typically relies on the servicer to make a determination, in accordance with the servicing standard, whether enforcement or waiver of violations of the due-on-sale or due-on-encumbrance requirements is in the best interest of the trust fund and the holders of the rated securities. Generally, the servicer is permitted to waive or consent to such violations in circumstances where:

- The violation relates to the granting of easements, rights-of-way, or similar encumbrances that the servicer determines will not have a material adverse impact on the value, use, or operation of the mortgaged property or the interest of the trust fund in the mortgaged property, or the ability of the borrower to pay the debt service or operating expensies, or
- The transferee of the mortgaged property is of similar credit quality as the transferor, has assumed all of the transferor's obligations under the loan documents, and meets other appropriate underwriting criteria.

Notwithstanding the foregoing, the transaction documents should not allow the servicer to waive enforcement of a "due-on-sale" or "due-on-encumbrance" clause unless it first obtains a ratings confirmation from Standard & Poor's with respect to the following:

- In the case of a "due-on-sale" clause, any mortgage loan that (A) represents 5% or more of the principal balance of all of the mortgage loans held by the trust, (B) has a principal balance over $35 million, or (C) is one of the 10 largest mortgage loans in the pool based on principal balance; or
- In the case of a "due-on-encumbrance" clause (which the servicer should interpret, if the loan documents allow such interpretation, to include requests for approval of mezzanine financing or preferred equity), any mortgage loan that (A) represents 2% or more of the principal balance of all of the mortgage loans held by the trust, (B) has a principal balance over $20 million (C) is one of the 10 largest mortgage loans in the pool based on principal balance, (D) has an aggregate loan-to-value ratio (including existing and proposed additional debt) that is equal to or greater than 85%, or (E) has an aggregate debt service coverage ratio (including the debt service on the existing and proposed additional debt) that is less than 1.2x to 1.0x. The servicer should provide copies of any such waivers to Standard & Poor's.

Defeasance
Generally, prior to completion of any defeasance, ratings confirmation should be obtained. For certain pool

transactions, however, in lieu of obtaining ratings confirmation, the servicer may, at its option, complete the defeasance in accordance with the servicing standard and deliver to Standard & Poor's a defeasance certification (in the form provided in Appendix V) within 10 days after completion of the defeasance. The servicer may choose this option only if the following conditions are satisfied:

- The loan is not one of the 10 largest loans in the pool;
- The loan has a principal balance at the time of the defeasance of less than $20 million and 5% of the pool principal balance; and
- Where a successor borrower assumes the loan, the successor borrower and all its affiliates do not hold loans (whether fully or partially defeased) in such pool that in the aggregate (i) total more than $20 million or (ii) comprise more than 5% of the pool principal balance. *(See Section One, Property-Specific and Large Loan Transactions - Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions - Defeasance, and Appendix IV for additional criteria on defeasance.)*

Sale of Defaulted Mortgage Loans and REO Properties
Most pooling and servicing agreements provide that the special servicer may offer to sell any REO property for cash to any person for a "par" purchase price that is generally equal to the unpaid principal balance of the related loan (calculated as if the related loan remained outstanding after foreclosure), plus accrued and unpaid interest, unreimbursed advances and interest thereon, and servicing and trustee fees. The special servicer should offer such REO property for sale in a fair auction or other manner as is consistent with the servicing standard. It should accept the highest cash bid received in this auction or other procedure from any person for any REO property in an amount at least equal to the "par" purchase price therefor.

In the absence of any bid for any REO property in an amount at least equal to the "par" purchase price, the special servicer may accept the highest cash bid received if the special servicer determines, consistent with the servicing standard, that a sale at that price is in the best interests of the holders of the rated securities. If the purchaser is the special servicer or other interested person or an affiliate thereof, the trustee must verify that the price is a fair price. The trustee generally relies on a current appraisal from an independent MAI appraiser in making this determination. Standard & Poor's reviews the provisions of the pooling and servicing agreement to evaluate whether there are appropriate safeguards in place to allow the REO property to be sold in a manner that will result in appropriate realization to the holders of the rated securities.

Due to certain accounting rules, defaulted mortgage loans cannot generally be sold in the same auction format as REO properties. Many pooling and servicing agreements therefor provide that, if any payment under the mortgage loan is at least 60 days delinquent, the servicer has accelerated the maturity of the mortgage loan, or the loan is then a specially serviced loan, certain specified parties will have an assignable purchase option to purchase such mortgage loan from the trust at a price equal to either:

- The "fair value" of the mortgage loan as determined by the special servicer in accordance with the servicing standard, or
- If that determination has not been made, an amount equal to the unpaid "par" purchase price.

In determining the fair value of the defaulted mortgage loan, the special servicer should take into consideration the anticipated recovery from pursuing a work-out or foreclosing the mortgage and liquidating the mortgaged property. The fair value should be recalculated by the special servicer if there is a material change in circumstances, the special servicer has received new information that has a material effect on its calculation of the fair value of the mortgage loan, or a significant period of time has elapsed between the time a purchase option is exercised and the time the fair value of the loan was last determined.

If the purchase option is exercised by the special servicer, the controlling class certificateholder, or an affiliate of either of them, the master servicer or the trustee should confirm the fair value determination and the costs incurred in connection with that verification should be an expense of the party exercising the purchase option. In the event that the master servicer or trustee designates a qualified, independent third party of recognized standing selected by it with reasonable care to assist it in making the determination of value, the master servicer or trustee will be entitled to rely upon such third party's determination. Unless and until the purchase option is exercised, the special servicer should be directed to pursue such other

resolution strategies available under the pooling and servicing agreement, including work-out and foreclosure, consistent with the servicing standard.

The purchase option should generally terminate, if not exercised sooner, upon:

- The related borrower's cure of all defaults on such mortgage loan,
- The acquisition on behalf of the trust of title to the mortgaged property by foreclosure or deed in lieu of foreclosure, or
- The modification or pay-off (full or discounted) of the mortgage loan in connection with a workout.

There are some variations from the fair value purchase option mechanism described above that are acceptable to Standard & Poor's. The focus of the review of the purchase option mechanisms by Standard & Poor's is to evaluate whether there are appropriate safeguards in place to reduce the risk that a defaulted loan sold pursuant to a purchase option will result in a realization to the holders of the rated securities that is less than what would have been realized if the special servicer had discretion on whether or not to sell such defaulted loan.

Property Inspections
To ensure that the borrowers are properly maintaining the mortgaged properties, the master servicer should be directed to conduct inspections (at its own expense) of the mortgage properties. Generally, an annual inspection should be provided for most properties. However, Standard & Poor's will consider an inspection schedule of every two years for nondefaulted small balance loans (generally loans with a principal balance less than $2 million, if such loans do not constitute a significant portion of the pool). Standard & Poor's looks at the pool characteristics in determining if any loans qualify for two-year inspections. If any loan becomes a special serviced loan, the special servicer should promptly inspect the related mortgaged property.

Amendments to Pooling and Servicing Agreements
Pooling and servicing agreements generally may be amended in minor ways to cure ambiguities and to supplement the pooling and servicing agreement so long as the amendment does not adversely affect, in any material respect, the interest of a holder of the rated securities. Additionally, upon the consent of 66-2/3% of the voting rights of the holders of the securities and with a ratings confirmation, the pooling and servicing agreement can be amended in other respects provided, however, no amendment affecting the timing, manner, or amount of any payments to the holders of the rated securities affecting the percentages of voting rights or altering the servicing standard may be made without the approval of 100% of the holders of the rated securities affected thereby. Various opinions are frequently requested in connection with any amendment. Copies of all amendments and opinions should be delivered to Standard & Poor's.

Fees
Standard & Poor's reviews the servicing fees and compensation to be paid to each servicer in light of the servicing responsibilities of each servicer in a particular transaction. Standard & Poor's is concerned that servicing fees and compensation in each transaction are appropriate to the servicing functions undertaken and that those fees and compensation have not been underbid by each servicer. In addition, Standard & Poor's reviews master servicing fees and compensation to consider whether interest payments on the underlying mortgage loans (net of amounts required to make interest payments to the holders of the rated securities) will be adequate to pay all servicing fees and compensation of the master servicer, as well as fees and compensation of potential successor servicers.

Subservicers
In many transactions rated by Standard & Poor's, servicers are permitted to accomplish their servicing responsibilities by engaging subservicers. This usually is a feature of pool transactions. Subservicing agreements generally must be consistent with the pooling and servicing agreement, and the pooling and servicing agreement and the subservicing agreement must generally contain the following terms and conditions:

- Subservicers may not make important servicing decisions (such as modifications of the mortgage loans or the decision to foreclose) without the involvement of the master servicer or special servicer;
- The trustee or any successor servicer may terminate the subservicing agreement without cause and without cost or further liability to the trust fund or holders of the rated securities;

- Neither the trustee nor the holders of the rated securities shall have any direct obligations or liabilities (including, without limitation, indemnification obligations) with respect to any subservicer on account of a subservicing agreement or otherwise; and
- The servicer shall remain liable to the holders of the rated securities for the full performance of its obligations under the pooling and servicing agreement, notwithstanding the engagement of such subservicer.

Standard & Poor's will consider exceptions to the guideline that the trustee or successor servicer have the right to terminate any subservicing agreement without cause and without expense to the trust fund if the subservicer has a strong rating and is on Standard & Poor's list of approved master servicers or primary servicers, and the subservicing agreement has termination events that mirror those in the pooling and servicing agreement. A ratings confirmation is not required each time a servicer or special servicer hires a subservicer because Standard & Poor's bases its rating on the review and approval of the master servicer or special servicer which, notwithstanding any subservicing agreement, continues to bear the primary and ultimate responsibility for overall servicing performance.

Successor Servicers and Events of Default
When the master servicer or special servicer desires to resign, merge, or otherwise transfer its servicing responsibilities, Standard & Poor's is concerned that the rights of and benefits to the holders of the rated securities not be impaired. Accordingly, prior to the transfer of servicing responsibilities to a successor servicer and prior to a merger or consolidation affecting the servicer, the parties to the transaction must obtain ratings confirmation. Any successor servicer must be on Standard & Poor's "approved" master servicer or special servicer list, as applicable, must sign an agreement satisfactory to the trustee assuming all of the resigning servicer's duties and obligations, must remake all of the representations and warranties related to the servicer contained in the transaction documents, and must deliver acceptable corporate and enforceability opinions.

Typically, a servicer may voluntarily resign only upon appointment by the trustee of and acceptance by a successor servicer. Typical events of default under a pooling and servicing agreement that could cause a termination of a servicer include the following:

- The failure of the servicer to deposit or remit funds collected on the mortgage loans at the appropriate time;
- The failure of the servicer to make required advances on the mortgage loans at the appropriate time;
- The failure of the servicer to perform or observe its other covenants or agreements or a breach of its representations and warranties contained in the pooling and servicing agreement that is not cured within a reasonable time;
- The occurrence of certain bankruptcy, receivership, insolvency, or similar events that would indicate the servicer's insolvency or inability to pay its obligations; or
- The servicer is removed from Standard & Poor's "approved" master servicer list or special servicer list, as applicable.

Following an event of default, the trustee typically may, or shall at the written direction of some aggregate percentage of all holders of the rated securities, terminate the defaulting servicer. The trustee usually will temporarily take over the servicer's responsibilities until an approved successor can be retained and a ratings confirmation is obtained with respect to such successor.

Directing Class and Conflicts of Interest
Almost all pool transactions are multiple tranche transactions. In multiple tranche transactions, there is frequently a fundamental conflict of interest between holders of senior classes of rated securities and holders of junior classes of securities. When a mortgage loan is in default and the value of the mortgaged property is not sufficient to pay the loan in full, the junior classes of securities are in the first loss position. If the loan is liquidated, the holders of the junior classes of securities may recognize a loss whereas the holders of senior classes of rated securities may not be adversely impacted by the liquidation.

In this situation, a holder of a senior class of securities is satisfied to have the loan liquidated whereas a holder of a junior class of securities may seek alternative solutions, such as a loan workout or extension, to

protect its interests. On the other hand, holders of the junior class of securities might have an incentive to extend mortgage loans beyond a point where it is in the best interest of the holders of the rated securities as a collective whole, in order to continue to receive distributions that may be funded by servicer advances. These advances, if ultimately determined to be nonrecoverable, would be charged as losses against the entire pool.

Many transactions that Standard & Poor's has rated have incorporated the concept of a "directing class" which is given authority to approve certain actions taken by the servicer with respect to defaulted mortgage loans. Typically, the initial directing class consists of the holders of the junior-most class of securities (i.e., the class that is in a first loss position with respect to losses on the mortgage pool). The holder or holders of the more than 50% of the principal amount of the securities of the directing class are typically entitled to appoint a directing class representative that will exercise the rights of the directing class. If the principal amount of the securities of a directing class percentage is eliminated by losses, or constitutes less than a certain percentage of its initial balance, typically 25%, the next more senior class of securities typically becomes the directing class.

Actions Subject to Approval by Directing Class
The concept of a directing class has evolved to give those holders of securities in the first loss position some control over the servicing and realization on defaulted mortgage loans. In a typical transaction, the servicer might be required to obtain the consent of the directing class before proceeding with any of the following:

- Any modification, consent, or forgiveness of principal or interest with respect to a defaulted mortgage loan;
- Any proposed foreclosure of a mortgage or acquisition of a mortgaged property by deed-in-lieu of foreclosure;
- Any proposed sale of a defaulted mortgage loan; and
- Any decision to conduct environmental clean-up or remediation.

Additionally, when a loan becomes specially serviced, the pooling and servicing agreement may require a special servicer to prepare an asset status report describing the proposed actions to be taken as to such loan. The directing class may have approval rights over such asset status report. Finally, the directing class might have the right to remove a special servicer, with or without cause, subject to ratings confirmation and payment by the directing class (and not the holders of the rated securities) of all termination or other fees and expenses relating to such removal.

Potential Remedies
Standard & Poor's evaluates potential conflicts on a case-by-case basis and will accept remedies reasonably designed to overcome such conflicts. For example, a conflict of interest arises if the servicer decides foreclosing on a particular mortgage loan is in the best interest of the holders of the rated securities as a collective whole, but then receives contrary instructions from the directing class. If the servicer does not foreclose, then the holders of the rated securities as a whole are subject to risk that the directing class was wrong in overriding the servicer's determination. The proceeds ultimately realized on the mortgage loan may be lower than those that would have been realized if the servicer had promptly proceeded to foreclosure.

In all transactions, however, the holders of the rated securities must be insulated from this risk by the servicer's obligation to act always in accordance with the servicing standard regardless of the instructions of the directing class. To the extent the direction of the directing class (or failure to approve any proposed action by the special servicer) might cause the servicer to violate the servicing standard, the servicer should be instructed not to follow such direction (or proceed without such approval). In addition, if the directing class has not approved a course of action within a reasonable period of time or if immediate action is appropriate, the servicer should be directed to proceed in accordance with the servicing standard without the approval of the directing class.

Transactions that have large loans with a "B" interest outside of the trust frequently allow the holder of the "B" interest certain rights similar to those of the directing class with respect to the loan to which the "B" interest relates (*See Section One, Property-Specific and Large Loan Transactions - Permitted Indebtedness - A/B Loans.*)

Servicer Conflicts of Interest

A similar conflict of interest arises in transactions in which the servicer or any of its affiliates holds a portion of the rated securities, any junior unrated securities, or other interests in the mortgage loan. In these situations, the servicer may have an incentive to extend mortgage loans to continue to receive fees and other compensation or to make principal and interest advances on the defaulted loan even though the mortgage loans should otherwise be liquidated.

Other conflicts of interest may arise if the servicer holds an interest in a mezzanine loan or an equity interest in the related borrower. If the servicer holds such an interest, it has an incentive to avoid foreclosing the related mortgage loan because a foreclosure would result in a loss of its investment. However, in all of these conflict of interest situations, the servicer should be directed to service the mortgage loans in accordance with the servicing standard regardless of such conflicts of interest. If the servicer owns an equity interest in a mortgage borrower, some transactions have provided for the related mortgage loan to be serviced by a different qualified servicer that does not have such a conflict of interest.

WAC Rated Securities

Often, rather than having a fixed interest rate, certain securities in a pool transaction may have an interest rate based upon (or capped at) the weighted average net mortgage rate (the "WAC rate"). The net mortgage rate payable with respect to each mortgage loan is generally calculated net of servicing fees and trustee fees. For the purposes of calculating the WAC rate, however, the net mortgage rate of any mortgage loan should be calculated without regard to any modification, waiver, or amendment of the terms of such mortgage loan subsequent to the closing date of the securitization. This is intended to allocate losses or shortfalls resulting from any modification, waiver, or amendment to the most subordinate classes of the issued securities.

Surveillance Information

The trustee and/or the servicer should be directed to provide Standard & Poor's with the information deemed by Standard & Poor's to be necessary to provide ongoing surveillance of pool transactions. The type and frequency of the information varies depending upon the transaction.

Representations and Warranties in Pool Transactions

Representations, warranties, and covenants are an integral consideration in pool transactions. In pool transactions, Standard & Poor's generally does not rely on the representations and warranties of the underlying borrower. Rather, it relies on the representations and warranties made by sellers of assets, issuers of securities, servicers, trustees, and other participants in the rated transactions. Depending on the particular transaction, the nature and necessity of various representations, warranties, and covenants will vary.

Accordingly, Standard & Poor's will review them on a case-by-case basis. The list below is published to provide guidelines to issuers and sellers structuring pool transactions. Standard & Poor's will review those representations and warranties proposed by an issuer (which may be less or more extensive than the list set forth below) and evaluate whether the proposed representations and warranties are sufficient for, and consistent with, the rating on the transactions.

To the extent that a party must make an exception or qualification to a representation and warranty, the exceptions and qualifications should be provided to Standard & Poor's at least five business days prior to the date Standard & Poor's is scheduled to provide rating levels for a pool to allow sufficient time to evaluate the impact of such qualification or exception on the analysis of the transaction. Each exception to a representation and warranty should be set forth on a schedule or exhibit attached to the relevant transaction document and include proper reference to the excepted representation and the respective loan. It should also offer sufficient detail of the exception and any relevant factors mitigating the exception.

Representations and Warranties Common to Mortgage Loan Sellers, Depositors, Trustees, Fiscal Agents, and Servicers

As with property-specific transactions, the mortgage loan seller, the depositor, each servicer, the trustee, and the fiscal agent (if any) each typically make the following representations and warranties:

- ***Due organization, valid existence.*** Each is duly organized, validly existing, in good standing, and in possession of all licenses and authorizations necessary to carry on its business.

- ***Power and authority.*** Each has full power and authority to carry on its business as now being conducted and to enter into the transaction documents and the transactions contemplated thereby.
- ***Execution and delivery.*** The transaction documents have been duly executed and delivered by such party.
- ***Enforceability.*** The transaction documents constitute valid, legal, binding, and enforceable obligations of such party (subject to bankruptcy, insolvency, or creditor rights laws generally, and principles of equity generally) without offset, defense, or counterclaim.
- ***No conflict.*** The execution, delivery, and performance of the transaction documents by such party will not cause or constitute (with due notice or lapse of time or both) a default under or conflict with such party's organizational documents or other agreements by which such party is bound or otherwise materially or adversely affect performance of duties.
- ***No violation of laws.*** The execution, delivery, and performance of the transaction documents by such entity will not violate any law, regulation, order, or decree of any governmental authority.
- ***Consents obtained.*** All consents, approvals, authorizations, orders, or filings of or with any court or governmental agency or body, if any, required for the execution, delivery, and performance of the transaction documents by such entity have been obtained or made.
- ***No litigation.*** There is no pending or threatened action, suit or proceeding, arbitration, or governmental investigation against such entity an adverse outcome of which would materially affect such party's performance under the transaction documents.

Mortgage Loan Seller-Specific Representations and Warranties
Each mortgage loan seller typically makes the following additional representations and warranties:

- ***Solvent.*** The mortgage loan seller is solvent and the sale of mortgage loans will not cause the mortgage loan seller to become insolvent.
- ***No fraud.*** The sale of the mortgage loans is not intended by the mortgage loan seller to hinder, delay, or defraud any of its creditors.
- ***Fair consideration.*** The consideration received by the mortgage loan seller upon the sale of the mortgage loans owned by it constitutes fair consideration and reasonably equivalent value for such mortgage loans.

Trustee-Specific Representations and Warranties
As with property-specific transactions, the trustee typically makes the following additional representation and warranty:

- ***Errors and omissions insurance.*** The trustee maintains errors and omissions insurance coverage for all persons involved with the performance of its duties under the transaction documents.

Servicer-Specific Representations and Warranties
Each servicer typically makes the following additional representations and warranties:

- ***Errors and omissions insurance.*** The servicer maintains errors and omissions insurance coverage for all persons involved with the performance of its duties under the transaction documents.
- ***Reasonable servicing fee.*** The servicer acknowledges and agrees that the servicing fee represents reasonable compensation and that the entire servicing fee shall be treated for accounting and tax purposes as compensation for the servicing and administration of the mortgage loans.
- ***Subservicing agreements.*** The servicer has examined each existing, and will examine each future subservicing agreement and is familiar with the terms thereof and the terms of such agreements are not and will not be materially inconsistent with the provisions of the transaction documents.

Mortgage Loan Representations and Warranties
Because Standard & Poor's does not generally rely on representations and warranties by the underlying borrowers in a pool transaction, the representations and warranties made regarding the loan pool are central to Standard & Poor's evaluation of a transaction. Standard & Poor's expects each transaction to provide that:

- All representations and warranties are made for the benefit of, and will inure to, the trustee for the benefit of the holders of the rated securities; and

- All representations and warranties survive the sale of the mortgage loans and continue in full force and effect, notwithstanding any restrictive or qualified endorsement in any related document, and notwithstanding subsequent termination of the related documents.

The following is a list of representations and warranties that are typically made with respect to the mortgage loans including, with respect to certain representations and warranties, samples of language and explanations for illustrative purposes:

- ***Title.*** The transferor has good title to, and is the sole owner and holder of, each mortgage loan.
- It is generally acceptable to limit the timing on this representation and warranty with "Immediately prior to the transfer of the mortgage loans to the transferee...."
- ***Authority.*** The transferor has full right, power, and authority to sell, assign and transfer the mortgage loans.
- ***Mortgage loan schedules***. The information in the mortgage loan schedules pertaining to each mortgage loan is true and correct in all material respects.
- It is generally acceptable to limit the timing of this representation and warranty to "as of the cut-off date."
- ***No liens.*** Each mortgage loan is transferred to the trust free and clear of any and all liens, pledges, charges, security interests, or other encumbrances.
- ***No participations.*** Each mortgage loan is not a participation interest in a mortgage loan, but is a whole loan.
- ***No equity participations.*** The lenders under the loan documents do not own and are not entitled to own any equity participations in the respective borrowers.
- ***No contingent interest.*** No mortgage loan has a shared appreciation feature, any other contingent interest feature, or a negative amortization feature, other than the loans with anticipated repayment dates which may accrue "excess interest" from and after the anticipated repayment date.
- ***Enforceable loan documents.*** The loan documents for each mortgage loan constitute valid, legal, binding and enforceable obligations of the related borrower (subject to bankruptcy, insolvency, or creditor rights laws generally, and principles of equity generally) without offset, defense, or counterclaim.
- ***Valid mortgage lien.*** Each mortgage and related security interest creates a valid and enforceable first lien on the related mortgaged property subject only to permitted exceptions. This representation and warranty is frequently split into a representation with respect to the mortgage, lien, and a separate representation for the related security interest in personal property.

Sample language follows:

Each related mortgage is a valid and, subject to bankruptcy or creditors rights laws generally and principles of equity generally, enforceable first lien on the related mortgaged property (subject to Permitted Exceptions). A Uniform Commercial Code financing statement has been filed and/or recorded (or sent for filing or recording) in all places necessary to perfect a valid first priority security interest in the personal property necessary to operate the mortgaged property. Any security agreement, chattel mortgage, or equivalent document related to and delivered in connection with the mortgage loan establishes and creates a valid and enforceable first priority lien on the property described therein.

- ***Assignment of rents.*** Any related assignment of leases creates a valid first priority assignment of or security interest in the right to receive all payments due under the related lease, and no other person owns any interest therein superior to or of equal priority with the interest created under such assignment.
- ***Permitted exceptions.*** The permitted exceptions do not and will not materially and adversely interfere with either the ability of the borrower timely to pay in full the principal and interest on the mortgage note or the use of the mortgaged property for the use currently being made thereof, the operation of the mortgaged property as currently being operated, or the value of the mortgaged property. *(See Section One, Property-Specific and Large Loan Transactions - Due Diligence in Property-Specific and Large Loan Transactions - Permitted Indebtedness.)*
- ***No modifications.*** There has been no waiver, modification, alteration, satisfaction, cancellation, subordination, or any instrument executed that would cause or result in the foregoing, except by a written instrument that has been delivered to the transferee or its designee as part of the related mortgage file, and there has been no release of the mortgaged property or borrower or the lien on the mortgaged property, in whole or part, or the execution of any instrument that would cause or result in any such release.

- ***Past due payments.*** As of the cut-off date, no scheduled payment under any note or mortgage is more than 30 days past due, and, in the 12-month period prior to the cut-off date (or since the date of origination if such mortgage loan was originated within 12 months of the cut-off date), no such scheduled payment has been 30 days or more past due.
- ***No delinquent taxes.*** No delinquent taxes, assessments, fees, water, sewer, or other governmental charges against any mortgaged property exist as of the cutoff date. This representation covers whether the taxes, assessments, fees, water, sewer, or other governmental charges are delinquent and unpaid. It is generally acceptable to consider such taxes and assessments delinquent and unpaid on the date on which interest or other penalties may first be payable thereon. Additionally, it is generally acceptable for the representation to state that either there are no delinquent and unpaid taxes or assessments "or, an escrow of funds in an amount sufficient to cover such payments has been established". It is generally not acceptable to qualify this representation by knowledge.
- ***Proceeds fully disbursed.*** The proceeds of each mortgage loan have been fully disbursed and there is no requirement for future advances, and any requirements or conditions to disbursement of any loan proceeds held in escrow have been satisfied with respect to any disbursement of any such escrow funds.
- ***No advances outside loan documents.*** The transferor has not (nor to the transferor's knowledge, has any prior holder of such mortgage loan) advanced funds or induced, solicited, or knowingly received funds from a party other than the related borrower for the payment of any amount required by such mortgage loan.
- ***No litigation.*** As of the closing date of the loan and, to transferor's knowledge, as of the cut-off date, there was and is no pending or threatened action, suit, or proceeding, arbitration, or governmental investigation against the borrower or mortgaged property an adverse outcome of which would materially affect such borrower's performance under the loan documents or the use, value, or operation of the property.
- ***No condemnation.*** As of the closing date of the loan and, to transferor's knowledge, as of the cut-off date, there was and is no proceeding pending or threatened for the total or partial condemnation, appropriation, or recapture of any material portion of the mortgaged property that would materially affect such borrower's performance under the loan documents, or the use, value, or operation of the property.
- ***Mechanics liens.*** No mechanics or materialmen's liens have attached to the mortgaged property, and to transferor's knowledge, no rights exist that could give rise to such liens that would be prior to or equal to the lien of the mortgage, except for those liens or rights that are insured against by a lender's title insurance policy.
- ***Insurance.*** The insurance on the mortgaged property satisfies Standard & Poor's insurance criteria.

Sample language incorporating Standard & Poor's insurance criteria is as set forth below. (This sample is for illustrative purposes only and specific insurance guidelines may vary for the particular transaction; see Appendix I, Insurance Criteria for U.S. CMBS Transactions.)

Each related mortgaged property is insured by an "all risk" fire and extended perils insurance policy, issued by a Qualified Insurer (see Appendix I, Insurance Criteria for insurer qualifications), in an amount not less than the lesser of the principal amount of the related mortgage loan and the replacement cost (with no deduction for physical depreciation) and not less than the amount necessary to avoid the operation of any co-insurance provisions with respect to the related mortgaged property; each related mortgaged property is also covered by business interruption or rental loss insurance that covers a period of not less than 12 months (or, with respect to mortgage loans with a principal balance of $35,000,000 or more, 18 months) and comprehensive general liability insurance in amounts generally required by prudent commercial mortgage lenders for similar properties; all premiums on such insurance policies required to be paid as of the cut-off date have been paid and such insurance policies are in full force and effect; such insurance policies require thirty days prior notice to the insured of termination or cancellation, and no such notice has been received by the transferor; such property and rental loss insurance policies name the lender under the mortgage loan and its successors and assigns as a loss payee under a mortgagee endorsement clause and such general liability insurance names the lender under the mortgage loan and its successors and assigns as a named or additional insured; such insurance policies are freely assignable to and will inure to the benefit of the trustee; and each related mortgage loan obligates the related borrower to maintain all such insurance and, at such borrower's failure to do so, authorizes the lender to maintain such insurance at the borrower's cost and expense and to obtain reimbursement therefor from such borrower.

Please note that the insurance representation may also cover other types of insurance (types of coverage

will depend, among other things, on the location and type of property) which are set forth and described fully in Appendix I and Schedule I and include, among others, liability insurance, worker's compensation, boiler and machinery, flood insurance (see also the Flood Zone representation below), earthquake insurance, and windstorm insurance. (For a further discussion of Standard and Poor's insurance criteria, see Appendix I, Insurance Criteria for U.S. CMBS Transactions.)

- ***No default.*** No monetary default or event of acceleration exists under the loan document and, to transferor's knowledge, no nonmonetary default, breach, violation, or event that, with the passage of time or with notice or expiration of any grace or cure period would constitute any of the foregoing, exists under the loan documents; no waiver of any of the foregoing exists; and no person other than the holder of the note may declare any of the foregoing.
- ***Environmental representation.*** Each mortgaged property is in material compliance with all applicable environmental laws, and no notice of violation of such laws has been issued by any governmental agency or authority; no action has been taken that would cause the mortgaged property to not be in compliance with all environmental laws; and no hazardous material is present at the mortgaged property such that the value, use, or operations of such mortgaged property is materially and adversely affected.

The following is sample language if an environmental report has been performed within 12 months of the closing date of the current transaction:

At origination, each borrower represented, warranted and covenanted in all material respects that to its knowledge, except as set forth in certain environmental reports and, except as commonly used in the operation and maintenance of properties of similar kind and nature to the mortgaged property, in accordance with prudent management practices and applicable law, and in a manner that does not result in any contamination of the mortgaged property or in a material adverse effect on the value, use or operations of the mortgaged property, neither the borrowers nor anyone else has used, caused or permitted to exist and will not use, cause or permit to exist on the related mortgaged property any hazardous materials (as defined below), in any manner that violates federal, state or local laws, ordinances, rules, regulations, orders, directives, permits licenses or other authorizations or policies governing environment, human health and safety or the use, storage, treatment, transportation, manufacture, refinement, handling, production, disposal or release of hazardous or toxic substances or materials or wastes, pollutants or contaminants including petroleum, petroleum constituents, asbestos, PCBs and toxic mold ("hazardous materials") or other environmental laws ("environmental laws"). The related borrower or an affiliate thereof have agreed to indemnify, defend and hold the mortgagee and its successors and assigns harmless from and against losses, liabilities, damages, injuries, penalties, fines, expenses, and claims of any kind whatsoever (including attorneys' fees and costs) paid, incurred or suffered by, or asserted against, any such party resulting from a breach of the foregoing representations, warranties or covenants given by the borrower in connection with such mortgage loan. A Phase I environmental report and with respect to certain mortgage loans, a Phase II environmental report, was conducted within 12 months of the closing date by a reputable environmental consulting firm in connection with such mortgage loan, which report did not indicate any material noncompliance with applicable environmental laws or material existence of hazardous materials or, if any material non-compliance or material existence of hazardous materials was indicated in any such report, then at least one of the following statements is true: (A) funds reasonably estimated to be sufficient to cover the cost to cure any material non-compliance with applicable environmental laws or material existence of Hazardous Materials have been escrowed by the related borrower and held by the related mortgagee; (B) the environmental condition identified in the related environmental report was remediated or abated in all material respects prior to the date hereof; (C) a no further action or closure letter was obtained from the applicable governmental regulatory authority (or the environmental issue affecting the related mortgaged property was otherwise listed by such governmental authority as "closed"); (D) such conditions or circumstances identified in the Phase I environmental report were investigated further and based upon such additional investigation, an environmental consultant recommended no further investigation or remediation; or (E) a secured creditor environmental impairment insurance policy was obtained and is a part of the related mortgage file. To transferor's knowledge, in reliance on such environmental reports and except as set forth in such environmental reports, each mortgaged property is in material compliance with all applicable environmental laws, and to transferor's knowledge, no notice of violation of such laws has been issued by any governmental agency or authority, except, in all cases, as indicated in such environmental reports; no action has been taken that would cause the mortgaged property to not be in compliance with all environmental laws; and no hazardous material is present at the mortgaged property such that the value, use or operations of such mortgaged property is materially and adversely affected.

For those properties where a secured creditor environmental insurance policy was obtained, the following is sample language with respect to such policy:

A secured creditor environmental impairment insurance policy was obtained with respect to each such mortgage loan and is part of the related mortgage file. Each of such environmental insurance policies is in full force and effect, the premiums for such policies have been paid in full, there is no deductible, and the trustee is named as an insured under each of such policies. The insurer of the policy has a Standard & Poor's rating of 'AA' or higher. (For a further discussion of environmental insurance, see *Section One, Property-Specific and Large Loan Transactions - Environmental Criteria*.)

In limited situations where no environmental report was obtained or where the environmental report is conducted more than 12 months prior to the closing date of the current transaction and has not been updated, the environmental representation and warranty should be made as is with no knowledge qualifier and no reliance on the environmental report.

- ***Mortgage origination in compliance with law.*** As of the date of its origination, the mortgage loan complied in all material respects with, or was exempt from, all requirements of federal, state or local law relating to the origination of such mortgage loan. It is generally acceptable to qualify this representation with "except to the extent any noncompliance did not materially and adversely affect the security provided by the mortgage" or the enforceability of the mortgage loan documents.
- ***Usury.*** The payments under the mortgage loan do not violate any applicable usury laws.
- ***Permits.*** The borrower, lessee and/or operator was in possession of all licenses, certificates of occupancy, permits, and authorizations then required for use of mortgaged property which were valid and in full force and effect as of the origination date.

Sample language with qualifiers is as follows:

As of origination, to transferor's knowledge, based on the related borrower's representations and covenants in the related mortgage loan documents and based on due diligence a reasonable prudent commercial mortgage lender would customarily perform in the origination of comparable mortgage loans, the borrower was in possession of all licenses, permits, and authorizations then required for use of the mortgaged property which were valid and in full force and effect as of the origination date.

- ***Servicing and collection.*** The origination, servicing, and collection practices used by the transferor or any prior holder of the note have been in all respects legal, proper, and prudent and have met customary industry standards.

The following is sample language with a knowledge qualifier with respect to any predecessor or prior servicer of the mortgage loan (there should not be a knowledge qualifier for transferor's origination, servicing, and collection practice):

The origination, servicing, and collection practices used by the transferor or, to the knowledge of the transferor, any predecessor holder of the mortgage loan or prior servicer with respect to the mortgage loan, have been in all respects legal, proper, and prudent, and in accordance with customary commercial mortgage lending standards.

- ***Valid assignment.*** The assignment of mortgage and related reassignment of leases executed and delivered in favor of the trustee are in recordable form, validly and effectively convey the assignor's interest therein, and constitute a legal, valid, binding, and, subject to bankruptcy, insolvency, or creditor rights laws generally, and principles of equity generally, enforceable assignment of such mortgage and related reassignment of leases from the relevant assignor to the trustee.
- ***Escrows.*** All escrow deposits and payments required pursuant to each mortgage loan have been made and are in the possession, or under the control, of the transferor, all amounts required to be deposited by the related borrower have not been released from such escrow accounts except in accordance with the mortgage loan documents, and all such escrows and deposits are being conveyed by the transferor to the transferee.
- ***Qualification to do business.*** To the extent required under applicable law, each holder of the note was

authorized to transact and do business in the jurisdiction where the mortgaged property is located while each was holder. Typically, this representation will include an exception where failure to be qualified to do business does not adversely affect the enforceability of the mortgage loan.

- ***Title insurance.*** The mortgaged property is covered by an American Land Title Association (ALTA) (or comparable) lender's title insurance policy insuring that the mortgage is a valid first lien on the mortgaged property, subject only to the permitted exceptions, and the following are true with respect to such policy: (i) the policy is in full force and effect; (ii) the policy is freely assignable to and will inure to the benefit of the transferee (subject to recordation of assignment of mortgage) without the consent or any notification to the insurer; (iii) the premium for such policy was paid in full; (iv) such policy is issued by a title insurance company licensed to issue policies in the state in which the related mortgaged property is located; (v) no claims have been made under any title insurance policy or other action taken that would materially impair such policy; and (vi) such policy insures that the related mortgaged property has access to a public road and affirmatively insures (unless the related mortgaged property is located in a jurisdiction where such affirmative insurance is not available) that the area shown on the survey, reviewed, or prepared in connection with the origination of the related mortgage loan, is the same as the legal description of the property contained in the related mortgage.
- ***Foreclosure remedies.*** The note and mortgage contain enforceable provisions for realization against the mortgaged property of the benefits of the security, including realization by judicial, or if applicable, nonjudicial foreclosure. The enforceability of the provisions in the related note, mortgage and assignment of leases is typically subject to bankruptcy, insolvency or creditor rights laws generally, and principles of equity generally.

A sample follows:

Each related mortgage, note and assignment of leases for each mortgage loan contain enforceable (subject to bankruptcy, insolvency, or creditor rights laws generally, and principles of equity generally) provisions so as to render the rights and remedies of the holder thereof adequate for the practical realization against the mortgaged property of the principal benefits of the security, including realization by judicial or, if applicable, nonjudicial foreclosure or appointment of a receiver, and there is no exemption available to the borrower that would interfere with such right to foreclose.

- ***Assignability of mortgage loans.*** The note and mortgage contain no provision limiting the right or ability of transferor to assign, transfer, and convey the note or mortgage to any other person or entity.
- ***REMIC rules.*** The mortgage loan and mortgage collateral comply in all respects with REMIC rules and regulations (if applicable).

Sample language follows:

Each mortgage loan constitutes a "qualified mortgage" within the meaning of Section 860G(a)(3) of the Internal Revenue Code (but without regard to the rule in Treasury Regulation Section 1.860G-2(f)(2) that treats a defective obligation as a qualified mortgage or any substantially similar successor provision) and all prepayment premiums and yield maintenance charges constitute "customary prepayment penalties" within the meaning of Treasury Regulation Section 1.860G-1(b)(2).

The mortgage loan is directly secured by a mortgage on a commercial property or multifamily residential property, and (2) the fair market value of such real property, as evidenced by an appraisal satisfying the requirements of FIRREA conducted within 12 months of the origination of the mortgage loan, was at least equal to 80% of the principal amount of the mortgage loan (a) at origination (or if the mortgage loan has been modified in a manner that constituted a deemed exchange under Section 1001 of the Internal Revenue Code at a time when the mortgage loan was not in default or default with respect thereto was not reasonably foreseeable, the date of the last such modification) or (b) at the date hereof; provided that the fair market value of the real property must first be reduced by (A) the amount of any lien on the real property interest that is senior to the mortgage loan and (B) a proportionate amount of any lien that is in parity with the mortgage loan (unless such other lien secures a mortgage loan that is cross-collateralized with such mortgage loan, in which event the computation described in (a) and (b) shall be made on an aggregated basis).

- ***Appointment of receiver.*** If the mortgaged property is subject to any leases, the borrower is the owner

and holder of the landlord's interest under any leases and the related mortgage and assignment of rents provides for the appointment of a receiver for rents or allows the mortgagee to enter into possession to collect rent or provides for rents to be paid directly to mortgagee in the event of a default. This representation may be included in the "Foreclosure Remedies" representation and warranty. (See the sample language in "Foreclosure Remedies".)

- ***Deed of trust trustee.*** If the related mortgage is a deed of trust, a trustee, duly qualified under applicable law to serve as such, has been properly designated and currently so serves and is named in the deed of trust, and no fees or expenses are or will become payable to the trustee under the deed of trust, except in connection with the sale or release of the mortgaged property following default or payment of the loan.
- ***Encroachments.*** None of the improvements included for the purpose of determining the appraised value of the mortgaged property at the time of the origination of the mortgage loan lies outside of the boundaries and building restriction lines of the mortgaged property and no improvements on adjoining properties materially encroach upon the mortgaged property.
- Generally, this representation contains an exception for encroachments onto adjoining property if the transferor has title insurance covering any resulting losses or such encroachments do not affect the value, use, or operation of the mortgaged property or the security provided by the mortgage. Additionally, there is typically an exception for encroachments onto the mortgaged property if the encroachments do not affect the value, use, or operation of the property or the security provided by the mortgage.
- ***Zoning.*** All improvements on the mortgaged property comply with applicable zoning laws and/or set-back ordinances in force when improvements were added. The zoning representation is generally qualified with "due diligence customarily performed by prudent commercial mortgage lenders" and typically excepts out noncompliance with zoning laws that do not have a "material and adverse effect on the use, value or operation of the mortgaged property".

Sample language follows:

Based on due diligence customarily performed by prudent commercial mortgage lenders, the improvements located on or forming part of each mortgaged property comply with applicable zoning laws and ordinances, or constitute a legal nonconforming use or structure or, if any such improvement does not so comply, such noncompliance does not materially and adversely affect the use, value, or operation of the related mortgaged property.

- ***All collateral in trust fund.*** The note is not secured by any collateral that is not included in the trust fund.
- ***Cross-collateralization.*** Each mortgage loan that is cross-collateralized or cross-defaulted is cross-collateralized or cross-defaulted only with other mortgage loans included in this transaction.
- ***Releases.*** The note and mortgage do not require the mortgagee to release any portion of the mortgaged property from the lien of the mortgage except on payment in full of the loan. If true, the foregoing representation is applicable. However, many times the loan documents will permit the partial or full release or defeasance of property (i.e. with respect to multi-property loans) prior to payment in full of the loan. If the loan documents allow partial releases or partial defeasance, the following representation will generally apply with respect to such releases:

Since origination, no material portion of the related mortgaged property has been released from the lien of the related mortgage. No mortgage, mortgage note or related loan document requires the mortgagee to release all or any portion of the related mortgaged property from the lien of the related mortgage except upon: (i) payment in full of all amounts due under the mortgage loan, (ii) defeasance in accordance with the "Defeasance" representation set forth below, (iii) a partial release of a property from a multi property loan upon satisfaction of customary legal and underwriting criteria and payment of a release price (at least equal to 125% of the allocated loan amount for the released parcel), or (iv) releases of unimproved out-parcels or other portions of the mortgaged property that will not have an adverse effect on the underwritten value of the loan or the use or operation of the mortgaged property. No release or partial release of any mortgaged property, or any portion thereof, expressly permitted pursuant to the terms of the note or mortgage will constitute a significant modification of the related mortgage loan under Treasury Regulation Section 1.860G-2(b)(2).

- ***Due-on-sale and due-on-encumbrance.*** Each related mortgage or loan agreement contains provisions

for the acceleration of the payment of the unpaid principal balance of the mortgage loan if the related mortgaged property or any controlling interest therein is directly or indirectly transferred, pledged, or sold, or encumbered in connection with subordinate or mezzanine financing without the consent of the holder of the mortgage loan. Each related mortgage or loan agreement should prohibit the transfer, sale, or encumbrance of the mortgaged property or any direct or indirect controlling interest therein without the consent of the holder of the mortgage loan.

- ***No subordinate financing.*** The mortgaged properties are not encumbered by any liens junior to or of equal priority with the liens of the related mortgages.
- ***Application of insurance proceeds.*** Any insurance proceeds in respect of a casualty loss or taking will be applied either to the repair or restoration of all or part of the related mortgaged property, with, if the proceeds exceed five percent of the loan amount, the mortgagee or a trustee appointed by it having the right to hold and disburse the proceeds as the repair or restoration progresses, or to the payment of the outstanding principal balance of such mortgage loan together with any accrued interest thereon.
- ***Flood zone.*** The mortgaged property is not located in a flood hazard area as defined by the Federal Insurance Administration.

If true, the foregoing representation remains applicable. However, if the property is located in a flood hazard area, then the representation should be made as to the flood insurance in place for such property. Typically, the flood insurance representation will be part of the "Insurance" representation. A sample of a flood insurance representation is as follows:

If any portion of the improvements on a mortgaged property securing a mortgage loan was, at the time of origination of such mortgage loan, in an area identified in the Federal Register by the Flood Emergency Management Agency as a special flood hazard area (Zone A or Zone V), then a flood insurance policy meeting the requirements of the guidelines of the Federal Insurance Administration is in effect with a Standard & Poor's qualified insurer (*see Appendix I, Insurance Criteria for U.S. CMBS Transactions for insurer qualifications*), in an amount representing coverage not less than the least of (1) the minimum amount required, under the terms of coverage, to compensate for any damage or loss on a replacement basis, (2) the outstanding principal balance of the mortgage loan, and (3) the maximum amount of insurance available under the applicable National Flood Insurance Administration Program. Such insurance coverage is not less than the estimated probable loss from flood, as determined by an independent, qualified professional engineer.

- ***Condition of property***. One or more engineering reports were performed within 12 months of the cut-off date and, except as set forth in such engineering report, each related mortgaged property is (a) free and clear of any damage that would materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan, (b) in good repair and condition, except to the extent any deficiencies would not materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan, and (c) all building systems contained therein are in good working order, except to the extent any deficiencies would not materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan.

In general, for any engineering report that is more than 12 months prior to the current transaction closing date, this representation and warranty should have no knowledge qualifier and should not be based on the engineering report. For example, "Each related mortgaged property is (a) free and clear of any damage that would materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan, (b) in good repair and condition, except to the extent any deficiencies would not materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan, and (c) all building systems contained therein are in good working order, except to the extent any deficiencies would not materially and adversely affect the use or value of the mortgaged property as security for the mortgage loan.

- ***Access/utilities.*** The mortgaged property has adequate rights of access to public ways and is served by utilities, including, without limitation, adequate water, sewer, electricity, gas, telephone, sanitary sewer, and storm drain facilities. All public utilities necessary to the continued use and enjoyment of the mortgaged property as presently used and enjoyed are located in the public right-of-way abutting the mortgaged property, and all such utilities are connected so as to serve the mortgaged property without passing over other property. All roads necessary for the full use of the mortgaged property for its current purpose have

been completed and dedicated to public use and accepted by all governmental authorities or are the subject of access easements for the benefit of the mortgaged property.

- ***Borrower bankruptcy***. No mortgaged property securing a mortgage loan is the subject of, and no borrower under a mortgage loan is a debtor in, any state or federal bankruptcy, insolvency, or similar proceeding.

- ***Defeasance***. With respect to any mortgage loan that, pursuant to the mortgage loan documents, can be defeased, (i) the mortgage loan documents provide for defeasance as a unilateral right of the borrower, subject to satisfaction of conditions specified in the mortgage loan documents, (ii) the mortgage loan cannot be defeased within two years after the closing date of the securitization, (iii) the borrower is permitted to pledge only United States "government securities" within the meaning of Treasury Regulation Section 1.860G-2(a)(8)(i), the revenues from which will be sufficient to make all scheduled payments under the mortgage loan when due including the entire remaining principal balance on the maturity date or, if the mortgage loan is a hyper-amortizing loan, the entire principal balance outstanding on the anticipated repayment date, and if the mortgage loan permits partial releases of real property in connection with partial defeasance, the revenues from the collateral will be sufficient to pay all such scheduled payments calculated on a principal amount equal to 125% of the allocated loan amount for the real property to be released, (iv) the defeasance collateral is not permitted to be subject to prepayment, call, or early redemption, (v) the borrower is required to provide independent certified public accountant's certification that the collateral is sufficient to make such payments, (vi) if the borrower would continue to own assets in addition to the defeasance collateral, the loan is required to be assumed by a single-purpose entity, (vii) the borrower is required to provide an opinion of counsel that the trustee has a perfected security interest in such collateral prior to any other claim or interest, (viii) the borrower is required to pay all rating agency fees associated with defeasance (if rating confirmation is a specific condition precedent thereto) and all other reasonable expenses associated with defeasance, including, but not limited to, accountant's fees and opinions of counsel, (ix) the borrower is required to provide an opinion of counsel that such defeasance will not cause any REMIC created under the transaction documents to fail to qualify as a REMIC for federal or applicable state tax purposes and (x) with respect to any mortgage loan that constitutes 5% or more of the pool, is one of the top 10 loans in the pool and/or has a principal balance of $20 million or more, the borrower must obtain ratings confirmation. To the transferor's knowledge, defeasance under the mortgage loan is only for the purpose of facilitating the disposition of a mortgaged property and not as part of an arrangement to collateralize a REMIC offering with obligations that are not real estate mortgages.

- ***Fixed-rate loans***. Each mortgage loan bears interest at a rate that remains fixed throughout the remaining term of such mortgage loan. It is generally permissible to except out of this representation loans with anticipated repayment dates after the anticipated repayment date and the imposition of a default rate. This representation is only applicable if there are fixed-rate loans in the pool.

- ***Tax-parcels***. Each mortgaged property constitutes one or more separate tax parcels and do not constitute a portion of any other tax lot not a part of the mortgaged property.

- ***Inspections***. Within 12 months of the closing date, the transferor or an affiliate inspected, or caused the inspection of, the mortgaged property.

- ***Ground Leases.*** With respect to any mortgage that is secured in whole or in part by the interest of a borrower as a lessee under a ground lease (the applicability of these representations and warranties will vary depending on whether or not the ground lessor's fee interest is subordinated to the lien of the mortgage):

- ***Fee encumbered.*** The mortgage loan is also secured by the related fee interest in the mortgaged property, and the fee interest is subject and subordinate of record to the mortgage, and the mortgage does not by its terms provide that it will be subordinated to the lien of any other mortgage or other lien upon such fee interest, and upon the occurrence of an event of default under the terms of the mortgage by the borrower, the mortgagee has the right to foreclose or otherwise exercise its rights with respect to the fee interest within a commercially reasonable time. This representation is applicable if the related mortgage does encumber the related lessor's fee interest in such mortgaged property. This representation frequently is not applicable (however, the remainder of the ground lease representations remain applicable).

- ***Recording.*** The ground lease or a memorandum thereof has been duly recorded, the ground lease permits the interest of the lessee to be encumbered by the related mortgage, and there has not been a material change in the terms of the ground lease since its recordation, with the exception of written instruments that are part of the related mortgaged file.

- ***No senior liens.*** Except for the permitted exceptions, the ground lessee's interest in the ground lease is not subject to any liens or encumbrances superior to, or of equal priority with, the related mortgage, other than the related ground lessor's related fee interest.

- ***Ground lease assignable.*** The borrower's interest in the ground lease is assignable to the trustee upon

notice to, but without the consent of, the lessor (or, if any such consent is required, it has been obtained prior to the closing date) or, in the event that it is so assigned, it is further assignable by the trustee and its successors and assigns upon notice to, but without a need to obtain the consent of, the lessor.

- ***Default.*** As of the cut-off date, the ground lease is in full force and effect, the transferor has no knowledge that any default beyond applicable notice and grace periods has occurred and, to the transferor's knowledge, there is no existing condition that, but for the passage of time or giving of notice, would result in a default under the terms of the ground lease.
- ***Notice.*** The ground lease requires the lessor to give notice of any default by the lessee to the mortgagee; or the ground lease, or an estoppel letter received by the mortgagee from the lessor further provides that notice of termination given under the ground lease is not effective against the mortgagee unless a copy of the notice has been delivered to the mortgagee in the manner described in the ground lease.
- ***Cure.*** The mortgagee is permitted a reasonable opportunity (including, where necessary, sufficient time to gain possession of the interest of the lessee under the ground lease) to cure any default under the ground lease that is curable, after the receipt of notice of any the default, before the lessor may terminate the ground lease.
- ***Term.*** The ground lease has a term that extends not less than (i) in the case of a mortgage loan that fully amortizes by its maturity date, ten years beyond the maturity date of the related mortgage loan; (ii) in the case of a mortgage loan that has a balloon payment on its maturity date, twenty years beyond the maturity date of the related mortgage loan; and (iii) in the case of a mortgage loan that has a maturity date by which the loan fully amortizes but has an anticipated repayment date on which the borrower is expected and entitled to repay the loan to avoid an increase of the interest rate after the anticipated repayment date, ten years beyond the final maturity date.
- ***New lease.*** The ground lease requires the lessor to enter into a new lease with the lender upon termination of the ground lease for any reason, including rejection of the ground lease in a bankruptcy proceeding, provided that the lender cures any defaults that are susceptible to being cured by the lender.
- ***Amendments***. The ground lease provides that no amendments, change, cancellations, alterations, surrender, or modifications may be made to the ground lease without the consent of the mortgagee.
- ***Insurance and condemnation proceeds.*** Under the terms of the ground lease and the related mortgage, taken together, any related insurance proceeds will be applied either to the repair or restoration of all or part of the related mortgaged property, with the mortgagee or a trustee appointed by it having the right to hold and disburse the proceeds as the repair or restoration progresses, or to the payment of the outstanding principal balance of the mortgage loan together with any accrued interest thereon.
- ***Subleasing.*** The ground lease does not impose restrictions on subletting that would be viewed as commercially unreasonable by a prudent commercial mortgage lender.
- ***Transfer notices***. To the extent required by any loan documents, the ground lease, or the ground lessor estoppel certificate, all notices of the transfer of the loan to the trustee for the benefit of the holders of the rated securities have been delivered or will be delivered contemporaneously with the closing of the securitized transaction.

Healthcare, Credit Tenant and Hotel Representations and Warranties

Depending on the circumstances, representations and warranties specific to health care transactions may be required. (*See Section One, Property-Specific and Large Loan Transactions - Representations and Warranties in Property-Specific and Large Loan Transactions - Senior Housing and Long-Term Care Facilities Representations, Warranties, and Covenants*.) Credit tenant loan representations and warranties should be provided if the pool contains any credit tenant loans. (*See Section Three, Credit Tenant Loan Transactions - Representations and Warranties in Credit Tenant Loan Transactions.*) Additionally, in pools that include hotel properties, certain additional representations and warranties should be provided. (*See Section One, Property-Specific and Large Loan Transactions - Representations and Warranties in Property-Specific and Large Loan Transactions - Representations and Warranties in Transactions Involving Hotel Properties.*)

Special-Purpose Bankruptcy-Remote Entity Representations and Warranties

As with property-specific transactions, each transferor or depositor that should be an SPE should represent and warrant that for so long as the rated securities remain outstanding, the entity shall remain an SPE. The SPE representations and warranties should be in both the loan documents and the organizational documents. (*For Standard & Poor's criteria with respect to SPEs, see Section Four.*)

Environmental Representations and Warranties
In pool transactions the environmental representations and warranties in the pooling and servicing or purchase and sale agreement are one of Standard & Poor's sources of due diligence with respect to the underlying properties. Therefore, Standard & Poor's typically expects to see representations and warranties regarding environmental conditions that individually or in the aggregate could materially affect repayment of the loans and the value of the collateral.

Standard & Poor's generally will look for environmental representations and warranties that provide assurances that there are no environmental conditions that are or would be material to the value, use, or marketability of the mortgaged property or otherwise adversely affect the repayment of the loans secured by the mortgaged property. (*For a further discussion of environmental insurance, see Section One, Property-Specific and Large Loan Transactions - Environmental Criteria.*)

Remedies for Breach of the Mortgage Loan Representations and Warranties
Traditionally, the sole remedies for a material breach (as described below) or a document defect (as described below) available to the transferee include (i) cure, (ii) repurchase, or (iii) substitution. Typically, a material breach is a breach of the mortgage loan seller representations and warranties that materially and adversely affects the value of, or the interests of any holder of the rated securities in, the mortgage loan.

A document defect typically includes any document or documents constituting part of the mortgage file that (1) has failed to be delivered as and when required, (2) has not been properly executed, and/or (3) is defective on its face. Standard & Poor's has endorsed the Commercial Mortgages Securities Association (CMSA) procedures and policies on loan document integrity and expects to see such procedures incorporated into the transaction documents.

In general, upon the earlier of notification to the transferor of a material breach or a document defect or the transferor's discovery of the material breach or document defect, the transferor must:

- ***Cure***. The transferor will typically have ninety (90) days to cure the material breach or document defect. Additionally, the transferor will typically have an additional ninety (90) days to cure if it has commenced curing the material breach or document defect and is diligently proceeding with such cure (provided that any additional cure periods do not result in REMIC violations).
- ***Repurchase***. If the transferor fails to cure the material breach or document defect within the required time frame, the transferor must repurchase the affected mortgage loan (if loans are crossed loans, this could result in a repurchase of all crossed loans) at the applicable purchase price. The purchase price will typically equal par plus accrued interest, unpaid principal and interest thereon, servicing advances with interest, servicing and trust fund expenses, and costs of enforcement.
- ***Substitute***. Instead of repurchasing the mortgage loan, the transferor may sometimes substitute another mortgage loan for the defective mortgage loan if the substitution occurs within two years of the closing date. The substitute mortgage loan must comply with various criteria that include, among other things, (i) having substantially the same terms as the substituted mortgage, (ii) qualifying as a "qualified replacement mortgage" for tax purposes, and (iii) receipt of ratings confirmation. In addition, the transferor will be required to pay any applicable substitution shortfall amount.

Generally, for crossed collateralized loans, a material breach or document defect with respect to a crossed loan will trigger a repurchase obligation with respect to all crossed loans. If only a particular crossed loan is affected by the material breach or document defect, the transferor may sometimes only be obligated to repurchase such affected crossed loan if the following conditions are satisfied:

- The material breach or document defect does not constitute a material breach or document defect, as the case may be, as to any other crossed loan;
- The debt service coverage ratio for all remaining related crossed loans for the four calendar quarters immediately preceding the repurchase or substitution is not less than the debt service coverage ratio for all related crossed loans, including the affected crossed loan, for the four calendar quarters immediately preceding the repurchase or substitution;
- The loan-to-value ratio for any remaining related crossed loans determined at the time of repurchase

or substitution based upon an appraisal obtained at the expense of the transferor is not greater than the loan-to-value ratio for all related crossed loans, including the affected crossed loan;

- The repurchase or substitution will not result in the imposition of a tax on the assets of the trust fund or cause any trust REMIC to fail to qualify as a REMIC for federal or applicable state tax purposes at any time that any of the certificates are outstanding as evidence by delivery of a REMIC opinion at the expense of transferor;
- The transferor, transferee, and related borrower (and any other necessary parties) agree to modify prior to or at the time of such repurchase or substitution, the related loan documents in a manner such that such affected crossed loan repurchased or substituted by the transferor, on the one hand, and any related crossed loans still held by the transferee, on the other, would no longer be cross-defaulted or cross-collateralized with one another, *provided* that the transferor shall have furnished to the transferee, at its expense, a REMIC opinion that such modification shall not cause an adverse REMIC event; and
- All other criteria for substitution or repurchase of mortgaged property set forth in the applicable transaction documentsare satisfied.

Failure to satisfy the preceding conditions generally results in a repurchase obligation with respect to all crossed loans.

Title Issues in Pool Transactions

In most pool transactions, the underlying loans are secured by a first priority lien on and security interest in the mortgaged property. In the event that a default occurs with respect to the underlying loans, the trustee, on behalf of the holders of the rated securities, must have the right, prior to all other parties, to realize upon the mortgaged property and all of its proceeds. Accordingly, certain representations and warranties should be made by the depositor or issuer regarding the loans that provide assurance and evidence that the trustee will have first priority lien on and security interest in the mortgaged property. The following represents a sample of the type of title issues that arise in pool transactions and Standard & Poor's recommendations with respect to these issues. Naturally, because each pool transaction is unique, additional issues particular to the transaction may need to be properly addressed.

Title Representations and Warranties

In a property-specific transaction, Standard & Poor's relies on the underlying borrower's representations and warranties regarding the status of title of the mortgaged property. Because Standard & Poor's does not directly rely on representations and warranties by the underlying borrowers in a pool transaction, the representations and warranties regarding the loan pool are central to Standard & Poor's analysis and therefor include representations and warranties with respect to the validity of the lien, title insurance and permitted exceptions. (*See Section Two, Representations and Warranties in Pool Transactions* - *Mortgage Loan Representation and Warranties for the title representations and warranties.)*

Permitted Exceptions

In property-specific transactions, Standard & Poor's may review the permitted exceptions in the mortgage and title policy. (*See Section One, Property-Specific and Large Loan Transactions - Due Diligence in Property-Specific and Large Loan Transactions - Permitted Exceptions.*) Because the pool analysis does not focus as much on individual properties, Standard & Poor's generally will rely on the representations and warranties related to the validity of the lien, title insurance, and permitted exceptions and will generally not specifically review permitted exceptions in pool transactions.

Eligible Institutions and Eligible Investments in Pool Transactions

Often in pool transactions, the transaction documents will provide for certain accounts to be established at the closing of a transaction to serve as collection accounts in which revenues generated by the mortgage loans are deposited and to establish reserve funds. Often, the accounts in which the reserves and revenues are held contain significant sums held over a substantial period of time. Standard & Poor's is concerned that these funds be maintained with a creditworthy institution, thereby avoiding the potential inability to access such funds in the event of an insolvency of the institution. Accordingly, these funds should be deposited in eligible institutions and invested in eligible investments issued by creditworthy issuers and for periods of time sufficient to insure the availability of the funds as and when needed.

In addition, Standard & Poor's criteria for eligible institutions and eligible investments is intended to isolate a transaction's payments, cash proceeds, and distributions from the insolvency of each entity that is a party to

the transaction. A typical pool transaction might involve the collection, processing, and accounting of each payment made by one or more borrowers. Each borrower could make payments either to a subservicer, the master servicer, or the special servicer. Collections by servicers generally must be deposited in an eligible account within one business day after receipt. Standard & Poor's relies on its legal and structural criteria to ensure that a transaction's cash flows are protected at every link in the cash flow chain.

Eligible Accounts and Institutions
In pool transactions, all accounts maintained by the master servicer, special servicer, any subservicer or the trustee must be "eligible accounts".

If an account is held by an "eligible institution", following a rating downgrade, withdrawal, qualification, or suspension of such institution's rating, each account must promptly (and in any case within not more than 30 calendar days) be moved to a qualifying institution or to one or more segregated trust accounts in the trust department of such institution, if permitted. No eligible account should be evidenced by a certificate of deposit, passbook, or other instrument.

Each eligible account should be a separate and identifiable account from all other funds held by the holding institution. All eligible accounts must be established and maintained in the name of the trustee, bearing a designation clearly indicating that the funds deposited there are held for the benefit of the holders of the rated securities. The trustee should possess all right, title, and interest in all funds on deposit from time to time in the account and in all proceeds thereof.

The account should be under the sole dominion and control of the trustee for the benefit of the holders of the rated securities, and should contain only funds held for their benefit. The trustee should agree that it shall have no right of setoff or banker's lien against, and no right to otherwise deduct from any funds held in the account for any amount owed it by the trust, any securityholder, or any credit support provider. Please contact Standard & Poor's regarding criteria for rating categories below 'AAA'.

Eligible Investments
Funds in eligible accounts may only be invested in eligible investments. The rationale for limiting investments in eligible accounts is to assure that the issuers of such investments are creditworthy and that funds will be available as and when needed. (*For Standard & Poor's criteria on Eligible Investments and a list of Eligible Investments, see Appendix II, Eligible Investment Criteria for 'AAA' Structured Transactions.*)

Section Three
Credit Tenant Loan Transactions

Overview

A credit tenant loan transaction is a commercial mortgage loan to a borrower that is secured by a bondable lease to a tenant that has received a credit rating from Standard & Poor's. The primary basis for the rating of a credit tenant loan transaction is the lease rental stream rather than the value of the real estate securing the loan. This central feature of a credit tenant loan transaction allows for a high degree of leverage, which is the key difference from other types of commercial mortgage transactions rated by Standard & Poor's.

In a credit tenant loan transaction, the debt service coverage ratio may be slightly above 1 to 1, provided that the rental income generated by the lease to the credit tenant is sufficient to pay debt service and any administrative costs of the securitization vehicle, such as an annual trustee fee. Such low ratios are acceptable to Standard & Poor's because, in rating a credit tenant loan transaction, Standard & Poor's relies primarily on the rental income generated by the lease and the creditworthiness of the tenant rather than the value of the real property.

Traditionally, credit tenant loan transactions have been stand-alone deals with one borrower or a related group of borrowers entering into a bondable lease or leases with a single tenant or related group of tenants. The borrower executes a note and mortgage in favor of a lender and an assignment of its rights to collect the rents under the lease. The lender then deposits, directly or indirectly through a depositor, the note, mortgage, and assignment of rights under the lease into a trust that issues the rated securities, typically certificates. Alternatively, the borrower issues its notes directly to third-party purchasers. In this latter case, the mortgage and assignment of the rights under the lease are held directly by a trustee for the benefit of the holders of the rated notes, and this direct issuance of debt eliminates the need for a transfer of the mortgage loan by the lender to the trust. The payments on the borrower's note will mirror very closely the payments on the lease. Typically, the sole source for payments of the debt service on the notes is the rental income generated by the lease.

In the last several years, however, Standard & Poor's has seen the use of pools of credit tenant loans to multiple unrelated borrowers and multiple unrelated rated tenants that may have different credit ratings. Additionally, Standard & Poor's has observed the inclusion of credit tenant loans in conduit transactions containing noncredit tenant loans.

The analysis of multiple credit tenant loans in the context of a commercial mortgage pool is different from the analysis of a stand-alone credit tenant loan transaction. In a pool transaction, the ratings assigned to the securities are not merely a function of the ratings of a single credit tenant, since the pool may include tenants with different credit ratings as well as noncredit tenant loans. (*For a discussion of the credit analysis of credit tenant loans in pool transactions*, *see Appendix XI, Credit Tenant Loans in Pool Transactions.*)

While the variation of the ratings of the credit tenants in a pool transaction, as well as other factors, causes the credit analysis of a pool of credit tenant loans to be different from the credit analysis of a stand-alone credit tenant loan transaction, the legal analysis of a credit tenant loan for inclusion in a stand-alone or a pool transaction is virtually identical, due to the heavy reliance in all credit tenant loan transactions on the income generated by each credit lease and the credit rating of the tenant.

Rating of Securities

Stand-Alone Credit Tenant Loan Transactions

Because payments of the rated securities are dependent entirely upon the continued timely receipt of the rental income generated by the lease, the creditworthiness of the tenant is a key component in Standard & Poor's analysis of a stand-alone credit tenant loan transaction. The tenant usually is an entity with a rating assigned by Standard & Poor's, and the rating that Standard & Poor's assigns to the rated securities is the same as the tenant's rating.

Alternatively, if the tenant is not a rated entity, the tenant's obligations must be guaranteed by an entity, usually an affiliate of the tenant, which has a rating assigned to it by Standard & Poor's. In this case, the rating that Standard & Poor's assigns to the rated securities is the same as the guarantor's rating. Any guarantee executed by the guarantor should meet Standard & Poor's guarantee criteria. (*See Guarantees in Credit Tenant Loan Transactions.*) Because the rating of the rated securities is dependent on the rating of the tenant or the guarantor, a downgrade, withdrawal, or qualification of the rating of the tenant or guarantor, as applicable, will result in a downgrade, withdrawal, or qualification of the rating assigned to the rated securities.

Credit Tenant Loans in Pool Transactions
While the rating of the credit tenants in a pool transaction is an integral part of the determination of the ratings of the rated securities, the ratings assigned to the securities in a pool transaction are not based on the rating of a single tenant. The credit ratings of multiple credit tenants are not likely to be uniform. For example, if the credit tenants in a pool are in different industries or have business operations in different jurisdictions, credit events are likely to affect credit tenants at different times and with different severities.

Additionally, a default by one credit tenant in a pool transaction may not cause a default on the rated securities or a shortfall in funds for distribution to the rated securities in a conduit pool that provides for principal and interest advances by a servicer and trustee, or such default may only affect the rating of the lowest rated tranches. This is in stark contrast to the traditional stand-alone single tranche credit tenant loan transaction that does not have advancing, where a monetary default by a tenant would almost certainly result in a default on all of the rated securities. The methodology for balancing the various underwriting factors in evaluating a pool that includes credit tenant loans is explained in Appendix XI.

Because the rating of the rated securities in a pool transaction is usually only partially dependent on the ratings of the various tenants in the pool, a downgrade, withdrawal, or qualification of the rating on one or more of the tenants may or may not result in the downgrade, withdrawal, or qualification of the ratings on all of the rated securities.

Key Credit Lease Issues

Special-Purpose, Bankruptcy-Remote Status of Borrower
Because the rental income generated by the lease is the primary source for payment of the rated securities, Standard & Poor's expects each credit tenant loan transaction to incorporate certain features designed to forestall any interruption, delay, or reduction in the rental income. One of the most important events that must be protected against is the insolvency of the borrower. To effect this protection, the borrower must be an SPE (*see Section Four, Special-Purpose Bankruptcy-Remote Entities*).

Transfer of the Property and Merger of the Borrower
Because the leased property must be owned at all times by an SPE or an entity with a rating as high as the rated securities, the transaction documents may permit the borrower to merge with an entity or to transfer the leased property to an entity if it is either an SPE or has a rating as high as the rating on the rated securities. As a condition to the transfer or merger, however, the borrower must comply with the following terms:

- Prior to any such transfer or merger, the borrower must obtain ratings confirmation;
- The transferee or entity with which the borrower merges must assume all of the borrower's obligations with respect to the transaction; and
- Nonconsolidation and enforceability opinions should be delivered to the trustee and Standard & Poor's. (*See Section Five, Legal Opinions.*)

Similarly, transfers of equity interests in the borrower should be restricted in a manner that will preserve the bankruptcy-remote status of the SPE borrower. (*For further information, see Section One, Property-Specific and Large Loan Transactions - Commercial Mortgages and Loan Agreements in Property-Specific and Large Loan Transactions - Transfers.*)

Form of Lease
Because the lease is a key component of the transaction, Standard & Poor's usually will review its terms to

verify that the lease includes certain provisions designed to assure the continued flow of rental income while the rated securities are outstanding. The following are some of the key items that Standard & Poor's reviews in a lease:

- ***Bondable leases.*** Typically, the lease will be a bondable triple net lease and will provide that every monetary and nonmonetary obligation associated with managing, owning, developing, and operating the leased property, including, but not limited to, the costs associated with utilities, taxes, insurance, maintenance, and repairs, is an obligation of the tenant. The borrower should not have any monetary obligation (other than the payments on the note or rated securities) or material nonmonetary obligations, and the entire rental income generated by the lease should be available to pay the rated securities.
- ***Leases that are not bondable.*** Standard & Poor's has reviewed leases in which the borrower has some monetary and/or nonmonetary obligations. Obviously, to the extent a borrower defaults in such obligations, the likelihood of default on the rated securities is increased. In these cases, Standard & Poor's will review each monetary obligation of the borrower, the costs associated with performing the obligations, the period in which the borrower must perform the obligations, the frequency with which the borrower must perform the obligations, and the source of the funds required to cover the costs of performing such obligations to determine whether the transactions can be rated. Standard & Poor's will also review the nature and extent of any nonmonetary obligations. Standard & Poor's has rated transactions where the leases are not bondable. However, as more of the terms of the lease deviate from those of a true bondable lease, the credit quality of the mortgaged property and the borrower become more important. Accordingly, in transactions involving leases that are not bondable, reserves or other credit enhancement, as well as a higher debt service coverage ratio, may be appropriate.
- ***Rental income.*** As a general rule, the rental income generated by the lease must equal or exceed the payments due with respect to the rated securities and any costs associated therewith. The rental income should not be reduced during the term of the loan. In addition, the tenant should not have the ability to abate rent, even in the context of a casualty or condemnation. In order to analyze whether rental income generated by a lease is sufficient, Standard & Poor's should be provided with cash flow schedules that detail rental payments, debt service payments, unamortized principal, and annual fees.
- ***Amortization; lease term.*** In typical credit tenant loan transactions, the lease to the credit tenant does not terminate prior to payment in full of the rated securities, and the credit tenant loan is structured so that the payments under the lease are sufficient to fully amortize the loan over its term. Such a structure avoids refinancing risk on the loan's maturity date. In recent years, Standard & Poor's has also been rating credit tenant loan transactions that do not fully amortize over their terms. In order to cover the refinancing risk, such transactions include a residual value insurance RVI policy (an "RVI policy"). Under an RVI policy, if the loan is not fully paid on maturity, the issuer of the RVI policy will pay the amount of the balloon payment due at maturity. If an RVI policy is used as a substitute for full amortization over the lease term, the RVI policy should have no conditions precedent to payment under the policy (other than the presentation of claim by the trustee) and should require the unconditional payment by the insurer of a sum certain on a date certain sufficient to cause a timely payment in full of the principal amount due under the loan at maturity. The form of the RVI policy must be acceptable to Standard & Poor's, and the rating of the issuer of an RVI policy must be at least as high as the highest rated issued security. Because the rating of the issuer of the RVI policy is an integral component of Standard & Poor's rating of a credit tenant loan transaction with a balloon payment, downgrade, withdrawal, or qualification of the rating of the issuer of the RVI policy may cause a downgrade, withdrawal, or qualification of the rating of the rated securities.
- ***Leases that allow early termination.*** In certain circumstances, Standard & Poor's has accepted leases that provide that the tenant may terminate the lease prior to the expiration of the lease term in the event a substantial casualty or condemnation occurs with respect to the leased property. Typically, such a lease provides that if a casualty or condemnation occurs in the last several years of the term of the lease or the casualty or condemnation is of such a magnitude (often expressed as a percentage of the gross leasable area), the tenant may terminate the lease. Standard & Poor's is willing to consider this type of lease on a case-by-case basis. Usually these termination risks are covered by obtaining a lease enhancement insurance policy that pays to the trustee the remaining obligations due under the loan in the event a tenant exercises its right to terminate the lease upon the occurrence of a casualty or condemnation. Standard & Poor's generally reviews each casualty and condemnation lease enhancement policy to assure itself that there are no conditions precedent to payment of claims under the policy other than the presentation of a claim by the trustee and that

the amount of coverage and timing of payments are sufficient to cause a timely payment of all sums due under the loan. The form of the lease enhancement policy must be acceptable to Standard & Poor's, and the rating of the issuer of a lease enhancement policy must be at least as high as the highest rated issued security. Because the rating of the issuer of the lease enhancement policy is an integral component of Standard & Poor's rating of a credit tenant loan transaction with termination risks, a downgrade, withdrawal, or qualification of the rating of the issuer of the lease enhancement policy below that of the credit tenant may cause a downgrade, withdrawal, or qualification of the rating of the rated securities. Occasionally, a transaction may not provide for a condemnation insurance policy covering the risk of termination in the event of a condemnation. In the absence of insurance covering condemnation risks, Standard & Poor's may undertake a determination of the probability that a use of a significant portion of the improvements will be lost as a result of a condemnation *(see Condemnation Analysis - Guidelines).*

- ***Insurance.*** During the term of the lease, the tenant must obtain insurance that meets Standard & Poor's guidelines. Alternatively, under certain circumstances, the tenant may be permitted to self-insure if its credit rating meets certain standards.
- ***Tenant option to purchase the property.*** Standard & Poor's often reviews leases in which the tenant is granted either an option to purchase the leased property or a right of first refusal in the event the landlord receives a bona fide third-party offer to purchase the leased property. If such an option or a right is included in the lease, the price at which the tenant may exercise the option or right must be in an amount at least equal to the outstanding principal balance of the related note plus accrued and unpaid interest.
- ***Assignment and subletting by tenant.*** Because the rating of the rated securities is dependent, in whole or in part, on the rating assigned to the tenant (or the guarantor, in the event the tenant is not rated), if the lease permits the assignment or subletting of the leased property, the tenant (or guarantor, if applicable) must continue to be liable for all obligations under the lease.

Substitution of Property

Quite often, a borrower will want to obtain a release of the lien of the mortgage on the leased property originally encumbered by the mortgage in consideration for the borrower's substituting property and subjecting the substituted property to the lien of the mortgage. Standard & Poor's will permit a substitution if the substituted property satisfies certain conditions, each of which is designed to assure that the rated securities are adequately secured:

- ***Fair market value.*** The fair market value of the substituted property and its useful life must be greater than or equal to the fair market value and useful life of the original property.
- ***Representations, warranties, and covenants.*** The original representations, warranties, and covenants made by the tenant and the borrower in the transaction documents with respect the original property must be made with respect to the substituted property.
- ***Environmental report.*** Standard & Poor's must be provided with an acceptable environmental report (*see Section One, Property-Specific and Large Loan Transactions - Environmental Criteria*).
- ***Lease terms.*** The substituted property must be leased to the tenant pursuant to a lease that contains substantially the same terms as the lease pursuant to which the tenant leased the original property.
- ***Indemnifications.*** Any indemnifications made by the tenant for the benefit of the borrower with respect to the original property must survive the substitution and remain in full force and effect despite the substitution.
- ***Notification and ratings confirmation.*** Standard & Poor's must receive prior written notification of the substitution. The substitution should be conditioned upon receipt from Standard & Poor's of ratings confirmation.

Title, Impositions, Taxes, and Mechanics Liens

The mortgage must be a first priority lien on and security interest in the leased property, subject only to the lease and other permitted exceptions (*See Section One, Property-Specific and Large Loan Transactions - Due Diligence in Property-Specific and Large Loan Transactions - Due Diligence in Property-Specific and Large Loan Transactions - Permitted Exceptions).* Both the mortgage and the lease should provide that the borrower and the tenant must pay in a timely manner all impositions, taxes, and claims for labor, materials, or supplies. The lease should include an indemnification by the tenant of the borrower for damages and claims arising out of the tenant's failure to pay such impositions, taxes, and claims.

Notwithstanding the borrower's absolute obligation to pay impositions, taxes, and claims, Standard & Poor's has reviewed mortgages and leases that provide that the borrower and the tenant may withhold payment of such impositions, taxes, and claims during a contest by appropriate proceedings conducted in good faith provided the following conditions are satisfied:

- The proceedings suspend collection of such impositions, taxes, or claims from the leased property.
- The leased property will not be sold, forfeited, or lost if the amount or condition being contested is paid or satisfied; and
- The trustee, for the benefit of the holders of the rated securities, is provided with sufficient security in respect of the claim being contested, pending the contest.

Separate Tax Lot
Standard & Poor's must be provided with evidence that each leased property is a separate tax lot for real estate tax purposes, to assure that the failure of a third party to pay real estate taxes on the portion of the tax lot that is not subject to the lien of the mortgage will not cause the creation of a lien on the leased property in favor of the taxing authority that is superior to the lien of the mortgage.

Condemnation Risk Analysis
Credit tenant loan transactions are highly leveraged, often with a debt service coverage ratio slightly above 1 to 1. Accordingly, the loss of any portion of a leased property due to a condemnation could adversely affect the rental income generated by the property that, in turn, would adversely affect payments to the holders of the rated securities. On stand-alone credit tenant loan transactions where there is a potential termination of the lease by the tenant in the event of a condemnation and adequate lease enhancement insurance is not in place, Standard & Poor's analyzes the leased properties involved to assess the likelihood that a condemnation might occur. To analyze condemnation risks consistently and thoroughly in such situations, the submission of information in the format described in *Condemnation Analysis Guidelines* will be requested.

Environmental Matters
In its environmental analysis of a particular credit tenant loan transaction, the key environmental provisions are found in the lease. In reviewing the lease, Standard & Poor's is generally less concerned with environmental representations and warranties than with environmental covenants, especially indemnification provisions designed to insulate the borrower from liability or responsibility in connection with existing or future environmental conditions or violations affecting the leased property.

Absent unusual circumstances, the tenant should be responsible for all environmental risks associated with the condition, use, and operation of the leased property throughout the term of the mortgage, whether those risks were known or unknown, and whether based on conditions or events related to the tenant or occurring prior to the date of the lease. Environmental representations and warranties are relevant to the extent that they serve as the basis for the tenant's indemnification of the borrower, but rarely would an indemnity based solely on representations and warranties be sufficient, unless unlimited by knowledge, materiality, responsibility, or other factors. Generally, Phase I and, where necessary, Phase II environmental assessments should be made available for Standard & Poor's review in connection with credit tenant loan transactions (*see Section One, Property-Specific and Large Loan Transactions - Environmental Criteria*).

As with stand-alone property-specific and large loan transactions, the reports are reviewed to identify any potential environmental impairments that may negatively affect the condition or ownership of the leased property.

Title Insurance
The rated securities must be secured by a mortgage that is a first priority lien on and security interest in the leased property. In the event that a default occurs with respect to the mortgage, Standard & Poor's seeks verification that the trustee, on behalf of the holders of the rated securities, will have the right, prior to all other parties, to foreclose and liquidate the leased property. Title insurance provides the trustee, on behalf of the holders of the rated securities, with assurances that the leased property will be protected against any clouds on title that might affect the value of the leased property and, ultimately, the value of the cash flow that services the rated securities. The borrower should obtain a new mortgagee title insurance policy that meets Standard & Poor's guidelines. *(For further information, see Section One, Property-Specific and Large*

Loan Transactions - Due Diligence in Property-Specific and Large Loan Transactions - Title Insurance and Appendix I.)

Construction Risk
Often a transaction will provide that the tenant or a related entity can construct improvements on the leased property after the issuance of the rated securities. Absent the inclusion in such a transaction of certain protections, the risk exists that the holders of the rated securities will not be paid during the construction of the improvements or because of cost overruns incurred in connection with construction of the improvements. Protections designed to assure that the holders of the rated securities are paid in full in a timely manner during the period of construction of the improvements, after completion of construction of the improvements, and in the event that the improvements are not completed, should be included in the transaction.

During the pendency of the construction, Standard & Poor's addresses the risk of timely debt service payments by requiring the posting of either cash reserves or a letter of credit or other sufficient liquidity arrangement that meets Standard & Poor's guidelines, each in an amount sufficient to pay interest and principal due under the applicable note during the construction period. Additionally, to address the risk that the improvements are not completed, Standard & Poor's recommends one of the following:

- The posting of cash reserves to pay 100% of the unpaid outstanding principal balance of the applicable note; or
- That the lease provides that

    a.) regardless of completion of construction of the improvements or tenant's ability to use such improvements, the tenant must begin paying rent under the lease on a certain date; and
    b.) the lease remains in full force and effect without abatement of rent through its term despite the noncompletion of the improvements.

The lease may provide that, as an alternative to compliance with the terms described above in clause (2), the tenant has an option either to pay the entire unpaid outstanding principal balance of the applicable note plus accrued and unpaid interest thereon or assume the obligations of the applicable note on a full recourse basis.

Representations and Warranties in Credit Tenant Loan Transactions

Stand-Alone Credit Tenant Loan Transactions
Representations and warranties in stand-alone credit lease tenant loan transactions are very similar to those in property-specific transactions (*see Section One, Property-Specific and Large Loan Transactions - Representations and Warranties in Property-Specific and Large Loan Transactions.*) Generally, the borrower will make the same representations and warranties as a borrower in a property-specific transaction and the tenant will make, in the lease, those representations and warranties identified in *Section One, Property-Specific and Large Loan Transactions - Representations and Warranties Common to Mortgage Loan Sellers, Depositors, Borrowers, Tenants, Trustees, and Servicers* and also *Borrower-Specific Representations and Warranties.*

Credit Tenant Loans in Pool Transactions
In the context of credit tenant loans included in a pool transaction, because of the volume of information necessary to be analyzed, Standard & Poor's does not review the loan documents and lease for each credit tenant loan. Accordingly, as with pool transactions of noncredit tenant loans, Standard & Poor's evaluation of a pool transaction that includes a significant concentration of credit tenant loans is dependent in part on a review of representations and warranties made by the originator of the credit tenant loans. The following representations and warranties should be included in the mortgage loan purchase and sale agreement:

- The lease is in full force and effect, and is a legal, valid, binding and enforceable obligation of the tenant.
- No default by the landlord or the tenant has occurred under the lease, and there are no existing conditions that, with the passage of time or the giving of notice, or both, would result in a default

under the terms of the lease.

- The tenant has not been released, in whole or in part, from its obligations under the terms of the lease.
- None of the terms of the lease has been impaired, waived, altered, or modified in any respect. The terms of the related mortgage loan provide that the lease cannot be modified without the consent of the mortgagee.
- The lease is subordinate in right to the related mortgage; any subleases entered into by the tenant will be subject and subordinate to the lease and will not relieve the tenant of any of its obligations under the lease; in the event that the mortgagee acquires title to the leased property by foreclosure or otherwise, the lessor's interest under the lease is freely assignable by the mortgagee and its successors and assigns to any person without the consent of the tenant, and in the event that the lessor's interest is assigned, the tenant will be obligated to attorn to the assignee as lessor under the lease.
- The tenant has agreed to notify the mortgagee of any default under the lease and to provide the mortgagee with additional time and opportunity to cure.
- The base rental payments due under the lease are greater than or equal to the scheduled payments of interest and principal (with the possible exception of the balloon balance due at maturity if the loan is enhanced with residual value insurance acceptable to Standard & Poor's) due under the loan documents and are payable without notice or demand and without right of set-off, counterclaim, recoupment, abatement, reduction, or defense.
- The tenant is required to make all rental payments directly to the mortgagee or its successors and assigns.
- There is no right of rescission, set-off, abatement, diminution, defense, or counterclaim to the lease, nor will the operation of any of the terms of the lease, or the exercise of any rights thereunder, render the lease unenforceable, in whole or in part, or subject to any right of rescission, set-off, abatement, diminution, defense, or counterclaim, and no such right has been asserted.
- The obligations of the tenant under the lease, including, without limitation, the obligation of the tenant to pay fixed and additional rent, are not affected by reason of any damage to, or destruction of, any portion of the leased property; any taking of the leased property or any part thereof by condemnation or otherwise; or any prohibition, limitation, interruption, cessation, restriction, or prevention of, or interference with, the tenant's use, occupancy, or enjoyment of the leased property; provided, however, that the lease may permit a lease termination under these circumstances if notice of termination is accompanied by the tenant's exercise of an option to purchase the leased property for an amount at least equal to the outstanding balance of the credit tenant loan plus accrued and unpaid interest.
- In the event that the lease may be terminated upon the occurrence of a casualty or condemnation, the related mortgage loan has the benefit of a noncancelable lease enhancement policy for which the entire premium has been paid in full.
- The landlord does not have any monetary obligations under the lease.
- Every obligation associated with managing, owning, developing, and operating the leased property, including, without limitation, the obligation to pay the costs associated with utilities, taxes, insurance, ground rents, capital and structural improvements, maintenance, and repairs is an obligation of the tenant.
- Any obligation or liability imposed by any easement or reciprocal easement agreement is an obligation of the tenant and is without recourse or liability to the landlord.
- The landlord does not have any nonmonetary obligations under the lease, the performance of which could involve a material expenditure of funds or the breach of which could result in the abatement of rent, a right of set-off, or termination of the lease.
- The lease contains customary and enforceable provisions that render the rights and remedies of the lessor adequate for the enforcement and satisfaction of the lessor's rights.
- The tenant may not terminate the lease for any reason (other than a default on the part of the landlord after notice and cure provisions) prior to the payment in full of: (a) the outstanding principal balance of the related credit tenant loan; (b) all accrued and unpaid interest on the related credit tenant loan; and (c) any other sums due and payable under the terms of the related credit tenant loan as of the termination date, which is a date on which a rent payment is due.
- In the event the tenant assigns the lease or sublets the leased property, the tenant will remain fully liable under the lease.

- The tenant has agreed to indemnify the landlord from any claims of any nature relating to the lease and the leased property.
- The tenant has agreed to indemnify the landlord from any claims of any nature arising as a result of any environmental problem affecting the leased property, which is caused by the tenant and arises after the commencement of the lease.
- The leased property is a separate tax parcel.
- The leased property is not subject to any lease other than the credit lease. No person has any possessory interest in, or right to occupy, the leased property except under and pursuant to the credit lease. The tenant is in occupancy of the leased property.
- With respect to any lease that is guaranteed by a guarantor, the guarantee represents the unconditional, irrevocable, and absolute obligation of the guarantor, without any right of set-off, counterclaim, or defense, and is a guarantee of payment and not merely collection. The guarantee is binding upon the guarantor, its successors and assigns and may not be amended or released without the mortgagee's consent. The rejection of the related lease in a bankruptcy or insolvency of the tenant will not affect the guarantor's obligations under the guarantee, and the guarantor will be obligated to pay the tenant's obligations under the related lease as though such rejection had not occurred. In the event that the tenant or the guarantor makes a payment that is subsequently invalidated, in whole or in part, declared to be fraudulent or preferential or set aside under any bankruptcy law or otherwise, the guarantor will be obligated to pay the amount of such payment to the extent invalidated, declared to be fraudulent or preferential or set aside.

In the case of loans that are not bondable, Standard & Poor's would expect analogous representations and warranties to be made that describe the ways in which the related loans and leases vary from the bondable lease standard. For example, the representation with respect to landlord obligations pursuant to easements and reciprocal easement agreements should summarize each landlord's monetary and nonmonetary obligations under the terms of the related lease and any related easement agreements.

The representations and warranties outlined above are related primarily to the terms of the credit leases themselves. In addition to these, the originator will typically give a series of standard representations and warranties with respect to other matters affecting the related mortgage loans and the leased properties (*see Section Two, Pool Transactions - Representations and Warranties in Pool Transactions).*

The Role of the Servicer in Credit Tenant Loan Transactions

As with other noncredit tenant loan transactions, loan servicing is an important part of stand-alone credit tenant loan transactions, as well as of pool transactions that include credit tenant loans. Generally, the same rules apply as described in Sections One and Two, although in a stand-alone credit tenant loan transaction provisions that relate to servicer advancing may not be applicable (*see Section One, Property-Specific and Large Loan Transactions - Servicing Issues in Property-Specific Transactions and Section Two, Pool Transactions - Servicing Issues in Pool Transactions)*.

The servicer's handling of credit tenant loans is particularly important because the actions or inaction of the servicer can directly impact whether the anticipated stream of lease payments is, in fact, available for the full term of the lease. The servicer must be familiar with the specific provisions of each credit tenant lease.

The servicer must also be aware of the terms of any insurance policies that have been put in place to cover lease termination rights or to cover the refinancing risk of a balloon payment is due when the lease expires. Many lease enhancement or RVI policies require that no modifications be made to the terms of the lease or the loan without the consent of the insurer. The servicer must consider these restraints in making servicing decisions to ensure that its actions do not impair the availability of coverage under the policies. In addition, if it becomes necessary to file a claim under a lease enhancement or RVI policy, the servicer must be familiar with the claims process so that it can act in a timely manner.

Guarantees in Credit Tenant Loan Transactions

Guarantees are frequently used in credit tenant loan transactions. As discussed above, if the tenant is not a rated entity, the transaction should provide for a guarantee from a rated entity guaranteeing the tenant's obligations under the lease. Generally, the guarantee will be executed in favor of the borrower/landlord and assigned by the borrower/landlord to a trustee (along with an assignment by the landlord of all of its rights in the lease payments and other proceeds) for the benefit of the holders of the rated securities. Essentially,

the evaluation of the creditworthiness of the tenant is shifted to an evaluation of the creditworthiness of the guarantor and the compliance of the guarantee with certain criteria established by Standard & Poor's.

These guidelines can apply to any form of guarantee, including a parent guarantee, a debt purchase agreement, a surety bond, or an insurance contract. The guarantee criteria are intended to reduce the risk that a guarantor be excused from making a payment under its guarantee.

Guarantees that are being relied upon by Standard & Poor's should comply with the following criteria *(for sample language corresponding to most of these concepts, see Appendix XII, Sample Guarantee Language)*:

- The guarantee is one of payment and (if applicable) performance and not of collection.
- The guarantor agrees to pay the guaranteed obligations on the date due and waives demand, notice, marshaling of assets, etc.
- If the guarantor is not a U.S. entity, the guarantor's obligations under the guarantee rank pari passu with its senior unsecured debt obligations.
- The guarantor's right to terminate or amend the guarantee should be conditioned upon a ratings confirmation.
- The guarantee is unconditional, irrespective of value, genuineness, validity, or enforceability of the guaranteed obligations. The guarantor should waive all other circumstance or condition that would normally release a guarantor from its obligations. The guarantor also should waive the right of set-off, counterclaim, etc.
- In connection with lease transactions, the guarantee also should provide that in the event of a rejection of a lease in a bankruptcy proceeding, the guarantor will pay the lease payment, notwithstanding the rejection and as though the rejection had not occurred.
- A statement that the guarantee reinstates if any guaranteed payment made by the primary obligor is recaptured as a result of the primary obligor's bankruptcy or insolvency.
- The holders of the rated securities are beneficiaries of the guarantee.

In the case of cross-border transactions, the risk of withholding tax with respect to payments by the guarantor may need to be addressed.

Eligible Institutions and Eligible Investments in Credit Tenant Loan Transactions

Often in credit tenant loan transactions the transaction documents will provide for accounts to be established at the closing of a transaction to serve as accounts in which revenues generated by the mortgage loans are deposited and are to be held. Similarly, the accounts in which the reserves and revenues are held often contain significant sums held over a substantial period of time. Standard & Poor's is concerned that these funds be maintained with a creditworthy institution thereby avoiding the potential inability to access such funds in the event of an insolvency of the institution. Accordingly, these funds should be deposited in eligible institutions and invested in eligible investments issued by creditworthy issuers and for periods of time sufficient to insure the availability of the funds as and when needed.

In addition, Standard & Poor's criteria for eligible institutions and eligible investments are intended to isolate a transaction's payments, cash proceeds, and distributions from the insolvency of each entity that is a party to the transaction. Standard & Poor's relies on its legal and structured finance criteria to ensure that a transaction's cash flows are protected at every link in the cash flow chain.

Eligible Accounts and Institutions

In credit lease transactions, all accounts maintained by the master servicer, special servicer, any subservicer, or the trustee must be eligible accounts (*see Section One, Property-Specific and Large Loan Transactions - Eligible Institutions and Eligible Investments in Property-Specific and Large Loan Transactions*).

Eligible Investments

Funds in eligible accounts may only be invested in eligible investments. The rationale for limiting investments in eligible accounts is to assure that the issuers of such investments are creditworthy and funds will be available as are when needed. (*For Standard & Poor's criteria on Eligible Investments and a*

list of Eligible Investments, see Appendix II, Eligible Investment Criteria for 'AAA' Structured Transactions.)

Condemnation Analysis Guidelines

On stand-alone credit tenant loan transactions where there is a potential for tenant termination in the event of a condemnation and satisfactory lease enhancement insurance is not obtained, Standard & Poor's may perform a condemnation analysis to determine the possibility that an act of condemnation will occur at some point in the future, particularly to the extent that it would be extensive enough to trigger the tenant's right to terminate the lease or abate rent.

As part of the analysis, Standard & Poor's reviews the existing road network for current and future adequacy. In order to perform this analysis, Standard & Poor's requests that certain information be provided in a standard format.

The following is a description of both the format for presentation of requested information and an explanation of what is requested. The order of presentation of the information should be uniform in order to facilitate the analysis. If more than one property is to be reviewed, Standard & Poor's requests that the information be submitted in a binder, organized by property, and separated by tabs.

Page One: Eminent Domain/Condemnation Summary

The first page should contain summary information regarding the location of the property, exact size of the leased property (in acres and total square footage), and the parameters in a lease that would trigger a tenant termination right or abatement of rent due to an act of condemnation. Below are explanations of what should be provided for page one and the report format.

- ***Eminent domain-lease termination rights summary.*** A simple summary of tenant's rights to either terminate the lease or abate the rent as a result of a condemnation event must be provided. This will include the percentage of land taken by such an event that will trigger this right (e.g., 10% of the property), the size of the leased property (e.g., 500,000 sq.ft.), and what the resulting square footage taken must equal to trigger the right (e.g., 50,000 sq.ft.).

Page Two: Parking Space Adequacy

The second page should be devoted to an analysis of adequacy of parking spaces as per the lease and as per the local zoning requirements. Standard & Poor's wants to determine that, in the event of a condemnation, adequate parking spaces would remain to satisfy both tenant and zoning requirements and no abatement of rent would occur. Below are explanations of the information that should be provided and the format in which it should be presented.

- ***Tenant requirements for parking summary.*** This is a simple summary of the requirements in the lease for a specified number of parking spaces (e.g., 500) that must be provided for the tenant. If the lease addresses any rights of the tenant to offset or abate rent, the terms of this right must be summarized, as well as the formula to abate rent.
- ***Zoning requirements.*** This reflects the number of spaces required given the total building square footage on the property and the local zoning requirements. If a reciprocal easement agreement provides for the use of additional spaces and is accepted by the tenant and/or the zoning board, this should be summarized; backup documentation regarding the reciprocal easement agreement and its acceptance by the respective parties should be supplied as addenda to Page Two. Any relevant restrictions, covenants, and expiration dates should be identified.
- ***Linear frontage of property along road(s).*** The frontage, in linear feet, that the leased property has to adjacent road(s) must be identified. For example, the leased property has 750 feet of frontage along State Street and 750 feet of frontage on County Line Road.
- ***Distance from parking lot to street(s).*** The distance from the adjacent road(s), respectively, to the parking lot must be provided (e.g., there is 10 feet from State Street to the parking lot's western edge, and five feet from County Line Road to the parking lot's southern edge). Note: The leased property is likely to abut the roads, but it is important to know the actual distance between the roads and parking lot.
- ***Maximum loss in condemnation-right to terminate.*** To facilitate the initial analysis, a straightforward worst-case analysis should be summarized.

This analysis should assume the road(s) adjacent to the leased property are widened by two lanes, or 30 feet in aggregate, toward the side(s) of the leased property. The total amount of the leased property that would be condemned in such a scenario should be calculated in total square footage and as a percentage of the total property. This figure should be compared with the figure needed to trigger the tenant's right to terminate, and the excess/shortfall of square footage remaining before a lease termination right is triggered should be identified.

For example, if State Street and County Line Roads were expanded by two lanes each, at 15 feet per lane (worst case), then 45,000 square feet of the property would be lost: 750 linear feet by 30 feet in depth, times two, equals 45,000 square feet. Thus, if 50,000 square feet of the leased property must be taken to trigger a lease termination right, an additional 5,000 square feet must be condemned in this scenario to effect such an event.

If a condemnation event has already occurred and the tenant has accepted the reduced size of the leased property and/or the reduced number of parking spaces, proof of this acceptance by tenant (or town zoning board, if a variance was required) should be submitted, with appropriate signature pages.)

Maximum loss in condemnation-loss of property. In a worst-case scenario, an analysis should also be performed that calculates the maximum number of parking spaces that would be lost by a two-lane expansion of the adjacent road(s). The remaining number of parking spaces should be compared with those required by the lease and the excess/shortfall should be stated. For example, if State Street and County Line Roads were expanded by two lanes each, Standard & Poor's might calculate 100 parking spaces of 625 total existing would be lost. Thus, the tenant still has 25 spaces more than the required 500 as per the lease.

Page Three: Aerial Photographs
Two clear aerial photos of the subject site should be submitted. Each photo must have the exact property delineated on it, either by thin marker or clear tape (making sure not to obscure the adjacent roadways). Each road adjacent to the site must be identified. One photo should be from an altitude of approximately 1,000 to 1,500 feet, taken directly over the site, clearly showing the property, the immediately adjacent roads and their existing traffic lanes, and other developed/undeveloped land adjacent to the site. The second photo should be taken from a higher altitude (approximately 3,500 to 5,000 feet) so that a larger area surrounding the site is revealed, particularly the road network.

Page Four: Site Plan With Parking Spaces
A site plan should be submitted in a manageable (i.e., reduced) size identifying the exact configuration of the leased property and the layout of the individual parking spaces. The total number of parking spaces existing should also be identified.

Page Five: D.O.T./City Planning Official Summaries
Correspondence or summaries of phone conversations with city planners and/or state department of transportation representatives should be submitted addressing, at a minimum, the following:

- Planned expansion of existing roads (i.e., widening);
- New roads planned;
- New intersections, jughandles, or cloverleafs, or modification to existing ones;
- Plans to alter existing roads in any way;
- Any improvements/alteration to roads or intersections completed in the past five years; and
- Any other circumstances that may result in a taking of any portion of the site.

Names of officials spoken or corresponded with should be documented with their respective phone numbers as well as the date of the communication.

Other
Any other information pertinent to the analysis may be summarized and included as addenda to the other information provided.

Section Four
Special-Purpose Bankruptcy-Remote Entities

Overview

The terms "single purpose," "special purpose," and "bankruptcy remote" are used in a variety of contexts throughout the structured finance and securitization markets. Although the terms have generally recognized meanings, those meanings may vary greatly depending on the role of the entity and the type of transaction. Special-purpose, bankruptcy-remote entities "SPEs" are used in a wide variety of commercial mortgage securitizations. Roles that may call for an SPE entity in a securitization include those of borrower, depositor, trust, general partner, member, lessor, and issuer.

Since the original publication of *Standard & Poor's Legal and Structured Finance Issues in Commercial Mortgage Securities*, Standard & Poor's has received ongoing inquiries regarding criteria relating to SPEs. These inquiries grow out of various market factors, including the increased desire by issuers to use limited liability companies and the inclusion of large loans in pool transactions. This section updates the criteria regarding SPEs in light of these market factors and inquiries.

Rationale for the SPE in a Commercial Mortgage-Backed Transaction

To understand the rationale for Standard & Poor's criteria, it is necessary to describe an SPE in the most basic terms. An SPE is an entity, formed concurrently with or immediately prior to the subject transaction, that is unlikely to become insolvent as a result of its own activities and that is adequately insulated from the consequences of any related party's insolvency. The SPE is generally utilized in one of three different types of transactions:

- The property-specific or large loan transaction;
- The pool transaction; and
- The credit lease transaction.

The most basic forms of these transactions, which are subject to a variety of structural permutations, are discussed in detail in sections one, two, and three of this publication and are briefly summarized below.

Property-Specific and Large Loan Transactions

In the property-specific or large loan transaction, Standard & Poor's credit analysis focuses on the property mortgaged by the borrower as collateral for the loan. It is critical to Standard & Poor's analysis that the borrower be insulated from economic issues that are unrelated to the borrower's real estate collateral. It is for this reason that the borrower in the property-specific or large loan transaction must be an SPE.

As discussed in section one, many property-specific transactions include, as part of their structure, a deposit of one or more mortgage loans into a trust. As a result, in a property-specific transaction, multiple SPEs may be appropriate. In addition to each borrower being an SPE, the depositor and/or the holder of any securities or interests in mortgage loan received or retained in connection with a transfer of a loan or loans should be an SPE if the transfer of the loan or loans by the originator to the depositor, or by the depositor to a trust, could not otherwise be characterized properly as a "true sale".

Pool Transactions

As discussed in section two, in a traditional pool transaction, one or more mortgage loan sellers will transfer a portfolio of mortgage loans (together with any loan documentation, reserve funds, security deposits, insurance policies, letters of credit, guarantees, or other forms of credit enhancement for the mortgage loans) to the depositor which, in turn, will transfer a such mortgage loans to a trust. The trust will issue the rated securities, which are backed by the mortgage loans, to investors in exchange for the proceeds from the sale of the securities.

One of the concerns that Standard & Poor's has in connection with the transfer of the loans from the originators to the depositor, or from the depositor to the trust, is whether the transfer constitutes a true sale under applicable law. Even though the transfer may be accomplished by means of an agreement between the transferor and the transferee for the purchase and sale of the mortgage loans, circumstances

surrounding the transfer could lead a court to conclude that the transfer of loans was not a sale, but rather a financing transaction whereby the transferee has made a loan to the transferor secured by the transferor's interest in the mortgage loans.

If such a recharacterization were to occur, the putative transfer of the mortgage loans would instead be construed as a pledge of mortgage loans by the transferor as collateral for the financing and, if the transferor were to become subject to a bankruptcy proceeding, a bankruptcy court could include the loans in the transferor's estate pursuant to Section 541 of the "Bankruptcy Code". Consequently, the automatic stay and other Bankruptcy Code provisions could apply to the mortgage loans, any related collateral, and proceeds of the foregoing, which would likely interfere with timely payments of interest or the ultimate payment of principal on the rated securities.

In situations where a transfer cannot be characterized properly as a true sale, the transferor generally should be an SPE. In addition, any securities or interests in the transferred mortgage loans received or retained by a loan originator in connection with such transfer generally should be held in an SPE.

The purpose of creating an SPE in these situations is to create an entity that should not become subject to a bankruptcy proceeding. The use of an SPE entity is designed to reduce the risk of the transferor becoming insolvent (or being substantively consolidated with an insolvent affiliate), filing a bankruptcy petition, and claiming (or having other creditors of the transferor claim) that the transfer of the mortgage loans and other collateral to the depositor or the securitization trust was not a true sale. If the depositor or holder of securities or retained interests do not become subject to a bankruptcy proceeding (or substantively consolidated with an insolvent affiliate), the likelihood that the depositor or holder of securities or retained interests or their creditors will have any incentive to recharacterize the transaction as a secured financing is consequently reduced. *(See Section Five, Legal Opinions, for a more detailed discussion of true sale issues)*.

Credit Lease Transactions
As discussed in Section Three, in a credit lease transaction, the borrower, as landlord and owner of the fee interest in an income-producing real property, obtains a loan that is secured by a "triple net" bondable lease to a rated tenant. Typically, the landlord/borrower will execute a note and mortgage in favor of the lender and will assign its right to collect the rents under the lease to the lender. The lender will then deposit, either directly or indirectly through a depositor, the note, mortgage, assignment of rents, and related collateral into a trust that will issue rated securities.

As in property-specific transactions, the trust structure (i.e., where the trust issues the rated securities) is not always employed. The lender or its affiliate may instead directly issue the rated securities (through an indenture or otherwise) and deposit the notes, the mortgages, the assignments of leases and rents, and the related collateral with a collateral administrator to hold in trust and as collateral for the rated securities.

A key difference between the structured credit lease transaction and traditional real estate financing is that in the former case, if the tenant has been assigned a credit rating by Standard and Poor's (or the tenant's lease payments are guaranteed by an entity who has been assigned a credit rating), it will be possible, under most circumstances, to assign a rating to the credit lease debt obligation of the landlord/borrower based on the credit rating of the tenant (or its guarantor). Generally, the rating ascribed to the credit lease debt obligation of a landlord/borrower will be adjusted only if the rating on the tenant (or the guarantor of the tenant's lease obligations) improves or declines.

Because the rating on the transaction is tied to the rating of the tenant (or its creditworthy guarantor), it is critical that the landlord/borrower be an SPE. If the landlord/borrower were not an SPE, a landlord/borrower insolvency could interfere with timely payments of interest or the ultimate payment of principal on the rated securities.

As with property-specific transactions and pool transactions, in a credit lease transaction, multiple SPEs may be appropriate. For example, if a depositor conveys the credit tenant loans into a trust, in addition to the landlord/borrower being an SPE, the depositor also should be an SPE if the transfer of the credit tenant loan by the depositor to the trust could not be characterized properly as a true sale.

Overview of SPE Criteria

The following general categories are the framework for Standard & Poor's SPE criteria:

- Restrictions intended to limit or eliminate the ability of an SPE from incurring liabilities other than the debt to be included as part of the rated transaction, including (i) restrictions and/or limitations on indebtedness, and (ii) limitations on purpose of the SPE and the activities in which it may engage.
- Restrictions intended to insulate the SPE from liabilities of affiliates and third parties, including (i) the requirement that the organizational documentation of the SPE and the transaction documents contain separateness covenants described in this section and (ii) the requirement that a nonconsolidation opinion be delivered with respect to the SPE meeting the guidelines described in Section Five of this publication.
- Restrictions intended to protect the SPE from dissolution risk, including (i) absolute prohibitions on liquidation and consolidation for so long as the rated securities are outstanding, (ii) restrictions on merger of the SPE, and sale of all or substantially all of the assets of the SPE, in each case, without the prior written consent of the lender and, following the securitization of the indebtedness, receipt of a ratings confirmation, and (iii) the requirement that, except for a properly structured single member limited liability company as discussed below, (a Single Member LLC*), the SPE have appropriate single-purpose, bankruptcy-remote equity owners (e.g., SPE general partners with respect to an SPE limited partnership, or an SPE member holding a meaningful economic interest with respect to an SPE limited liability company that is not a Single Member LLC).
- Restrictions intended to limit a solvent SPE from filing a bankruptcy petition (or taking any other insolvency action), including the requirement that the SPE (and/or any SPE constituent entity) have an independent director or independent manager whose vote is required prior to the filing of any bankruptcy (or taking any other insolvency actions) in accordance with the guidelines of this section.

*Although a single-member LLC typically contains only one member, it may contain multiple members. The term "single-member LLC" is used in this section for ease of discussion. (See Appendix XIII for a discussion of Standard & Poor's SPE criteria for single-member LLCs).

The foregoing categories of restrictions for SPEs are discussed in detail in this Section.

Specific SPE Criteria

Although a wide range of entities such as general partnerships, limited partnerships, limited liability companies, corporations, municipalities, not-for-profit institutions, charitable institutions, public purpose corporations, and business trusts are utilized in commercial mortgage transactions, the type of entities most frequently used in recently rated commercial mortgage transactions are corporations, limited partnerships, and limited liability companies. The following criteria should be incorporated into both the transaction documents in addition to the following:

- If the SPE is a corporation, the filed articles of incorporation;
- If the SPE is a limited liability company, the limited liability company operating agreement;
- If the SPE is a limited partnership, the limited partnership agreement; and
- If the SPE is another type of entity, its corresponding organizational documents.

Restrictions on Additional Indebtedness

The ability of an SPE to incur indebtedness, other than the indebtedness that is supporting the rated securities, should be limited. The nature of this limitation will depend on the SPE's role in the transaction.

For example, the SPE mortgage borrower's organizational documentation and the transaction documentation that evidences the indebtedness backing the rated securities should generally restrict the SPE mortgage borrower from incurring indebtedness other than (i) the indebtedness that backs the rated securities and (ii) unsecured trade payables that are as follows:

- Subject to a cap on the aggregate amount of trade indebtedness that may be incurred (which maximum amount, in the case of an SPE mortgage borrower in property specific or large loan

transactions, is generally less than 2% of the principal amount indebtedness supporting the rated securities, and is generally less than a *de minimis* amount in the case of an SPE equity owner of an SPE mortgage borrower);

- Incurred in the ordinary course of business,
- Related to the ownership and operation of the mortgaged property;
- Required to be paid within 60 days from the date such trade payables are first incurred by the SPE mortgage borrower (and not merely 60 days from the date on which the trade payables are due); and
- Not evidenced by a promissory note (see Section One, Permitted Indebtedness, for a further discussion of additional debt).

Standard & Poor's will generally review, on a case-by-case basis, the documentation and information with respect to any additional debt that an SPE is permitted to incur.

Limitations on the Purpose of an SPE

The purpose for which the SPE is formed and the activities that the SPE may be engaged in should be expressly limited in both the transaction documents and the organizational documentation of the SPE. The nature of the limitation will depend on the SPE's role in the transaction. For example, an SPE mortgage borrower's purpose should be limited to owning and operating the mortgaged property that is collateral for the debt supporting the rated securities and activities necessary and incidental to such purpose. The purpose of any equity owner of an SPE mortgage borrower that itself is a SPE constituent entity should be limited to owning the equity interests in the SPE mortgage borrower, while an SPE depositor's purpose should be limited to depositing the mortgage loans into the trust that will issue the rated securities.

Prohibition on Consolidation and Liquidation; Restrictions on Mergers and Asset Sales

Both the organizational documentation of an SPE and the transaction documentation related to the indebtedness that supports the rated securities should, for so long as the rated securities are outstanding, prohibit the SPE from doing the following:

- Consolidating or combining with another entity;
- Liquidating or winding-up; and
- Merging or selling all or substantially all of its assets, in each case, without the prior written consent of the lender and, in the case of property-specific or large loan transactions, receipt of a ratings confirmation.

Prohibition on Amendments to Documentation

Both the organizational documentation of an SPE and the transaction documentation related to the indebtedness that supports the rated securities should prohibit the SPE from amending the provisions of the organizational documentation of the SPE that pertain to SPE criteria (including any defined terms pertaining to such criteria) as long as the rated securities are outstanding.

SPE Equity Owners of SPE Limited Partnerships, SPE Limited Liability Companies, and Multitiered SPE Structures

The discussion that follows addresses the proper structuring for SPE equity owners in limited partnerships and limited liability companies, which are two of the most common types of entities used in commercial mortgage transactions. SPE equity owners for other types of entities, such as general partnerships and trusts, are examined by Standard & Poor's on a case-by-case basis.

SPE Equity Owners in SPE Limited Partnerships

SPE limited partnerships are frequently used as borrowers in mortgage loan transactions. Typically, SPE limited partnerships consist of one general partner and one or more limited partners. Under the Revised Uniform Limited Partnership Act, if a general partner of a limited partnership were to become subject to a bankruptcy proceeding, the partnership would dissolve unless it was otherwise continued or reconstituted by the remaining partners. Because Standard & Poor's cannot predict whether or not the remaining partners would continue or reconstitute an SPE limited partnership, Standard & Poor's seeks to protect against this dissolution risk by requiring that all general partners of the SPE limited partnership be structured as SPEs themselves. Requiring the SPE limited partnership to have each of its general partners be an SPE should reduce the risk of a general partner becoming insolvent, which might otherwise cause the SPE limited partnership to dissolve.

Providing that all general partners of an SPE limited partnership will be SPEs should also protect against the possibility that, in the case where a general partner becomes insolvent but the limited partnership is not, a bankruptcy court's approval in connection with the general partner's insolvency might be required for the SPE limited partnership to undertake certain acts. For example, if the sole general partner of an SPE limited partnership were to become insolvent and the SPE limited partnership desired to refinance the related mortgage loan, it is possible that the approval of the bankruptcy court would be required with respect to such proposed financing.

Where an SPE general partner of the SPE limited partnership is not an SPE corporation or a properly structured single-member LLC, but instead is an SPE limited partnership or SPE limited liability company that is not a properly structured Single Member LLC, the SPE general partner should itself have SPE general partners that are SPE corporations or properly structured single-member LLCs in the manner described in this Section. This guideline applies with equal force to each SPE limited partnership or limited liability company included in the chain of general partnership ownership in the borrower structure.

SPE Equity Owner in SPE Limited Liability Company
In general (except in the case of a properly structured single-member LLC), with respect to transactions involving an SPE limited liability company, at least one member of the SPE limited liability company holding a meaningful economic interest in such SPE (generally at least 0.5%) should itself be an SPE. Standard & Poor's chief concern is that the bankruptcy or insolvency of non-SPE members may precipitate the bankruptcy or insolvency of the SPE limited liability company or a dissolution of the SPE limited liability company. Having at least one member of the SPE limited liability company that is itself an SPE mitigates such risk. However, as described in Appendix XIII, Standard & Poor's will rate a transaction involving a properly structured single-member LLC (which has no SPE economic members).

Where the SPE equity owner of the SPE limited liability company is not an SPE corporation or a properly structured single-member LLC, but instead is structured as an SPE limited liability company that is not a single-member LLC, such SPE equity owner must itself have an SPE equity owner that is an SPE corporation or a properly structured single-member LLC in the manner described in this Section. This guideline applies with equal force to each SPE limited liability company or SPE limited partnership included in the borrower structure.

The "Independent Director"
The following discussion concerns Standard & Poor's recommendations for "independent directors" for SPE organizational structures. These recommendations are commonly followed in transactions reviewed by Standard & Poor's and are currently viewed by Standard & Poor's as prevalent in the market. The discussion that follows does not, however, attempt to address each possible permutation and combination of entities that may comprise the SPE's organizational structure. Independent director provisions for general partnership borrowers, trust borrowers, and other borrowing structures that differ from the structures described below are examined by Standard & Poor's on a case-by-case basis.

As noted above, the vote of the independent director is required to undertake certain actions, most importantly, to file a bankruptcy petition or take other insolvency action with respect to the SPE. The provisions regarding the independent director are intended to protect against a voluntary bankruptcy petition being filed by the shareholders, members, partners, directors, or managers (as applicable) of an otherwise solvent SPE. This situation could arise, for example, where all of the directors on the board of an SPE corporation were also members of the board of directors of the operating company parent of that SPE corporation.

If there were no independent director on the board of the SPE corporation, and the parent of the SPE corporation were to become insolvent and, as a consequence, deem it advantageous for the SPE corporation to file a bankruptcy petition (without regard to the impact on the SPE corporation's creditors), the directors of the SPE corporation could simply vote to file a bankruptcy petition with respect to the otherwise solvent SPE corporation. The independent director is, therefore, intended (in part) to help insulate against the risk that the shareholders, members, partners, directors, or managers (as applicable) of the parent of the SPE will be able to control the SPE and vote to file a bankruptcy petition with respect to an the otherwise solvent SPE.

The following is a generally acceptable definition of "independent director".

A duly appointed member of the board of directors of the relevant entity who shall not have been, at the time of such appointment or at any time while serving as a director or manager of the relevant entity and may not have been at any time in the preceding five years, any of the following:

- A direct or indirect legal or beneficial owner in such entity or any of its affiliates;
- A creditor, supplier, employee, officer, director, family member, manager, or contractor of such entity or any of its affiliates; or
- A person who controls (whether directly, indirectly, or otherwise) such entity or any of its affiliates, or any creditor, supplier, employee, officer, director, manager, or contractor of such entity or its affiliates.

Independent Directors for SPE Corporations
An SPE corporation should have, at all times while the indebtedness supporting the rated securities is outstanding, at least one independent director duly appointed to, and serving on, its board of directors. In addition, the unanimous consent of the board of directors of the SPE (including the independent director(s)) should be required to file, or consent to the filing of, a bankruptcy or insolvency petition or otherwise institute insolvency proceedings with respect to the SPE corporation. The board of directors of the SPE corporation (including the independent director(s)) should be required to consider the interests of the creditors of the SPE corporation in connection with all such bankruptcy and insolvency actions.

Independent Directors for SPE Limited Liability Companies
An SPE limited liability company should have, at all times while the indebtedness supporting the rated securities is outstanding:

- An independent manager or independent director who is a duly appointed member of, and serving on, the board of managers or board of directors of the SPE limited liability company borrower, if the SPE limited liability company borrower is structured such that it includes a board of managers or board of directors whose vote is required with respect to taking any bankruptcy or insolvency action; or
- An SPE independent member that is a member of the SPE limited liability company borrower having (x) if such independent member of the SPE limited liability company borrower is a corporation, an independent director, (y) if such independent member of the SPE limited liability company borrower is a limited liability company, an independent member or independent manager, or (z) if such independent member of the SPE limited liability company borrower is a limited partnership, an SPE general partner that itself has an independent director if such general partner is a corporation, or an independent manager or independent member if such SPE general partner is a limited liability company; or
- As to any single-member LLC, an independent member that is a "non-economic member", which may be a corporation having an independent director, a limited liability company having an independent member, or independent manager or a limited partnership having a general partner that has an independent director, independent manager, or independent member, as applicable. For any properly structured single-member LLC, the independence feature provided by an independent director may also be provided by an individual who serves as the "non-economic member" of the limited liability company borrower, provided the individual would otherwise qualify as an independent director if the SPE limited liability company borrower were structured with a board of managers.

Independent Directors for SPE Limited Partnerships
Each general partner of an SPE limited partnership borrower should have, at all times while the indebtedness supporting the rated securities is outstanding, the following:

- An independent director among its board of directors, if such general partner is a corporation, in the manner described under the Section entitled "Independent Directors for SPE Corporations," above; or
- An independent manager or independent member (as applicable) if such general partner is a properly structured single-member LLC, in the manner described under the Section entitled "Independent Directors for SPE Limited Liability Companies" above.

Separateness Covenants
As discussed above, in order to increase the likelihood that an SPE will be insulated from the liabilities and obligations of its affiliates and third parties, the SPE should agree to abide and, as applicable, its shareholders, members, partners, and affiliates should agree to cause the SPE to abide by the following separateness covenants with respect to the SPE (the "Separateness Covenants") whereby the SPE covenants, among other things:

- To maintain books and records separate from any other person or entity;
- To maintain its accounts separate from any other person or entity;
- Not to commingle assets with those of any other entity;
- To conduct its own business in its own name;
- To maintain separate financial statements;
- To pay its own liabilities out of its own funds;
- To observe all partnership formalities;
- To maintain an arm's-length relationship with its affiliates;
- To pay the salaries of its own employees and maintain a sufficient number of employees in light of its contemplated business operations;
- Not to guarantee or become obligated for the debts of any other entity or hold out its credit as being available to satisfy the obligations of others;
- Not to acquire obligations or securities of its partners, members, or shareholders;
- To allocate fairly and reasonably any overhead for shared office space;
- To use separate stationery, invoices, and checks;
- Not to pledge its assets for the benefit of any other entity or make any loans or advances to any entity;
- To hold itself out as a separate entity;
- To correct any known misunderstanding regarding its separate identity; and
- To maintain adequate capital in light of its contemplated business operations.

Nonconsolidation Opinions
In order for an entity to be considered an SPE, the insolvency of an affiliate of that SPE should not impact the SPE. Under the equitable provisions of Section 105 of the Bankruptcy Code, a court has the power to "substantively consolidate" ostensibly separate but related entities. Substantive consolidation treats the assets and liabilities of the entities as if they belonged to one, enabling the creditors of each formerly separate estate to reach the assets of the consolidated estate.

In a commercial mortgage transaction, if an affiliate of the SPE were to become insolvent, it is possible that the affiliate or the affiliate's creditors would attempt to substantively consolidate the insolvent affiliate with the SPE, effectively placing the SPE under bankruptcy court protection and subjecting its assets to the claims of the affiliate's creditors.

In determining whether to substantively consolidate two entities, courts generally focus on the degree to which the affairs of the entities are intertwined. The separateness covenants (and the other SPE criteria) described in this Section are intended to separate the affairs of the affiliate with those of the SPE, and to mitigate consolidation risk. The law pertaining to substantive consolidation is, however, a complex subject and the separateness covenants alone will not adequately protect against the risk. For this reason, counsel to the SPE must properly structure the transaction and the relationship between the SPE and its affiliates (including affiliated property managers) to avoid the risk of substantive consolidation. In order to confirm whether a given SPE structure is appropriately insulated from consolidation risk, Standard & Poor's relies on an opinion of counsel for the SPE to that effect. Standard & Poor's specific guidelines with respect to nonconsolidation opinions are discussed in detail in Section Five of this publication.

Pre-Existing Entities as SPEs
Generally, an SPE entity should be formed immediately prior to the subject transaction in order to limit the risk that any prior activity involving the entity (i.e., activity occurring before the incurring of the indebtedness securing the rated securities) could be a basis for consolidating such the proposed SPE with any other

entity. Standard & Poor's has frequently been asked whether a pre-existing entity may qualify for treatment as an SPE, and has, on a case-by-case basis, reviewed transactions involving mortgage loan borrowers that are pre-existing entities. *(See Appendix XIV for a further discussion of "pre-existing" or "recycled" SPEs.)*

Entity-Specific SPE Criteria

As noted above, the types of entities most frequently used in recently rated commercial mortgage transactions are corporations, limited partnerships, and limited liability companies. Set forth below are specific criteria that should be incorporated into both the transaction documents:

- If the SPE is a corporation, the filed articles of incorporation;
- If the SPE is a limited liability company, the limited liability company operating agreement;
- If the SPE is a limited partnership, the limited partnership agreement; and
- The SPE criteria apply with equal force to an SPE that is itself serving as a SPE equity owner of another SPE. Standard & Poor's guidelines for each of these types of entity are set forth described here.

SPE Corporations

In Standard & Poor's analysis of an SPE corporation (including where the SPE corporation is acting as an SPE equity owner of an SPE limited partnership or SPE limited liability company as described above), Standard & Poor's will evaluate whether both the certificate or articles of incorporation of the SPE corporation and the transaction documents relating to the indebtedness that support the rated securities generally conform to the following:

- ***Limited purpose.*** The SPE corporation's purpose should be limited as described under the heading "*Limitation on the Purpose of an SPE*" above.
- ***Restriction on additional debt.*** The SPE corporation's ability to incur indebtedness should be limited as described under the heading "*Restrictions on Additional Indebtedness*" above.
- ***Prohibition on other activities, merger, consolidation, and asset sales.*** The SPE corporation (and its equity owners and affiliates) should, so long as the rated securities are outstanding, be (i) prohibited from engaging in any business activity other than owning the mortgaged property that secures the related indebtedness if such SPE corporation is the borrower, or, if such SPE corporation is an SPE equity owner, from engaging in any business activity other than owning equity interests in the SPE borrower; (ii) prohibited from consolidating or combining with another entity; (iii) prohibited from liquidating or winding-up; and (iv) prohibited from merging or selling all or substantially all of its assets, in each case, without the prior written consent of the lender, and, in the case of a property-specific or large loan transaction, receipt of a ratings confirmation.
- ***Prohibition on amendments to documentation.*** The SPE corporation should be prohibited from amending the SPE provisions of its organizational documentation as described under the heading "*Prohibition on Amendments to Documentation*" above.
- ***Independent director.*** The SPE corporation should have at least one independent director, and the unanimous consent of the board of directors (including the independent director) should be required to file, or consent to the filing of, a bankruptcy or insolvency petition, or otherwise institute insolvency proceedings as described under the heading "*The 'Independent Director'*" above.
- ***Separateness covenants.*** The SPE corporation should agree to observe the separateness covenants described under the heading "*Separateness Covenants*" above, and the separateness covenants should be contained in the filed articles or certificate of incorporation of such SPE corporation (as well as in the transaction documents).
- ***Foreign qualification.*** If the SPE corporation is formed in a jurisdiction different from where the mortgaged property is located, the SPE corporation should be qualified under applicable law in the state in which the mortgaged property is located.
- ***Nonconsolidation opinion.*** Standard & Poor's will typically expect a non-consolidation opinion to be delivered in the circumstances described in Section Five of this publication.

SPE Limited Partnerships

In Standard & Poor's analysis of an SPE limited partnership (including where the SPE limited partnership is acting as an SPE equity owner of another SPE limited partnership or SPE limited liability company as

described above), Standard & Poor's will evaluate whether both the limited partnership agreement of the SPE limited partnership and the transaction documents relating to the indebtedness that supports the rated securities conform to the following:

- ***Limited purpose.*** The SPE limited partnership's purpose should be limited as described under the heading "*Limitation on Purpose of an SPE*" above.
- ***Restriction on additional debt.*** The SPE limited partnership's ability to incur indebtedness should be limited as described under the heading "*Restrictions on Additional Indebtedness*" above.
- ***Prohibition on other activities, merger, consolidation, and asset sales.*** The SPE limited partnership (and its equity owners and affiliates) should, so long as the rated securities are outstanding, be (i) prohibited from engaging in any business activity other than owning the mortgaged property that secures the related indebtedness if such SPE limited partnership is the borrower, or, if such SPE limited partnership is an SPE equity owner, from engaging in any business activity other than owning equity interests in the SPE borrower; (ii) prohibited from consolidating or combining with another entity; (iii) prohibited from liquidating or winding-up; and (iv) prohibited from merging or selling all or substantially all of its assets, in each case, without the prior written consent of the lender and, in the case of a property-specific or large loan transaction, receipt of a ratings confirmation.
- ***Prohibition on amendments to documentation.*** The SPE limited partnership should be prohibited from amending the SPE provisions of its organizational documentation as described under the heading "*Prohibition on Amendments to Documentation*" above.
- ***SPE general partner.*** All of the general partners of the SPE limited partnership should be SPEs as described under the heading "*SPE Equity Owner of Limited Partnerships and Limited Liability Companies*" above.
- ***Independent director.*** The consent of the SPE general partner of the SPE limited partnership (including the vote of the Independent Director of the SPE general partner) should be required in order to file, or consent to the filing of, a bankruptcy or insolvency petition or otherwise institute insolvency proceedings as described under the heading "*The 'Independent Director'*" above.
- ***Separateness covenants.*** The SPE limited partnership should agree to observe the separateness covenants with respect to the SPE described under the heading "*Separateness Covenants*" above, and the separateness covenants should be contained in both the transaction documents and the limited partnership agreement of such SPE limited partnership. Additionally, the limited partnership agreement of the SPE limited partnership should specifically require that for so long as the indebtedness supporting the rated securities is outstanding, each of the equity owners of the SPE limited partnership will cause the SPE limited partnership to observe the Separateness Covenants.
- ***Continuity provisions.*** If there is more than one general partner, the limited partnership agreement of the SPE limited partnership should provide that the SPE limited partnership shall continue (and not dissolve) for so long as another solvent general partner of the SPE limited partnership exists.
- ***Foreign qualification.*** If the SPE limited partnership is formed in a jurisdiction different from where the mortgaged property is located, the SPE limited partnership should be qualified under applicable law in the state in which the collateral securing the indebtedness that secures the rated securities is located.
- ***Nonconsolidation opinion.*** Standard & Poor's will typically expect a non-consolidation opinion to be delivered in the circumstances described under the heading "*NonConsolidation Opinions*" above.

SPE Limited Liability Companies
In April of 2002, Standard & Poor's published its third edition of "*Legal Criteria for Structured Finance Transactions,*" which is Standard & Poor's legal criteria for residential mortgage-backed and asset-backed structured finance transactions. The publication included "*Appendix IV: Legal Criteria for LLCs,*" which significantly revised the criteria for SPE limited liability companies and incorporated Standard & Poor's criteria on single-member LLCs. That appendix is attached to this publication as Appendix XIII, Revised Legal Criteria for Multi- and Single-Member LLCs.

Standard & Poor's has now adopted these criteria for use in commercial mortgage-backed securitizations. Therefore, in Standard & Poor's analysis of an SPE limited liability company (including where the SPE limited liability company is acting as an SPE equity owner of an SPE limited partnership or another SPE limited liability company as described above), Standard & Poor's will evaluate whether the SPE limited liability company's limited liability company operating agreement, the transaction documents relating to the

indebtedness supporting the rated securities and the opinions delivered in connection therewith conform to Appendix XIII.

Conduit SPE Criteria

In typical conduit transactions, lenders make mortgage loans (usually under $20 million in original principal balance) to borrowers with the specific intent to convey the mortgage loans into a securitization within a relatively short time following the closing of the loan. Generally, all of the conduit mortgage loans conveyed into the securitization trust are expected to meet standard underwriting criteria established by the originating conduit lender.

Standard & Poor's is frequently asked whether borrowers in conduit transactions must comply with Standard & Poor's SPE criteria described in this section. If the pool of conduit mortgage loans included in the securitization is large enough and diverse enough to be treated as a pool-wide or aggregate basis by Standard & Poor's, strict compliance with Standard & Poor's SPE criteria would not be necessary.

If, however, mortgage loans to any borrower or group of affiliated borrowers comprise in the aggregate more than 5% of the mortgage loan pool, or if any mortgage loan is $20 million or more, the SPE criteria should be complied with. Standard & Poor's general guidelines are set forth below. These assume that the loan documents contain a prohibition on subordinate indebtedness secured by the mortgaged property that serves as collateral for the loans.

Loans with Less than 5% Borrower Concentration or Less than $20 Million

With respect to mortgage loans made to a borrower or affiliated groups of borrowers, where (i) the principal balances of such mortgage loans (as of the closing date of the securitization) comprise (in the aggregate) less than 5% of the aggregate outstanding principal balance of all of the mortgage loans comprising the securitized pool of mortgage loans, and (ii) the outstanding principal balance of any single mortgage loan is less than $20 million, borrowers should comply with Standard & Poor's SPE criteria, except that such borrowers need not comply with the following:

- Recommendations for an Independent Director as discussed under the heading "*The Independent Director"* above;
- Delivery of a nonconsolidation opinion regarding the borrower as discussed under the heading "*Nonconsolidation Opinions*" above; and;
- If the borrower is a limited partnership or a limited liability company, the recommendation that an equity owner be an SPE as discussed under the heading *"SPE Equity Owner of SPE Limited Partnerships and SPE Limited Liability Companies and Multitiered SPE Structures,"* above.

However, loans that only meet these standards will not be viewed by Standard & Poor’s as full bankruptcy-remote SPEs.

Loans with 5% or Greater Borrower Concentration or $20 Million or Greater Principal Balance

For mortgage loans made to a borrower or affiliated groups of borrowers, where (i) the principal balances of such mortgage loans (as of the closing date of the securitization) comprise (in the aggregate) 5% or more of the aggregate outstanding principal balance of all of the mortgage loans comprising the securitized pool of mortgage loans or (ii) the outstanding principal balance of any single mortgage loan is $20 million or more, the borrower should be structured in compliance with all of Standard & Poor's SPE criteria.

In any event, Standard & Poor's may request that additional borrowers be SPEs or waive its SPE guidelines depending upon Standard & Poor's evaluation of economic and other incentives for filing a bankruptcy petition.

For ease of reference, we refer to the independent directors, independent managers, and independent members in this discussion as "Independent Directors."

Section Five
Legal Opinions

Legal considerations, in addition to credit considerations, are an integral part of the rating process for a commercial mortgage transaction. Standard & Poor's resolves most legal concerns by analyzing the transaction documents and, where appropriate, receiving opinions of counsel. Generally, there are seven categories of opinions that may be appropriate for a commercial mortgage transaction:

- True sale opinions,
- Nonconsolidation opinions,
- Security interest opinions,
- Corporate and enforceability opinions,
- Local counsel opinions,
- Tax opinions, and
- Interest rate cap or swap opinions.

Standard & Poor's may request additional opinions that are warranted by a particular transaction. As a general rule, opinions to be provided in accordance with Standard & Poor's criteria should be addressed and delivered to Standard & Poor's.

True Sale Opinions

Transfers by Bankruptcy Code Transferors

General

In general, a transfer of assets by a transferor that is eligible to become a debtor under the Bankruptcy Code (a "Bankruptcy Code transferor") that is structured as a "true sale" is preferable to a transfer that is structured as a financing secured by a pledge of assets. This is due to the fact that a mere pledge of loans and related collateral by a Bankruptcy Code transferor, which loans provide the income for payments of rated securities being issued in a transaction, may not allow the holders of the rated securities backed by such loans to have timely access to the collateral if the transferor should become the subject of a proceeding under the Bankruptcy Code. Although a creditor ultimately should be able to realize the benefits of the pledged collateral, several provisions of the Bankruptcy Code may cause the holders of the rated securities to experience delays in receiving payment and, in some cases, to receive less than the full value of their collateral.

Under Section 362(a) of the Bankruptcy Code, the filing of a bankruptcy petition with respect to a Bankruptcy Code transferor automatically stays all creditors from exercising their rights to pledged collateral. A bankruptcy court could provide relief from the stay under certain circumstances, but it is difficult to estimate the likelihood of relief from the stay. Moreover, in most cases, the duration of the stay is difficult to estimate. In addition, Section 363 of the Bankruptcy Code provides that, under certain circumstances, a bankruptcy court may permit a debtor to use pledged collateral to aid in such debtor's reorganization or, pursuant to Section 364 of the Bankruptcy Code, to incur debt that is secured by a lien on assets that is prior to the lien of existing secured creditors. Under Section 542 of the Bankruptcy Code, a secured creditor in possession of its collateral may be required to return possession of this collateral to a bankrupt debtor.

These uncertainties associated with transfers that constitute pledges rather than true sales mean that, in the case of structured transactions involving loans originated by Bankruptcy Code transferors, the fact that strong loans back the rated securities will not in itself determine the credit rating of these securities. Accordingly, the structure of a transaction is a factor in the credit rating. The likelihood that the payments on the loans will be available to make payments on the rated securities in a timely manner and to pay principal prior to the rated final payment date, notwithstanding the insolvency, receivership, or bankruptcy of the Bankruptcy Code transferor, is a strong factor in the ratings analysis.

In general, in a "multiple-tier transaction", a strong structure is achieved by having all loans held by any Bankruptcy Code transferor sold (and not pledged) to a depositor, which in turn sells rather than pledges

the loans to a trust that issues the rated securities. In a "single-tier transaction", a strong structure is achieved by having the Bankruptcy Code transferor directly sell rather than pledge the loans to a trust that directly issues the rated securities. Such structuring of any transfer is referred to as a true sale of the loans.

To ensure that a transaction structure addresses the timely availability of each loan payment to pay the holders of the rated securities, Standard & Poor's analyzes each transfer of loans in a securitization transaction to determine whether each such transfer constitutes a true sale of the loans or a secured financing secured by a pledge of the loans, the nature of each transaction party's property rights in any loans, and whether any transferors or third parties have retained rights in the loans or risk of loss if the loans fail to perform in a satisfactory manner that may affect whether the transfers can be properly characterized as true sales or may otherwise impair timely payment on the rated securities. Standard & Poor's often derives comfort regarding these issues by obtaining opinions of counsel.

Pool Transactions—Multiple-Tier Structures
In pool transactions the transfer of loans to a trust is typically structured as a two-tier transaction. In the "first tier," each Bankruptcy Code transferor holding loans sells the loans to a depositor. In the "second tier," the depositor sells the loans to a trust and the trust issues the rated securities and uses the proceeds of the rated securities to purchase the loans from the depositor. The depositor uses the proceeds of the sale to purchase the loans from the Bankruptcy Code transferor.

In a multiple-tier transaction, in which the transferors are Bankruptcy Code transferors, Standard & Poor's has the following interrelated criteria.

First Tier: True Sale or First Priority Perfected Security Interest
Generally, the transfer from a Bankruptcy Code transferor to a depositor should be structured so that in the event of a bankruptcy of the Bankruptcy Code transferor, the transfer of the loans to the depositor would be viewed as a true sale of the loans by the Bankruptcy Code transferor. The loans and payments thereunder and proceeds thereof would not be viewed as property of the estate of the Bankruptcy Code transferor under Section 541 of the Bankruptcy Code or be subject to the automatic stay under Section 362(a) of the Bankruptcy Code if the transaction is viewed as a true sale. In this regard, each transfer of loans from a Bankruptcy Code transferor to a depositor is subject to review in terms of the factors bankruptcy courts generally consider in determining whether a transfer is a true sale or a secured loan. *(For a brief enumeration of some of these factors, see Appendix XV, Typical Factors Considered by Courts in Determining Existence of a True Sale.)*

In particular, whenever it is necessary that a transfer qualify as a true sale, the transfer must be examined for any arrangements by which the Bankruptcy Code transferor retains an interest in the loans or risk of loss, such as retention of securities that are being issued in the transaction or providing indemnification or other credit support if the loans fail to perform in a satisfactory manner. Depending upon the circumstances, Standard & Poor's may view a transfer wherein the Bankruptcy Code transferor takes back such securities as having a significant risk of being characterized as a secured loan transaction rather than a true sale. (*See Retention of Securities by Transferor in a True Sale below for a discussion of Standard & Poor's criteria relating to this issue.)*

True Sale Opinion
To obtain legal comfort that the transfer of the loans from any Bankruptcy Code transferor to a depositor constitutes a true sale, Standard & Poor's, as a general matter, will request a true sale legal opinion on such transfer. The true sale opinion should state that the loans being transferred and the payments thereunder and proceeds thereof will not be property of the Bankruptcy Code transferor's estate under Section 541 of the Bankruptcy Code or be subject to the automatic stay under Section 362(a) of the Bankruptcy Code in the event of the bankruptcy of the Bankruptcy Code transferor.

Sometimes, loans may pass through multiple owners before coming to rest in a depositor. In general, Standard & Poor's would want true sale opinions on each transfer in the chain. However, in some cases, this request would be burdensome and add little real value to the overall transaction. Therefore, in certain circumstances, true sale opinions on certain transfers may not be necessary.

For example, in cases of "open market transfers," a true sale opinion for intermediate transfers may not be necessary. Standard & Poor's will consider transfers on a case-by-case basis to determine whether they

are open market transfers. As a general matter, if a transfer satisfies the following criteria, Standard & Poor's will deem the transfer to be an open market transfer:

- The transfer is an arm's-length nonrecourse transfer between unaffiliated entities;
- The transferor received payment in full at the time of the transfer;
- The transferee is purchasing assets from multiple transferors; and
- The transferor does not receive, as payment, any securities issued in the rated transaction.

Depending on the type of transaction, Standard & Poor's will consider additional factors in determining whether a transfer is open market. For example, the transferee in an open market transfer should have purchased the assets in the ordinary course of its business. Standard & Poor's considers open market transfers to be true sales for bankruptcy purposes and, therefore, true sale opinions in connection with such transfers may not be necessary. In many instances, it may be difficult to determine whether a transfer was indeed an open market transfer. In these cases, Standard & Poor's nevertheless may request a true sale opinion. In addition, Standard & Poor's generally expects to receive a true sale opinion with respect to any transfer to a depositor. *(For Select Specific Opinion Criteria/Language, see Appendix XVI.)*

"Either/Or Security Interest" Opinion
If the facts surrounding the transfer to the depositor would not support a true sale opinion, then, generally, an "either/or" security interest opinion would be appropriate, opining that either:

- The transfer of the loans to the depositor would be viewed as a "true sale" of the loans by the transferor to the depositor and the loans and payments thereunder and proceeds thereof would not be viewed as property of the estate of the transferor under Section 541 of the Bankruptcy Code or be subject to the automatic stay under Section 362(a) of the Bankruptcy Code, or
- The trust has obtained, or will have obtained following the taking of certain actions required by the transaction documents, a valid security interest in the loans, the payments thereunder and the proceeds thereof.

In situations in which an "either/or" opinion is delivered, the appropriate Article 9 representations, warranties, and covenants should be included in the relevant agreements to provide comfort that the security interest is a first priority perfected security interest. *(For Standard & Poor's criteria in connection with Article 9 representations, warranties and covenants and security interest matters generally, see Appendix II.)* In the case of a delivery of an "either/or" opinion, the Bankruptcy Code transferor should be an SPE, or any securities received in connection with the transfer or any retained interests in the loans should be held in an SPE affiliate of the Bankruptcy Code transferor, and the delivery of a nonconsolidation opinion with respect to the SPE, its equity owners (and the Bankruptcy Code transferor, in the case of securities or retained interests held by an SPE affiliate) should be delivered. (*For Standard and Poor's criteria with respect to SPEs, See Section Four.*)

Second Tier: True Sale or First Priority Perfected Security Interest
With respect to a "second-tier" transfer, if the facts support a true sale opinion, an additional opinion should be provided that in the event of a bankruptcy of the depositor, the transfer of the loans to the trust will be viewed as a true sale of the loans by the depositor and the loans, loan payments, and loan proceeds would not be viewed as property of the estate of the depositor under Section 541 of the Bankruptcy Code or be subject to the automatic stay under Section 362(a) of the Bankruptcy Code. If, however, the facts surrounding the transfer from the depositor to the trust would not support a true sale opinion, the depositor (or an affiliate holding the retained securities or interests in the Loan) should be an SPE and an "either/or" opinion and a nonconsolidation opinion with respect to the relevant entities should be provided.

Pool Transactions-Single-Tier Structures
Instead of the multiple-tier transaction discussed above, some transactions are structured with only one tier. In these transactions, the Bankruptcy Code transferor does not use a depositor, but rather sells the loans directly to a trust that issues the rated securities. In a single-tier transaction from a Bankruptcy Code transferor, the same general criteria as used for multiple-tier structures applies to single-tier transactions. Depending on the structure of the transfer, the circumstances in which a true sale or an either/or opinion would be delivered are identical to the discussions above regarding multiple-tier transactions.

Property-Specific Transactions
In some property-specific transactions, a borrower issues notes that are rated and sold directly to third-party purchasers and the borrower delivers a mortgage and other loan documents directly to the trustee for the benefit of the holders of the rated securities. A true sale opinion is not necessary in such direct issuance of debt transactions. However, as discussed in section one, in many property-specific transactions, a loan is transferred by a Bankruptcy Code transferor directly, or indirectly through a depositor, to a trust which issues rated securities. In this type of transaction, like a pool transaction, circumstances surrounding the transaction could lead a court to conclude that the transfer of the loan was not a sale, but a financing transaction whereby the trust made a secured loan to the originator. As a result, Standard & Poor's will seek comfort regarding the structure of the transaction through receipt of legal opinions. Depending on the structure of the transfer(s) of the Loan, the circumstances in which a true sale or an either/or opinion would be delivered are identical to the discussions above regarding pool transactions.

Credit Lease Transactions
In a credit lease transaction, a borrower issues notes, the payments of which are backed by payments under credit lease from the borrower, as landlord, to a credit tenant. In certain credit lease transactions, the notes are rated and sold directly to third-party purchasers and the borrower delivers a mortgage and other loan documents directly to the trustee for the benefit of the holders of the rated securities. A true sale opinion is not necessary in such direct issuance of debt transactions.

However, as discussed in section three, in some credit lease transactions, the borrower executes loan documents in favor of an originator. The originator will simultaneously deposit directly, or indirectly through a depositor, the loan into a trust that will issue securities. As this type of credit lease transaction involves the transfer of a mortgage loan to a trust, as is the case with the property-specific and pool transactions, Standard & Poor's will seek comfort regarding the structure of the transaction through receipt of legal opinions. Depending on the structure of the transfer(s) of the loan, the circumstances in which a true sale or an either/or opinion would be delivered are identical to the discussions above regarding pool transactions.

Criteria Related to Retention of Securities by Transferor in a True Sale
When a Bankruptcy Code transferor receives securities from a rated transaction (either in partial payment for the loans that are sold or otherwise), the transfer from the Bankruptcy Code transferor to the transferee may not be characterized properly as a true sale. The Bankruptcy Code transferor may not be viewed by a bankruptcy court as having fully divested itself of all rights to the loans (one of the legal tests of a sale) because of the receipt of such securities, which may be considered to represent a retained interest in the loan or loans backing the securities.

Standard & Poor's is also concerned that, where the Bankruptcy Code transferor receives securities, it may be viewed as continuing to bear the risk of the loans because a portion of the payment to the Bankruptcy Code transferor for the transfer of the loans is dependent on the performance of the loans. A court could view the transfer of loans and the retention of securities as a loan to the Bankruptcy Code transferor (secured by a pledge of the loans) rather than a true sale of such loans.

In many cases, the transaction can be structured in a manner acceptable to Standard & Poor's. In some situations, the Bankruptcy Code transferor may hold certain securities if they represent only a small portion of the loans or if the retained securities constitute an interest strip or noneconomic residual interest. In addition, Standard & Poor's generally will accept a true sale opinion in transactions where the principal amount of the retained securities by the Bankruptcy Code transferor equal 10% or less of the initial principal balance of the entire pool of loans sold to the trust.

In other cases where a true sale opinion would not be acceptable, such as when the principal amount of the retained securities constitute more than 10% of the principal amount of the entire pool of the loans, Standard & Poor's will generally expect the delivery of an either/or security interest opinion, and an SPE affiliate (either a wholly owned subsidiary or a sister company of the Bankruptcy Code transferor) should generally hold the securities. In such cases, where the retained securities are held by an SPE, there still is a risk that, in a bankruptcy of the Bankruptcy Code transferor, its creditors would argue that the retained securities actually are assets of the Bankruptcy Code transferor and not its affiliate, and seek to consolidate the retained securities in the estate of the bankrupt affiliate and challenge the true sale characterization of the transfers.

Therefore, a nonconsolidation opinion should be provided to the effect that the assets and liabilities of the SPE affiliate would not be consolidated with the assets and liabilities of the Bankruptcy Code transferor (and the equity owner of the affiliate, if different from the Bankruptcy Code transferor) in the event of the bankruptcy of the Bankruptcy Code transferor (or the bankruptcy of the equity owner of the SPE affiliate, if applicable).

Transfers by Non-Bankruptcy Code Transferors

General
The section "*Securitizations by Bankruptcy Code Transferors"* addresses Standard & Poor's legal criteria for structured transactions in which the transferor of loans into the securitization structure is a Bankruptcy Code transferor. As noted therein, Standard & Poor's criteria for structured transactions involving Bankruptcy Code transferors attempt to minimize the risk that the loans would not be available for timely payment on the rated securities should any of the Bankruptcy Code transferors become a debtor in bankruptcy under the Bankruptcy Code.

This section addresses Standard & Poor's legal criteria for structured transactions in which the transferor of loans into the securitization structure is a non-Bankruptcy Code transferor. Non-Bankruptcy Code transferors, such as banks and insurance companies, are not eligible to become debtors under the Bankruptcy Code. Because structured transactions involving non-Bankruptcy Code transferors do not pose the same bankruptcy concerns as those involving Bankruptcy Code transferors, Standard & Poor's criteria for structured transactions involving these entities differ in detail, but not in purpose, from the criteria for Bankruptcy Code transferors.

Non-Bankruptcy Code transferors
Neither banks nor insurance companies are eligible to become debtors under the Bankruptcy Code. As such, the various sections of the Bankruptcy Code discussed in the section *Securitizations by Bankruptcy Code Transferors* do not apply to Loan transfers in structured transactions in which either a bank or an insurance company functions as the transferor.

Both banks and insurance companies may, however, become insolvent, and therefore are not deemed by Standard & Poor's to be bankruptcy remote. As such, Standard & Poor's criteria seeks to insulate the structured transaction from the consequences of the bank's or the insurance company's insolvency, albeit not under the Bankruptcy Code.

FDIC-Insured Banks
Bank insolvency regimes vary depending upon whether the bank is a national or state-chartered financial institution and whether it is insured by the U.S. Federal Deposit Insurance Corp. (the FDIC). Standard & Poor's has the following interrelated criteria for structured transactions involving FDIC-insured banks as transferors.

Single-Tier Transactions
In transactions involving a single loan originator, FDIC-insured banks have sometimes used single-tier transaction structures and have not interposed a depositor between the bank and the trust. While single-tier transactions are typically structured as true sales of the loans to a trust, traditional legal opinion comfort as to the true sale aspect is not available with respect to a FDIC-insured bank transferor.

FDIC Regulation of Securitizations
Under Section 11(c)(3)(A) of the Federal Deposit Insurance Act (the FDIA), the FDIC is authorized to accept appointment as receiver or conservator for an insured state depository institution. Also, under Sections 11 (c)(1) and (2) of the FDIA, the FDIC is authorized to accept appointment as conservator and is required to be appointed as receiver for a national bank. Standard & Poor's criteria for transactions in which either an FDIC-insured state-chartered bank or a national bank serves as a transferor addresses the powers of the FDIC under the relevant provisions of the FDIA should such bank become insolvent.

Under a recent regulation of the FDIC (Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation (the "FDIC Regulation"), the FDIC stated that, subject to certain conditions, it will not, by exercise of its authority to disaffirm or repudiate contracts under 12 U.S.C. 1821(e), reclaim, recover, or recharacterize as

property of the receivership estate the financial assets that were transferred by an FDIC-insured bank in connection with a securitization or participation. The following conditions must be met to comply with the FDIC Regulation:

- The transaction must meet the FDIC Regulation's definition of a "securitization" or "participation";
- The criteria for sale accounting under generally accepted accounting principles, other than the "legal isolation" condition as it applies to institutions for which the FDIC may be appointed as conservator or receiver (which is addressed by the FDIC Regulation) will have to have been satisfied with respect to the transaction;
- The documentation effecting the transfer of financial assets must reflect the intent of the parties to treat the transaction as a sale and not a secured borrowing (without regard to the intended treatment of the transaction for tax purposes); and
- The FDIC-insured bank must have received adequate consideration for the transfer of the financial assets at the time the transfer was made.

Based on this regulation, if a structured transaction involving the transfer of loans from an FDIC-insured bank complies with the above conditions, Standard & Poor's obtains comfort that a sale by the FDIC-insured bank of the loans should not be avoidable in the event of the bank's insolvency.

FDIC Sale Opinion

To obtain legal comfort regarding the above, in a single-tier transaction involving an FDIC-insured bank, depending on the structure chosen by the issuer, Standard & Poor's obtains comfort from the recent FDIC Regulation discussed above under *FDIC Regulation on Securitizations*. In addition, Standard & Poor's will generally request an "FDIC/Sale opinion" to the effect that the conditions listed under the FDIC Regulation have been satisfied and accordingly, the FDIC will not reclaim, recover, or recharacterize as property of the receivership estate the financial assets being transferred by the FDIC-insured bank. *(For Select Specific Opinion Criteria/Language, see Appendix XVI.)*

To the extent that a transfer by an FDIC-insured bank does not satisfy the requirements necessary to render an FDIC/Sale opinion, Standard & Poor's generally will need comfort that payments on the loans will be available in a timely manner to pay holders of the rated securities. Standard & Poor's criteria regarding residential mortgage and asset-backed securitizations and transfers by FDIC-insured banks can provide some guidance as to the means by which Standard & Poor's would gain such comfort. (*See Legal Criteria for Structured Finance Transactions, April 2002, available on RatingsDirect, Standard & Poor's Web-based credit analysis system at www.ratingsdirect.com, and at* www.standardandpoors.com.*)*

Multiple-Tier Transactions

While FDIC-insured banks have sometimes used single-tiered transaction structuring in transactions involving a single loan originator, most FDIC-insured banks are using multiple-tier structuring for bank regulatory, accounting, tax, or other reasons. In such a transaction, an FDIC-insured bank, as transferor, transfers the loans to a depositor that in turn transfers the loans to a trust, which issues the rated securities. In multiple-tier transactions from FDIC-insured banks, an FDIC/Sale opinion should be provided as to the transfer from the FDIC-insured bank to the depositor and a standard true sale opinion or either/or opinion as to the transfer from the depositor to the trust. In the case of an either/or opinion, the depositor (or the affiliate that holds any retained interests in the loans) will need to be structured as an SPE and relevant nonconsolidation opinions provided.

Non-FDIC-Insured Banks

The insolvency of a bank whose deposits are not insured by the FDIC is generally governed by state law. As such, transfers by non-FDIC-insured banks are beyond the scope of this publication. The principles of securitization discussed throughout this publication and Standard & Poor's criteria regarding other types of transferors, however, can be used to derive, in general, Standard & Poor's criteria for structured transactions from non-FDIC-insured banks.

Specifically, the loans should be sufficiently insulated from the transferor so that, as a legal matter, in an insolvency of the non-FDIC-insured bank, payments on the loans are made available in a timely manner to pay principal and interest on the rated securities. Legal opinions and, possibly, other comfort should be provided regarding the treatment of the loan transfer in an insolvency of the non-FDIC-insured bank,

including any possible stay on enforcement, avoidance, rejection, disaffirmance, or set-off issues. As appropriate, Standard & Poor's may request comfort along these lines from a state's banking regulator.

Insurance Companies
The insolvency of an insurance company is generally governed by state law and administered by the insurance commissioner or superintendent of the state. Although the National Association of Insurance Commissioners has promulgated a uniform insolvency act, the act has not been enacted uniformly in all states, and it is beyond the scope of this publication to examine and differentiate state insolvency regimes for insurance companies.

In addition, the act leaves broad discretion to state commissioners in the conduct of insolvency proceedings.

The principles of securitization discussed throughout this publication and Standard & Poor's criteria regarding other types of transferors, however, can be used to derive, in general, Standard & Poor's criteria for structured transactions from insurance companies. Specifically, the loans should be sufficiently separated from the transferor so that, as a legal matter, in an insolvency of the insurance company payments on the loans are not disrupted by such insolvency. Legal opinions and, possibly, other comfort should be provided regarding the treatment of the transfer if the loans in an insolvency of the insurance company, including any possible stay on enforcement, avoidance, rejection, disaffirmance, or set-off issues.

Nonconsolidation Opinions

General
Under the equitable provisions of Section 105 of the Bankruptcy Code, a court has the power to substantively consolidate ostensibly separate but related entities and treat the assets and liabilities of the entities as if they belonged to one entity, thus enabling the creditors of each to reach the assets of the consolidated estate. Because of this possibility of substantive consolidation and the resultant risk that holders of the rated securities would not receive timely payment on their investment, in circumstances in which consolidation of an entity required to be an SPE with a Bankruptcy Code transferor or the SPE's equity owners is a possibility, a legal opinion from independent legal counsel should be provided stating that, if the Bankruptcy Code transferor or the SPE equity owners were to become insolvent, neither the SPE, nor its assets and liabilities, would be substantively consolidated with the Bankruptcy Code transferor or the SPE's equity owners.

In this regard, the facts and circumstances of the relationship between the SPE and other entities in a transaction, in terms of the factors courts generally consider in determining whether two entities should be substantively consolidated, should be examined. Additionally, each SPE should adopt separateness covenants in both the transaction documents and its organizational documents. *(For a list of the separateness covenants generally used by SPEs, see section four.)*

In addition, because of a court's power to substantively consolidate ostensibly separate but related entities as discussed above and in section one, for large loans included in pool transactions and for property specific transactions, the mortgage borrowers generally should be SPEs and the delivery of a legal opinion from independent legal counsel stating that, if the applicable non-SPE were to become insolvent, neither the SPE, nor its assets and liabilities, would be substantively consolidated with those of such non-SPE entity.

Nonconsolidation Opinion
As mentioned above, to obtain legal comfort in regard to consolidation in bankruptcy in certain circumstances, Standard & Poor's will request a nonconsolidation opinion of independent legal counsel that, if any equity owner or group of affiliated equity owners (or group of family members) who own more than 49% of the equity in the SPE were to become insolvent, the assets and liabilities of the SPE would not be substantively consolidated with that of the equity owner or group of affiliated equity owners (or group of family members).

Generally, a nonconsolidation opinion is not necessary as between two SPEs, but there are limited exceptions, as discussed below. Nonconsolidation opinions should generally be no more than six months

old at the time of the rating of the securities. Additionally, the opinion giver should state that he or she has reviewed every transaction document, the relevant organizational documents and any other document that he or she has deemed necessary in order for Standard & Poor's to gain comfort that the opinion giver has reviewed all relevant documents.

Since an SPE may take a variety of organizational forms, the particular nonconsolidation opinion that Standard & Poor's will request in a given transaction will depend upon the type of entities involved and their relationship to one another. In general, the following nonconsolidation opinions should be provided:

- If a limited partnership is utilized as an SPE, an opinion of independent legal counsel should be provided to the effect that, upon the insolvency of (1) any limited partner or group of affiliated limited partners (or group of family members) having greater than a 49% interest in the SPE limited partnership, (2) any general partner that is not an SPE, or (3) an affiliated property manager*, the SPE limited partnership and its assets and liabilities would not be substantively consolidated with that of the insolvent partner or property manager.
- Furthermore, under established Standard & Poor's criteria, each general partner of the limited partnership must also be an SPE. Accordingly, assuming that the general partner is a corporation, an opinion should also be given that upon the insolvency of any shareholder or group of affiliated shareholders (or group of family members) having greater than a 49% interest in the general partner, the general partner or its assets and liabilities would not be substantively consolidated with those of the insolvent shareholder.
- If a corporation is used as the SPE, an opinion of independent legal counsel should be provided to the effect that, upon the insolvency of (1) any shareholder or group of affiliated shareholders (or group of family members) having a greater than 49% interest in the SPE corporation or (2) an affiliated property manager, the SPE corporation and its assets and liabilities would not be substantively consolidated with that of the insolvent shareholder or property manager.
- If a limited liability company (LLC) is used as the SPE, an opinion of independent legal counsel should be provided to the effect that, upon the insolvency of (1) any member or group of affiliated members (or group of family members) having a greater than 49% interest in the SPE LLC or (2) an affiliated property manager, the SPE LLC and its assets and liabilities would not be substantively consolidated with that of the insolvent member or affiliated property manager. Furthermore, under Standard & Poor's criteria, unless the SPE LLC is a properly structured single-member LLC, at least one member of the LLC must also be an SPE. *(For a discussion of Standard & Poor's criteria for single-member LLCs, see Appendix XIII).* Accordingly, an opinion should also be given that upon the insolvency of any equity owner or group of affiliated equity owners (or group of family members) who have a greater than 49% interest in the SPE member, the SPE member and its assets and liabilities would not be substantively consolidated with that of the insolvent equity owner.

*Depending upon the circumstances, Standard & Poor's may require nonconsolidation opinions between an SPE and certain indirect affiliates, such as property managers. In the case of a property manager, if a direct or indirect equity owner of an SPE has a significant equity interest in a property manager or if the facts or circumstances indicate a risk that third parties might be misled as to the separate existence of the SPE borrower, a nonconsolidation opinion between the SPE and the property manager is generally required.

Non-"Deal-Required" SPEs
As mentioned above, a nonconsolidation opinion is generally not necessary as between two SPEs. However, in certain deal structures, there may be entities structured as SPEs that are not "deal-required SPEs". This structure is common in transactions where certain entities in the organizational chain are structured as SPEs for the purpose of incurring mezzanine debt in a separate transaction. Alternatively, an entity's organizational structure may include an equity owner that is not an operating company that, while not including all the attributes of an SPE, has no other purpose but to act as an equity owner of such entity.

In either such case, for nonconsolidation purposes, the entity is treated as a non-SPE unless:

- The transaction documents require the entity to be an SPE and it would be an event of default under the loan documents if that entity failed to be an SPE;
- The entity has been an SPE at all times since its organization; and
- The entity is not permitted to incur debt (including mezzanine debt) other than unsecured trade

payables incurred in the ordinary course of business (subject to the limitations discussed in section one).

According to the foregoing, a mezzanine borrower (even if otherwise structured as an SPE and required to be an SPE under the mortgage loan documents) will not be treated as an SPE for the purpose of determining appropriate nonconsolidation opinion pairings.

An example of the foregoing concepts are demonstrated as follows:

- A borrower is an SPE formed as an LLC;
- The borrower's equity owners consist of a 1% SPE corporation member and a 99% LLC member (which is set up as an SPE for a potential mezzanine loan);
- Both the 99% member and the 1% member are owned 100% by Corporation A, which is an operating company; and
- The loan documents provide that only the borrower and the 1% member are required to be structured as, and remain, SPEs (and under the loan documents, failure of the borrower and the 1% member to maintain such SPE status is to an event of default under the loan documents).

In this scenario, because the 99% member, although set up as an SPE, would not, according to the above guidelines, be necessary as a deal-required SPE, it is treated as a non-SPE for nonconsolidation opinion purposes. Accordingly, Standard & Poor's will request a nonconsolidation opinion between the following:

- The borrower and its 99% member (even though it is set up as an SPE);
- The borrower and Corporation A (to have a nonconsolidation opinion covering the pairing of the SPE borrower with a "true" equity owner (i.e., the operating company) and not just a shell SPE entity (i.e., the 99% owner); and
- The 1% SPE member and Corporation A.

Assumptions
Generally, every factual assumption in the nonconsolidation opinion must be supported by a covenant in the loan documents or the organizational documents. The following is a discussion of certain types of acceptable and unacceptable assumptions.

Assumptions as to Non-SPEs and Non-Deal-Required SPEs
As a general rule, Standard & Poor's does not accept assumptions as to the conduct of non-SPEs. For the most part, assumptions as to the conduct of non-SPE's should not be necessary if the transaction documents and the organizational documents relating to the SPE are properly structured. Additionally, ensuring compliance with conduct assumptions made as to entities that are not parties to the transaction documents is problematic. For assumption purposes in nonconsolidation opinions, non-deal-required SPEs are treated as non-SPEs. The following are exceptions to the general rule on assumptions as to the conduct of non-SPE's:

- Standard & Poor's will accept an assumption that the non-SPE entity will not hold its credit out as available to pay the debts of the SPE and an assumption that the non-SPE entity will not pay the debts of the SPE.
- If the assumption involves an activity that requires both the SPE's and the non-SPE entity's participation (a "mirror assumption"), and it is a permitted assumption with respect to the SPE, Standard & Poor's will accept a "mirror assumption" as to the non-SPE entity (for example, an assumption that the SPE will not commingle its assets with the non-SPE entity and that non-SPE entity will not commingle its assets with the SPE).
- Standard & Poor's will accept an assumption that the non-SPE entity will not engage in any type of fraudulent activity (this assumption may also be made with respect to SPEs).

Assumptions as to Prior Conduct
As a general rule, if the SPE is being created simultaneously with the closing of the relevant transaction, assumptions as to past conduct are acceptable since there is a relatively short period of time, if at all, during which the entity was in existence prior to the issuance of the opinion. If the SPE is a preexisting

entity, Standard & Poor's generally will not accept assumptions as to prior conduct unless:

- The entity has essentially been at all times since its inception an SPE that complies with all of Standard & Poor's SPE criteria and the loan documents contain relevant representations and warranties as to prior conduct, or the loan documents specifically contain representations by the SPE borrower that it has never since its inception done anything in violation of Standard & Poor's SPE single purpose entity criteria; and
- Standard & Poor's gains comfort based on discussions with counsel rendering the opinion that counsel reviewed issues as to prior conduct with the pre-existing SPE and has determined that the entity did not engage in any behavior that would violate its SPE status. This due diligence on the part of counsel typically consists of reviewing lien searches, loan documents from prior loans, books and records, and certificates from officers or directors of the existing entity, as well as certificates from knowledgeable third parties, such as attorneys and accountants. (*See Appendix XIV for a further discussion of "recycled" SPEs.*)

Certain Assumptions Relating to SPEs

Following are some examples of acceptable and unacceptable assumptions:

- An assumption that the SPE will comply with all laws and will observe all corporate formalities is too broad and is generally not acceptable. This assumption should be limited by materiality or to such laws and formalities that relate to separateness.
- An assumption that the SPE will comply with all of its obligations under the loan documents, without any limitation either as to their relation to separateness provisions and materiality of any breach, is too broad and is generally not acceptable. The opinion giver should either specifically set forth the specific loan covenants that he or she is assuming compliance with or limit the assumption by materiality and to those obligations that relate to separateness.
- An assumption that the SPE is and will remain solvent (other than as set forth in the following sentence) is generally not acceptable. Standard & Poor's will accept an assumption that that the SPE is adequately capitalized and solvent as of the date of the transaction and that the SPE *intends* to be adequately capitalized and solvent in the future.This assumption is generally not acceptable with respect to any non-SPE.
- An assumption that the SPE will pay its expenses out of its own funds is generally acceptable, but a broader assumption that suggest the SPE will in fact pay all expenses should be limited by "to the extent sufficient funds are available" or similar language.

Other Assumption Issues

- Standard & Poor's will accept an assumption that the lender has reasonably relied on the SPE borrower's separateness in making the loan.
- Standard & Poor's will accept an assumption that the lender would suffer prejudice from, or that the lender would be harmed by, a consolidation.
- Assumptions that are not relevant to consolidation, although grounded in the loan documents or the organizational documents, are not generally acceptable (for example, an assumption that the "SPE will not own personal property unless used in the operation of the property" is not relevant to a nonconsolidation analysis).
- Standard & Poor's will generally accept an assumption that a management agreement with an affiliate is an arm's-length agreement only if it is based on a covenant in the loan documents and the facts support such an assumption.

Negative Factors

As a general rule, if there are "bad facts" that exist in a particular transaction with respect to a nonconsolidation analysis (for example, existence of a parent guarantee), Standard & Poor's generally expects the opinion giver to explain in the opinion why the existence of those bad facts does not affect the opinion. This provides Standard & Poor's with comfort that the opinion giver has carefully reviewed the issues.

Guaranties
Often, a direct or an indirect equity owner of the SPE will execute a guarantee in connection with the transaction. The nature of the guarantee will determine how such guarantee should be treated in the opinion.

- If the guarantee is executed by an entity that (together with its affiliates) does not directly or indirectly own at least 49% of an applicable SPE and hence, such entity is not a covered "pairing" in the nonconsolidation opinion, the opinion giver should at least acknowledge the guarantee as a document that he or she has reviewed in connection with issuing the opinion.
- If the guarantee is executed by an entity that (together with its affiliates) directly or indirectly owns at least 49% of an applicable SPE and, hence, such entity is a covered "pairing" in the nonconsolidation opinion, the opinion giver should acknowledge the guarantee as a document that has been reviewed in connection with issuing the opinion and should explain in the opinion why the existence of the guarantee does not create an undue risk of consolidation. An exception to this rule is that if the guarantee is a standard, recourse carve-out guarantee that does not include recourse to the guarantor in the event of the voluntary bankruptcy of the borrower, it is acceptable for the opinion giver to merely acknowledge the guarantee as a document that has been reviewed in connection with issuing the opinion without further explanation of the consolidation risks.

Nonconsolidation for Non-Bankruptcy Code Transferors
For non-Bankruptcy Code transferors, such as insurance companies and FDIC-issued banks, Standard & Poor's will address the need for nonconsolidation opinions and their scope on a case-by-case basis.

Security Interest Matters

General
On July 1, 2001, a substantially revised version of Article 9 of the Uniform Commercial Bankruptcy Code became effective. It has been adopted in every state. Revised Article 9 is broader in scope than its predecessor and covers more types of transactions, as well as additional asset types.

A rating is Standard & Poor's opinion of the creditworthiness of the debt being issued. The rating is based on information provided by the issuer and its advisors, including representations, warranties, and covenants included in the transaction documents. Some of the representations, warranties, and covenants contained in structured finance transaction documents address legal matters. Standard & Poor's generally requests legal opinions from transaction counsel to provide further comfort on some of these legal matters, for example on true sale and security interest issues.

As a consequence of revised Article 9, except as described below in the context of transfers of loans, Standard & Poor's generally no longer reviews security interest opinions. Standard & Poor's is not expressing any view as to whether legal opinions regarding security interest matters should be requested by any participants in a transaction.

The New Criteria

Security Interest Opinions No Longer Reviewed
Given the limited scope of the security interest opinions typically delivered in structured finance transactions, and in light of the revisions to Article 9 becoming effective, except as described below, Standard & Poor's has concluded that these opinions will not add significant value to the structured finance rating process for many types of assets. Accordingly, for most structured finance transactions, except as described below, Standard & Poor's will not request legal opinions regarding the creation, perfection, or priority of a security interest as a condition of issuing the rating. On a case-by-case basis, depending on the structure of the transaction and the nature of the asset, Standard & Poor's may request one or more of these matters to be addressed in a legal opinion. As is current market practice, transaction counsel should contact Standard & Poor's legal department early in the rating process to determine what legal opinions will be requested by Standard & Poor's for the transaction.

Reliance on Representations, Warranties and Covenants
Standard & Poor's believes that, subject to certain modifications and additions necessitated by the revisions

to Article 9, the standard representations, warranties, and covenants currently provided by the parties in structured finance documentation used in most public securities offerings will, in most cases, adequately address security interest matters for purposes of the rating. While some of these standard representations, warranties, and covenants are "legal" in nature, most relate to factual matters. When viewed in their entirety, they will generally provide sufficient comfort to Standard & Poor's that the trustee has a valid, perfected, first-priority security interest in the assets supporting the transaction.

To facilitate the timely review of the transaction documents, Standard & Poor's has prepared forms of model representations and warranties for the following Article 9 categories: accounts, tangible chattel paper, electronic chattel paper, instruments, general intangibles, securities entitlements/securities accounts, goods, and deposit accounts. These model representations should provide guidance to the market participants regarding what Standard & Poor's will be looking for in the transaction documents. Standard & Poor's encourages issuers to incorporate the model representations and warranties in substantially the published form; material changes should generally be reviewed by Standard & Poor's. The forms of model representations are provided in Appendix III hereto and may be directly copied.

Review of Either/Or and Perfection Opinions in Connection With Transfers of loans
Notwithstanding the foregoing, in the context of transfers of loans, Standard & Poor's will continue to review any "either/or" security interest legal opinions in the context of transfers of loans. However, Standard & Poor's will generally not review an opinion as to whether such a security interest is a perfected, first priority security interest if the transaction documents contain the appropriate Article 9 representations, warranties, and covenants. (*See Pool Transactions - Multi-Tier Structures - Second Tier: True Sale or First Priority Preferred Security Interest; Second Tier: True Sale Opinion, "Either/Or" Security Interest Opinion)*.

Corporate and Enforceability Opinions

General
Standard & Poor's may request what are commonly referred to as the "corporate" and "enforceability" opinions from an independent legal counsel to ensure the integrity of the transaction. These opinions traditionally are given in loan transactions and securitization transactions with respect to the participants in the transactions (including the borrower, issuer, servicer, trustee, depositor, mortgage loan sellers, and parties to any credit enhancement agreements, such as insurance policies, swap agreements, and interest rate cap agreements) regarding a number of legal issues concerning the validity and effectiveness of the transaction. The following list of legal opinions reflects those corporate and enforceability opinions that Standard & Poor's typically sees in commercial mortgage transactions. Standard & Poor's may decline to rate a transaction without such opinions or it may nevertheless rate a transaction without such opinions or with variations on such opinions, depending on the circumstances:

- ***Validity, enforceability.*** An opinion that the applicable documents executed by the applicable party are duly authorized and constitute the legal, valid, binding and enforceable obligations of the applicable party.
- ***Valid existence, good standing.*** An opinion that the applicable party is duly organized, validly existing under the laws of the jurisdiction of its formation, and is in good standing under the laws of such jurisdiction and any other jurisdictions in which it is required to qualify to do business.
- ***Power, authority.*** An opinion that the applicable party has the full power and authority to carry on its business and to enter into the applicable documents and the transactions thereby contemplated.
- ***No violation of laws or documents.*** An opinion that the execution, delivery, and performance of the applicable documents by the applicable party will not violate any law, regulation, order, or decree of any governmental authority or constitute a default under or conflict with the organizational documents or other agreements governing or to which the applicable party is a party.
- ***No consent.*** An opinion that no approval, consent, order, or authorization is required in connection with the execution, delivery, and performance of the applicable documents other than those approvals, consents, orders, and authorizations that have been obtained in connection with the closing of the transaction.
- ***Usury.*** An opinion that the payments set forth in the applicable documents do not violate applicable usury laws.
- ***Choice of law.*** An opinion that the governing law provisions set forth in the applicable documents are enforceable.

- ***Qualification.*** An opinion that the applicable party is qualified to do business in all jurisdictions in which it is required to qualify to do business.
- ***No litigation.*** An opinion that there is no action, suit, or proceeding at law or in equity wherein an unfavorable decision, ruling, or finding would materially and adversely affect the applicable party's ability to carry out its obligations under, or the validity or enforceability of, the applicable documents.
- ***Valid transfer.*** In transactions involving the transfer of one or more mortgage loans, an opinion that the documents effecting such transfer will be sufficient to effect such transfer under applicable law.

Single-Member LLC Opinions

In transactions involving a single-member LLC as an SPE, Standard & Poor's generally expects the following additional opinions to be provided:

- Standard & Poor's requests an opinion of counsel that (a) the required affirmative vote of the independent manager in order for the LLC to file a voluntary bankruptcy petition is enforceable under applicable state law, and (b) in a bankruptcy proceeding of the LLC, a federal bankruptcy court would apply such state law in determining who has the authority to file a voluntary bankruptcy petition on behalf of the LLC.
- Standard & Poor's also requests a legal opinion to the effect that the death, bankruptcy, insolvency, or incapacity of the member(s) would not, in itself, cause the LLC to be dissolved or its affairs to be wound up.
- If the single-member LLC is structured with a "springing member", Standard & Poor's requests an opinion of counsel that the springing-member provision contained in the LLC agreement is enforceable. (*For Standard & Poor's criteria with respect to Single-Member LLCs, see Appendix XIII.)*

Local Counsel Opinions

General

In property-specific transactions transactions and large loan transactions included in pool transactions, Standard & Poor's may also review the "local counsel" opinions relating to the mortgage and other items specific to the state in which the real property is located. The following is a list of opinions commonly provided to Standard & Poor's. Depending on the circumstances, other opinions may be requested.

- ***Validity, enforceability.*** An opinion that the loan documents (the "loan documents") executed by the borrower are duly authorized and constitute the legal, valid, binding, and enforceable obligations of the borrower.
- ***Valid existence, good standing.*** An opinion that the borrower is duly organized, validly existing as an identified entity under the laws of the jurisdiction of its formation, and is in good standing under the laws of such jurisdiction and any other jurisdictions in which it is required to qualify to do business.
- ***Power, authority.*** An opinion that the borrower has the full power and authority to carry on its business and to enter into the loan documents and the transactions contemplated.
- ***No violation of laws or documents.*** An opinion that the execution, delivery, and performance of the loan documents by the borrower will not violate any law, regulation, order, or decree of any governmental authority or constitute a default under or conflict with the organizational documents or other agreements governing or to which the borrower is a party.
- ***No consent.*** An opinion that no approval, consent, order, or authorization is required in connection with the execution, delivery, and performance of the loan documents other than those approvals, consents, orders, and authorizations that have been obtained in connection with the closing of the transaction.
- ***Usury.*** An opinion that the payments set forth in the loan documents do not violate applicable usury laws.
- ***Choice of law.*** An opinion that the governing law provision set forth in the loan documents is enforceable.
- ***Qualification.*** An opinion that the borrower is qualified to do business in all jurisdictions in which it is required to qualify to do business.
- ***Mortgage.*** An opinion that the mortgage(s) and assignment(s) of rents and leases are in forms satisfactory for recordation in the jurisdiction in which recordation will be effected and upon such

recordation it will create a valid and effective lien of record on and security interest in, as to the mortgage, the real property (including fixtures) described therein and, as to the assignment of rents and leases, the property described therein.

- ***UCC property.*** An opinion that, as to any security for which perfection is accomplished pursuant to the UCC (the UCC property), upon filing of the financing statements in the identified offices and jurisdictions, a valid and perfected lien will be created in the UCC property.

Tax Opinions

General
The purpose of tax opinions in commercial mortgage transactions is twofold. First, it is important as a credit matter to know that the transaction structure will not subject the SPE or any other relevant party to undue tax burdens, thereby creating a competing need for cash flow. Second, tax opinions go to the general integrity of a transaction. Thus, it is essential to know with certainty the tax structure of the deal, particularly because tax surprises may adversely impact the holders of the rated securities, affecting the character of the income received by holders of the rated securities, as well as the timing and amount of the income taxed to holders of the rated securities.For example, if a certificateholder purchases what is represented as debt for tax purposes, and the certificate is later determined to represent an equity interest, the character and timing of the certificateholder's income might be adversely affected.

Entity Classification
Issuers of commercial mortgage obligations almost universally fall into one of three tax classifications: (1) real estate mortgage investment conduits (REMICs), (2) grantor trusts, or (3) qualified real estate trust subsidiaries. Occasionally, a partnership or a limited liability company treated as a partnership for tax purposes is an issuer.

Since the adoption of the "check the box" rules in 1997, treatment of a partnership or limited liability company as a partnership and not a corporation is elective with the parties, and therefore the only required assurance is that the parties have not elected to be treated as a corporation.

Classification of grantor trusts as such is not governed by the check the box rules, and thus there is more judgment involved in determining that a grantor trust will be taxed as such. Failure to qualify ordinarily results in the trust being treated as a partnership for tax purposes, which is not a bad result from a ratings perspective, as the entity remains a pass-through and not a taxpayer. This reclassification may, however, have an adverse effect on certain classes of certificateholders.

In all cases involving issuers purporting to be treated as either grantor trusts or partnerships, classification opinions should include an express opinion that the entity is not a "taxable mortgage pool." The taxable mortgage pool classification results in the recharacterization of the entity as a corporation for tax purposes, and may cause the issuer to be subject to burdensome income taxes.

A REMIC itself is a form of entity that does not exist outside the tax law. It is best described as a circle drawn around a mortgage or a pool of mortgages solely for tax purposes. REMICs are by far the most common issuers of mortgage-backed securities, although for nontax purposes the REMIC is usually a common law trust or part of a common law trust, so that the trust itself is the issuer. Often a trust will contain multiple REMICs, as well as other miscellaneous assets (e.g., an interest rate cap or swap agreement) that are not eligible to be part of a REMIC. The reason for the multiple REMICs most frequently is the need to satisfy the tax requirement that interests in a REMIC conform to certain accounting rules, which require internal layering of interests within the trust.

For transactions that involve REMIC issuers, opinions generally should be provided to the effect that each of the REMICs created by the documents qualify as REMICs, and such opinions should identify each of the "regular" and the single "residual" interest in each REMIC. REMICs are, by definition, not taxable mortgage pools, so no additional opinion on this point is required. Moreover, REMIC regular interests are automatically "debt for tax", and therefore no opinion on this point is necessary. "Debt for Tax Opinions" are discussed below.

Qualified real estate investment trust (REIT) subsidiaries (and occasionally REITs themselves) also issue

mortgage-backed securities. Regarding these issues, legal opinions as to their qualification should generally be provided. If a REIT is the issuer, a "debt for tax" opinion (as described below) should also generally be provided. If the opinion is that an issuer is a qualified REIT subsidiary, that opinion itself contains the conclusion that the issued securities are debt for tax, but a supplemental opinion on the point should also be given. For technical reasons, there is no need in either case to get a "no taxable mortgage pool" opinion.

If (1) a party whose solvency is critical to the rating of obligations holds the residual interest in a REMIC and (2) there is concern as to the financial soundness of the party, Standard & Poor's may request that the party quantify the "phantom income" tax burden, i.e., tax without cash flow, associated with the residual interest.

Debt for Tax Opinions
When an SPE (other than a REMIC) issues obligations that are meant to be characterized as debt for tax purposes, it is important to have an opinion that they will be so characterized. Frequently, the SPE is "thinly capitalized," which raises the issue of whether the debt is really debt for tax purposes. In addition, where debt is issued as trust certificates, the fact that the certificates are not called debt raises a question as to their status as debt for tax purposes. Since the tax integrity of the deal depends upon the deductibility of the interest by the issuer, and the treatment by the holders of the rated securities of what they own as a debt instrument, this opinion is particularly important.

Credit Lease and Synthetic Lease Transactions
Where an SPE is a lessor in a credit lease transaction, it is vital that the lease be characterized for tax purposes as a true lease, if that is the intention of the parties. Frequently, credit lease transactions involve sale-leasebacks, in which case the true lease issue becomes particularly sensitive. The tax consequences to the SPE (and potentially, to its creditors) will vary significantly depending upon whether the sale-leaseback transaction is a real purchase and leaseback for tax purposes or is a mere financing (as in the case of a "synthetic lease"), in which the SPE is deemed a lender to the owner/sponsor or other user of the property. Thus, it is important that there be certainty either that the transaction will be characterized as intended or, that if it fails, the risk of the tax consequences of failure does not fall upon the issuer of the rated securities. Since it is often impossible to obtain a "clean" tax opinion that the parties' tax characterization is correct, Standard & Poor's will take into account the effects of recharacterization on the holders of rated securities.

Interest Rate Cap and Swap Opinions

General
In structured finance transactions where the rating on the securities is dependent on a swap or rate cap agreement, Standard & Poor's generally requests the following legal opinions for the swap counterparty and counterparty guarantor, as applicable, under the law of the jurisdiction of organization of the relevant entity and under the governing law of the swap agreement and guarantee, as applicable:

- ***Enforceability opinion***. An enforceability opinion from outside counsel in connection with the swap agreement and guarantee to be delivered with respect to the swap provider and guarantor, as applicable, opining that the swap agreement (including the confirmation, schedule, and ISDA Master Agreement, together with any guarantees given in connection therewith) will, on execution, be legal, valid, binding, and enforceable in accordance with its terms.
- ***Pari passu***. If the counterparty is not a U.S. entity, a "pari passu" opinion that the payments due under the swap agreement or any guarantee rank at least pari passu with the unsecured and unsubordinated obligations of the swap provider or guarantor, as applicable.
- ***Choice of law***. If the counterparty is not a U.S. entity, a choice of law opinion containing an opinion that (a) the courts in the jurisdictions of the swap provider and guarantor, as applicable, would recognize and give effect to choice of law in the swap agreement and guarantee, as applicable, and (b) the choice of law is, prima facie, valid and binding under the law of such jurisdiction.
- ***Judgments***. If the counterparty is not a U.S. entity, a recognition of claim opinion containing an opinion that the courts in the jurisdictions of the swap provider and guarantor, as applicable, would recognize and enforce as a valid judgment any final and conclusive civil judgment of a court of competent jurisdiction for monetary claims made under the swap agreement and guarantee, as applicable.

- ***Local tax opinion***. A local tax opinion containing an opinion that no stamp, duty, or other documentary tax will be payable by the borrower, except to the extent borrower is provided with funds sufficient for paying such a tax. (This opinion is to be delivered in connection with Cross Border Agreements if there is uncertainty regarding payment of stamp, registration, or other documentary tax levied by foreign taxing authorities.)
- ***Withholding tax opinions***. If the counterparty is not a U.S. entity, an opinion to be delivered with respect to payments in connection with withholding tax under the swap agreement and the guarantee, as applicable (including an opinion from borrower's counsel). These opinions may be waived if Standard & Poor's has previously received similar opinions under the same governing law in similar transactions.

Appendix I
Insurance Criteria for U.S. CMBS Transactions

A borrower is expected to maintain various types of insurance on the property in appropriate amounts to protect against losses and preserve the lender's security in the asset. Since holders of rated securities rely on the cash flow generated from the property, any disruption in cash flow due to an uninsured loss could result in losses to holders of rated securities. The financial strength of the insurance carrier is also important, because the insurer's ability to pay any covered losses is important to Standard & Poor's analysis of the security for the loan. Insurance coverage typically includes, at a minimum, fire and casualty (including coverage for acts of terrorism), general liability, and rental interruption insurance. Flood, windstorm, and earthquake coverage may also be required, depending on the location of the property.

The minimum insurance requirements for any property that is included in a commercial mortgage-backed securitization transaction will vary, based on the size of the loan and the type of securitized transaction. The requirements for stand-alone property-specific and large loan transactions are more stringent because of the lack of diversity and the reliance on a single property or small group of properties for all or a significant portion of the cash flow required to pay holders of rated securities. Conversely, the requirements for a typical smaller conduit loan may be less stringent, primarily due to the diversity benefit and homogeneity of traditional conduit pools. As a result, a casualty on a single loan that does not represent a significant percentage of a pool should not result in a significant disruption of payments to holders of highly rated securities.

The borrower is expected to maintain coverage during the life of the loan and this requirement should appear as a covenant in the loan documents. All insurance policies should have a clause in favor of the lender, stating that there can be no changes, including modifications, amendments, or cancellations, to the policy without 30 days written notice to the lender. All exclusions not standard and customary to the industry are subject to Standard & Poor's review and approval.

For the purposes of these guidelines, large conduit loans are generally those that are $35 million or more, while small conduit loans are typically less than $35 million. However, some conduit loans of less than $35 million may be subject to the more stringent large loan criteria if they constitute a significant percentage of the pool (generally over 5%).

Qualified Insurers

Stand-Alone Property-Specific and Large Loans Transactions

In stand-alone property-specific or large loan transactions, insurers providing coverage for fire and casualty protection, earthquake, flood, rental interruption insurance, liability, workers compensation and boiler and machinery claims should have a financial strength rating from Standard & Poor's that is no less than two rating categories below the highest rating outstanding on the securities backed by the transaction or the related mortgage pool. However, at no time should the carrier's financial strength rating fall below 'BBB' by Standard & Poor's regardless of then-outstanding rating on the securities backed by the transaction or the related mortgage pool.

Small Loans in Conduits

Insurers providing all levels and types of coverage for small conduits loans should have minimum financial strength ratings of 'BBB' by Standard & Poor's at all times during the life of the loan.

Group Coverage

From time to time, in stand-alone property specific or large loan transactions insurance coverage for a property is provided by a group of insurers that share the risks of loss in an effort to reduce the maximum possible loss that an individual insurer may incur. The financial strength requirements outlined above will generally apply, as well as the following standards:

- The first layers of coverage should be provided by carriers with a minimum financial strength rating from Standard & Poor's no less than two rating categories below the then-highest rating of the securities backed by the loan or the related mortgage pool, but in no event should the financial strength rating be less than 'BBB' by Standard & Poor's.

- If the syndicate consists of five or more members, then 60% of the insured amounts should be provided by carriers that have a financial strength rating no less than two rating categories below the then-highest rating of the securities backed by the loan or the related mortgage pool, but in no event should the financial strength ratings of any members of the syndicate be less than 'BBB' by Standard & Poor's.
- If there are four or fewer members of the syndicate, then 75% of the insured amounts should be provided by carriers that have a financial strength rating no less than two rating categories below the then-highest rating of the securities backed by the loan or the related mortgage pool, but in no event should the financial strength ratings of any members of the syndicate be less than 'BBB' by Standard & Poor's.
- Coverage that is provided under a blanket insurance policy should detail the allocated coverage amounts, deductibles, and per occurrence limits for each covered property for each type of coverage that is provided.

Deductibles
The amount of any deductible for any type of coverage, including flood, windstorm, and earthquake, should not exceed 5% of the insured property's net cash flow. Reserves may be required for any deductible that exceeds the 5% threshold, because a borrower's inability to cover the costs of repairs and make debt service payments in the event of a casualty, as a result of a high deductible, increases the risk of a default on the loan.

Types of Coverage

Fire, Casualty, and Other Extended Coverage Insurance

- The property insurance coverage should be equivalent to the "special cause of loss" form. The amount of the coverage should be in an amount equal to the then-full replacement cost of the property, including costs associated with "civil or ordinance of law" requirements and without any deductions for depreciation.

Standard and Poor's may request evidence of the maximum possible loss that may result from catastrophic perils such as flood, earthquake, and windstorm if a property is located in an area subject to these risks, and insurance coverage for these risks should generally not be less than the probable maximum loss. Policies should have the lender as a loss payee under a mortgagee endorsement clause, and coverage provided should be sufficient to ensure that the insurer would not consider the borrower a co-insurer under the policies. Property insurance policies should contain an agreed value clause that should be updated annually. All exclusions not standard and customary to the industry are subject to review by Standard & Poor's.

Business Interruption and Loss of Rents Insurance
Business interruption or loss of income insurance should cover a minimum period of:

- Twelve months for small conduit loans, and
- Eighteen months for stand-alone property-specific transactions and large loan transactions.

Business interruption coverage should provide protection against loss of income resulting from direct physical loss to the mortgaged property and indirect loss that may significantly jeopardize revenue. These losses should be covered regardless of cause, with coverage sufficient to sustain expected revenues for the mortgaged property had the loss not occurred. The loss of income analysis should include all rents and all additional rents including percentage rents, if applicable, payable by tenants under the leases. Coverage should also be sufficient to avoid any reduction for co-insurance. In addition, extra expense protection should be provided at limits that are adequate to sustain expected income.

Liability Coverage
The borrower should maintain commercial general liability and umbrella coverage, with provisions, coverage levels and limits of liability that are customary to the applicable industry and property type, which adequately protects the interests of the borrower and the trustee, on behalf of the holders of the rated securities. Director's and officer's professional liability insurance should be carried in adequate amounts, as

applicable.

Workers' Compensation and Statutory Coverages
The borrower should carry workers' compensation insurance as required by law, along with adequate limits of employer's liability and U.S. longshore and harbor workers' coverage, if applicable. In addition, all other insurance coverage that the borrower is or may be required to carry by law should be provided.

Boiler and Machinery
Comprehensive boiler and machinery coverage should be carried on all mechanical equipment that would cause a disruption in revenue if rendered inoperable. The coverage provided should cover direct losses and consequential losses that could materially jeopardize revenue.

Flood
Insurance coverage should be provided where any part of the property is located in a zone identified by the Federal Emergency Management Agency (FEMA) as a special flood hazard under the National Flood Insurance Act of 1968, as amended. Coverage should equal at least the lesser of the principal balance of the loan or maximum amount of insurance that is available under current Federal Insurance Administration standards, but should in any event be sufficient to cover the estimated probable maximum loss. An analysis of the maximum probable loss estimate must accompany the insurance documentation for all properties located in a federally designated flood zone. The information should be presented in a report prepared by a professional engineer. The engineer should include a resume detailing his or her experience and familiarity with the subject area and mortgaged property type. Standard & Poor's will review the report and may request additional information to assess the sufficiency of coverage.

Earthquake Insurance
(See Earthquake Insurance Requirements for U.S. CMBS Transactions.)

Environmental Insurance
(See Section One, Environmental Criteria-Environmental Insurance for a discussion of environmental insurance and See also Appendix VII, The Credit Impact of Secured Creditor Environmental Insurance on CMBS Transactions.)

Other Insurance
Insurance coverage should be provided for any other types of risks that are appropriate to protect the value of the property.

Documentation of Insurance Coverage
To enable Standard & Poor's to assess whether the borrower's existing insurance coverage meets the guidelines described above, the following should be submitted to Standard & Poor's upon request:

- A schedule of insurance supported by valid certificates and evidences of insurance;
- Copies of the property, general liability, boiler and machinery, workers' compensation, business interruption, environmental, and umbrella/excess policies;
- A schedule of locations with flood and earthquake zones listed for all properties covered under the policies, including the mortgaged property(s) being securitized; and
- A schedule of replacement cost values for all locations covered under the property policy.

If requested by Standard & Poor's, the borrower's insurance representative or broker should submit a statement verifying that the borrower's insurance meets Standard & Poor's standards, together with any recommendations made by the representative or broker for additional coverage as required.
Any exceptions to Standard & Poor's insurance guidelines should be explained in writing and should be submitted together with all other documentation.

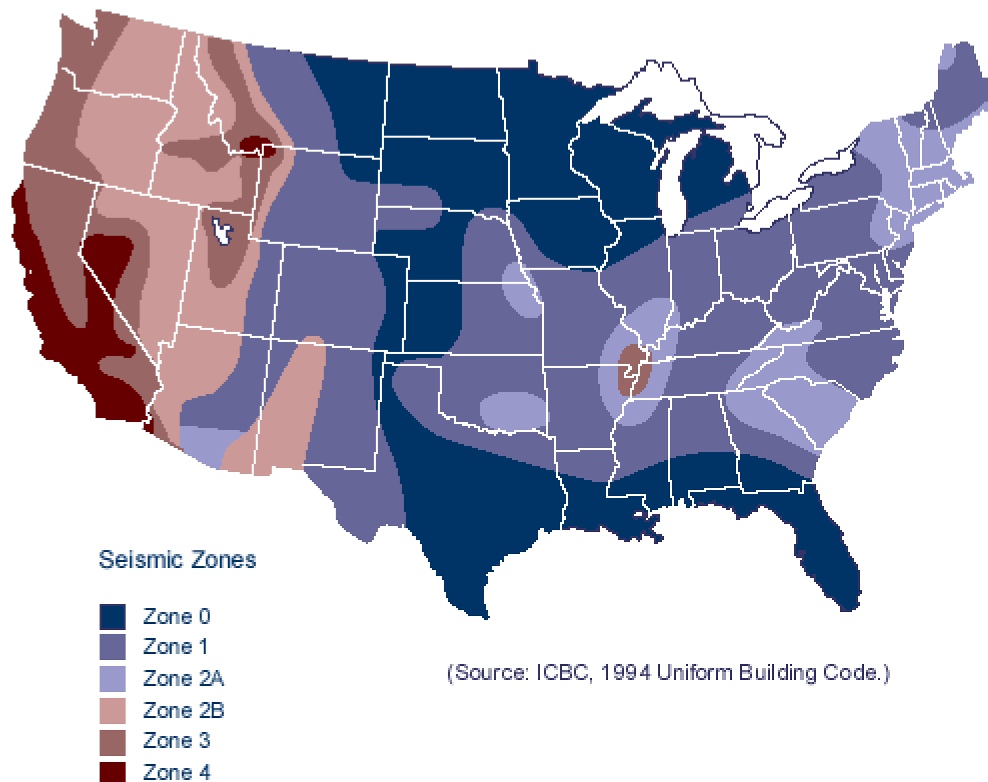
Earthquake Insurance Requirements for U.S. CMBS Transactions
Analysis of insurance coverage is an integral part of Standard & Poor's rating process for U.S. CMBS because the availability of insurance proceeds helps to ensure that value will be preserved, even in the event of a catastrophe. Standard & Poor's expects loan documents to require borrowers to maintain standard hazard insurance in an amount that is equal to the replacement cost of the property to ensure that

funds are available to restore the property or repay the loan, in the event of a casualty loss.

While standard hazard insurance policies are commonly available and purchased by owners of commercial properties, insurance against special hazards, like earthquakes, is typically lacking. This is due, in many cases, to prohibitively high premiums. In some instances, special hazard insurance may not be commercially available at any price because of restrictions on the amount of such business that insurers can write. It's also possible that the high level of the deductible may make an earthquake policy essentially worthless.
The absence of earthquake insurance on properties that secure commercial mortgage loans concerns Standard & Poor's because uninsured losses at the property level may translate into losses to the rated securities. In analyzing all CMBS transactions, Standard & Poor's must quantify the exposure to the risk of losses caused by uninsured special hazards and the potential impact of this risk on the transaction.

Probable Maximum Loss
Standard & Poor's expects a seismic risk analysis to be performed for each property securing a commercial mortgage loan that is intended to be securitized, if the property is located in a state that includes earthquake Zones 3 or 4 (see map). Earthquake risk increases from Zone 1 through Zone 4, with Zone 4 being the most severe. While California offers the greatest exposure to earthquake risk, Zones 3 and 4 are also found in Washington, Oregon, Utah, and Missouri.

Seismic Risk Analysis



Note: The seismic zones are defined as: Zone 0–low probability of damaging ground motion; Zone 1–low probability of damaging ground motion; Zone 2A–low to moderate probability of damaging ground motion; Zone 2B—moderate probability of damaging ground motion; Zone 3—moderate to high probability of damaging ground motion; Zone 4—high probability of damaging ground motion.

A seismic risk analysis provides an estimate of the probable maximum loss (PML) that a building is likely to sustain during the most severe earthquake that has a high probability of affecting the building site during a

specified holding period. The PML is the estimated cost to repair the damage divided by the current replacement cost of the improvements.

The replacement cost should include all costs associated with meeting current legal requirements, including building codes, and ordinances that may have gone into effect since the property was originally constructed. The replacement cost does not include loss of contents or loss of use of the building, nor does it include the value of the land or the market value of the improvements.

The PML estimate allows Standard & Poor's to assess the level of risk to which a loan may be subject because of the location of the property. It also allows Standard & Poor's to size the additional credit enhancement that may be required to address this risk. The impact on credit support will be dependent on the concentration of affected loans in the pool.

The calculation of PML is based on an analysis of an earthquake that has a 10% chance of being exceeded during a 50-year exposure period. This study is commonly known as the 475-year event or the 500-year test. Most reports typically provide an estimate of the aggregate PML, which incorporates the probability of different earthquakes occurring during an assumed 50-year holding period. However, some reports estimate the PML based on a scenario-specific event, such as the occurrence of the largest capable earthquake on a specific fault. This is a more conservative estimate, since the largest earthquake on a nearby fault may not occur within 1000 years and is usually considered for life safety reasons.

Seismic Risk Analysis
At a minimum, a seismic risk analysis should include engineer's qualifications; descriptions of the property and the building structure; a study of the impact of soil conditions and ground-shaking and site seismicity; conclusions; and a summary of the procedures used to evaluate the situation.

Engineer's Qualifications
The seismic review must be performed by a qualified civil or structural engineer who has specific experience in the analysis of seismic construction and design and a thorough knowledge of the Uniform Building Code (UBC) or Federal Emergency Management Association (FEMA) provisions where the UBC does not apply. The engineer should be registered in the state where the structure is located; however, an engineer registered in California can perform the analysis for a property located in any state.

Property Description
The review should discuss the building height and class, construction materials, and overall quality of construction, framing, and design. The report should note when the structure was built, significant alterations that have been made to it over time, and the adequacy of the building codes in effect at the time of construction or renovation relative to current standards. This discussion should be based on a site inspection as well as a review of construction drawings.

It is likely that some buildings that were constructed prior to 1970 and even over the last several years now fall into higher-risk seismic zones (Zones 3 and 4) than they did originally because UBC's seismic zone maps are redrawn periodically. In these situations, the report should identify and discuss how current standards for high-risk seismic zones compare with the standards to which the improvements were built.

Building Structure
The amount of damage that a building sustains during an earthquake depends on the impact of ground acceleration on its lateral load resistance system. Consequently, certain types of structures experience more damage than others. For example, perimeter walls of reinforced masonry generally provide good lateral resistance for earthquake loads, as do tilt-up concrete walls so long as the walls and the roof supports are connected in an appropriate manner. Conversely, unreinforced masonry structures historically have suffered more damage, while wood-frame and all-steel structures have a better performance history. The 1994 Northridge earthquake was instructive because it revealed the vulnerability of certain types of structures, such as those with "tuck-under" parking, to earthquake damage. In addition, the impact of damage caused by pounding from adjacent structures should also be integrated into the structural evaluation.

The building structure section of the report should address the extent to which the structure was specifically designed to withstand higher levels of shaking. It should contain a detailed discussion of the structural vulnerability of the improvements, based on the California Applied Technology Council (ATC-13) models, as well a review of the building's performance during previous earthquakes. It should also include previous

earthquake damage and detailed information on the seismic retrofits that have been implemented. It is important to note, however, that a building's performance during previous earthquakes may not be indicative of future performance, since the level of ground-shaking varies from earthquake to earthquake.

Soil Conditions And Ground-Shaking
Surrounding soil conditions have a significant impact on the damage a structure may sustain in the aftermath of an earthquake. Soft soils tend to amplify wave motion, while solid rock vibrates far less. Areas that have been built up from land fill have a greater tendency to experience more intense shaking. Earthquake-induced soil liquefaction occurs when intense, prolonged ground-shaking causes a build-up of pore water pressure in loose, saturated, granular or sandy soils. The liquefied soil acts as a dense fluid, losing some or all of its ability to support building foundations. This results in more damage to susceptible structures in these areas. In California, the Los Angeles Basin, the San Diego metropolitan statistical area, and the San Francisco Bay area are all noted for their susceptibility to soil liquefaction.

Because soil conditions play such an important role in determining the level of damage that a building may sustain, the report should include a thorough discussion of the soil conditions and how they have been integrated into the seismicity model. For example, there should be included any adjustments that were made to the Modified Mercalli Intensity scale to reflect different levels of intensity due to specific soil conditions.

Site Seismicity
The report should include a discussion of historical earthquake activity in the area, highlighting all faults that may affect the site, their distance from the site, and whether the site falls in a special study zone as defined in the Alquist-Priolo Earthquake Fault Zoning Act.

Conclusions
The report should reach a conclusion as to the PML for the subject property. It should also include a detailed explanation of the type of damage that may occur at the site.

Summary Of Procedures
The report should summarize the procedures followed by the engineer, as well as any limitations governing the use of the results of the report.

PML Results And Insurance Requirements
Standard & Poor's typically prefers that earthquake insurance is provided for any asset that has a PML of more than 20% (see table 1). Coverage under the policy should be equal to the estimated damage costs. For example, if the replacement cost of an asset is estimated at $250,000, and the PML is 22%, then earthquake-related damage is likely to be $55,000. Therefore, the insurance should provide $55,000 of coverage. If loss of income as a result of earthquake damage is not covered under the property's standard business interruption insurance policy, then additional coverage should be factored in to reflect loss of income following an earthquake. There are instances in which Standard & Poor's may also require insurance coverage on loans with PMLs of less than 20%. In the case of a highly leveraged loan-for instance, one with a loan-to-value ratio of 90% or more, based on the property's appraised value-the borrower's equity in the property may be wiped out if there is an uninsured loss (see table 2).

Table 1		
PML Estimate And Ranges		
Risk level	PML range (%)	Anticipated damage
Slight repair	0-10	Limited damage not requiring repair
Moderately low term	10-20	Significant damage, with some short-term business interruption
Moderate	20-30	Significant damage to many building components; structure must be closed for repair and inspection
Heavy repair	30-60	Extensive damage requiring major repair; possible building collapse; economic loss
Major	>60	Widespread major damage resulting in possible razing of facility

Table 2	
Example of High LTV Scenario	
First mortgage balance ($)	90,000
Appraised value ($)	100,000
Replacement cost ($)	75,000
PML (%)	16
Estimated cost to repair earthquake-related damage ($)	12,000
Equity following earthquake ($)	(2,000)

The lack of adequate equity introduces an additional level of event risk that must be evaluated relative to the low PML.

Additional considerations are the borrower's overall financial strength and his incentive to default or to avoid a default. The reverse may hold true for a property that is less highly leveraged but has a higher PML.

Each earthquake policy should have a maximum deductible of 5%. If the deductible is greater than 5%, the borrower should be required to establish a reserve for the difference. The reserve requirement may be relaxed, or a higher deductible would be allowed, if the borrower's equity in the property exceeds 30%, based on the appraised value of the property, although Standard & Poor's will also take into consideration its own estimate of the value of the underlying property or properties (see table 3). This relaxed standard will not generally apply to loans with mezzanine financing or any other forms of secondary debt.

Table 3	
Example of Low LTV Scenario	
First mortgage balance ($)	70,000
Appraised value ($)	100,000
Replacement cost ($)	75,000
PML (%)	30
Estimated cost to repair earthquake-related damage ($)	22,000
Equity following earthquake ($)	8,000

If earthquake coverage is provided under an umbrella policy, the borrower must provide a list of all of the properties covered by the policy, including the allocated coverage and the per-claim limit per incident.

Each provider of earthquake insurance for most loans that are securitized in CMBS conduit pools or fusion pools should have a Standard & Poor's insurer financial strength rating no lower than 'BBB'.

In the case of large-loan and property-specific transactions, the rating of the insurer should be not less than two categories below the rating of the most highly-rated securities issued, and in no event lower than 'BBB'. The insurance for a large loan or a group of related loans to a single borrower in a conduit or fusion pool must meet the large-loan and property-specific rating requirements if the loan or loan group constitutes more than 5% of the pool balance or has a balance of $35 million or more.

Appendix II
Eligible Investment Criteria for 'AAA' Rated Structured Transactions

(Editor's note: This article by Tom Gillis and Tom Murray was originally published on June 25, 2001 and is available on RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com, and at www.standardandpoors.com.)

The most widespread criteria used for investment in the secondary market relate to the category called "eligible investments." Eligible investments are those securities that the trust of a structured finance transaction is allowed to purchase for the management of its cash flow. Standard & Poor's considers these investments appropriate in 'AAA' rated, structured transactions. Whether it is a CMBS, RMBS, or ABS deal, the one common denominator is the requirement for, and qualification of, eligible investments.

Fortunately, it is also the most stable category, rarely changing over time. However, Standard & Poor's is republishing its criteria to confirm that they remain unchanged. At the same time, it is important to note that one qualifying investment, the debt obligations of the Student Loan Marketing Association (SLMA or Sallie Mae), will no longer qualify as an eligible investment after Sept. 30, 2008. The enactment of the Student Loan Marketing Association Reorganization Act will result in the gradual dissolution of Sallie Mae's GSE (government-sponsored enterprise) status, which allows Sallie Mae limited access to U.S. Treasury funds. The final dissolution date is Sept. 30, 2008. If additional Sallie Mae debt is issued, the debt must mature before that date. Sallie Mae debt obligations will continue to qualify as eligible investments for rated structured transactions until Sept. 30, 2008.

Eligible Investments

Eligible investments are typically used to temporarily house (usually 30 days or less) the cash flows related to a transaction in low-risk, short-term investments. Eligible investments may also be used for certain reserve or cash collateral accounts, where maturities may extend beyond the next payment date. In instances where the investments may be invested for up to 90 days or longer, the eligibility of investments may be further restricted, as indicated below. In no case should the following eligible investments have maturities in excess of one year. Any use other than contemplated above may not be appropriate for structured finance transactions.

The following investments are eligible for 'AAA' rated transactions:

1) Certain obligations of, or obligations guaranteed as to principal and interest by, the U.S. government or any agency or instrumentality thereof, when these obligations are backed by the full faith and credit of the United States. As Standard & Poor's does not explicitly rate all such obligations, the obligation must be limited to those instruments that have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change. If it is rated, the obligation should not have an 'r' suffix attached to its rating. Interest may either be fixed or variable. If the investments may be liquidated prior to their maturity or are being relied on to meet a certain yield, additional restrictions are necessary. Interest should be tied to a single interest rate index plus a single fixed spread (if any) and should move proportionately with that index. These investments include but are not limited to:

- U.S. Treasury obligations (all direct or fully guaranteed obligations);
- Farmers Home Administration Certificates of Beneficial Ownership;
- General Services Administration participation certificates;
- U.S. Maritime Administration guaranteed Title XI financing;
- Small Business Administration guaranteed participation certificates and guaranteed pool certificates;
- U.S. Department of Housing and Urban Development local authority bonds; and
- Washington Metropolitan Area Transit Authorityguaranteed transit bonds.

2) Federal Housing Administration debentures.

3) Certain obligations of government-sponsored agencies that are not backed by the full faith and credit of the United States. As Standard & Poor's does not explicitly rate all these obligations, they must be limited to instruments that have a predetermined fixed dollar amount of principal due at maturity that cannot vary. If it is rated, the obligation should not have an 'r' suffix attached to its rating. Interest may either be fixed or variable. If the investments may be liquidated prior to their maturity, or are being relied on to meet a certain yield, additional restrictions are necessary. Interest should be tied to a single interest rate index plus a single fixed spread (if any) and move proportionately with that index. These investments are limited to:

- Federal Home Loan Mortgage Corp. (FHLMC) debt obligations;
- Farm Credit System (formerly Federal Land Banks, Federal Intermediate Credit Banks, and Banks for Cooperatives) consolidated system-wide bonds and notes;
- Federal Home Loan Banks (FHL Banks) consolidated debt obligations;
- Federal National Mortgage Association (FNMA) debt obligations;
- Student Loan Marketing Association (SLMA) debt obligations;
- Financing Corp. (FICO) debt obligations; and
- Resolution Funding Corp. (REFCORP) debt obligations.

4) Certain federal funds, unsecured certificates of deposit, time deposits, banker's acceptances, and repurchase agreements having maturities of not more than 365 days, of any bank, the short-term debt obligations of which are rated 'A-1+' by Standard & Poor's. In addition, the instrument should not have an 'r' suffix attached to its rating and its terms should have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change. Interest may either be fixed or variable. If the investments may be liquidated prior to their maturity or are being relied on to meet a certain yield, additional restrictions are necessary. Interest should be tied to a single interest rate index plus a single fixed spread (if any) and should move proportionately with that index.

5) Certain deposits that are fully insured by the Federal Deposit Insurance Corp. (FDIC). The deposit's repayment terms have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change. If rated, the deposit should not have an 'r' suffix attached to its rating. Interest may either be fixed or variable. If the investments may be liquidated prior to their maturity or are being relied on to meet a certain yield, additional restrictions are necessary. Interest should be tied to a single interest rate index plus a single fixed spread (if any) and should move proportionately with that index.

6) Certain debt obligations maturing in 365 days or less that are rated 'AA-' or higher by Standard & Poor's. The debt should not have an 'r' suffix attached to its rating and by its terms have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change. Interest can be either fixed or variable. If the investments may be liquidated prior to their maturity or are being relied on to meet a certain yield, additional restrictions are necessary. Interest should be tied to a single interest rate index plus a single fixed spread (if any) and should move proportionately with that index.

7) Certain commercial paper rated 'A-1+' by Standard & Poor's and maturing in 365 days or less. The commercial paper should not have an 'r' suffix attached to its rating and by its terms have a predetermined fixed dollar amount of principal due at maturity that cannot vary or change. Interest may either be fixed or variable. If the investments may be liquidated prior to their maturity or are being relied on to meet a certain yield, additional restrictions are necessary. Interest should be tied to a single interest rate index plus a single fixed spread (if any) and should move proportionately with that index.

8) Investments in certain short-term debt of issuers rated 'A-1' by Standard & Poor's may be permitted with certain restrictions. The total amount of debt from 'A-1' issuers must be limited to the investment of monthly principal and interest payments (assuming fully amortizing collateral). The total amount of 'A-1' investments should not represent more than 20% of the rated issue's outstanding principal amount and each investment should not mature beyond 30 days. Investments in 'A-1' rated securities are not eligible for reserve accounts, cash collateral accounts, or other forms of credit enhancement in 'AAA' rated issues. In addition, none of the investments may have an 'r' suffix attached to its rating. The terms of the debt should have a predetermined fixed dollar amount of principal due at maturity that cannot vary. Interest may either be fixed or variable. If the investments may be liquidated prior to their maturity or are being relied on to meet a certain yield, additional restrictions are necessary. Interest should be tied to a single interest rate index plus a single fixed spread (if any) and should move proportionately with that index. Short-term debt includes

commercial paper, federal funds, repurchase agreements, unsecured certificates of deposit, time deposits, and banker's acceptances.

9) Investment in money market funds rated 'AAAm' or 'AAAm-G' by Standard & Poor's.

10) Stripped securities: principal-only strips and interest-only strips of noncallable obligations issued by the U.S. Treasury, and REFCORP securities stripped by the Federal Reserve Bank of New York.

11) Any security not included in this list may be approved by Standard & Poor's after a review of the specific terms of the security and its appropriateness for the issue being rated.

Appendix III
Revised Article 9 of the Uniform Commercial Code: New Standard & Poor's Criteria

(Editor's note: This article by Dina Moskowitz was originally published on June 1, 2001 and is available on RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com, and at www.standardandpoors.com.)

On July 1, 2001, a substantially revised version of Article 9 of the Uniform Commercial Code will become effective in approximately 40 states. Article 9 governs the creation, perfection, and priority of security interests in most types of property (other than real estate). As a result, understanding and complying with the procedures set forth in Article 9 is important to protect the rights of investors and lenders involved in most types of asset-based lending, including asset-backed structured finance transactions rated by Standard & Poor's.

Revised Article 9 is broader in scope than current law. It covers more types of transactions (for example, sales of promissory notes and payment intangibles) as well as additional asset types (such as deposit accounts and commercial tort claims). In addition, revised Article 9 simplifies the procedures for perfecting security interests in most types of collateral. However, the rules for determining priority of security interests under revised Article 9 are more complex than under current law.

A rating is Standard & Poor's opinion of the creditworthiness of the debt being issued. The rating is based on information provided by the issuer and its advisors, including representations and warranties included in the transaction documents. Some of these representations and warranties contained in structured finance transaction documents address legal matters. Currently, Standard & Poor's requests legal opinions from transaction counsel to provide further comfort on some of these legal matters, for example on true sale and security interest issues. Regarding enforceability issues, however, Standard & Poor's generally assumes, without reviewing a legal opinion, that the transaction documents are legal, valid, and binding and that the provisions will have their intended legal effect.

As a consequence of revised Article 9, Standard & Poor's will follow the approach used for enforceability matters and will no longer review security interest opinions. Standard & Poor's will continue to review true sale and nonconsolidation opinions. Standard & Poor's is not expressing any view as to whether legal opinions regarding security interest matters should be requested by any participants in a transaction.

The New Criteria

Security Interest Opinions No Longer Reviewed
Given the limited scope of the security interest opinions typically delivered in structured finance transactions (see "FPPSI Opinion Primer" below), and in light of the revisions to Article 9 becoming effective beginning July 1, 2001, Standard & Poor's has concluded that these opinions will not add significant value to the structured finance rating process for many types of assets, including, among others, credit card receivables, mortgage loans, equipment leases, and automobile loans/leases. With respect to the legal conclusions expressed in the "creation" and "perfection" opinions (see "FPPSI Opinion Primer" below), Standard & Poor's believes that, generally, for purposes of the rating process, it is appropriate to assume that counsel for the transaction has drafted a security agreement and one or more financing statements that are effective to create and perfect, respectively, a security interest in collateral subject to Article 9. With respect to "priority" issues, this "opinion" typically is based on an officer's certificate of the borrower. Standard & Poor's recognizes that law firms are increasingly reluctant to deliver this type of "opinion" because it does not in fact provide a legal conclusion as to the priority of the trustee's or collateral agent's lien.

Accordingly, for most structured finance transactions, Standard & Poor's will not request legal opinions regarding the creation, perfection, or priority of a security interest as a condition of issuing the rating. On a case-by-case basis, depending on the structure of the transaction and the nature of the asset, Standard & Poor's may request one or more of these matters to be addressed in a legal opinion. For example, Standard & Poor's may request security interest opinions for new types of assets or structures. As is current market

practice, transaction counsel should contact Standard & Poor's legal department early in the rating process to determine what legal opinions will be requested by Standard & Poor's for the transaction.

Reliance on Representations and Warranties
Standard & Poor's believes that, subject to certain modifications and additions necessitated by the revisions to Article 9, the standard representations and warranties currently provided by the parties in structured finance documentation used in public securities offerings will, in most cases, adequately address security interest matters for purposes of the rating. While some of these standard representations and warranties are "legal" in nature, most relate to factual matters. When viewed in their entirety, they will provide sufficient comfort to Standard & Poor's that the trustee or collateral agent has a valid, perfected, first-priority security interest in the assets supporting the transaction.

To facilitate the timely review of the transaction documents, Standard & Poor's has prepared forms of model representations and warranties for the following Article 9 categories: accounts, tangible chattel paper, electronic chattel paper, instruments, general intangibles, securities entitlements/securities accounts, goods, and deposit accounts. These model representations should provide guidance to the market participants regarding what the Standard & Poor's analyst will be looking for in the transaction documents. Standard & Poor's encourages issuers to incorporate the model representations and warranties in substantially the published form; material changes will likely require review by Standard & Poor's legal department. The forms of model representations are provided below and may be directly copied.

In each form, the representations and warranties are organized under the headings "General," "Creation," "Perfection," and "Priority" only to indicate the primary legal issue that they are intended to address. Of course, the representations and warranties may be located in a single section or in different sections of the transaction documents, as drafting considerations dictate. These representations and warranties should survive the closing, and their breach should not be waivable by any of the transaction parties while the rated debt is outstanding.

Standard & Poor's encourages counsel for the transaction parties to contact Standard & Poor's legal department if there are issues regarding the applicability of the model representations and warranties to a particular transaction, as well as which Article 9 asset categories are relevant in a particular transaction. If it is not clear which Article 9 category is applicable, it may be appropriate to deliver a "characterization" opinion or, alternatively, to include the representations applicable to all relevant Article 9 categories. Additional representations and warranties may be appropriate for "new assets". These issues, as well as any other legal issues, should be discussed early in the rating process with Standard & Poor's legal department.

Related Issues

Transition Rules
Revised Article 9 contains detailed rules that govern the transition of current Article 9 to revised Article 9. For outstanding transactions rated prior to July 1, 2001, Standard & Poor's assumes that servicers will take the necessary steps to maintain the perfection and priority of security interests perfected under current Article 9.

Non-Article 9 Security Interest Matters
To the extent that issues relating to creation, perfection, or priority of a security interest in a particular type of asset are not governed by Article 9 (e.g., real estate, aircraft, railcars, automobiles), Standard & Poor's existing legal criteria continue to apply. Standard & Poor's encourages market participants and their counsel to contact the legal department with questions regarding the appropriate legal criteria for a transaction.

Revised Article 9 Not Effective in all 50 States
Under revised Article 9, as well as current Article 9, transactions that involve multiple jurisdictions require an analysis of which state's law applies to creation, perfection, and priority matters. The relevant jurisdictions may include state of governing law of documents, state of chief executive office of borrower/seller, state of incorporation of borrower/seller, and state of location of collateral. This analysis will become further complicated by the fact that revised Article 9 will not be effective in all 50 states by July 1, 2001. Provisions of revised Article 9 that are more permissive than current law may not apply if choice-of-law rules dictate that the law of a state in which the revisions are not yet effective governs the issue. This applies, for

example, to the ability to perfect a sale or pledge of promissory notes by filing a financing statement, rather than by delivering the notes. Standard & Poor's will rely on transaction counsel to structure the transaction in a manner that takes into account the applicable choice-of-law rules.

Consultation With Counsel
Like all other representations and warranties relating to legal maters, Standard & Poor's will assume that the representations and warranties relating to security interest matters are given by the seller/borrower after consultation with counsel.

FPPSI Opinion Primer

In a structured finance transaction, payments to bondholders or lenders rely on the cash flow from a discrete pool of assets. Generally, the seller's/borrower's counsel provides legal opinions which indicate (in the view of the lawyer giving the opinion) that the trustee or collateral agent acting for the bondholders or lenders has a first priority perfected security interest (FPPSI) in the assets supporting the payments on the bonds or the loan.

However, the scope of these opinions is limited. They contain many factual assumptions, which are supported by the representations and warranties in the transaction documents, and qualifications (exclusions), which, in the aggregate, result in legal opinions that address a narrowly defined set of legal issues. To the extent the legal opinions in a structured finance transaction do not address certain issues, the transaction parties, as well as Standard & Poor's, may obtain comfort through a combination of credit support and reliance on the representations and warranties in the transaction documents. In some cases, the lack of legal comfort may cause Standard & Poor's to conclude that the rating is linked to the Standard & Poor's corporate rating of one of the transaction parties.

With respect to security interest matters, the legal opinions address the three main components of a FPPSI. The "creation" opinion expresses the lawyer's view that the security agreement has been drafted properly so as to create a valid security interest that is enforceable against the borrower. The "perfection" opinion expresses the lawyer's view that the security interest will be "perfected" if the borrower takes certain actions, which generally means the borrower will file (at a state government office) a financing statement, naming the trustee or collateral agent as secured party, that complies with the requirements of Article 9. (Under current Article 9, promissory notes need to be delivered to the trustee or collateral agent in order for the security interest to be perfected. Under revised Article 9, filing a financing statement will be a permissible alternative method of perfection for promissory notes.)

For purposes of the Standard & Poor's rating, the significance of the security interest being "perfected" is that the security interest will be enforceable against the bankruptcy trustee of the borrower, in the event the borrower becomes a debtor in a bankruptcy proceeding. For entities structured as "bankruptcy-remote", perfection reduces the incentive of a third party, including the entity's owner(s), to cause a voluntary or involuntary bankruptcy proceeding in order to obtain access to the entity's assets.

Lastly, the "priority" opinion, which sounds (incorrectly) like it is an opinion to the effect that no other liens will be prior to the trustee's or collateral agent's lien, is typically not a legal opinion at all, but rather a statement that the lawyer has reviewed copies of the financing statements filed against the borrower and has concluded that none of such financing statements describes the assets that are the subject of the transaction. Frequently, the lawyer's conclusion relies on a certification from the borrower because it is not possible for the lawyer to discern from the previously filed financing statements what assets they cover. "Priority" opinions typically address only the priority of the trustee's or collateral agent's security interest over liens that had been perfected by filing because, under Article 9, by operation of law, various liens automatically have priority over the trustee's or collateral agent's lien.

Model Representations and Warranties

The Model Representations and Warranties for the Revised Article 9 collateral categories set forth below may be directly copied for use in transaction documents.

- Instruments
- Goods
- Tangible Chattel Paper

- Electronic Chattel Paper
- Accounts
- Securities Entitlements
- Deposit Accounts
- General Intangibles

Revised Article 9 Category: Instruments

(e.g., Mortgage Loans and Other Promissory Notes)

General

1. This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the [Collateral] in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

2. The [Collateral] constitutes "instruments" within the meaning of the applicable UCC.

Creation

3. [Debtor] owns and has good and marketable title to the [Collateral] free and clear of any [Lien], claim or encumbrance of any Person.

For Sale of Promissory Notes

4. [Debtor] has received all consents and approvals required by the terms of the [Collateral] to the sale of the [Collateral] hereunder to the [Secured Party].

Perfection: If Perfection Is by Filing

5. [Debtor] has caused or will have caused, within ten days, the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under applicable law in order to perfect the security interest in the [Collateral] granted to the [Secured Party] hereunder.

Perfection: If Perfection Is by Possession

6. All original executed copies of each [mortgage note] [promissory note] that constitute or evidence the [Collateral] have been delivered to the [Secured Party/Custodian].

7. If possession is through a third party custodian rather than the secured party, select either:

[Debtor] has received a written acknowledgment from [Custodian] that [Custodian] is holding the mortgage notes] [promissory notes] that constitute or evidence the [Collateral] solely on behalf and for the benefit of the [Secured Party];

or:

[Debtor] has received a written acknowledgment from [Custodian] that [Custodian] is acting solely as agent of the [Secured Party].

Priority

8. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Collateral]. [Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement relating to the

security interest granted to the [Secured Party] hereunder or that has been terminated*. Debtor is not aware of any judgment or tax lien filings against [Debtor].

*In circumstances where there are preexisting blanket filings, the following may be given: "[Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement (i) relating to the security interest granted to [Secured Party] hereunder, (ii) that has been terminated, or (iii) that names [Name] as secured party."

If Perfection Is by Filing

9. [Debtor] has in its possession all original copies of the [mortgage notes] [promissory notes] that constitute or evidence the [Collateral]. The [mortgage notes] [promissory notes] that constitute or evidence the [Collateral] do not have any marks or notations indicating that they have been pledged, assigned or otherwise conveyed to any Person other than the [Secured Party]. All financing statements filed or to be filed against [Debtor] in favor of the [Secured Party] in connection herewith describing the [Collateral] contain a statement to the following effect: "A purchase of or security interest in any collateral described in this financing statement will violate the rights of the [Secured Party]."

If Perfection Is by Possession

10. None of the [mortgage notes] [promissory notes] that constitute or evidence the [Collateral] has any marks or notations indicating that they have been pledged, assigned or otherwise conveyed to any Person other than the [Secured Party].

Additional Items to Be Included in Agreement

The following items should be included in the transaction documents:

- Survival of the foregoing representations and warranties;
- Non-waiver of the foregoing representations and warranties; and
- Covenant by Servicer to maintain perfection and priority of security interest.

Revised Article 9 Category: Goods

(e.g., Inventory and Equipment)
(Excludes Consumer Goods, Certificate of Title Goods, and Fixtures)

General

1. This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the [Collateral] in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

2. The [Collateral] constitutes "goods" within the meaning of the applicable UCC.

Creation

3. [Debtor] owns and has good and marketable title to the [Collateral] free and clear of any [Lien], claim or encumbrance of any Person.

Perfection

4. [Debtor] has caused or will have caused, within ten days, the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under applicable law in order to perfect the security interest in the [Collateral] granted to the [Secured Party] hereunder

.
Priority
5. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Collateral]. [Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement relating to the security interest granted to the [Secured Party] hereunder or that has been terminated*. Debtor is not aware of any judgment or tax lien filings against [Debtor].

*In circumstances where there are preexisting blanket filings, the following may be given: "[Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement (i) relating to the security interest granted to [Secured Party] hereunder, (ii) that has been terminated, or (iii) that names [Name] as secured party."

6. No creditor of [Debtor] other than [Secured Party] has in its possession any goods that constitute or evidence the [Collateral].

Additional Items to Be Included in Agreement
The following items should be included in the transaction documents:

- Survival of the foregoing representations and warranties;
- Non-waiver of the foregoing representations and warranties; and
- Covenant by Servicer to maintain perfection and priority of security interest.

Revised Article 9 Category: Tangible Chattel Paper
(e.g., Autos Loans/Leases, Equipement Leases, and Manufactured Housing Loans)

Note that with respect to Auto Loans/Leases, this list of model representations does not apply to the vehicles subject to the loans/leases. With respect to Equipment Leases, this list of model representations does not apply to goods that are subject to a "true lease". (For goods subject to a true lease, see model representations for "Revised Article 9 Category: Goods.") This list applies to goods that are subject to a "finance lease" other than goods that are excluded from the scope of Revised Article 9 (e.g., titled vehicles, airplanes, and railcars).

General
1. This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the [Collateral]* in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

*"Collateral" means the loans or leases, as applicable.

2. [Debtor] has taken all steps necessary to perfect its security interest against the [Account Debtor] in the property securing the [loans] [leases].

3. The [Collateral] constitutes "tangible chattel paper" within the meaning of the applicable UCC.

Creation
4. Debtor] owns and has good and marketable title to the [Collateral] free and clear of any [Lien], claim or encumbrance of any Person.

Perfection: If Perfection Is by Filing

5. [Debtor] has caused or will have caused, within ten days, the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under applicable law in order to perfect the security interest in the [Collateral] granted to the [Secured Party] hereunder.

Perfection: If Perfection Is by Possession

6. All original executed copies of each [loan agreement] [lease] that constitute or evidence the [Collateral] have been delivered to the [Secured Party/Custodian].

7. If possession is through a third party custodian rather than the secured party, select either:

[Debtor] has received a written acknowledgment from [Custodian] that [Custodian] is holding the [loan agreements][leases] that constitute or evidence the [Collateral] solely on behalf and for the benefit of the Secured Party;

or:

[Debtor] has received a written acknowledgment from [Custodian] that [Custodian] is acting solely as agent of the [Secured Party].

Priority

8. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Collateral]. [Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement relating to the security interest granted to the [Secured Party] hereunder or that has been terminated**. Debtor is not aware of any judgment or tax lien filings against [Debtor].

**In circumstances where there are preexisting blanket filings, the following may be given: "[Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement (i) relating to the security interest granted to [Secured Party] hereunder, (ii) that has been terminated, or (iii) that names [Name] as secured party."

If Perfection Is by Filing

9. [Debtor] has in its possession all original copies of the [loan agreements] [leases] that constitute or evidence the [Collateral]. The [loan agreements] [leases] that constitute or evidence the [Collateral] do not have any marks or notations indicating that they have been pledged, assigned or otherwise conveyed to any Person other than the [Secured Party]. All financing statements filed or to be filed against [Debtor] in favor of the [Secured Party] in connection herewith describing the [Collateral] contain a statement to the following effect: "A purchase of or security interest in any collateral described in this financing statement will violate the rights of the [Secured Party]."

If Perfection Is by Possession

10. None of the [loan agreements] [leases] that constitute or evidence the [Collateral] has any marks or notations indicating that it has been pledged, assigned or otherwise conveyed to any Person other than the [Secured Party].

Additional Items to Be Included in Agreement

The following items should be included in the transaction documents:

- Survival of the foregoing representations and warranties;
- Non-waiver of the foregoing representations and warranties; and
- Covenant by Servicer to maintain perfection and priority of security interest.

Revised Article 9 Category: Electronic Chattel Paper

(e.g., Auto Loans/Leases, Equipment Leases, and Manufactured Housing Loans)

Note that with respect to Auto Loans/Leases, this list of model representations does not apply to the vehicles subject to the loans/leases. With respect to Equipment Leases, this list of model representations does not apply to goods that are subject to a "true lease". (For goods subject to a true lease, see model representations for "Revised Article 9 Category: Goods.") This list applies to goods that are subject to a "finance lease" other than goods that are excluded from the scope of Revised Article 9 (e.g., titled vehicles, airplanes, and railcars).

General

1. This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the [Collateral]* in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

* "Collateral" means the loans or leases, as applicable.

2. [Debtor] has taken all steps necessary to perfect its security interest against the [Account Debtor] in the property securing the [loans] [leases].

3. The [Collateral] constitutes "electronic chattel paper" within the meaning of the applicable UCC.

Creation

4. [Debtor] owns and has good and marketable title to the [Collateral] free and clear of any [Lien], claim or encumbrance of any Person.

Perfection: If Perfection Is by Filing

5. [Debtor] has caused or will have caused, within ten days, the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under applicable law in order to perfect the security interest granted to the [Secured Party] hereunder.

Perfection: If Perfection Is by Control

6. Only one authoritative copy of each [loan agreement] [lease] that constitutes or evidences the [Collateral] exists. Each such authoritative copy (a) is unique, identifiable and unalterable (other than with the participation of the [Secured Party] in the case of an addition or amendment of an identified assignee and other than a revision that is readily identifiable as an authorized or unauthorized revision), (b) has been marked with a legend to the following effect: "Authoritative Copy" and (c) has been communicated to and is maintained by the [Secured Party/Custodian].

7. [Debtor] has marked the authoritative copy of each [loan agreement] [lease] that constitutes or evidences the [Collateral] with a legend to the following effect: "[Full Legal Name of Debtor] has pledged all its rights and interest herein to [Full Legal Name of Secured Party]." Such [loan agreements] [leases] do not have any other marks or notations indicating that they have been pledged, assigned or otherwise conveyed to any Person other than the [Secured Party].

8. [Debtor] has marked all copies of each [loan agreement] [lease] that constitutes or evidences the [Collateral] other than the authoritative copy with a legend to the following effect: "This is not an authoritative copy."

9. The [Collateral] has been established in a manner such that (a) all copies or revisions that add or change an identified assignee of the authoritative copy of each [loan agreement] [lease] that constitutes or evidences the [Collateral] must be made with the participation of the [Secured Party] and (b) all revisions of the authoritative copy of each [loan agreement] [lease] that constitutes or evidences the [Collateral] must be

readily identifiable as an authorized or unauthorized revision.

10. If electronic chattel paper is being maintained by a third party custodian rather than the secured party, select either:

[Debtor] has received a written acknowledgment from [Custodian] that [Custodian] is maintaining the authoritative copy of each [loan agreement][lease] that constitutes or evidences the [Collateral] solely on behalf and for the benefit of the Secured Party;

or:

[Debtor] has received a written acknowledgment from [Custodian] that [Custodian] is acting solely as agent of the [Secured Party].

Priority

11. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Collateral]. [Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement relating to the security interest granted to the [Secured Party] hereunder or that has been terminated.** Debtor is not aware of any judgment or tax lien filings against [Debtor].

** In circumstances where there are preexisting blanket filings, the following may be given: "[Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement (i) relating to the security interest granted to [Secured Party] hereunder, (ii) that has been terminated, or (iii) that names [Name] as secured party."

If Perfection Is by Filing

12. [Debtor] has not communicated an authoritative copy of any [loan agreement] [lease] that constitutes or evidences the [Collateral] to any Person other than the [Secured Party/Custodian].

If Perfection Is by Control

13. The authoritative copy of each [loan agreement] [lease] that constitutes or evidences the [Collateral] communicated to the [Secured Party/Custodian] has no marks or notations indicating that it has been pledged, assigned or otherwise conveyed to any Person other than the [Secured Party].

Additional Items to Be Included in Agreement

The following items should be included in the transaction documents:

- Survival of the foregoing representations and warranties;
- Non-waiver of the foregoing representations and warranties; and
- Covenant by Servicer to maintain perfection and priority of security interest.

Revised Article 9 Category: Accounts

(e.g., Credit Card, Trade, and Health-Care Insurance Receivables)

General

1. This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the [Collateral] in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

2. The [Collateral] constitutes "accounts" within the meaning of the applicable UCC.

Creation
3. [Debtor] owns and has good and marketable title to the [Collateral] free and clear of any [Lien], claim or encumbrance of any Person.

Perfection
4. [Debtor] has caused or will have caused, within ten days, the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under applicable law in order to perfect the security interest in the [Collateral] granted to the [Secured Party] hereunder.

Priority
5. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Collateral]. [Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement relating to the security interest granted to the [Secured Party] hereunder or that has been terminated.* Debtor is not aware of any judgment or tax lien filings against [Debtor].

*In circumstances where there are preexisting blanket filings, the following may be given: "[Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement (i) relating to the security interest granted to [Secured Party] hereunder, (ii) that has been terminated, or (iii) that names [Name] as secured party."

Additional Items to Be Included in Agreement
The following items should be included in the transaction documents:

- Survival of the foregoing representations and warranties;
- Non-waiver of the foregoing representations and warranties; and
- Covenant by Servicer to maintain perfection and priority of security interest.

<u>Revised Article 9 Category: Securities Entitlements</u>
(e.g., Permitted Investments and CLO/CBO)

General
1. This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the [Collateral] in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

Note that "Collateral" means securities, permitted investments and other assets credited to securities accounts.

2. All of the [Collateral] has been and will have been credited to one of the [Securities Accounts]. The securities intermediary for each [Securities Account] has agreed to treat all assets credited to the [Securities Accounts] as "financial assets" within the meaning of the UCC [except for (list assets)].

Note that as to any pledged collateral not credited to a securities account or as to which the securities intermediary has not agreed to treat as a "financial asset", separate steps will need to be taken to perfect the security interest.

Creation

3. [Debtor] owns and has good and marketable title to the [Collateral] free and clear of any [Lien], claim or encumbrance of any Person.

4. [Debtor] has received all consents and approvals required by the terms of the [Collateral] to the transfer to the [Secured Party] of its interest and rights in the [Collateral] hereunder.

Perfection: If Perfection Is by Filing

5. [Debtor] has caused or will have caused, within ten days, the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under applicable law in order to perfect the security interest granted in the [Collateral] to the [Secured Party] hereunder.

Perfection: If Perfection Is by Control

6. Select either:

[Debtor] has delivered to [Secured Party] a fully executed agreement pursuant to which the securities intermediary has agreed to comply with all instructions originated by the [Secured Party] relating to the [Securities Accounts] without further consent by the [Debtor];

or:

[Debtor] has taken all steps necessary to cause the securities intermediary to identify in its records the [Secured Party] as the person having a security entitlement against the securities intermediary in each of the [Securities Accounts].*

*For reference, see definition of "Entitlement Holder" in UCC Section 8-102(7).

Priority

7. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Collateral]. [Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement relating to the security interest granted to the [Secured Party] hereunder or that has been terminated.** Debtor is not aware of any judgment or tax lien filings against [Debtor].

**In circumstances where there are preexisting blanket filings, the following may be given: "[Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement (i) relating to the security interest granted to [Secured Party] hereunder, (ii) that has been terminated, or (iii) that names [Name] as secured party."

8. The [Securities Accounts] are not in the name of any person other than the [Debtor] or the [Secured Party]. The [Debtor] has not consented to the securities intermediary of any [Securities Account] to comply with entitlement orders of any person other than the [Secured Party].

Additional Items to Be Included in Agreement

The following items should be included in the transaction documents:

- Survival of the foregoing representations and warranties;
- Non-waiver of the foregoing representations and warranties; and

- Covenant by Servicer to maintain perfection and priority of security interest.

Revised Article 9 Category: Deposit Accounts

(e.g., Demand, Time, and Savings Accounts)

General

1. This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the [Deposit Accounts] in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

2. The [Deposit Accounts] constitute "deposit accounts" within the meaning of the applicable UCC.

Creation

3. [Debtor] owns and has good and marketable title to the [Deposit Accounts] free and clear of any [Lien], claim or encumbrance of any Person.

Perfection*

4. Select either:

[Debtor] has delivered to [Secured Party] a fully executed agreement pursuant to which the bank maintaining the [Deposit Accounts] has agreed to comply with all instructions originated by the [Secured Party] directing disposition of the funds in the [Deposit Accounts] without further consent by the [Debtor];

or:

[Debtor] has taken all steps necessary to cause [Secured Party] to become the account holder of the [Deposit Accounts].

*Note that filing is not a permissible method of perfection for deposit accounts.

Priority

4. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Deposit Accounts].

5. The [Deposit Accounts] are not in the name of any person other than the [Debtor] or the [Secured Party]. The [Debtor] has not consented to the bank maintaining the [Deposit Accounts] to comply with instructions of any person other than the [Secured Party].

Additional Items to Be Included in Agreement

The following items should be included in the transaction documents:

- Survival of the foregoing representations and warranties;
- Non-waiver of the foregoing representations and warranties; and
- Covenant by Servicer to maintain perfection and priority of security interest.

Revised Article 9 Category: General Intangibles

(eg., Intellectual Property, Loan Participations, Swaps, and Most Contract Rights)

Note that this list of model representations does not apply to loan participations that are evidenced by instruments or chattel paper.

General

1. This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the [Collateral] in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

2. The [Collateral] constitutes "general intangibles" within the meaning of the applicable UCC.

Creation

3. [Debtor] owns and has good and marketable title to the [Collateral] free and clear of any [Lien], claim or encumbrance of any Person.

4. For sale of loan participations, swaps, and other payment intangibles,* [Debtor] has received all consents and approvals required by the terms of the [Collateral] to the sale of the [Collateral] hereunder to the Secured Party.

*A "payment intangible" is a subcategory of "general intangible" under which the account debtor's principal obligation is a monetary obligation.

Perfection

5. [Debtor] has caused or will have caused, within ten days, the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under applicable law in order to perfect the security interest in the [Collateral] granted to the [Secured Party] hereunder.

Priority

6. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Collateral]. [Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement relating to the security interest granted to the [Secured Party] hereunder or that has been terminated.** Debtor is not aware of any judgment or tax lien filings against [Debtor].

**In circumstances where there are preexisting blanket filings, the following may be given: "[Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral] other than any financing statement (i) relating to the security interest granted to [Secured Party] hereunder, (ii) that has been terminated, or (iii) that names [Name] as secured party."

Additional Items to Be Included in Agreement

The following items should be included in the transaction documents:

- Survival of the foregoing representations and warranties;
- Non-waiver of the foregoing representations and warranties; and
- Covenant by Servicer to maintain perfection and priority of security interest.

Appendix IV
Standard & Poor's Defeasance Criteria for U.S. CMBS Transactions

(Editor's note: This article by Roy Chun was originally published on April 4, 2003 and is available on RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com, and at www.standardandpoors.com.)

In CMBS single property or pool transactions, borrowers may be prohibited under the applicable loan documents from prepaying a mortgage loan. However, in lieu of the right to prepay, they may be permitted to execute a collateral defeasance, provided there is no default on the loan. In a collateral defeasance, the real estate collateral securing a mortgage loan is released from the lien and replaced or substituted by U.S. government obligations.

Obligations or securities that meet all of the following requirements are acceptable defeasance collateral if they:

- Constitute "government securities" as defined in Section 2(a)(16) of the Investment Company Act of 1940 as amended (15 U.S.C. 80a-1);
- Are listed under paragraphs 1, 2, or 3 in "Standard & Poor's Eligible Investment Criteria for 'AAA' Rated Structured Transactions" (published June 25, 2001);
- Are rated 'AAA' by Standard & Poor's;
- Have a principal amount due at maturity that cannot vary or change;
- Provide for interest at a fixed rate; and
- Are not subject to prepayment, call, or early redemption.

From obligations or securities that meet these requirements, a portfolio should be selected that will provide a revenue stream of interest and/or principal payments sufficient to pay each scheduled principal and interest payment when due on the defeased loan through the maturity date. Alternatively, if the loan is a "hyper-amortization" loan, the revenue stream should be sufficient to make scheduled payments through the anticipated repayment date. The timing of the payments to be received from the defeasance collateral should match, as closely as possible (but always in advance of), the payment schedule for the loan being defeased. Cash proceeds from the defeasance collateral received in any month should be applied within four months after receipt to payment of the scheduled debt service. Earnings on reinvestment of proceeds from the defeasance collateral may not be considered in calculating the funds available to pay debt service.

If the mortgage loan is secured by multiple properties and only a portion of the real estate is being defeased, Standard & Poor's expects that the defeasance collateral will be sufficient to pay when due a portion of all scheduled debt service payments through the maturity date calculated on a principal amount equal to 125% of the loan amount allocated to the mortgaged properties defeased. Any loan-to-value and debt service coverage tests specified in the loan documents for the undefeased real estate collateral should also be satisfied.

Except as discussed below, before delivery of the defeasance collateral, written confirmation should be obtained from Standard & Poor's that the defeasance will not result in a lowering, withdrawal, or qualification of the ratings then assigned to the rated securities. Standard & Poor's recommends the following structure and documentation of defeasance collateral transactions.

Cash Flow Verification

An independent certified public accountant should provide written certification to the trustee that compares projections of cash flow from the defeasance collateral to the payment schedule for the defeased loan (or portion thereof) and verifies the accuracy of the computations of the revenue stream of the defeasance collateral and the matching (as to timing and amount) of the revenue stream with the debt service requirements of the defeased loan through the maturity date. It also should certify that revenues received in any month will be applied within four months after receipt to scheduled debt service payments, that the

defeasance securities are not subject to prepayment, call or early redemption, and that the interest income to the borrower or the successor borrower, as applicable, from the defeasance collateral will not in any tax year exceed the interest expense associated with the defeased loan.

Legal Opinions

If the securitization involves a real estate mortgage investment conduit (REMIC), Standard & Poor's expects an opinion that the defeasance will not adversely affect the status of the trust as a REMIC under Section 860D of the Internal Revenue Code. The REMIC opinion should confirm that any modifications of, or waivers of the requirements of, the loan documents in connection with the defeasance do not constitute "significant modifications". In addition, the borrower should deliver opinions that the defeasance agreements are the legal, valid, and binding obligation of the borrower, enforceable in accordance with their terms. If a successor borrower will assume the defeasing borrower's obligations, additional opinions should be provided as discussed below.

First Priority Perfected Security Interest

The trustee must have a valid first priority perfected security interest in the defeasance collateral, all securities entitlements for the defeasance collateral, and all proceeds thereof. This is generally effected by the pledge of the defeasance collateral through a securities intermediary to the trustee for the benefit of the holders of the rated securities. Standard & Poor's generally does not review security interest opinions (although it does not express any view as to whether such opinions should be requested by any participants in the defeasance transaction and it may request such opinions on a case-by-case basis). The defeasing borrower should make the representations relating to securities entitlements and deposit accounts that are recommended in Standard & Poor's Structured Finance commentary entitled "Revised Article 9 of the Uniform Commercial Code: New Standard & Poor's Criteria," published June 6, 2001. (The article is available on RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com. It is also available on Standard & Poor's Web site at www.standardandpoors.com.)

Cash Management, Eligible Institutions, and Permitted Investments

The defeasance collateral should be held in a segregated eligible account, and the securities intermediary that holds the defeasance collateral should be an eligible institution (see Standard & Poor's Structured Finance Ratings Real Estate Finance Criteria for definitions of "eligible account" and "eligible institution"). If the securities intermediary ceases to be an eligible institution, it should be replaced within 30 days. Proceeds of the defeasance collateral may be re-invested by the securities intermediary only in permitted investments (see Standard & Poor's Structured Finance Ratings Real Estate Finance Criteria for a definition of "permitted investments"). The securities intermediary should agree to make timely distributions of the defeasance collateral proceeds directly to the account of the trustee to cover debt service when due.

Successor Borrower

In each defeasance where the original borrower will retain title to the real property after its release from the lien of the mortgage, a successor borrower should be formed to hold title to the defeasance collateral for the balance of the loan term. The successor borrower is expected to satisfy the Standard & Poor's criteria for special-purpose bankruptcy-remote entities, including having an independent director. A successor borrower entity may hold defeasance collateral for more than one loan in a single pool, but if that successor borrower (with all its affiliates) holds defeasance collateral for loans (whether fully or partially defeased) in one pool aggregating more than $20 million, or more than five percent (5%) of the pool balance, ratings confirmation should be obtained.

Upon the defeasing borrower's transfer of the defeasance collateral to the successor borrower, the successor borrower should assume all of the original borrower's payment obligations under the loan. However, recourse against the successor borrower may be limited to its interest in the defeasance collateral, except for misrepresentations by the successor borrower, any transfer or encumbrance of the defeasance collateral by the successor borrower, dissolution, termination, bankruptcy, or other insolvency actions of the successor borrower. A further exception is the failure of the successor borrower to, at all times, satisfy the special-purpose and bankruptcy-remoteness criteria. The defeasing borrower should deliver to the trustee an opinion of counsel addressing the enforceability of the defeasance agreements against the successor borrower and, if appropriate, a substantive nonconsolidation opinion for the successor borrower.

Partial Defeasance

In a partial defeasance, a successor borrower not affiliated with the original borrower may hold the

defeasance collateral if this is not prohibited by the loan documents. In this case, two substitute notes should be delivered: one note evidencing the successor borrower's obligation for the defeased portion of the loan (including the 25% premium above the allocated loan amount), and the other note evidencing the original borrower's remaining obligation secured by the real estate. If the loan documents provide for it, the cross-collateralization and cross-defaulting of the defeased and undefeased portions of the loan may be terminated.

No Subordinate Liens or Expenses

The defeasance agreements should prohibit any subordinate liens against the defeasance collateral and should require payment from sources other than the defeasance collateral or other assets of the successor borrower, if applicable, of all fees and expenses relating to the defeasance, relating to the securities account, and relating to the continued existence in good standing of the successor borrower.

Release of Liability

The original borrower and the real estate may be fully released from all liability with respect to the loan, except that the original borrower should remain liable for the following:

- Misrepresentations in connection with the defeasance,
- Failure to provide the required first priority perfected security interest in the defeasance collateral,
- Failure to cooperate after the defeasance with any actions necessary to affirm the trustee's perfected security interest in the defeasance collateral, and
- Any environmental or other indemnity for the original loan that by its terms survives repayment of the loan.

Servicer Certification in Lieu of Standard & Poor's Confirmation

Generally, prior to completion of any defeasance, Standard & Poor's ratings confirmation should be obtained. For certain pool transactions, however, in lieu of obtaining ratings confirmation, the servicer may, at its option, complete the defeasance in accordance with the servicing standard and deliver to Standard & Poor's a defeasance certification (in the form attached) within 10 days after completion of the defeasance. The servicer may choose this option only if:

- The loan (together with all loans cross-collateralized with it) is not one of the 10 largest loans in the pool;
- The loan (together with all loans cross-collateralized with it) has a principal balance at the time of the defeasance of less than (i) $20 million, and (ii) 5% of the pool principal balance; and
- Where a successor borrower assumes the loan, the successor borrower and all its affiliates do not hold loans (whether fully or partially defeased) in such pool that in the aggregate (i) total more than $20 million or (ii) comprise more than 5% of the pool principal balance.

As the overall amount of defeasance collateral in a pool increases to a level that may warrant an upgrade, Standard & Poor's intends, as part of its rating assessment, to review with the servicer the status of prior defeasance transactions.

Appendix V
Form of Notice Regarding Defeasance of Mortgage Loan

For loans not among ten largest and having balance of less than (a) $20,000,000 and (b) 5% of outstanding pool balance

To: Standard & Poor's Ratings Services
55 Water Street
New York, New York 10041
Attn: Commercial Mortgage Surveillance

From: _________, in its capacity as Servicer (the "Servicer") under the Pooling and Servicing Agreement dated as of ________ (the "Pooling and Servicing Agreement"), among the Servicer, _________ as Trustee, and others.

Date: _________, 20___

Re: _____________ Commercial Mortgage Pass-Through Certificates, Series _______ Mortgage Loan (the "Mortgage Loan") heretofore secured by real property known as _______.

Capitalized terms used but not defined herein have the meanings assigned to such terms in the Pooling and Servicing Agreement. ***[Note: all terms in this notice should be conformed to terms used in the Pooling and Servicing Agreement]***

THE STATEMENTS SET FORTH BELOW ARE MADE (A) TO THE BEST KNOWLEDGE OF THE UNDERSIGNED BASED UPON DUE DILIGENCE CONSISTENT WITH THE SERVICING STANDARD SPECIFIED IN THE POOLING AND SERVICING AGREEMENT (THE "SERVICING STANDARD"), AND (B) WITHOUT INTENDING TO WARRANT THE ACCURACY THEREOF OR UNDERTAKE ANY DUTY OR STANDARD OF CARE GREATER THAN THE DUTIES OF SERVICER UNDER THE POOLING AND SERVICING AGREEMENT AND THE SERVICING STANDARD

We hereby notify you and confirm that each of the following is true, subject to those exceptions, if any, set forth on **Exhibit A** hereto, which exceptions the Servicer has determined, consistent with the Servicing Standard, will have no material adverse effect on the Mortgage Loan or the defeasance transaction:

1. The Mortgagor has consummated a defeasance of the Mortgage Loan of the type checked below:

   ____ a full defeasance of the entire outstanding principal balance ($___________) of the Mortgage Loan; or

   ____ a partial defeasance of a portion ($__________) of the Mortgage Loan that represents ___% of the entire principal balance of the Mortgage Loan ($________);

2. The defeasance was consummated on __________, 20__.

3. The defeasance was completed in all material respects in accordance with the conditions for defeasance specified in the Mortgage Loan Documents and in accordance with the Servicing Standard.

4. The defeasance collateral consists only of one or more of the following: (i) direct debt obligations of the U.S. Treasury, (ii) direct debt obligations of the Federal National Mortgage Association, (iii) direct debt obligations of the Federal Home Loan Mortgage Corporation, or (iv) interest-only direct debt obligations of the Resolution Funding Corporation. Such defeasance collateral consists of securities that (i) if they include a principal obligation, the principal due at maturity cannot vary or change, (ii)

provide for interest at a fixed rate and (iii) are not subject to prepayment, call or early redemption.

5. After the defeasance, the defeasance collateral will be owned by an entity (the "Defeasance Obligor") that: (i) is the original Borrower, (ii) is a Single-Purpose Entity (as defined in the S&P Criteria), (iii) is subject to restrictions in its organizational documents substantially similar to those contained in the organizational documents of the original Borrower with respect to bankruptcy remoteness and single purpose, (iv) has been designated as the Defeasance Obligor by the originator of the Mortgage Loan pursuant to the terms of the Mortgage Loan Documents, or (v) has delivered a letter from Standard & Poor's confirming that the organizational documents of such Defeasance Obligor were previously approved by Standard & Poor's. The Defeasance Obligor owns no assets other than defeasance collateral and (only in the case of the original Borrower) real property securing one or more Mortgage Loans included in the pool under the Pooling and Servicing Agreement (the "Pool").

6. If such Defeasance Obligor (together with its affiliates) holds more than one defeased loan, it does not (together with its affiliates) hold defeased loans aggregating more than $20 Million or more than five percent (5%) of the aggregate certificate balance of the Certificates as of the date of the most recent Paying Agent's Monthly Certificateholder Report received by Servicer (the "Current Report").

7. The defeasance documents require that the defeasance collateral be credited to an eligible account (as defined in the S&P Criteria) that must be maintained as a securities account by a securities intermediary that is at all times an Eligible Institution (as defined in the S&P Criteria). The securities intermediary may reinvest proceeds of the defeasance collateral only in Permitted Investments (as defined in the Pooling and Servicing Agreement).

8. The securities intermediary is obligated to pay from the proceeds of the defeasance collateral, directly to the Servicer's collection account, all scheduled payments on the Mortgage Loan or, in a partial defeasance, not less than 125% of the portion of such scheduled payments attributed to the allocated loan amount for the real property defeased (the "Scheduled Payments").

9. The Servicer received written confirmation from an independent certified public accountant stating that (i) revenues from the defeasance collateral (without taking into account any earnings on reinvestment of such revenues) will be sufficient to timely pay each of the Scheduled Payments including the payment in full of the Mortgage Loan (or the allocated portion thereof in connection with a partial defeasance) on its Maturity Date (or, in the case of an ARD Loan, on its Anticipated Repayment Date), (ii) the revenues received in any month from the defeasance collateral will be applied to make Scheduled Payments within four (4) months after the date of receipt, (iii) the defeasance collateral is not subject to prepayment, call or early redemption, and (iv) interest income from the defeasance collateral to the Defeasance Obligor in any tax year will not exceed such Defeasance Obligor's interest expense for the Mortgage Loan (or the allocated portion thereof in a partial defeasance) for such year, other than in the year in which the Maturity Date or Anticipated Repayment Date will occur, when interest income will exceed interest expense.

10. The Servicer received opinions of counsel that, subject to customary qualifications, (i) the defeasance will not cause the Trust to fail to qualify as a REMIC for purpose of the Internal Revenue Code, (ii) the agreements executed by the Mortgagor and the Defeasance Obligor in connection with the defeasance are enforceable against them in accordance with their terms, and (iii) the Trustee will have a perfected, first priority security interest in the defeasance collateral.

11. The agreements executed in connection with the defeasance (i) prohibit subordinate liens against the defeasance collateral, (ii) provide for payment from sources other than the defeasance collateral of all fees and expenses of the securities intermediary for administering the defeasance and the securities account and all fees and expenses of maintaining the existence of the Defeasance Obligor, (iii) permit release of surplus defeasance collateral and earnings on reinvestment to the Defeasance Obligor only after the Mortgage Loan has been paid in full, (iv) include representations and/or covenants of the Mortgagor and/or securities intermediary substantially as set forth on **Exhibit B** hereto, (v) provide for survival of such representations; and (vi) do not permit waiver of such representations and covenants.

12. The outstanding principal balance of the Mortgage Loan immediately before the defeasance was less than $20,000,000 and less than 5% of the aggregate certificate balance of the Certificates as of

the date of the current Report. The Mortgage Loan is not one of the ten (10) largest loans in the pool.

13. Copies of all material agreements, instruments, organizational documents, opinions of counsel, accountant's report and other items delivered in connection with the defeasance will be provided to you upon request.

14. The individual executing this notice is an authorized officer or a servicing officer of the Servicer.

IN WITNESS WHEREOF, the Servicer has caused this notice to be executed as of the date captioned above.

SERVICER:_________________________________

By:____

Name:

Title:

EXHIBIT A

Exceptions

EXHIBIT B

Perfected Security Interest Representations

General:

1. [The defeasance agreements] create a valid and continuing security interest (as defined in the applicable UCC) in the [Collateral, Securities Account and Deposit Account] in favor of the [Secured Party], which security interest is prior to all other [Liens], and is enforceable as such as against creditors of and purchasers from [Debtor].

Note that "Collateral" means securities, permitted investments and other assets credited to securities accounts.

2. The [Deposit Account] constitutes a "deposit account" within the meaning of the applicable UCC.

3. All of the [Collateral] has been and will have been credited to a [Securities Account]. The securities intermediary for the [Securities Account] has agreed to treat all assets credited to the [Securities Account] as "financial assets" within the meaning of the UCC.

Creation:

4. [Debtor] owns and has good and marketable title to the [Collateral, Securities Account and Deposit Account] free and clear of any [Lien], claim or encumbrance of any Person.

5. [Debtor] has received all consents and approvals required by the terms of the [Collateral] to the transfer to the [Secured Party] of its interest and rights in the [Collateral] hereunder.

Perfection:

6. [Debtor] has caused or will have caused, within ten (10) days, the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under applicable law in order to perfect the security interest granted in the [Collateral, Securities Account and Deposit Account] to the [Secured Party] hereunder.

7. [Debtor] has delivered to[Secured Party] a fully executed agreement pursuant to which the securities intermediary or the account bank has agreed to comply with all instructions originated by the [Secured Party] relating to the [Securities Account] or directing disposition of the funds in the [Deposit Account] without further consent by the [Debtor].

8. [Debtor] has taken all steps necessary to cause the securities intermediary to identify in its records the [Secured Party] as the person having a security entitlement against the securities intermediary in the [Securities Account].

9. [Debtor] has taken all steps necessary to cause [Secured Party] to become the account holder of the [Deposit Account].

Priority:

10. Other than the security interest granted to the [Secured Party] pursuant to this Agreement, [Debtor] has not pledged, assigned, sold, granted a security interest in, or otherwise conveyed any of the [Collateral, Securities Account and Deposit Account]. [Debtor] has not authorized the filing of and is not aware of any financing statements against [Debtor] that include a description of collateral covering the [Collateral, Securities Account and Deposit Account] other than any financing statement relating to the security interest granted to the [Secured Party] hereunder or that has been terminated. Debtor is not aware of any judgment or tax lien filings against [Debtor].

11. The [Securities Account and Deposit Account] are not in the name of any person other than the [Debtor] or the [Secured Party]. The [Debtor] has not consented to the securities intermediary of any [Securities Account] or the account bank of any [Deposit Account] to comply with entitlement orders or instructions of any person other than the [Secured Party].

Appendix VI
Intercreditor Agreement

INTERCREDITOR AGREEMENT

by and between

[________________________________]

as Senior Lender

and

[________________________________]

as Mezzanine Lender

Dated as of __________, 20__

Premises: ____________________________
____

INTERCREDITOR AGREEMENT

THIS INTERCREDITOR AGREEMENT (this "Agreement"), dated as of ______, 20__ by and between ______________________, a ________________________, having an office at __________ _____________, __________________________, _________________________ ("Senior Lender"), and _ ____________________ a ________________________, having an office at _________________ _______, ("Mezzanine Lender").

RECITALS

WHEREAS, pursuant to the terms, provisions and conditions set forth in that certain Loan Agreement, dated as of _____________, 20__, between ___________________, a _________________ _______, ("Borrower") and Senior Lender (the "Senior Loan Agreement"), Senior Lender has made or is about to make a loan to Borrower in the original principal amount of $ ________________ (the "Senior Loan"), which Senior Loan is evidenced by a certain Promissory Note, dated as of ____________, 20__, made by Borrower to Senior Lender in the amount of the Senior Loan (the "Senior Note"), and secured by, among other things, **[*insert as applicable:*** a Mortgage, Assignment of Leases and Rents and Security Agreement/Deed of Trust, Assignment of Leases and Rents and Security Agreement**]**, dated as of __________________, 20__, made by Borrower in favor of Senior Lender (the "Senior Mortgage"), which Senior Mortgage encumbers the real property described on Exhibit A attached hereto and made a part hereof, and all improvements thereon and appurtenances thereto (collectively, the "Premises"); and

WHEREAS, pursuant to the terms, provisions and conditions set forth in that certain Mezzanine Loan Agreement, dated as of ___________________, 20__, between __________________ _______, a ________________________ ("Mezzanine Borrower") and Mezzanine Lender (the "Mezzanine Loan Agreement"), Mezzanine Lender is the owner and holder of a loan to Mezzanine Borrower in the original principal amount of $ ______________________ (the "Mezzanine Loan"), which Mezzanine Loan is evidenced by a certain Promissory Note, dated as of ______________, 20__, made by Mezzanine Borrower in favor of Mezzanine Lender in the amount of the Mezzanine Loan (the "Mezzanine Note"), and secured by, among other things, a Pledge and Security Agreement, dated as of ______________, 20__, from Mezzanine Borrower pursuant to which Mezzanine Lender is granted a first priority security interest in all of Mezzanine Borrower's ownership interests in Borrower **[**and its general partner/managing member**]** (the "Pledge Agreement"); and

WHEREAS, Senior Lender and Mezzanine Lender desire to enter into this Agreement to provide for the relative priority of the Senior Loan Documents (as such term is hereinafter defined) and the Mezzanine Loan Documents (as such term is hereinafter defined) on the terms and conditions hereinbelow set forth, and to evidence certain agreements with respect to the relationship between the Mezzanine Loan and the Mezzanine Loan Documents, on the one hand, and the Senior Loan and the Senior Loan Documents, on the other hand.

NOW, THEREFORE, in consideration of the foregoing recitals and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Senior Lender and Mezzanine Lender hereby agree as follows:

Section 1. Certain Definitions; Rules of Construction.

(a) As used in this Agreement, the following capitalized terms shall have the following meanings:

"Affiliate" means, as to any particular Person, any Person directly or indirectly, through one or more intermediaries, controlling, Controlled by or under common control with the Person or Persons in question.

"Agreement" means this Agreement, as the same may be amended, modified and in effect from time to time, pursuant to the terms hereof.

"Award" has the meaning provided in Section 9(d) hereof.

"Borrower" has the meaning provided in the Recitals hereto.

"Borrower Group" has the meaning provided in Section 10(c) hereof.

"Business Day" means _______________.

"CDO" has the meaning provided in the definition of the term "Qualified Transferee."

"Certificates" means any securities (including all classes thereof) representing beneficial ownership interests in the Senior Loan or in a pool of mortgage loans including the Senior Loan issued in connection with a Securitization of the Senior Loan.

"Continuing Senior Loan Event of Default" means an Event of Default under the Senior Loan for which (i) Senior Lender has provided notice of such Event of Default to Mezzanine Lender in accordance with Section 11(a) of this Agreement and (ii) the cure period provided to Mezzanine Lender in Section 11(a) of this Agreement has expired.

"Control" means the ownership, directly or indirectly, in the aggregate of more than fifty percent (50%) of the beneficial ownership interests of an entity and the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an entity, whether through the ability to exercise voting power, by contract or otherwise. "Controlled by," "controlling" and "under common control with" shall have the respective correlative meaning thereto.

"Directing Mezzanine Lender" has the meaning provided in Section 4(c) hereof.

"Eligibility Requirements" means, with respect to any Person, that such Person (i) has total assets (in name or under management) in excess of [$600,000,000] **[Note: for very large loans, a higher amount may be required]** and (except with respect to a pension advisory firm or similar fiduciary) capital/statutory surplus or shareholder's equity of [$250,000,000] **[Note: for very large loans, a higher amount may be required]** and (ii) is regularly engaged in the business of making or owning commercial real estate loans or operating commercial mortgage properties.

"Enforcement Action" means any (i) judicial or non-judicial foreclosure proceeding, the exercise of any power of sale, the taking of a deed or assignment in lieu of foreclosure, the obtaining of a receiver or the taking of any other enforcement action against the Premises or Borrower, including, without limitation, the taking of possession or control of the Premises, (ii) acceleration of, or demand or action taken in order to collect, all or any indebtedness secured by the Premises (other than giving of notices of default and statements of overdue amounts) or (iii) exercise of any right or remedy available to Senior Lender under the Senior Loan Documents, at law, in equity or otherwise with respect to Borrower and/or the Premises.

"Equity Collateral" means the equity interests of Borrower [and its general partner/managing member] pledged pursuant to the Pledge Agreement.

"Equity Collateral Enforcement Action" means any action or proceeding or other exercise of Mezzanine Lender's rights and remedies commenced by Mezzanine Lender, in law or in equity, or otherwise, in order to realize upon the Equity Collateral.

"Event of Default" as used herein means (i) with respect to the Senior Loan and the Senior Loan Documents, any Event of Default thereunder which has occurred, is continuing (i.e., has not

been cured by Borrower or by the Mezzanine Lender in accordance with the terms of this Agreement) and (ii) with respect to the Mezzanine Loan and the Mezzanine Loan Documents, any Event of Default thereunder which has occurred and is continuing (i.e., has not been cured by Mezzanine Borrower).

"Loan Pledgee" has the meaning provided in Section 15 hereof.

"Loan Purchase Price" has the meaning provided in Section 13(a) hereof.

"Mezzanine Borrower" has the meaning provided in the Recitals hereto.

"Mezzanine Lender" has the meaning provided in the first paragraph of this Agreement.

"Mezzanine Loan" has the meaning provided in the Recitals hereto.

"Mezzanine Loan Agreement" has the meaning provided in the Recitals hereto.

"Mezzanine Loan Cash Management Agreement" means any cash management agreement executed in connection with, or the cash management provisions of, the Mezzanine Loan Documents.

"Mezzanine Loan Documents" means the Mezzanine Loan Agreement, the Mezzanine Note and the Pledge Agreement, together with all documents and instruments set forth on Exhibit C hereto, as any of the foregoing may be modified, amended, extended, supplemented, restated or replaced from time to time, subject to the limitations and agreements contained in this Agreement.

"Mezzanine Loan Modification" has the meaning provided in Section 7(b) hereof.

"Mezzanine Note" has the meaning provided in the Recitals hereto.

"Monetary Cure Period" has the meaning provided in Section 11(a) hereof.

"Permitted Fund Manager" means any Person that on the date of determination is (i) one of the entities listed on Exhibit D **[to be reviewed on a case by case basis]** or any other nationally-recognized manager of investment funds investing in debt or equity interests relating to commercial real estate, (ii) investing through a fund with committed capital of at least $250,000,000 and (iii) not subject to a Proceeding.

"Person" means any individual, sole proprietorship, corporation, general partnership, limited partnership, limited liability company or partnership, joint venture, association, joint stock company, bank, trust, estate unincorporated organization, any federal, state, county or municipal government (or any agency or political subdivision thereof) endowment fund or any other form of entity.

"Pledge" has the meaning provided in Section 15 hereof.

"Pledge Agreement" has the meaning provided in the Recitals hereto.

"Premises" has the meaning provided in the Recitals hereto.

"Proceeding" has the meaning provided in Section 10(c) hereof.

"Property Manager" means ___________________ or any successor thereto as property manager of the Premises.

"Protective Advances" means all sums advanced for the purpose of payment of real estate taxes (including special payments in lieu of real estate taxes), maintenance costs, insurance

premiums or other items (including capital items) reasonably necessary to protect the Premises or the Separate Collateral, respectively, from forfeiture, casualty, loss or waste, including, with respect to the Mezzanine Loan, amounts advanced by Mezzanine Lender pursuant to Section 11 hereof.

"Purchase Option Notice" has the meaning provided in Section 13(a) hereof.

"Qualified Manager" shall mean a property manager of the Premises which (i) is a reputable management company having at least five (5) years' experience in the management of commercial properties with similar uses as the Premises and in the jurisdiction in which the Premises are located, (ii) has, for at least five (5) years prior to its engagement as property manager, managed at least (5) properties of the same property type as the Premises, (iii) at the time of its engagement as property manager has leasable square footage of the same property type as the Premises equal to the lesser of (A) 1,000,000 leasable square feet and (B) five (5) times the leasable square feet of the Premises and (iv) is not the subject of a bankruptcy or similar insolvency proceeding. **[Note: for very large assets, the tests in clauses (ii) and (iii) may be required to be higher.] [Insert other appropriate criteria for type of asset. e.g. luxury hotels, convention centers, regional malls, etc.]**

"Qualified Transferee" means (i) Mezzanine Lender, or (ii) one or more of the following:

(A) a real estate investment trust, bank, saving and loan association, investment bank, insurance company, trust company, commercial credit corporation, pension plan, pension fund or pension advisory firm, mutual fund, government entity or plan, provided that any such Person referred to in this clause (A) satisfies the Eligibility Requirements;

(B) an investment company, money management firm or "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act of 1933, as amended, or an institutional "accredited investor" within the meaning of Regulation D under the Securities Act of 1933, as amended, provided that any such Person referred to in this clause (B) satisfies the Eligibility Requirements;

(C) an institution substantially similar to any of the foregoing entities described in clauses (ii)(A) or (ii)(B) that satisfies the Eligibility Requirements;

(D) any entity Controlled by any of the entities described in clause (i) or clauses (ii)(A) or (ii)(C) above;

(E) a Qualified Trustee in connection with a securitization of, the creation of collateralized debt obligations ("CDO") secured by or financing through an "owner trust" of, the Mezzanine Loan (collectively, "Securitization Vehicles"), so long as (A) the special servicer or manager of such Securitization Vehicle has the Required Special Servicer Rating and (B) the entire "controlling class" of such Securitization Vehicle, other than with respect to a CDO Securitization Vehicle, is held by one or more entities that are otherwise Qualified Transferees under clauses (ii)(A), (B), (C) or (D) of this definition; provided that the operative documents of the related Securitization Vehicle require that (1) in the case of a CDO Securitization Vehicle, the "equity interest" in such Securitization Vehicle is owned by one or more entities that are Qualified Transferees under clauses (ii)(A), (B), (C) or (D) of this definition and (2) if any of the relevant trustee, special servicer, manager fails to meet the requirements of this clause (E), such Person must be replaced by a Person meeting the requirements of this clause (E) within thirty (30) days; or

(F) an investment fund, limited liability company, limited partnership or general partnership where a Permitted Fund Manager or an entity that is otherwise a Qualified Transferee under clauses (ii)(A), (B), (C) or (D) of this definition acts as the general partner, managing member or fund manager and at least 50% of the equity interests in such investment vehicle are

owned, directly or indirectly, by one or more entities that are otherwise Qualified Transferees under clauses (ii)(A), (B), (C) or (D) of this definition.

"Qualified Trustee" means (i) a corporation, national bank, national banking association or a trust company, organized and doing business under the laws of any state or the United States of America, authorized under such laws to exercise corporate trust powers and to accept the trust conferred, having a combined capital and surplus of at least $100,000,000 and subject to supervision or examination by federal or state authority, (ii) an institution insured by the Federal Deposit Insurance Corporation or (iii) an institution whose long-term senior unsecured debt is rated either of the then in effect top two rating categories of each of the Rating Agencies.

"Rating Agencies" shall mean, prior to a Securitization, each of S&P, Moody's Investors Service, Inc., and Fitch, Inc., or any other nationally-recognized statistical rating agency which has been designated by Senior Lender and, after a Securitization, shall mean any of the foregoing that have rated any of the Certificates.

"Rating Agency Confirmation" means each of the Rating Agencies shall have confirmed in writing that the occurrence of the event with respect to which such Rating Agency Confirmation is sought shall not result in a downgrade, qualification or withdrawal of the applicable rating or ratings ascribed by such Rating Agency to any of the Certificates then outstanding. In the event that no Certificates are outstanding or the Senior Loan is not part of a Securitization, any action that would otherwise require a Rating Agency Confirmation shall require the consent of the Senior Lender, which consent shall not be unreasonably withheld or delayed.

"Redirection Notice" has the meaning provided in Section 15 hereof.

"Required Special Servicer Rating" means (i) a rating of "CSS1" in the case of Fitch, (ii) on the S&P list of approved special servicers in the case of S&P and (iii) in the case of Moody's, such special servicer is acting as special servicer in a commercial mortgage loan securitization that was rated by Moody's within the twelve (12) month period prior to the date of determination, and Moody's has not downgraded or withdrawn the then-current rating on any class of commercial mortgage securities or placed any class of commercial mortgage securities on watch citing the continuation of such special servicer as special servicer of such commercial mortgage securities.

"S&P" means Standard & Poors Ratings Services, a division of The McGraw-Hill Companies, Inc.

"Securitization" means the sale or securitization of the Senior Loan (or any portion thereof) in one or more transactions through the issuance of securities, which securities may be assigned ratings by the Rating Agencies.

"Senior Lender" has the meaning provided in the first paragraph of this Agreement.

"Senior Loan" has the meaning provided in the Recitals hereto.

"Senior Loan Agreement" has the meaning provided in the Recitals hereto.

"Senior Loan Cash Management Agreement" means any cash management agreement or agreements executed in connection with, or cash management provisions of, the Senior Loan Documents.

"Senior Loan Default Notice" has the meaning provided in Section 11(a) hereof.

"Senior Loan Documents" means the Senior Loan Agreement, the Senior Note and the Senior Mortgage, together with the instruments and documents set forth on Exhibit B hereto, as any of

the foregoing may be modified, amended, extended, supplemented, restated or replaced from time to time, subject to the limitations and agreements contained in this Agreement.

"Senior Loan Liabilities" shall mean, collectively, all of the indebtedness, liabilities and obligations of Borrower evidenced by the Senior Loan Documents and all amounts due or to become due pursuant to the Senior Loan Documents, including interest thereon and any other amounts payable in respect thereof or in connection therewith, including, without limitation, any late charges, default interest, prepayment fees or premiums, exit fees, advances and post-petition interest.

"Senior Loan Modification" has the meaning provided in Section 7(a) hereof.

"Senior Mortgage" has the meaning provided in the Recitals hereto.

"Senior Note" has the meaning provided in the Recitals hereto.

"Separate Collateral" means (i) the Equity Collateral, (ii) the accounts (and monies therein from time to time) established pursuant to the Mezzanine Cash Management Agreement, and (iii) any other collateral given as security for the Mezzanine Loan pursuant to the Mezzanine Loan Documents, in each case not directly constituting security for the Senior Loan.

["SPE Constituent Entity" means ________________ **[list any entity required to be a single purpose entity pursuant to the terms of the Senior Loan Documents]**]

"Third Party Agreement" has the meaning provided in Section 5(a) hereof.

"Third Party Obligor" has the meaning provided in Section 5(a) hereof.

"Transfer" means any assignment, pledge, conveyance, sale, transfer, mortgage, encumbrance, grant of a security interest, issuance of a participation interest, or other disposition, either directly or indirectly, by operation of law or otherwise.

(b) For all purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

(i) all capitalized terms defined in the recitals to this Agreement shall have the meanings ascribed thereto whenever used in this Agreement and the terms defined in this Agreement have the meanings assigned to them in this Agreement, and the use of any gender herein shall be deemed to include the other genders;

(ii) [terms not otherwise defined herein shall have the meaning assigned to them in the Senior Loan Agreement;]

(iii) all references in this Agreement to designated Sections, Subsections, Paragraphs, Articles, Exhibits, Schedules and other subdivisions or addenda without reference to a document are to the designated sections, subsections, paragraphs and articles and all other subdivisions of and exhibits, schedules and all other addenda to this Agreement, unless otherwise specified;

(iv) a reference to a Subsection without further reference to a Section is a reference to such Subsection as contained in the same Section in which the reference appears, and this rule shall apply to Paragraphs and other subdivisions;

(v) the terms "includes" or "including" shall mean without limitation by reason of enumeration;

(vi) the words “herein”, “hereof”, “hereunder” and other words of similar import refer to this Agreement as a whole and not to any particular provision;

(vii) the words “to Mezzanine Lender’s knowledge” or “to the knowledge of Mezzanine Lender” (or words of similar meaning) shall mean to the actual knowledge of officers of Mezzanine Lender with direct oversight responsibility for the Mezzanine Loan without independent investigation or inquiry and without any imputation whatsoever; and

(viii) the words “to Senior Lender’s knowledge” or “to the knowledge of Senior Lender” (or words of similar meaning) shall mean to the actual knowledge of officers of Senior Lender with direct oversight responsibility for the Senior Loan without independent investigation or inquiry and without any imputation whatsoever.

Section 2. Approval of Loans and Loan Documents.

(a) Mezzanine Lender hereby acknowledges that (i) it has received and reviewed and, subject to the terms and conditions of this Agreement, hereby consents to and approves of the making of the Senior Loan and, subject to the terms and provisions of this Agreement, all of the terms and provisions of the Senior Loan Documents, (ii) the execution, delivery and performance of the Senior Loan Documents will not constitute a default or an event which, with the giving of notice or the lapse of time, or both, would constitute a default under the Mezzanine Loan Documents, (iii) Senior Lender is under no obligation or duty to, nor has Senior Lender represented that it will, see to the application of the proceeds of the Senior Loan by Borrower or any other Person to whom Senior Lender disburses such proceeds, and (iv) any application or use of the proceeds of the Senior Loan for purposes other than those provided in the Senior Loan Documents shall not affect, impair or defeat the terms and provisions of this Agreement or the Senior Loan Documents.

(b) Senior Lender hereby acknowledges that (i) it has received and reviewed, and, subject to the terms and conditions of this Agreement, hereby consents to and approves of the making of the Mezzanine Loan and, subject to the terms and provisions of this Agreement, all of the terms and provisions of the Mezzanine Loan Documents, (ii) the execution, delivery and performance of the Mezzanine Loan Documents will not constitute a default or an event which, with the giving of notice or the lapse of time, or both, would constitute a default under the Senior Loan Documents, (iii) Mezzanine Lender is under no obligation or duty to, nor has Mezzanine Lender represented that it will, see to the application of the proceeds of the Mezzanine Loan by Mezzanine Borrower or any other Person to whom Mezzanine Lender disburses such proceeds and (iv) any application or use of the proceeds of the Mezzanine Loan for purposes other than those provided in the Mezzanine Loan Documents shall not affect, impair or defeat the terms and provisions of this Agreement or the Mezzanine Loan Documents. Senior Lender hereby acknowledges and agrees that any conditions precedent to Senior Lender’s consent to mezzanine financing as set forth in the Senior Loan Documents or any other agreements with the Borrower, as they apply to the Mezzanine Loan Documents or the making of the Mezzanine Loan, have been either satisfied or waived.

Section 3. Representations and Warranties.

(a) Mezzanine Lender hereby represents and warrants as follows:

(i) Exhibit C attached hereto and made a part hereof is a true, correct and complete listing of all of the Mezzanine Loan Documents as of the date hereof. To Mezzanine Lender’s knowledge, there currently exists no default or event which, with the giving of notice or the lapse of time, or both, would constitute a default under any of the Mezzanine Loan Documents.

(ii) Mezzanine Lender is the legal and beneficial owner of the entire Mezzanine Loan free and clear of any lien, security interest, option or other charge or

encumbrance, other than any lien or security interest granted to any Loan Pledgee (as hereinafter defined) as contemplated by the provisions of Section 15 hereof.

(iii) There are no conditions precedent to the effectiveness of this Agreement that have not been satisfied or waived.

(iv) Mezzanine Lender has, independently and without reliance upon Senior Lender and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement.

(v) Mezzanine Lender is duly organized and is validly existing under the laws of the jurisdiction under which it was organized with full power to execute, deliver, and perform this Agreement and consummate the transactions contemplated hereby.

(vi) All actions necessary to authorize the execution, delivery, and performance of this Agreement on behalf of Mezzanine Lender have been duly taken, and all such actions continue in full force and effect as of the date hereof.

(vii) Mezzanine Lender has duly executed and delivered this Agreement and this Agreement constitutes the legal, valid, and binding agreement of Mezzanine Lender enforceable against Mezzanine Lender in accordance with its terms subject to (x) applicable bankruptcy, reorganization, insolvency and moratorium laws, and (y) general principles of equity which may apply regardless of whether a proceeding is brought in law or in equity.

(viii) To Mezzanine Lender's knowledge, no consent of any other Person and no consent, license, approval, or authorization of, or exemption by, or registration or declaration or filing with, any governmental authority, bureau or agency is required in connection with the execution, delivery or performance by Mezzanine Lender of this Agreement or consummation by Mezzanine Lender of the transactions contemplated by this Agreement.

(ix) None of the execution, delivery and performance of this Agreement nor the consummation of the transactions contemplated by this Agreement will (v) violate or conflict with any provision of the organizational or governing documents of Mezzanine Lender, (w) to Mezzanine Lender's knowledge, violate, conflict with, or result in the breach or termination of, or otherwise give any other Person the right to terminate, or constitute (or with the giving of notice or lapse of time, or both, would constitute) a default under the terms of any contract, mortgage, lease, bond, indenture, agreement, or other instrument to which Mezzanine Lender is a party or to which any of its properties are subject, (x) to Mezzanine Lender's knowledge, result in the creation of any lien, charge, encumbrance, mortgage, lease, claim, security interest, or other right or interest upon the properties or assets of Mezzanine Lender pursuant to the terms of any such contract, mortgage, lease, bond, indenture, agreement, franchise, or other instrument (provided, however, that Mezzanine Lender shall have the right to grant a lien, charge, encumbrance, claim or security interest in the Mezzanine Loan or any portion thereof to a Loan Pledgee as contemplated by the provisions of Section 15 hereof), (y) violate any judgment, order, injunction, decree, or award of any court, arbitrator, administrative agency or governmental or regulatory body of which Mezzanine Lender has knowledge against, or binding upon, Mezzanine Lender or upon any of the securities, properties, assets, or business of Mezzanine Lender or (z) to Mezzanine Lender's knowledge, constitute a violation by Mezzanine Lender of any statute, law or regulation that is applicable to Mezzanine Lender.

(x) The Mezzanine Loan is not cross-defaulted with any loan other than the Senior Loan. The Premises do not secure any loan from Mezzanine Lender to Mezzanine Borrower or any other Affiliate of Borrower.

(b) Senior Lender hereby represents and warrants as follows:

(i) Exhibit B attached hereto and made a part hereof is a true, correct and complete listing of the Senior Loan Documents as of the date hereof. To Senior Lender's knowledge, there currently exists no default or event which, with the giving of notice or the lapse of time, or both, would constitute a default under any of the Senior Loan Documents.

(ii) Senior Lender is the legal and beneficial owner of the Senior Loan free and clear of any lien, security interest, option or other charge or encumbrance.

(iii) There are no conditions precedent to the effectiveness of this Agreement that have not been satisfied or waived.

(iv) Senior Lender has, independently and without reliance upon Mezzanine Lender and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement.

(v) Senior Lender is duly organized and is validly existing under the laws of the jurisdiction under which it was organized with full power to execute, deliver, and perform this Agreement and consummate the transactions contemplated hereby.

(vi) All actions necessary to authorize the execution, delivery, and performance of this Agreement on behalf of Senior Lender have been duly taken, and all such actions continue in full force and effect as of the date hereof.

(vii) Senior Lender has duly executed and delivered this Agreement and this Agreement constitutes the legal, valid, and binding agreement of Senior Lender enforceable against Senior Lender in accordance with its terms subject to (x) applicable bankruptcy, reorganization, insolvency and moratorium laws and (y) general principles of equity which may apply regardless of whether a proceeding is brought in law or in equity.

(viii) To Senior Lender's knowledge, no consent of any other Person and no consent, license, approval, or authorization of, or exemption by, or registration or declaration or filing with, any governmental authority, bureau or agency is required in connection with the execution, delivery or performance by Senior Lender of this Agreement or consummation by Senior Lender of the transactions contemplated by this Agreement.

(ix) None of the execution, delivery and performance of this Agreement nor the consummation of the transactions contemplated by this Agreement will (v) violate or conflict with any provision of the organizational or governing documents of Senior Lender, (w) to Senior Lender's knowledge, violate, conflict with, or result in the breach or termination of, or otherwise give any other Person the right to terminate, or constitute (or with the giving of notice or lapse of time, or both, would constitute) a default under the terms of any contract, mortgage, lease, bond, indenture, agreement, or other instrument to which Senior Lender is a party or to which any of its properties are subject, (x) to Senior Lender's knowledge, result in the creation of any lien, charge, encumbrance, mortgage, lease, claim, security interest, or other right or interest upon the properties or assets of Senior Lender pursuant to the terms of any such contract, mortgage, lease, bond, indenture, agreement, franchise or other instrument, (y) violate any judgment, order, injunction, decree or award of any court, arbitrator, administrative agency or governmental or regulatory body of which Senior Lender has knowledge against, or binding upon, Senior Lender or upon any of the securities, properties, assets, or business of Senior Lender or (z) to Senior Lender's knowledge, constitute a violation by Senior Lender of any statute, law or regulation that is applicable to Senior Lender.

(x) The Senior Loan is not cross-defaulted with any other loan. The Premises do not secure any other loan from Senior Lender to Borrower, Mezzanine Borrower or any other Affiliate of Borrower.

Section 4. Transfer of Mezzanine Loan or Senior Loan.

(a) Mezzanine Lender shall not Transfer more than 49% of its beneficial interest in the Mezzanine Loan unless either (i) a Rating Agency Confirmation has been given with respect to such Transfer, in which case the related transferee shall thereafter be deemed to be a "Qualified Transferee" for all purposes of this Agreement, or (ii) such Transfer is to a Qualified Transferee. Any such transferee must assume in writing the obligations of Mezzanine Lender hereunder and agree to be bound by the terms and provisions hereof. Such proposed transferee shall also remake each of the representations and warranties contained herein for the benefit of the Senior Lender.

(b) At least five (5) days prior to a transfer to a Qualified Transferee, the Mezzanine Lender shall provide to Senior Lender and, if any Certificates are outstanding, to the Rating Agencies, a certification that such transfer will be made in accordance with this Section 4, such certification to include the name and contact information of the Qualified Transferee.

(c) If more than one Person shall hold a direct interest in the Mezzanine Loan, the holder(s) of more than 50% of the principal amount of the Mezzanine Loan shall designate by written notice to Senior Lender one of such Persons (the "Directing Mezzanine Lender") to act on behalf of all such Persons holding an interest in the Mezzanine Loan. The Directing Mezzanine Lender shall have the sole right to receive any notices which are required to be given or which may be given to Mezzanine Lender pursuant to this Agreement and to exercise the rights and power given to Mezzanine Lender hereunder, including any approval rights of Mezzanine Lender; provided, that until the Directing Mezzanine Lender has been so designated, the last Person known to the Senior Lender to hold more than a 50% direct interest in the Mezzanine Loan shall be deemed to be the Directing Mezzanine Lender. Once the Directing Mezzanine Lender has been designated hereunder, Senior Lender shall be entitled to rely on such designation until it has received written notice from the holder(s) of more than 50% of the principal amount of the Mezzanine Loan of the designation of a different Person to act as the Directing Mezzanine Lender.

(d) Mezzanine Lender acknowledges that any Rating Agency Confirmation may be granted or denied by the Rating Agencies in their sole and absolute discretion and that such Rating Agencies may charge customary fees in connection with any such action.

(e) Senior Lender may, from time to time, in its sole discretion Transfer all or any of the Senior Loan or any interest therein, and notwithstanding any such Transfer or subsequent Transfer, the Senior Loan and the Senior Loan Documents shall be and remain a senior obligation in the respects set forth in this Agreement to the Mezzanine Loan and the Mezzanine Loan Documents in accordance with the terms and provisions of this Agreement.

Section 5. Foreclosure of Separate Collateral.

(a) Mezzanine Lender shall not exercise any rights it may have under the Pledge Agreement and the other Mezzanine Loan Documents or applicable law with respect to a foreclosure or other realization upon the Equity Collateral (including, without limitation, obtaining title to the Equity Collateral or selling or otherwise transferring the Equity Collateral) without a Rating Agency Confirmation unless (i) the transferee of title to the Equity Collateral is a Qualified Transferee, (ii) the Premises will be managed by a Qualified Manager promptly after the transfer of title to the Equity Collateral, and (iii) if not in place prior to the transfer of title to the Equity Collateral, hard cash management and adequate reserves for taxes, insurance, debt service, ground rents, capital repair and improvement expenses, tenant improvement expenses and leasing commissions and operating expenses will be implemented under the Senior Loan promptly after the transfer of title to the Equity Collateral; provided, that the implementation of such hard cash management and reserves would not cause a "significant modification"

of the Senior Loan, as such term is defined in Treasury Regulations Section 1.860G-2(b). Additionally, if a non-consolidation opinion was delivered in connection with the closing of the Senior Loan, the transferee of the Equity Collateral shall deliver a new non-consolidation opinion relating to the transferee acceptable to the Rating Agencies within ten (10) business days of the transfer of title to the Equity Collateral. The Mezzanine Lender shall provide notice of the transfer and an officer's certificate from an officer of Mezzanine Lender certifying that all conditions set forth in this Section 5(a) have been satisfied to Senior Lender and the Rating Agencies upon consummation of any transfer of the Equity Collateral pursuant to this Section 5(a). Senior Lender may request reasonable evidence that the foregoing requirements have been satisfied. In the event that such Transfer results in the removal of any guarantor, indemnitor, pledgor, or other obligor under the Senior Loan Documents (each, a "Third Party Obligor"), such transferee or an Affiliate thereof reasonably satisfactory to the Senior Lender shall: (A) execute and deliver to Senior Lender a guaranty, indemnity, pledge agreement or other agreement which provides for the obligations of such obligor (each, a "Third Party Agreement"), in each case, in a form substantially similar to the Third Party Agreement that it is replacing, pursuant to which the Third Party Obligor shall undertake the obligations set forth therein, and (B) if there are Certificates then outstanding, deliver (or cause to be delivered) to Senior Lender and each Rating Agency, an opinion of counsel that the substitution of the original Third Party Obligor and the original Third Party Agreement with a substitute Third Party Obligor and a substitute Third Party Agreement, would not cause a "significant modification" of the Senior Loan, as such term is defined in Treasury Regulations Section 1.860G-2(b).

(b) Nothing contained herein shall limit or restrict the right of Mezzanine Lender to exercise its rights and remedies, in law or in equity, or otherwise, in order to realize on any Separate Collateral that is not Equity Collateral.

(c) In the event Mezzanine Lender or any purchaser at a UCC sale obtains title to the Separate Collateral, Senior Lender hereby acknowledges and agrees that [**optional:** any transfer or assumption fee in the Senior Loan Agreement shall be waived as a condition to such transfer and] any such transfer shall not constitute a breach or default under the Senior Loan Documents, provided the conditions in Section 5(a) are met. Senior Lender also acknowledges and agrees that it will not impose any unreasonable fees or delays in connection with such Transfer.

Section 6. Notice of Rating Confirmation. Mezzanine Lender promptly shall notify Senior Lender of any intended action relating to the Mezzanine Loan which would require Rating Agency Confirmation pursuant to this Agreement and shall cooperate with Senior Lender in obtaining such confirmation. Senior Lender promptly shall notify Mezzanine Lender of any intended action relating to the Senior Loan which would require Rating Agency Confirmation pursuant to this Agreement and shall cooperate with Mezzanine Lender in obtaining such confirmation. Mezzanine Lender shall pay all fees and expenses of the Rating Agencies in connection with any request for any Rating Agency Confirmation pursuant to this Agreement.

Section 7. Modifications, Amendments, Etc.

(a) Senior Lender shall have the right without the consent of Mezzanine Lender in each instance to enter into any amendment, deferral, extension, modification, increase, renewal, replacement, consolidation, supplement or waiver (collectively, a "Senior Loan Modification") of the Senior Loan or the Senior Loan Documents provided that no such Senior Loan Modification shall (i) increase the interest rate or principal amount of the Senior Loan, (ii) increase in any other material respect any monetary obligations of Borrower under the Senior Loan Documents, (iii) extend or shorten the scheduled maturity date of the Senior Loan (except that Senior Lender may permit Borrower to exercise any extension options in accordance with the terms and provisions of the Senior Loan Documents), (iv) convert or exchange the Senior Loan into or for any other indebtedness or subordinate any of the Senior Loan to any indebtedness of Borrower, (v) amend or modify the provisions limiting transfers of interests in the Borrower or the Premises, (vi) modify or amend the terms and provisions of the Senior Loan Cash Management Agreement with respect to the manner, timing and method of the application of payments under the Senior Loan Documents, (vii) cross default the Senior Loan with any other indebtedness, (viii) consent to a higher strike price with respect to any new or extended interest rate cap agreement entered

into in connection with the extended term of the Senior Loan, (ix) obtain any contingent interest, additional interest or so-called "kicker" measured on the basis of the cash flow or appreciation of the Premises, (or other similar equity participation), or (x) extend the period during which voluntary prepayments are prohibited or during which prepayments require the payment of a prepayment fee or premium or yield maintenance charge or increase the amount of any such prepayment fee, premium or yield maintenance charge; provided, however, in no event shall Senior Lender be obligated to obtain Mezzanine Lender's consent to a Senior Loan Modification in the case of a work-out or other surrender, compromise, release, renewal, or indulgence relating to the Senior Loan during the existence of a Continuing Senior Loan Event of Default, except that under no conditions shall clause (i) (with respect to increase principal amount only), or clause (x) be modified without the written consent of Mezzanine Lender. In addition and notwithstanding the foregoing provisions of this Section 7, any amounts funded by the Senior Lender under the Senior Loan Documents as a result of (A) the making of any Protective Advances or other advances by the Senior Lender, or (B) interest accruals or accretions and any compounding thereof (including default interest), shall not be deemed to contravene this Section 7(a).

(b) Mezzanine Lender shall have the right without the consent of Senior Lender in each instance to enter into any amendment, deferral, extension, modification, increase, renewal, replacement, consolidation, supplement or waiver (collectively, a "Mezzanine Loan Modification") of the Mezzanine Loan or the Mezzanine Loan Documents provided that no such Mezzanine Loan Modification shall (i) increase the interest rate or principal amount of the Mezzanine Loan, (ii) increase in any other material respect any monetary obligations of Mezzanine Borrower under the Mezzanine Loan Documents, (iii) extend or shorten the scheduled maturity date of the Mezzanine Loan (except that Mezzanine Lender may permit Mezzanine Borrower to exercise any extension options in accordance with the terms and provisions of the Mezzanine Loan Documents), (iv) convert or exchange the Mezzanine Loan into or for any other indebtedness or subordinate any of the Mezzanine Loan to any indebtedness of Mezzanine Borrower, (v) provide for any additional contingent interest, additional interest or so-called "kicker" measured on the basis of the cash flow or appreciation of the Premises or (vi) cross default the Mezzanine Loan with any other indebtedness. Notwithstanding anything to the contrary contained herein, if an Event of Default exists under the Mezzanine Loan Documents, Mezzanine Lender shall be permitted to modify or amend the Mezzanine Loan Documents in connection with a work-out or other surrender, compromise, release, renewal or modification of the Mezzanine Loan except that under no conditions shall clause (i), with respect to increases in principal amounts only, clause (ii), clause (iii) (with respect to shortening the maturity only), clause (iv) or clause (v) be modified without the written consent of the Senior Lender. In addition and notwithstanding the foregoing provisions of this Section 7(b), any amounts funded by the Mezzanine Lender under the Mezzanine Loan Documents as a result of (A) the making of any Protective Advances or other advances by the Mezzanine Lender, or (B) interest accruals or accretions and any compounding thereof (including default interest), shall not be deemed to contravene this Section 7(b).

(c) Senior Lender shall deliver to Mezzanine Lender copies of any and all modifications, amendments, extensions, consolidations, spreaders, restatements, alterations, changes or revisions to any one or more of the Senior Loan Documents (including, without limitation, any side letters, waivers or consents entered into, executed or delivered by Senior Lender) within a reasonable time after any of such applicable instruments have been executed by Senior Lender.

(d) Mezzanine Lender shall deliver to Senior Lender copies of any and all modifications, amendments, extensions, consolidations, spreaders, restatements, alterations, changes or revisions to any one or more of the Mezzanine Loan Documents (including, without limitation, any side letters, waivers or consents entered into, executed or delivered by Mezzanine Lender) within a reasonable time after any of such applicable instruments have been executed by Mezzanine Lender.

Section 8. Subordination of Mezzanine Loan and Mezzanine Loan Documents.

(a) Mezzanine Lender hereby subordinates and makes junior the Mezzanine Loan, the Mezzanine Loan Documents and the liens and security interests created thereby, and all rights, remedies, terms and covenants contained therein to (i) the Senior Loan, (ii) the liens and security

interests created by the Senior Loan Documents and (iii) all of the terms, covenants, conditions, rights and remedies contained in the Senior Loan Documents, and no amendments or modifications to the Senior Loan Documents or waivers of any provisions thereof shall affect the subordination thereof as set forth in this Section 8(a). Mezzanine Lender hereby acknowledges and agrees that the Mezzanine Loan is not secured by a lien on the Premises or any of the other collateral securing the Senior Loan or any other assets of the Borrower.

(b) Every document and instrument included within the Mezzanine Loan Documents shall be subject and subordinate to each and every document and instrument included within the Senior Loan Documents and all extensions, modifications, consolidations, supplements, amendments, replacements and restatements of and/or to the Senior Loan Documents.

(c) This Agreement shall not be construed as subordinating and shall not subordinate or impair Mezzanine Lender's first lien priority right, estate and interest in and to the Separate Collateral and Senior Lender hereby acknowledges and agrees that Senior Lender does not have and shall not hereafter acquire, any lien on, or any other interest whatsoever in, the Separate Collateral, or any part thereof, and that the exercise of remedies and realization upon the Separate Collateral by Mezzanine Lender or a Loan Pledgee in accordance with the terms and provisions of this Agreement shall not in and of itself constitute a default or an Event of Default under the Senior Loan Documents.

Section 9. Payment Subordination.

(a) Except (i) as otherwise expressly provided in this Agreement and (ii) in connection with the exercise by Mezzanine Lender of its rights and remedies with respect to the Separate Collateral in accordance with the terms of this Agreement, all of Mezzanine Lender's rights to payment of the Mezzanine Loan and the obligations evidenced by the Mezzanine Loan Documents are hereby subordinated to all of Senior Lender's rights to payment by Borrower of the Senior Loan and the obligations secured by the Senior Loan Documents, and Mezzanine Lender shall not accept or receive payments (including, without limitation, whether in cash or other property and whether received directly, indirectly or by set-off, counterclaim or otherwise) from Borrower and/or from the Premises prior to the date that all obligations of Borrower to Senior Lender under the Senior Loan Documents are paid. If a Proceeding shall have occurred or a Continuing Senior Loan Event of Default shall have occurred and be continuing, Senior Lender shall be entitled to receive payment and performance in full of all amounts due or to become due to Senior Lender before Mezzanine Lender is entitled to receive any payment on account of the Mezzanine Loan. All payments or distributions upon or with respect to the Mezzanine Loan which are received by Mezzanine Lender contrary to the provisions of this Agreement shall be received and held in trust by the Mezzanine Lender for the benefit of Senior Lender and shall be paid over to Senior Lender in the same form as so received (with any necessary endorsement) to be applied (in the case of cash) to, or held as collateral (in the case of non-cash property or securities) for, the payment or performance of the Senior Loan in accordance with the terms of the Senior Loan Documents. Nothing contained herein shall prohibit the Mezzanine Lender from making Protective Advances (and adding the amount thereof to the principal balance of the Mezzanine Loan) notwithstanding the existence of a default under the Senior Loan at such time.

(b) Notwithstanding anything to the contrary contained in this Agreement, including, without limitation, Section 9(a), provided that no Event of Default shall then exist under the Senior Loan Documents, Mezzanine Lender may accept payments of any amounts due and payable from time to time which Mezzanine Borrower is obligated to pay Mezzanine Lender in accordance with the terms and conditions of the Mezzanine Loan Documents and Mezzanine Lender shall have no obligation to pay over to Senior Lender any such amounts.

(c) Mezzanine Lender may take any Equity Collateral Enforcement Action which is permitted under Section 5 hereof; provided, however, that (i) Mezzanine Lender shall, prior to commencing any Equity Collateral Enforcement Action, give the Senior Lender written notice of the default which would permit Mezzanine Lender to commence such Equity Collateral Enforcement Action and (ii) Mezzanine Lender shall provide Senior Lender with copies of any and all material notices,

pleadings, agreements, motions and briefs served upon, delivered to or with any party to any Equity Collateral Enforcement Action and otherwise keep Senior Lender reasonably apprised as to the status of any Equity Collateral Enforcement Action.

(d) In the event of a casualty to the buildings or improvements constructed on any portion of the Premises or a condemnation or taking under a power of eminent domain of all or any portion of the Premises, Senior Lender shall have a first and prior interest in and to any payments, awards, proceeds, distributions, or consideration arising from any such event (the "Award"). If the amount of the Award is in excess of all amounts owed to Senior Lender under the Senior Loan Documents, however, and either the Senior Loan has been paid in full or Borrower is entitled to a remittance of same under the Senior Loan Documents other than to restore the Premises, such excess Award or portion to be so remitted to Borrower shall, to the extent permitted in the Senior Loan Documents, be paid to or at the direction of Mezzanine Lender, unless other Persons have claimed the right to such awards or proceeds, in which case Senior Lender shall only be required to provide notice to Mezzanine Lender of such excess Award and of any other claims thereto. In the event of any competing claims for any such excess Award, Senior Lender shall continue to hold such excess Award until Senior Lender receives an agreement signed by all Persons making a claim to the excess Award or a final order of a court of competent jurisdiction directing Senior Lender as to how and to which Person(s) the excess Award is to be distributed. Notwithstanding the foregoing, in the event of a casualty or condemnation, Senior Lender shall release the Award from any such event to the Borrower if and to the extent required by the terms and conditions of the Senior Loan Documents in order to repair and restore the Premises in accordance with the terms and provisions of the Senior Loan Documents. Any portion of the Award made available to the Borrower for the repair or restoration of the Premises shall not be subject to attachment by Mezzanine Lender.

Section 10. Rights of Subrogation; Bankruptcy.

(a) Each of Mezzanine Lender and Senior Lender hereby waives any requirement for marshaling of assets thereby in connection with any foreclosure of any security interest or any other realization upon collateral in respect of the Senior Loan Documents or the Mezzanine Loan Documents, as applicable, or any exercise of any rights of set-off or otherwise. Each of Mezzanine Lender and Senior Lender assumes all responsibility for keeping itself informed as to the condition (financial or otherwise) of Borrower, Mezzanine Borrower, the condition of the Premises and all other collateral and other circumstances and, except for notices expressly required by this Agreement, neither Senior Lender nor Mezzanine Lender shall have any duty whatsoever to obtain, advise or deliver information or documents to the other relative to such condition, business, assets and/or operations. Mezzanine Lender agrees that Senior Lender owes no fiduciary duty to Mezzanine Lender in connection with the administration of the Senior Loan and the Senior Loan Documents and Mezzanine Lender agrees not to assert any such claim. Senior Lender agrees that Mezzanine Lender owes no fiduciary duty to Senior Lender in connection with the administration of the Mezzanine Loan and the Mezzanine Loan Documents and Senior Lender agrees not to assert any such claim.

(b) No payment or distribution to Senior Lender pursuant to the provisions of this Agreement and no Protective Advance by Mezzanine Lender shall entitle Mezzanine Lender to exercise any right of subrogation in respect thereof prior to the payment in full of the Senior Loan Liabilities, and Mezzanine Lender agrees that, except with respect to the enforcement of its remedies under the Mezzanine Loan Documents permitted hereunder, prior to the satisfaction of all Senior Loan Liabilities it shall not acquire, by subrogation or otherwise, any lien, estate, right or other interest in any portion of the Premises or any other collateral now securing the Senior Loan or the proceeds therefrom that is or may be prior to, or of equal priority to, any of the Senior Loan Documents or the liens, rights, estates and interests created thereby.

(c) Subject to Section 30 of this Agreement, the provisions of this Agreement shall be applicable both before and after the commencement, whether voluntary or involuntary, of any case, proceeding or other action against Borrower [or any SPE Constituent Entity] under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief of debtors (a

"Proceeding"). For as long as the Senior Loan shall remain outstanding, Mezzanine Lender shall not, and shall not solicit any person or entity to, and shall not direct or cause Mezzanine Borrower to direct or cause either the Borrower or any entity which controls Borrower (the "Borrower Group") to: (i) commence any Proceeding; (ii) institute proceedings to have Borrower [or any SPE Constituent Entity] adjudicated a bankrupt or insolvent; (iii) consent to, or acquiesce in, the institution of bankruptcy or insolvency proceedings against Borrower [or any SPE Constituent Entity]; (iv) file a petition or consent to the filing of a petition seeking reorganization, arrangement, adjustment, winding-up, dissolution, composition, liquidation or other relief by or on behalf of Borrower [or any SPE Constituent Entity]; (v) seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for Borrower [or any SPE Constituent Entity], the Premises (or any portion thereof) or any other collateral securing the Senior Loan (or any portion thereof); (vi) make an assignment for the benefit of any creditor of Borrower [or any SPE Constituent Entity]; (vii) seek to consolidate the Premises or any other assets of the Borrower [or any SPE Constituent Entity] with the assets of the Mezzanine Borrower or any member of the Borrower Group in any proceeding relating to bankruptcy, insolvency, reorganization or relief of debtors; or (viii) take any action in furtherance of any of the foregoing.

(d) If Mezzanine Lender is deemed to be a creditor of Borrower or any SPE Constituent Entity in any Proceeding (i) Mezzanine Lender hereby agrees that it shall not make any election, give any consent, commence any action or file any motion, claim, obligation, notice or application or take any other action in any Proceeding by or against the Borrower [or any SPE Constituent Entity] without the prior consent of Senior Lender, except to the extent necessary to preserve or realize upon Mezzanine Lender's interest in the Equity Collateral; provided, however, that any such filing shall not be as a creditor of the Borrower, (ii) Senior Lender may vote in any such Proceeding any and all claims of Mezzanine Lender, and Mezzanine Lender hereby appoints the Senior Lender as its agent, and grants to the Senior Lender an irrevocable power of attorney coupled with an interest, and its proxy, for the purpose of exercising any and all rights and taking any and all actions available to the Mezzanine Lender in connection with any case by or against the Borrower [or any SPE Constituent Entity] in any Proceeding, including without limitation, the right to file and/or prosecute any claims, to vote to accept or reject a plan, to make any election under Section 1111(b) of the Bankruptcy Code; provided, however, that with respect to any proposed plan of reorganization in respect of which creditors are voting, Senior Lender may vote on behalf of Mezzanine Lender only if the proposed plan would result in Senior Lender being "impaired" (as such term is defined in the United States Bankruptcy Code) and (iii) Mezzanine Lender shall not challenge the validity or amount of any claim submitted in such Proceeding by Senior Lender in good faith or any valuations of the Premises or other Senior Loan collateral submitted by Senior Lender in good faith, in such Proceeding or take any other action in such Proceeding, which is adverse to Senior Lender's enforcement of its claim or receipt of adequate protection (as that term is defined in the Bankruptcy Code).

Section 11. Rights of Cure.

(a) Prior to Senior Lender commencing any Enforcement Action under the Senior Loan Documents, Senior Lender shall provide written notice of the default which would permit the Senior Lender to commence such Enforcement Action to Mezzanine Lender and any Loan Pledgee entitled to notice thereof pursuant to Section 15 of this Agreement, whether or not Senior Lender is obligated to give notice thereof to Borrower (each, a "Senior Loan Default Notice") and shall permit Mezzanine Lender an opportunity to cure such default in accordance with the provisions of this Section 11(a). If the default is a monetary default relating to a liquidated sum of money, Mezzanine Lender shall have until five (5) Business Days after the later of (i) the giving by Senior Lender of the Senior Loan Default Notice and (ii) the expiration of Borrower's cure provision, if any, (a "Monetary Cure Period") to cure such monetary default; provided, however, in the event it elects to cure any such monetary default, Mezzanine Lender shall (x) defend and hold harmless Senior Lender for all cost, expenses, losses, liabilities, obligations, damages, penalties, costs, and disbursements imposed on, incurred by or asserted against Senior Lender due to or arising from such Monetary Cure Period and (y) without duplication of the foregoing, reimburse the Senior Lender for any interest charged by Senior Lender on any required (pursuant to applicable pooling and servicing agreement) advances for monthly payments of principal and/or interest on the Senior Loan and/or on any Protective Advances. [**Optional:** Mezzanine Lender

shall not be required, in order to effect a cure hereunder (other than the cure by Mezzanine Lender of a default in the payment of the Senior Loan in full on the maturity date thereof or the reimbursement of interest on advances for monthly payment of principal and/or interest and/or on any Protective Advances, as aforesaid), to pay any interest calculated at the default rate under the Senior Loan Documents to the extent the same is in excess of the rate of interest which would have been payable by Borrower in the absence of such default (and irrespective of any cure of such default by Mezzanine Lender pursuant to the provisions of this Agreement), and no interest shall accrue at the default rate as against Mezzanine Lender for such period.] Mezzanine Lender shall not have the right to cure as hereinabove set forth with respect to monthly scheduled debt service payments on the Senior Loan for a period of more than [four] consecutive months unless Mezzanine Lender has commenced and is continuing to diligently pursue its rights against the Separate Collateral. If the default is of a non-monetary nature, Mezzanine Lender shall have the same period of time as the Borrower under the Loan Documents to cure such non-monetary default; provided, however, if such non-monetary default is susceptible of cure but cannot reasonably be cured within such period and if curative action was promptly commenced and is being continuously and diligently pursued by Mezzanine Lender, Mezzanine Lender shall be given an additional period of time as is reasonably necessary for Mezzanine Lender in the exercise of due diligence to cure such non-monetary default for so long as (i) Mezzanine Lender makes or causes to be made timely payment of Borrower's regularly scheduled monthly principal and/or interest payments under the Senior Loan and any other amounts due under the Senior Loan Documents, (ii) such additional period of time does not exceed thirty (30) days, unless such non-monetary default is of a nature that can not be cured within such thirty (30) days, in which case, Mezzanine Lender shall have such additional time as is reasonably necessary to cure such non-monetary default, (iii) such default is not caused by a bankruptcy, insolvency or assignment for the benefit of creditors of Borrower and (iv) during such non-monetary cure period, there is no material impairment to the value, use or operation of the Premises. Any additional cure period granted to the Mezzanine Lender hereunder shall automatically terminate upon the bankruptcy (or similar insolvency) of the Borrower.

(b) To the extent that any Qualified Transferee acquires the Equity Collateral in accordance with the provisions and conditions of this Agreement, such Qualified Transferee shall acquire the same subject to the Senior Loan and the terms, conditions and provisions of the Senior Loan Documents for the balance of the term thereof, which shall not be accelerated by Senior Lender solely due to such acquisition and shall remain in full force and effect; provided, however, that (i) such Qualified Transferee shall have caused Borrower to reaffirm in writing, subject to such exculpatory provisions as shall be set forth in the Senior Loan Documents, all of the terms, conditions and provisions of the Senior Loan Documents on Borrower's part to be performed and (ii) all defaults under the Senior Loan which remain uncured as of the date of such acquisition have been cured by such Qualified Transferee or waived by Senior Lender except for defaults that are not susceptible of being cured by such Qualified Transferee; provided, that such defaults which are not susceptible of being cured do not materially impair the value, use or operation of the Premises. [**Optional:** Notwithstanding any contrary or inconsistent provision of this Agreement, the Senior Loan Documents or the Mezzanine Loan Documents, no acquisition or other fee or similar charge shall be due in connection with such Qualified Transferee's acquisition of any interest in Borrower or the Premises as the result of a Equity Collateral Enforcement Action or assignment in lieu of foreclosure or other negotiated settlement in lieu of any of the foregoing.]

(c) So long as no Event of Default shall have occurred and be continuing under the Senior Loan Documents, all funds held and applied pursuant to the Senior Loan Cash Management Agreement, shall continue to be applied pursuant thereto and shall not be applied by Senior Lender to prepay outstanding principal balance of the Senior Loan.

Section 12. No Actions; Restrictive Provisions. Senior Lender consents to Mezzanine Lender's right, pursuant to the Mezzanine Loan Documents, under certain circumstances, to cause the termination of the Property Manager. In the event both Mezzanine Lender and Senior Lender shall have such rights at any time, and Senior Lender shall fail to exercise such rights, Mezzanine Lender may exercise such rights, provided such exercise may be superseded by any subsequent exercise of such rights by Senior Lender pursuant to the Senior Loan Documents. Upon the occurrence of any event which would entitle Mezzanine Lender to cause the termination of the Property Manager pursuant to the

Mezzanine Loan Documents, Mezzanine Lender shall have the right to select, or cause the selection, of a replacement property manager (including any asset manager) or leasing agent for the Premises, which replacement manager, asset manager and/or leasing agent shall either (a) be subject to Senior Lender's reasonable approval and, if any Certificates are then outstanding, be subject to a Rating Agency Confirmation or (b) be a Qualified Manager. Notwithstanding anything in this Section 12 to the contrary, if an Event of Default under the Senior Loan then exists or any other event shall have occurred pursuant to which Senior Lender has the right to select any replacement manager, asset manager and/or leasing agent pursuant to the Senior Loan Documents, Senior Lender shall have the sole right to select any replacement manager, asset manager and/or leasing agent, whether or not a new manager or agent was retained by Mezzanine Lender.

Section 13. Right to Purchase Senior Loan.

(a) If the Senior Loan has been accelerated, any Enforcement Action has been commenced and is continuing under the Senior Loan Documents or the Senior Loan is a "specially serviced mortgage loan" under the applicable pooling and servicing agreement (each of the foregoing, a "Purchase Option Event"), upon ten (10) Business Days prior written notice to Senior Lender (the "Purchase Notice"), Mezzanine Lender shall have the right to purchase, in whole but not in part, the Senior Loan for a price equal to the outstanding principal balance thereof, together with all accrued interest and other amounts due thereon (including, without limitation, any late charges, default interest, exit fees, advances and post-petition interest), any Protective Advances made by Senior Lender and any interest charged by Senior Lender on any advances for monthly payments of principal and/or interest on the Senior Loan and/or on any Protective Advances), including all costs and expenses (including legal fees and expenses) actually incurred by Senior Lender in enforcing the terms of the Loan Documents (the "Loan Purchase Price"). Concurrently with payment to the Senior Lender of the Loan Purchase Price, Senior Lender shall deliver or cause to be delivered Mezzanine Lender all Senior Loan Documents held by or on behalf of Senior Lender and will execute in favor of Mezzanine Lender or its designee assignment documentation, in form and substance reasonably acceptable to Mezzanine Lender, at the sole cost and expense of Mezzanine Lender to assign the Senior Loan and its rights under the Senior Loan Documents (without recourse, representations or warranties, except for representations as to the outstanding balance of the Senior Loan and as to Senior Lender's not having assigned or encumbered its rights in the Loan). The right of Mezzanine Lender to purchase the Senior Loan shall automatically terminate (i) upon a transfer of the Premises by foreclosure sale, sale by power of sale or delivery of a deed in lieu of foreclosure or (ii) if a Purchase Option Event ceases to exist.

(b) Mezzanine Lender covenants not to enter any agreement with the Borrower or any Affiliate thereof to purchase the Senior Loan pursuant to subsection (a) above or in connection with any refinancing of the Senior Loan in any manner designed to avoid or circumvent the provisions of the Senior Loan Documents which require the payment of a prepayment fee or yield maintenance charge in connection with a prepayment of the Senior Loan by the Borrower.

Section 14. Additional Understandings. For as long as the Mezzanine Loan remains outstanding:

(a) Notices of Transfer; Consent. Senior Lender promptly shall notify Mezzanine Lender if Borrower seeks or requests a release of the lien of the Senior Loan or seeks or requests Senior Lender's consent to, or take any action in connection with or in furtherance of, a sale or transfer of all or any material portion of the Premises, the granting of a further mortgage, deed of trust or similar encumbrance against the Premises or a prepayment or refinancing of the Senior Loan. In the event of a request by the Borrower for Senior Lender's consent to either (i) the sale or transfer of all or any material portion of the Premises or (ii) the granting of a further mortgage, deed of trust or similar encumbrance against the Premises, Senior Lender shall, if Senior Lender has the right to consent, obtain the prior written consent of Mezzanine Lender prior to Senior Lender's granting of its consent or agreement thereto.

(b) Annual Budget. The Mezzanine Lender shall have the right to approve the annual operating budget of Borrower in accordance with the terms of the Mezzanine Loan Documents. In the event the Mezzanine Lender objects to any such proposed budget, the Mezzanine Lender shall advise the Senior Lender of such objections, along with its suggestions for changes, within ten (10) days after its receipt of such budget in accordance with the Mezzanine Loan Documents. Senior Lender agrees to consult with the Mezzanine Lender with respect to such objections and suggestions but such consultation shall not be binding on Senior Lender. The Mezzanine Lender shall consent to any changes in the budget reasonably requested by the Senior Lender.

[The following alternative is acceptable for Senior Loans with hard cash management and adequate reserves for taxes, insurance, debt service, ground rents, capital repairs and improvement expenses, tenant improvement expenses and leasing commissions, and operating expenses:

(b) Annual Budget. The Mezzanine Lender shall have the right to approve the annual operating budget of Borrower in accordance with the terms of the Mezzanine Loan Documents. Notwithstanding anything contained herein, in the Senior Loan Documents or in the Mezzanine Loan Documents, the Mezzanine Lender may require Borrower to submit the annual budget to the Mezzanine Lender for approval prior to any submission to the Senior Lender. Upon Mezzanine Lender's approval, the Mezzanine Lender shall submit the approved budget to the Senior Lender for its approval. The Mezzanine Lender shall consent to any changes in the budget reasonably requested by the Senior Lender. In the event that the approval of the Mezzanine Lender is not obtained on a timely basis, the then current existing operating budget shall remain in effect with an increase in any non-discretionary expense item to either (i) the prior budgeted expense amount with a 5% increase or (ii) the actual expense incurred as evidenced by the applicable bill or invoice.]

Section 15. Financing of Mezzanine Loan. Notwithstanding any other provision hereof, Senior Lender consents to Mezzanine Lender's pledge (a "Pledge") of the Mezzanine Loan and of the Separate Collateral to any entity which has extended a credit facility to Mezzanine Lender that is a Qualified Transferee or a financial institution whose long-term unsecured debt is rated at least "A" (or the equivalent) or better by each Rating Agency (a "Loan Pledgee"), on the terms and conditions set forth in this Section 15; provided that a Loan Pledgee which is not a Qualified Transferee may not take title to the Equity Collateral without a Rating Agency Confirmation. Upon written notice by Mezzanine Lender to Senior Lender that the Pledge has been effected, Senior Lender agrees to acknowledge receipt of such notice and thereafter agrees: (a) to give Loan Pledgee written notice of any default by Mezzanine Lender under this Agreement of which default Senior Lender has actual knowledge; (b) to allow Loan Pledgee a period of ten (10) days (in respect of a monetary default) and a period of thirty (30) days (in respect of a non-monetary default) to cure a default by Mezzanine Lender in respect of its obligations to Senior Lender hereunder, but Loan Pledgee shall not be obligated to cure any such default; (c) that no amendment, modification, waiver or termination of this Agreement shall be effective against Loan Pledgee without the written consent of Loan Pledgee, which consent shall not be unreasonably withheld; (d) that Senior Lender shall give to Loan Pledgee copies of any Senior Loan Default Notice simultaneously with the giving of same to the Mezzanine Lender and accept any cure thereof by Loan Pledgee made in accordance with the provisions of Section 11 of this Agreement as if such cure were made by the Mezzanine Lender; and (e) that, upon written notice (a "Redirection Notice") to Senior Lender by Loan Pledgee that Mezzanine Lender is in default, beyond applicable cure periods, under Mezzanine Lender's obligations to Loan Pledgee pursuant to the applicable credit agreement between Mezzanine Lender and Loan Pledgee (which notice need not be joined in or confirmed by Mezzanine Lender), and until such Redirection Notice is withdrawn or rescinded by Loan Pledgee, Senior Lender shall remit to Loan Pledgee and not to Mezzanine Lender, any payments that Senior Lender would otherwise be obligated to pay to Mezzanine Lender from time to time pursuant to this Agreement, any Mezzanine Loan Document or any other agreement between Senior Lender and Mezzanine Lender that relates to the Senior Loan. Mezzanine Lender hereby unconditionally and absolutely releases Senior Lender from any liability to Mezzanine Lender on account of Senior Lender's compliance with any Redirection Notice believed by Senior Lender to have been delivered by Loan Pledgee. Loan Pledgee shall be permitted to fully exercise its rights and remedies against Mezzanine Lender, and realize on any and all collateral granted by Mezzanine Lender to Loan Pledgee (and accept an assignment in lieu of

foreclosure as to such collateral), in accordance with applicable law. In such event, the Senior Lender shall recognize Loan Pledgee (and any transferee which is also a Qualified Transferee at any foreclosure or similar sale held by Loan Pledgee or any transfer in lieu of such foreclosure), and its successors and assigns, as the successor to Mezzanine Lender's rights, remedies and obligations under this Agreement and the Mezzanine Loan Documents and any such Loan Pledgee or Qualified Transferee shall assume in the writing the obligations of the Mezzanine Lender hereunder accruing from and after such Transfer and agrees to be bound by the terms and provisions hereof. The rights of Loan Pledgee under this Section 15 shall remain effective unless and until Loan Pledgee shall have notified the Senior Lender in writing that its interest in the Mezzanine Loan has terminated.

Section 16. Intentionally Omitted.

Section 17. Obligations Hereunder Not Affected.

(a) All rights, interests, agreements and obligations of Senior Lender and Mezzanine Lender under this Agreement shall remain in full force and effect irrespective of:

(i) any lack of validity or enforceability of the Senior Loan Documents or the Mezzanine Loan Documents or any other agreement or instrument relating thereto;

(ii) any taking, exchange, release or non-perfection of any other collateral, or any taking, release or amendment or waiver of or consent to or departure from any guaranty, for all or any portion of the Senior Loan or the Mezzanine Loan;

(iii) any manner of application of collateral, or proceeds thereof, to all or any portion of the Senior Loan or the Mezzanine Loan, or any manner of sale or other disposition of any collateral for all or any portion of the Senior Loan or the Mezzanine Loan or any other assets of Borrower or Mezzanine Borrower or any other Affiliates of Borrower;

(iv) any change, restructuring or termination of the corporate structure or existence of Borrower or Mezzanine Borrower or any other Affiliates of Borrower; or

(v) any other circumstance which might otherwise constitute a defense available to, or a discharge of, Borrower, Mezzanine Borrower or a subordinated creditor or a Senior Lender subject to the terms hereof.

(b) This Agreement shall continue to be effective or be reinstated, as the case may be, if at any time any payment of all or any portion of the Senior Loan is rescinded or must otherwise be returned by Senior Lender or Mezzanine Lender upon the insolvency, bankruptcy or reorganization of Borrower or otherwise, all as though such payment had not been made.

Section 18. Notices. All notices, demands, requests, consents, approvals or other communications required, permitted, or desired to be given hereunder shall be in writing sent by facsimile (with answer back acknowledged) or by registered or certified mail, postage prepaid, return receipt requested, or delivered by hand or reputable overnight courier addressed to the party to be so notified at its address hereinafter set forth, or to such other address as such party may hereafter specify in accordance with the provisions of this Section 18. Any such notice, demand, request, consent, approval or other communication shall be deemed to have been received: (a) three (3) Business Days after the date mailed, (b) on the date of sending by facsimile if sent during business hours on a Business Day (otherwise on the next Business Day), (c) on the date of delivery by hand if delivered during business hours on a Business Day (otherwise on the next Business Day) and (d) on the next Business Day if sent by an overnight commercial courier, in each case addressed to the parties as follows:

To Mezzanine Lender:

____
____
____
Attention: __________________
Telecopy: (___) _______-______

With a copy to:

____
____
____
Attention: __________________
Telecopy: (___) _______-______

To Senior Lender:

____
____
____
Attention: __________________
Telecopy: (___) _______-______

With a copy to:

____
____
____
Attention: __________________
Telecopy: (___) _______-______

[To Loan Pledgee:

____
____
____
Attention: __________________
Telecopy: (___) _______-______]

Section 19. Estoppel.

(a) Mezzanine Lender shall, within ten (10) days following a request from Senior Lender, provide Senior Lender with a written statement setting forth the then current outstanding principal balance of the Mezzanine Loan, the aggregate accrued and unpaid interest under the Mezzanine Loan, and stating whether to Mezzanine Lender's knowledge any default or Event of Default exists under the Mezzanine Loan.

(b) Senior Lender shall, within ten (10) days following a request from Mezzanine Lender, provide Mezzanine Lender with a written statement setting forth the then current outstanding principal balance of the Senior Loan, the aggregate accrued and unpaid interest under the Senior Loan, and stating whether to Senior Lender's knowledge any default or Event of Default exists under the Senior Loan.

Section 20. Further Assurances. So long as all or any portion of the Senior Loan and the Mezzanine Loan remains unpaid and the Senior Mortgage encumbers the Premises, Mezzanine Lender

and Senior Lender will each execute, acknowledge and deliver in recordable form and upon demand of the other, any other instruments or agreements reasonably required in order to carry out the provisions of this Agreement or to effectuate the intent and purposes hereof.

Section 21. No Third Party Beneficiaries; No Modification. The parties hereto do not intend the benefits of this Agreement to inure to Borrower, Mezzanine Borrower or any other Person. This Agreement may not be changed or terminated orally, but only by an agreement in writing signed by the party against whom enforcement of any change is sought. If any Certificates are outstanding, this Agreement shall not be amended unless a Rating Agency Confirmation has been obtained with respect to such amendment.

Section 22. Successors and Assigns. This Agreement shall bind all successors and permitted assigns of Mezzanine Lender and Senior Lender and shall inure to the benefit of all successors and permitted assigns of Senior Lender and Mezzanine Lender.

Section 23. Counterpart Originals. This Agreement may be executed in counterpart originals, each of which shall constitute an original, and all of which together shall constitute one and the same agreement.

Section 24. Legal Construction. In all respects, including, without limitation, matters of construction and performance of this Agreement and the obligations arising hereunder, this Agreement shall be governed by, and construed in accordance with, the internal laws of the State of [New York] applicable to agreements intended to be wholly performed within the State of [New York].

Section 25. No Waiver; Remedies. No failure on the part of the Senior Lender to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

Section 26. No Joint Venture. Nothing provided herein is intended to create a joint venture, partnership, tenancy-in-common or joint tenancy relationship between or among any of the parties hereto.

Section 27. Captions. The captions in this Agreement are inserted only as a matter of convenience and for reference, and are not and shall not be deemed to be a part hereof.

Section 28. Conflicts. In the event of any conflict, ambiguity or inconsistency between the terms and conditions of this Agreement and the terms and conditions of any of the Senior Loan Documents or the Mezzanine Loan Documents, the terms and conditions of this Agreement shall control.

Section 29. No Release. Nothing herein contained shall operate to release Borrower from (a) its obligation to keep and perform all of the terms, conditions, obligations, covenants and agreements contained in the Senior Loan Documents or (b) any liability of Borrower under the Senior Loan Documents or to release Mezzanine Borrower from (x) its obligation to keep and perform all of the terms, conditions, obligations, covenants and agreements contained in the Mezzanine Loan Documents or (y) any liability of Mezzanine Borrower under the Mezzanine Loan Documents.

Section 30. Continuing Agreement. This Agreement is a continuing agreement and shall remain in full force and effect until the earliest of (a) payment in full of the Senior Loan, (b) transfer of the Premises by foreclosure of the Senior Mortgage or the exercise of the power of sale contained therein or by deed-in-lieu of foreclosure, (c) transfer of title to the Mezzanine Lender of the Separate Collateral or (d) payment in full of the Mezzanine Loan; provided, however, that any rights or remedies of either party hereto arising out of any breach of any provision hereof occurring prior to such date of termination shall survive such termination.

Section 31. Severability. In the event that any provision of this Agreement or the application hereof to any party hereto shall, to any extent, be invalid or unenforceable under any applicable statute, regulation, or rule of law, then such provision shall be deemed inoperative to the extent that it may conflict therewith and shall be deemed modified to conform to such statute, regulation or rule of law, and the remainder of this Agreement and the application of any such invalid or unenforceable provisions to parties, jurisdictions or circumstances other than to whom or to which it is held invalid or unenforceable, shall not be affected thereby nor shall same affect the validity or enforceability of any other provision of this Agreement.

Section 32. Expenses.

(a) To the extent not paid by Borrower or out of or from any collateral securing the Senior Loan which is realized by Senior Lender, Mezzanine Lender agrees upon demand to pay to Senior Lender the amount of any and all reasonable expenses, including, without limitation, the reasonable fees and expenses of its counsel and of any experts or agents, which Senior Lender may incur in connection with the (i) exercise or enforcement of any of the rights of Senior Lender against Mezzanine Lender hereunder to the extent that Senior Lender is the prevailing party in any dispute with respect thereto or (ii) failure by Mezzanine Lender to perform or observe any of the provisions hereof.

(b) To the extent not paid by Mezzanine Borrower out of or from any collateral securing the Mezzanine Loan which is realized by Mezzanine Lender, Senior Lender agrees upon demand to pay to Mezzanine Lender the amount of any and all reasonable expenses, including, without limitation, the reasonable fees and expenses of its counsel and of any experts or agents, which Mezzanine Lender may incur in connection with the (i) exercise or enforcement of any of the rights of Mezzanine Lender against Senior Lender hereunder to the extent that Mezzanine Lender is the prevailing party in any dispute with respect thereto or (ii) failure by Senior Lender to perform or observe any of the provisions hereof.

Section 33. Injunction. Senior Lender and Mezzanine Lender each acknowledge (and waive any defense based on a claim) that monetary damages are not an adequate remedy to redress a breach by the other hereunder and that a breach by either Senior Lender or Mezzanine Lender hereunder would cause irreparable harm to the other. Accordingly, Senior Lender and Mezzanine Lender agree that upon a breach of this Agreement by the other, the remedies of injunction, declaratory judgment and specific performance shall be available to such non-breaching party.

Section 34. Mutual Disclaimer.

(a) Each of Senior Lender and Mezzanine Lender are sophisticated lenders and/or investors in real estate and their respective decision to enter into the Senior Loan and the Mezzanine Loan is based upon their own independent expert evaluation of the terms, covenants, conditions and provisions of, respectively, the Senior Loan Documents and the Mezzanine Loan Documents and such other matters, materials and market conditions and criteria which each of Senior Lender and Mezzanine Lender deem relevant. Each of Senior Lender and Mezzanine Lender has not relied in entering into this Agreement, and respectively, the Senior Loan, the Senior Loan Documents, the Mezzanine Loan or the Mezzanine Loan Documents, upon any oral or written information, representation, warranty or covenant from the other, or any of the other's representatives, employees, Affiliates or agents other than the representations and warranties of the other contained herein. Each of Senior Lender and Mezzanine Lender further acknowledges that no employee, agent or representative of the other has been authorized to make, and that each of Senior Lender and Mezzanine Lender have not relied upon, any statements, representations, warranties or covenants other than those specifically contained in this Agreement. Without limiting the foregoing, each of Senior Lender and Mezzanine Lender acknowledges that the other has made no representations or warranties as to the Senior Loan or the Mezzanine Loan or the Premises (including, without limitation, the cash flow of the Premises, the value, marketability, condition or future performance thereof, the existence, status, adequacy or sufficiency of the leases, the tenancies or occupancies of the Premises, or the sufficiency of the cash flow of the Premises, to pay all amounts which may become due from time to time pursuant to the Senior Loan or the Mezzanine Loan).

(b) Each of Senior Lender and Mezzanine Lender acknowledges that the Senior Loan and the Mezzanine Loan Documents are distinct, separate transactions and loans, separate and apart from each other.

[NO FURTHER TEXT ON THIS PAGE]

IN WITNESS WHEREOF, Senior Lender and Mezzanine Lender have executed this Agreement as of the date and year first set forth above.

SENIOR LENDER:

________________________________,
a ________________________________

By: ________________________
Name:
Title:

MEZZANINE LENDER:

________________________________,
a ________________________________

By: ________________________
Name:
Title:

EXHIBIT A

[Attach Legal Description of Premises]

EXHIBIT B

Senior Loan Documents

EXHIBIT C

Mezzanine Loan Documents

EXHIBIT D

Permitted Fund Managers

[To be reveiwed on a case by case basis]

Appendix VII
The Credit Impact of Secured Creditor Environmental Insurance on CMBS Transactions

(Editor's note: This article by Shawn Harrington was originally published on May 1, 2000 and is available on RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com, and at www.standardandpoors.com.)

Standard & Poor's has reviewed and evaluated the credit impact of secured creditor environmental insurance policies on CMBS transactions for the past seven years. The purpose of this article is to outline Standard & Poor's perspective on the credit impact resulting from the use of secured creditor environmental insurance instead of, and in addition to, traditional environmental due diligence.

A secured creditor environmental insurance policy must cover the outstanding principal balance of the loan plus accrued interest, and other outstanding expenses, in order for Standard & Poor's to assess any credit impact. The policy would be triggered by the combination of a default under the loan agreement and the discovery of on-site pollution. The policy should then pay the trust the outstanding balance of the loan, any interest that has been advanced, and other expenses- thereby limiting potential losses from an environmentally contaminated property within a Standard & Poor's rated CMBS transaction. The secured creditor insurance does not replace either the borrower's obligations to provide an environmental indemnification, or the lender's environmental representations and warranties in the underlying securitization documentation.

Historically, the impact of these policies on the ratings of CMBS transactions has been viewed by Standard & Poor's as credit neutral, at best. The effect of a policy that meets all Standard & Poor's requirements can be to reduce some of the environmental risk associated with a CMBS pool. The credit impact of such a policy offered instead of traditional due diligence would be neutral because it would mitigate the credit negative implications. These credit negative implications typically would affect the below-investment-grade tranches of a transaction by increasing subordination levels. Policies offered in addition to the required due diligence are viewed as credit neutral to modestly positive as the level of risk mitigated is considered minimal by Standard & Poor's. The limited credit impact of secured creditor environmental policies is a result of the lack of any payment record on these policies, the possibility of claims rejection and disputes, and the limited number of alternative providers in the event of a downgrade of the existing provider. Standard & Poor's also may not view environmental insurance as a complete mitigant for identified environmental problems, and will continue to require the traditional due diligence process for loans over US$20 million, or which make up more than 5% or more of the pool balance, in any transaction.

The Advantages and Disadvantages of Traditional Due Diligence

An environmental site assessment prepared in accordance with the American Society for Testing and Materials' (ASTM) Standard Practice E 1527, commonly known as an ASTM "Phase I", is generally regarded as the industry standard for basic traditional environmental due diligence. Standard & Poor's environmental due diligence requirements known as Standard & Poor's Plus Protocol are based on the ASTM Phase I standard with certain supplemental information provided for each property in a CMBS transaction. The purpose of environmental due diligence is to identify the presence of hazardous substances on, under, from, or around real property that could pose a risk of liability or impair the value of property. Both investors and rating agencies expect originators to provide a Phase I environmental site assessment for each property securing a loan that will be included in a commercial mortgage securitization. If the Phase I report suggests that further investigation is needed either to rule out the possibility that an environmental problem exists or to quantify the extent of the problem, the originators have also been required to supply a Phase II study.

One of the most significant advantages of the traditional due diligence process is that it can identify properties with environmental risks and potentially the level of that risk at the origination stage of the mortgage process. The information provided by a Phase I report can allow for a natural screening process. The environmental hazards that are uncovered are either mitigated, or the loan secured by a contaminated property is not selected for inclusion into a securitization. The mitgants to environmental hazards uncovered

during the due diligence process have included establishing operations and maintenance plans, performing remediation prior to securitization, reserving the estimated costs of remediation, and/or providing indemnification from an identified responsible party who is a Standard & Poor's rated entity.

Clearly, Phase I reports do not cover all environmental concerns for commercial real estate. There are a variety of environmental hazards, such as the presence of hazardous substances in soils and ground water, that may go undetected during a Phase I site assessment and database search. Also the Phase I environmental consultants can make mistakes. If such a failure in the traditional due diligence process occurs, the only available recovery may be against the environmental consultant who performed the work, and then generally only if the work was performed negligently. The emergence of an environmental problem that went unnoticed during the origination process may ultimately result in the default of an otherwise performing loan.

The secured creditor environmental loan balance policy can cover all, or a portion of, the loans in a pool. These policies are triggered concurrently by both a default under the loan and a pollution condition discovered during the term of the loan. A default is defined as the failure of the borrower to make scheduled debt service payments as well as all other monetary and nonmonetary defaults not cured within their grace periods. A pollution condition refers to environmental conditions exceeding levels allowed by applicable environmental laws. The pollution condition is normally discovered by the servicer after the loan defaults and a Phase I report is ordered.

If pollution is found, the servicer notifies, within the minimum notice period, the insurer of the default and the pollution condition according to the notice provisions of the policy. The insurer pays the outstanding loan balance and other related obligations. After the claim is paid and the loan is paid off in full from the perspective of the CMBS transaction, the trustee would then assign the mortgage loan to the insurer. The insurance provider would then presumably foreclose on the property and recover its claims payment from the value of the property, with any value recovered above the paid claim used to reinstate the aggregated policy limit. Once the claim is paid by the insurer, the trust should be made whole from a credit perspective. However, it should be noted that from an investor's yield perspective, these claims payments will result in the transaction experiencing unanticipated prepayments that will affect the investor's yield.

The language required for these policies must be very clear and precisely outline timing issues and procedural and documentational requirements that will be imposed upon the special servicer. The pooling and servicing agreement must assure that these policy requirements are followed.

Environmental Insurance as a Low-Cost Substitute and Other Benefits

Secured creditor environmental insurance policies are being used by issuers as a lower-cost substitute for, and as a supplement to, traditional environmental due diligence. In the case of seasoned loans, environmental insurance is often used to compensate for the inability to update environmental due diligence. Environmental insurance can provide the protection by a rated entity for unknown or undisclosed environmental conditions, as well as for conditions disclosed by a Phase I assessment, as long as those disclosures do not represent policy coverage exceptions. Environmental insurance also provides coverage against new environmental conditions that may appear during the loan term, although the quantification of this advantage is difficult, if not impossible, to calculate at the inception of any CMBS transaction.

Substituting environmental insurance policies for traditional environmental due diligence for relatively small balance loans in a CMBS transaction can provide significant cost savings to the issuer by providing risk mitigation as traditional due diligence is not typically performed for small balance loans.

It should be specifically noted that the use of these secured creditor environmental insurance policies does not replace the borrower's obligations to provide environmental indemnification, the lender's environmental representations and warranties in the underlying securitization documentation, nor the traditional mitgants mentioned when a known significant environmental condition exists. Instead, secured creditor environmental insurance may be accepted for use within Standard & Poor's rated CMBS transactions instead of traditional environmental due diligence only to mitigate the environmental risks created by the lack of due diligence for those properties. The lack of environmental due diligence is viewed by Standard & Poor's as creating an increase in credit risk to the underlying collateral pool, and has historically negatively impacted the ratings of a transaction by increasing subordination levels, typically at the noninvestment-grade tranches. This type of insurance can limit the negative impact resulting from the lack of due diligence.

As a result, Standard & Poor's will accept a secured creditor insurance policy which meets this criteria in lieu of a Phase I environmental site assessment for mortgage loans which do not exceed the lessor of $20 million or 5% of the pool balance.

The most significant disadvantage in using environmental insurance as a substitute for traditional due diligence is the loss of the adverse selection process that naturally occurs as a result of the use of traditional due diligence. The issuer would typically not originate the loan on a property where pollution conditions were discovered and could not be mitigated. The limited due diligence process undertaken by most insurers may not focus on significant issues that would have been identified during the traditional due diligence process. Although the due diligence may vary by provider, the limited process generally involves an environmental database review for each property, a review of the information provided in a questionnaire completed by the borrower, and, if available, outdated environmental reports.

The process of removing loans secured by environmentally impacted collateral properties that normally occurs through the use of Phase I reports will not exist. Therefore, there is an increased likelihood of loans secured by properties with environmental conditions being included to a greater extent in CMBS transactions with environmental insurance policies where due diligence was not performed. The other significant negative aspect of these policies is that they are relatively new and there is no claims paying history to evaluate whether these policies will perform as contemplated.

The Benefits of the Loan Balance Policy

Standard & Poor's has seen two types of secured creditor environmental insurance policies. The first is a policy providing loan balance coverage, and the second is a policy covering the lesser of loan balance or the costs of clean-up of the insured property. Both policies require borrower default and the existence of a pollution condition covered by the policy before a claim is paid. Standard & Poor's strongly favors the loan balance policy that will pay off the outstanding balance of the loan, plus accrued interest from the date of default, and related outstanding obligations, regardless of the cost of clean-up. In most situations the ease of administration associated with a loan balance policy versus a lesser of loan balance or clean-up cost policy is more beneficial to bondholder interests in a default situation. The lender/servicer is also never required to foreclose on the property in the loan balance policy. The lesser of loan balance and clean-up cost is viewed less favorably because of the uncertainty as to how the clean-up costs will be estimated and the timing of the clean-up process. If foreclosure by the lender/servicer is required in either policy, the insurance will not be viewed as a credit mitigant. Standard & Poor's expects both policies to include coverage for any third-party or governmental claims brought against the insured for bodily injury, property damage, or clean-up costs.

Requirements for Policy Provisions of a Loan Balance Policy

In an attempt to make the process of evaluating secured creditor loan balance environmental insurance policies more efficient, Standard & Poor's has included the following checklist of required provisions for both the declaration page and the insurance policy. Of course these policies are constantly evolving, and there may be new or additional issues that Standard & Poor's would consider important in its evaluation of these policies. It has also been Standard & Poor's experience that the existing policies use varying language to express the concepts detailed below. The actual language used often requires revision to more accurately reflect the expectations of the insured and Standard & Poor's. Accordingly the actual policy language should still be reviewed to ensure that the language clearly addresses the concepts noted below.

Table 1 Standard & Poor's Required Provisions for Declarations

Named and additional insured	Trustee, along with the master servicer and special servicer as additional insured along with any replacement trustee and servicer
Policy period	Up to the longest loan maturity of any loan in the pool including all servicer extensions plus five additional years
Deductible	None or escrow 100% of any deductible upon closing of the securitization
Policy premium	Paid in full at policy inception for the full term of the policy

Table 2 Standard & Poor's Required Provisions for Secured Creditor Loan Balance Policy	
Coverage triggers	Two events in combination 1) a default under the loan agreement and 2) a pollution condition typically defined as pollutants in concentrations which exceed levels allowed by applicable environmental laws
Foreclosure	There should be no requirement that there be a foreclosure in order to recover the loan balance
Policy termination	Only for nonpayment of the premium which must be prepaid upfront
Notice and claims provisions	A minimum of 30 days
Coverage exclusions	As a general rule, lead-based paint (LBP) and asbestos (ACM) are excluded, however, traditional due diligence must then be performed
Limits of coverage: aggregate limit	In the aggregate, a minimum of 30% to 50% of the aggregated loan balances in the overall pool dependent upon property type, use, tenant mix, and geographic location. These limits assume a diverse pool contain similarly sized loans
Limits of coverage: each loss limit	125% of the outstanding principal balance of the largest loan in the pool
Assignability	Freely assignable to successor named insured and additional insured successors
Subrogation	Only apply after the trust recoups any additional costs which are not recovered through the insurance
Rating of the insurer	Standard & Poor's rating of 'AA' or higher

The Reasons Behind the Requirements

Named Insured
The Trustee must be named as insured on any policy along with the master and special servicer as additional insured. To address the possibility of replacement trustees or servicers, the policy should automatically provide coverage to successor trustees and servicers. The trustee must receive any claims payments of principal to pay off bondholders and of interest to compensate the servicer for advancing payments.

Policy Period
Standard & Poor's requires the policy period to extend until the longest maturity of any loan in the pool including any servicer extensions, plus five additional years. This policy term extending five years beyond the longest maturity date plus extensions should mitigate the possibility of refinance risk on any loan where an environmental condition is discovered upon loan maturity or during a servicer approved extension period.

Deductible
There cannot be any costs from these policies that could become an expense of the trust. For this reason, there can be no deductible on these policies or, if there are deductibles, the entire amount must be escrowed upfront.

Coverage Triggers
The triggers for these policies are the combination of a default under the loan agreement and the discovery of a pollution condition on the property securing that loan. In addition to the failure of the borrower to make scheduled debt service payments, the definition of a default under the loan agreement should also include both monetary and nonmonetary defaults that are not cured within the applicable grace periods. The definition of a pollution condition should address adverse environmental conditions where concentrations exceed levels allowed under applicable environmental laws.

Foreclosure
The policy provisions must not contain any requirement of foreclosure to realize on a claim. The special servicer is typically forbidden under the servicing standard to obtain title or possession of a mortgage

property if the trust could be considered an owner under CERCLA or any other applicable law.

Policy Termination
As Standard & Poor's relies on the policy to mitigate environmental risk over the life of the CMBS transaction, the policy should only be cancelable by the insurer for nonpayment of the premium. The entire premium must be funded upfront to insure there is no possibility of termination. Coverage for claims arising from third parties should continue and not be terminated with respect to a property that is transferred out of the trust.

Notice and Claims Provision
The insured should have a minimum of 30 days to deliver notice to the insurer. The notice is given after a default as defined in the loan agreement and the insured has knowledge of a pollution condition. The language in the policy must be very clear as to the documentation required to file and recover a claim.

Coverage Exclusions
Most policies typically exclude lead-based paint (LBP), asbestos (ACM), and, in some cases, underground storage tanks (USTs). In addition some policies exclude prior known environmental conditions. Typically any environmental condition excluded from coverage must be covered by the traditional due diligence process and any cost of remediation escrowed. All conditions disclosed in due diligence materials provided to the insurer should be covered by the policy unless specifically excluded by endorsement. Prior known environmental conditions not covered by a policy must also be appropriately mitigated. These policies typically exclude conditions known to the insured and which are not disclosed by the insured at the time of application. This is acceptable as long as the condition known to the insured means the insured had actual knowledge of the condition, and provided that all information contained in available environmental reports is treated as disclosed for the purposes of this exclusion.

Limits of Coverage: Each Loss Limit
The loan limit coverage should be at a minimum the outstanding principal balance of the defaulted loan plus accrued interest, unreimbursed advances, interest and property protection expenses, and interest on advances from the date of the default. However, the loan loss limit should never be less than 125% of the outstanding balance of the largest loan in the pool.

Limits of Coverage: Aggregate Limit
The amount of total loss coverage for the CMBS transaction directly depends on the property composition of the pool. The greater percentage of property types with higher likelihood of the existence of an environmental condition, such as industrial properties, will increase the overall required coverage limit for the pool. The typical CMBS conduit transaction tranched to the 'AAA' level will require between 30% and 50% of the aggregated loan balances in aggregate coverage.

Traditional Due Diligence Continues For Large Loans
Standard & Poor's overall concerns about the use of environmental insurance in CMBS transactions will also limit use of insurance for loans over US$20 million, or larger than 5% of the pool balance, which will continue to be required to meet Standard & Poor's ASTM Plus due diligence requirements.

Subrogation
The insurer should not have rights of subrogation against a borrower while the borrower is still in possession of the property or the loan is still outstanding. Subrogation should only apply after the trust recoups any additional costs and expenses that are not recovered through the insurance. These subrogation requirements may be altered to limit the impact of subrogation on loans secured by multiple properties located in a single-action state.

Reinstatement
In the event that the insured does recover payments made via subrogation, the policy limits should be reinstated to the extent of the recovery.

Rating of the Insurer
The insurer must have a Standard & Poor's claims-paying ability rating of not less than one rating category below the highest rating outstanding on the rated securities. For a typical conduit transaction, a rating of 'AA' would be required. This rating dependent issue would require replacement of the insurer in the event of a downgrade of the current provider. Rating dependency is quite pivotal as there are an extremely limited number of firms currently providing this insurance product.

Pooling and Servicing Agreement (PSA)
The use of secured creditor environmental insurance in a CMBS transaction creates additional requirements for the servicers that must be clearly outlined in the PSA. The issues of both timely notice of a default and pollution condition and the requirement of the special servicer to obtain a current environmental assessment of the property securing the defaulted loan is crucial in ensuring the insurance policy coverage. This coverage is what effectively mitigates any potential environmental risk associated with the properties in the underlying collateral pool of any CMBS transaction covered only by environmental insurance policies. Specific language must obligate the servicer to comply with all the requisite provisions of an environmental policy necessary to ensure coverage.

Mortgage Loan Purchase Agreement
The mortgage loan purchase agreement must include a number of representations about the insurance purchased by the loan seller. Some of the more salient representations required are that the policy is in full force and effect, the entire premium has been paid upfront, the term of the policy is appropriate, and there are no deductibles. The loan seller must also represent that all appropriate information, including all information regarding all known environmental conditions, has been disclosed to the insurer upon the issuance of the policy.

Conclusion
The major concerns of secured creditor policies are the possibility of claims rejection and dispute, the lack of historical payment history on this type of insurance, and its limited use in the capital markets. Standard & Poor's is not aware of any claims on secured creditor policies on any rated CMBS transactions. Another major concern is the lack of replacement providers in the event of a downgrade of the current provider. This could result in a downgrade of the below-investment-grade certificates of a CMBS transaction with secured creditor insurance.

Secured creditor environmental insurance loan balance policies continue to beare currently being evaluated on a policy-specific and pool-specific basis to determine the extent to which the policy mitigates the environmental risk in the transaction. Nevertheless, Standard & Poor's will accept a secured creditor loan balance only insurance policy which meets this criteria in lieu of a Phase I environmental site assessment for a mortgage loan which does not exceed the lessor of $20 million or 5% of the pool balance in a pool transaction.

Appendix VIII
Large Loan Summary

PART I

Summary: A first mortgage loan in the amount of $__________ (the "Loan") from _________________________________ ("Lender") to __________ ("Borrower"), made pursuant to that certain Loan Agreement dated as of ____________, 200_ between Lender and Borrower. The Loan is evidenced by a promissory note (the "Note") and is secured, *inter alia*, by ______mortgages and deeds of trust (the "Deeds of Trust") encumbering _____ properties (the "Properties") owned in __________ by Borrower.

I. PARTIES

A. **Borrower:**

B. **Lender:** _________________________________, a ________ corporation

II. TERMS OF THE LOAN

A. **Amount of Loan:** $__________

1. **Future advances:**

2. **Cross-collateralization and cross default with other loans (excluding the Loan):**

B. **Interest Rate:** Identify the Rate

1. **Fixed:**

2. **Change in stated rate:**

3. **Payment in advance or arrears:**

4. **360-day year v. 365 year:**

5. **Default rate:**

C. **Term of Loan**

1. **Term:** The final maturity date of the Loan is ______________.

2. **Option to extend:**

3. **Option of Lender to call loan at earlier date:**

D. **Payments**:

E. **Prepayment**:

F. **Defeasance**:

a. Describe terms of defeasance including prerequisites for defeasance, the nature of opinions to be delivered and the type of defeasance collateral which may be acquired.

G. **Personal Liability**:

1. **Recourse v. Non-Recourse:**

2. **Guarantee:**

H. **Use of Funds**:

I. **Cash Management/Collection of Rents/Reserve Accounts**:

1. **Cash Management/Collection of Rents:**

a. Explain the lock box features of the loan, including, type of accounts, sweeping features and the party (i.e., Borrower, tenant or manager) that deposits into lock box account.

2. **Reserve Accounts:**

a. Describe types of accounts and the use of the deposits in such accounts.

J. **Eligible Account and Permitted Investments**:

1. **Definitions:** The loan documents contain the following definition of Eligible Accounts and Permitted Investments:

2. **Accounts which Must be Eligible Accounts:**

III. SECURITY

A. **Real Estate**.

B. **Security Agreement**.

C. **Additional Collateral**.

IV. LIEN PRIORITY

A. **Lien Priority**.

B. **Permitted Exceptions**.

1. Define.

2. The loan documents contain a representation that none of the "permitted exceptions" will materially and adversely affect the ability of the Borrower to pay in full the Loan, the use of the properties for the use currently being made thereof, the operation of the properties or the value of the properties.

C. **Trade Payables.** In how many days is the Borrower required to pay its trade payables? What is the cap on the amount of trade payables that the Borrower may have at any given point in time?

V. REPRESENTATIONS AND WARRANTIES.

1. **Survival after closing:**

2. **Identity of party making representations and warranties:**

3. **Consequence of breach of representation and warranty:**

4. **Identify representations which are typical in a commercial mortgage transaction but are missing:**

5. **Identify representations which are unique to the transaction (i.e., nursing home representations; ground lease representations)**

VI. INSURANCE

A. **Type and Amounts:**

a. **Physical Hazard:**

b. **Flood Insurance:**

c. **Earthquake:**

d. **Rental value or business interruption:**

e. **Broad Form Comprehensive General Liability insurance:**

f. **Boiler and Machinery:**

g. **Builder's Risk Insurance:**

h. **Worker's compensation:**

i. **Catch All:**

B. **Company and Rating Requirements:**

C. **Loss payee, mortgagee clause or endorsement:**

D. **<u>Casualty and Condemnation Proceeds</u>:**

1. **Insurance policies and condemnation proceeds assigned as part of collateral package:**

2. **Settlement of insurance claims and condemnation awards:**

3. **Use of proceeds upon a taking or casualty:**

<u>Insurance</u>: Identify circumstances in which Borrower is entitled to receive insurance proceeds and the mechanics of distribution of such proceeds. Identify circumstances in which the insurance proceeds are applied to the debt.

<u>Condemnation</u>: Identify circumstances Borrower is entitled to receive insurance proceeds and the mechanics of distribution of such proceeds. Identify circumstances in which the condemnation proceeds are applied to the debt.

4. **Borrower required to restore:**

VII. Loan Documents

A. **<u>Loan Documents</u>:**

VIII. PROVISIONS TO BE CONSIDERED IN LOAN DOCUMENTS.

A. **<u>Management; Termination of Manager</u>:**

1. **Terms of Management:**

2. **Collateral Assignment of the Management Agreement:**

3. **Termination of Manager/Requirements of Replacement Manager:**

4. **Identify Manager and whether it is related to the Borrower:**

B. **<u>Financial Covenants</u>:**

C. **<u>Transfer</u>:**

1. **Interest in Borrower:**

2. **Interest in Property:**

D. **<u>Events of Default and Grace Periods</u>:**

E. **<u>Legal Remedies</u>** -

F. **Legal Fees** - Is Borrower liable for legal fees in disputes and exercise of remedies?

G. **Governing Law**:

PART II

Summarize compliance of the Borrower with the special purpose entity requirements set forth in Section Four, Special Purpose Bankruptcy-Remote Entities.

PART III

Identify any provisions which would seem unusual in a loan of this kind.

PART IV

Is there preferred equity or mezzanine financing?

If so, please describe the terms of such equity/financing including, but not limited to, the holder of the equity/financing, the terms of such financing, the terms of any cash management and the any control rights held by the holder of the equity/financing.

PART V

Is the loan secured in whole or in part by the interest of a borrower as a lessee under a ground lease? ☐ Yes ☐ No

If yes, please complete the following:

Yes	No		
☐	☐	1.	Fee Encumbered. The mortgage loan is also secured by the related fee interest in the mortgaged property, and the fee interest is subject and subordinate of record to the mortgage, and the mortgage does not by its terms provide that it will be subordinated to the lien of any other mortgage or other lien upon such fee interest, and upon the occurrence of an event of default under the terms of the mortgage by the borrower, the mortgagee has the right to foreclose or otherwise exercise its rights with respect to the fee interest within a commercially reasonable time. ____________________ ____________________
☐	☐	2.	Recording. The ground lease or a memorandum thereof has been duly

Yes No

recorded, the ground lease permits the interest of the lessee thereunder to be encumbered by the related mortgage, and there has not been a material change in the terms of the ground lease since its recordation, with the exception of written instruments which are part of the related mortgaged file.

☐ ☐ 3. No Senior Liens. Except as indicated in the related title insurance policy or opinion of title, the ground lessee's interest in the ground lease is not subject to any liens or encumbrances superior to, or of equal priority with, the related mortgage, other than the related ground lessor's related fee interest.

____

____

☐ ☐ 4. Ground Lease Assignable. The borrower's interest in the ground lease is assignable to the trustee upon notice to, but without the consent of, the lessor thereunder (or, if any such consent is required, it has been obtained prior to the closing date) or, in the event that it is so assigned, it is further assignable by the trustee and its successors and assigns upon notice to, but without a need to obtain the consent of, such lessor.

____

____

☐ ☐ 5. Default. As of the closing date, the ground lease is in full force and effect and no default has occurred under the ground lease and there is no existing condition which, but for the passage of time or the giving of notice, would result in a default under the terms of the ground lease.

____

____

☐ ☐ 6. Notice. The ground lease requires the lessor thereunder to give notice of any default by the lessee to the mortgagee; or the ground lease, or an estoppel letter received by the mortgagee from the lessor further provides that notice of termination given under the ground lease is not effective against the mortgagee unless a copy of the notice has been delivered to the mortgagee in the manner described in such ground lease.

____

____

☐ ☐ 7. Cure. The mortgagee is permitted a reasonable opportunity (including, where necessary, sufficient time to gain possession of the interest of the lessee under the ground lease) to cure any default under the ground lease, which is curable after the receipt of notice of any default before the lessor thereunder may terminate the ground lease.

____

____

☐ ☐ 8. Term. The ground lease has a term which extends not less than 20 years (10 years if the loan (i) fully amortizes by its maturity date or (ii) has a maturity date by which the loan fully amortizes but has an anticipated repayment date on

which the borrower is expected and entitled to repay the loan to avoid an increase of the interest rate after the anticipated repayment date) beyond the maturity date of the related mortgage loan.

☐ ☐ 9. New Lease. The ground lease requires the lessor to enter into a new lease with the lender upon termination of the ground lease for any reason, including rejection of the ground lease in a bankruptcy proceeding, provided that the lender cures any defaults which are susceptible to being cured by the lender.

☐ ☐ 10. Insurance Proceeds. Under the terms of the ground lease and the related mortgage, taken together, any related insurance proceeds will be applied either to the repair or restoration of all or part of the related mortgaged property, with the mortgagee or a trustee appointed by it having the right to hold and disburse the proceeds as the repair or restoration progresses, or to the payment of the outstanding principal balance of the mortgage loan together with any accrued interest thereon.

☐ ☐ 11. Subleasing. Such ground lease does not impose restrictions on subletting that would be viewed as commercially unreasonable by a prudent commercial mortgage lender.

☐ ☐ 12. Amendments. Such ground lease provides that no amendments, changes, cancellations, alterations, surrender or modifications may be made to the ground lease without the consent of the mortgagee.

☐ ☐ 13. Transfer Notices. To the extent required by any loan documents, or the ground lease, or the ground lessor estoppel certificate, all notices of the transfer of the loan to the trustee for the benefit of the holders of the rated securities have been delivered or will be delivered contemporaneously with the closing of the securitized transaction.

☐ ☐ 14. Other Mortgages. The fee interest in the ground lease is not encumbered by a mortgage, and pursuant to the terms of the ground lease, cannot be encumbered by a mortgage.

Appendix IX
Standard & Poor's Questionnaires For Interest Rate Cap Agreements

1992 ISDA Form

An interest rate cap agreement is an agreement whereby one party agrees to make periodic payments to another party based on a notional amount in the event that certain interest indices (such as LIBOR or commercial paper rates) exceed a certain level. Risks associated with interest rate caps and other swaps typically fall on the first loss class and such risks include, among other things, insufficient swap payments, cap provider defaults, and insufficient collateral necessary to find a replacement cap provider.

In the event that a transaction makes use of a cap agreement, Standard & Poor's will need to review the risks and the terms of the cap agreement itself. The list below does not represent Standard & Poor's criteria but is an illustrative summary questionnaire which is useful in identifying issues and understanding the terms of the related interest rate cap. Standard & Poor's will review the summary questionnaire and those cap agreements, schedules, opinions and guarantees, proposed and evaluate whether the proposed cap agreements are sufficient for, and consistent with, the rating on the transactions.

For purposes of the attached summary/questionnaire, the following terms shall have the following meanings:

ISDA Agreements: collectively the Local Agreement and the Cross Border Agreement.

Confirmation: a document containing the economic terms of the specific cap transaction.

Cross Border Agreement: the 1992 ISDA Master Agreement (Multicurrency Cross Border).

Local Agreement: the 1992 ISDA Master Agreement (Local Currency - Single Jurisdiction).

Ratings Confirmation: written confirmation from Standard & Poor's that such event will not result in a downgrade, withdrawal or qualification of the then applicable ratings on the securities.

Schedule: this document amends and supplements the ISDA Agreements by revising, adding or deleting terms in the ISDA Agreements as agreed by the parties.

SUMMARY CHECKLIST/QUESTIONNAIRE

CAP PROVIDER RISK

Typically, in transactions using a cap agreement, the issuer is relying on payments from the cap provider to make required payments on the loan underlying the securities.

Yes	No		
		1.	Rating of the cap provider.
☐	☐	(a)	For most interest rate caps, the cap provider must have either (a) a long term rating of 'A+' or higher from Standard & Poor's or (b) if the long term rating is 'A' or lower by Standard & Poor's, a short term rating of 'A-1' from Standard & Poor's. If the cap provider is not rated, or has an inadequate rating, the cap provider's obligations may be guaranteed by an entity with a credit rating sufficient for Standard & Poor's. If applicable, Standard & Poor's should be provided with the guarantee to review for compliance with Standard & Poor's criteria (*see Guarantees*).
		2.	Downgrading of the cap provider.
			If the cap provider is downgraded below the above ratings by Standard & Poor's, the cap provider must:
☐	☐	(a)	within thirty (30) days of the downgrade, either: (i) find a replacement cap provider acceptable to Standard & Poor's with the requisite Standard & Poor's ratings or (ii) post collateral in an amount equal to the greater of: (x) the mark-to-market value of the cap, (y) the amount of the next payment that is due, or (z) one percent (1%) of the outstanding notional amount. The value of the cap must be calculated monthly and if necessary, additional collateral must be posted at such time. However, if the value of the cap fluctuates more than one percent (1%) of the notional amount, then both valuation and postings of additional collateral must be performed weekly. All collateral must be (i) invested in eligible investments (other than the debt of the cap provider) in the currency of the rated securities and invested with an eligible institution (other than the cap provider), (ii) segregated and pledged to the trustee for the benefit of the certificate holders under normal ISDA requirements with terms and conditions approved by the trustee and in the possession of the trustee, and (iii) deposited in an account in the name of the trustee. All costs associated with posting the collateral shall be borne by the cap provider. If funds do not mature before the next interest payment due on the rated securities, additional collateral may be required by Standard & Poor's. Cap provider shall continue to actively pursue efforts to have an acceptable replacement cap provider in place.
☐	☐	(b)	continue to perform its obligations until a replacement cap provider meeting the requirements set forth in (a) above have been satisfied.

☐ ☐ (c) pay all costs and expenses in connection with the replacement of the cap provider.

☐ ☐ (d) If the cap provider fails to replace the cap provider or post collateral specified herein, the borrower is required by the loan documents to obtain a new interest rate cap agreement in a form and with a cap provider subject to Ratings Confirmation.

CAP AGREEMENT FORM (MASTER AGREEMENT)

Yes No

☐ ☐ 1. Form. The ISDA Agreements subject to the 2000 Definitions are the applicable documents.

☐ ☐ 2. Execution. The ISDA Agreements, Confirmation and Schedule have been executed by all necessary parties.

CONDITIONS PRECEDENT

Yes No

☐ ☐ 1. Premium Paid. Confirm that borrower has paid the required premium to the cap provider on or before the closing date of the loan.

☐ ☐ 2. Other Conditions Precedent. Confirm that borrower has complied with any other conditions precedent as specified by the cap provider or set forth in the related documents on or before the closing date of the loan.

CAP AGREEMENT SCHEDULE

Yes No

☐ ☐ 1. Notice and Cure Periods. The Schedule deletes the grace and cure periods available to the cap provider under Section 5 of the ISDA Agreements.

If the response to this statement is "No", please see 1.(a) immediately following.

☐ ☐ (a) If the grace or cure periods under Section 5 of the ISDA Agreements have not been deleted: (i) any grace or cure periods remaining will expire in time to ensure the availability of cap payments by cap

Yes No

provider on a timely basis for distribution to the holders of the rated securities and (ii) if notice is required to trigger a cure period, a party, such as the servicer, must have an affirmative obligation to provide such notice of non-payment to the cap provider on the cap provider payment date.

This ensures that all funds will be available on a timely basis for distribution to the holders of the rated securities.

2. Events of Default. Events of default applicable to a borrower must be severely limited. In most cases, the only allowable defaults for a borrower are non-payment of the cap premium:

☐ ☐ (a) Upon payment of the cap premium by borrower, borrower cannot default. (Paragraph 4 of the May 1989 ISDA Addendum to Schedule to Interest Rate and Currency Exchange Agreement or similar language must be incorporated by reference.)

For example, the following is sample language for illustrative purposes:

Limitation on Events of Default. Notwithstanding the terms of Sections 5 and 6 of this Agreement, if at any time and so long as the borrower has satisfied in full all its payment obligations under Section 2(a)(i) of this Agreement and has at the time no future payment obligations, whether absolute or contingent, under such Section, then unless cap provider is required pursuant to appropriate proceedings to return to the borrower or otherwise returns to the borrower upon demand of the borrower any portion of any such payment, (a) the occurrence of an event described in Section 5(a) of this Agreement with respect to the borrower shall not constitute an Event of Default or Potential Event of Default with respect to the borrower as Defaulting Party and (b) cap provider shall be entitled to designate an Early Termination Date pursuant to Section 6 of this Agreement only as a result of the occurrence of a Termination Event set forth in Section 5(b)(i) of this Agreement with respect to the cap provider as the Affected Party.

Generally, the language should provide that notwithstanding the provisions of Section 5(a), none of the events of 5(a) shall constitute an event of default with respect to borrower.

Therefore, the Schedule to the ISDA Agreements removes the following events of default with respect to the borrower: Sections 5(a)(ii) - Breach of Agreement, 5(a)(iii) - Credit Support Default, 5(a)(iv) - Misrepresentation, 5(a)(v) - Default under Specified Transaction, 5(a)(vi) - Cross Default, 5(a)(vii) - Bankruptcy and 5(a)(viii) - Merger without Assumption.

Yes	No	
☐	☐	(b) All events of default set forth in Section 5 of the ISDA Agreements (other than cross default) apply to the cap provider and are not restricted by any amendments to the Schedule.
☐	☐	(c) To the extent the cap provider's obligations are guaranteed, all events of default set forth in Section 5 of the ISDA Agreements (other than cross default) apply to the guarantor.

3. Termination Events. The ISDA Agreements contain a number of events which give rights to one or both parties to bring about an early termination of the cap agreement. Generally, other than in the case of an illegality (Section 5(b)(i) of the ISDA Agreements), only the trustee should be permitted to bring about an early termination of a cap agreement:

Yes	No	
☐	☐	(a) Notwithstanding the provisions of Section 5(b), none of the events of Section 5(b) constitute a termination event with respect to the borrower.

Therefore, the Schedule to the ISDA Agreements removes the following termination events: Sections 5(b)(ii) - Tax Event, 5(b)(iii) - Tax Event Upon Merger and 5(b)(iv) - Credit Event Upon Merger. In addition, Section 5(b)(v) should be limited to item (d) below.

If the Schedule to the ISDA Agreements does not remove Sections 5(b)(ii) and/or 5(b)(iii), please see 3.(a)(i) immediately following.

Yes	No	
☐	☐	(i) If the Schedule retains the termination events in Sections 5(b)(ii) and 5(b)(iii), the following language is incorporated in the Schedule:

"If an event occurs that would otherwise give rise to a termination event under Sections 5(b)(ii) and/or 5(b)(iii) of the ISDA Agreements, cap provider must, at the time of such event, either (a) transfer the cap to a replacement cap provider acceptable to Standard & Poor's with the requisite Standard & Poor's ratings at cap provider's sole cost and expense, or (b) continue to perform its obligations under the cap agreement including, without limitation, the obligation to unconditionally "gross up" in the event that a withholding tax is imposed on payments being made by the cap provider."

Yes	No	
☐	☐	(b) The Schedule provides that the "Automatic Early Termination" provision of Section 6(a) is not applicable;

Yes	No

☐ ☐ (c) The Schedule provides that all payments under the agreement should be made without setoff or counterclaim (Section 6(e)).

☐ ☐ (d) The Schedule includes the failure of the cap provider to satisfy Standard & Poor's ratings requirements as the sole Additional Termination Event as defined in Section 5(b)(v) of the ISDA Agreements.

☐ ☐ 4. Governing Law. The cap transaction are governed by the laws of the state which governs the transaction documents.

☐ ☐ 5. Multibranch Party. The Schedule includes a representation from each party that it is not a multibranch party for purposes of the cap agreement.

6. Assignment by borrower and cap provider. Under Section 7 of the Master Agreement, neither party can assign its interest in the cap agreement without the prior written consent of the other party.

☐ ☐ (a) The Schedule amends the ISDA Agreements to permit the assignment by the borrower of all of the benefit and interest in the cap agreement to the trustee and in connection with such assignment:

☐ ☐ (1) The Schedule (or other document executed by the cap provider and borrower) requires that all directions to the cap provider will be from the trustee (or the servicer on its behalf) and the cap provider shall not recognize instructions or directions from the borrower.

☐ ☐ (2) The Schedule (or other document executed by the cap provider and borrower) requires that all payments by the cap provider be made to the trustee (or the servicer on its behalf) and not to the borrower (regardless of whether or not an event of default exists under the loan documents).

If the collateral assignment or pledge of the rate cap is not addressed in the Schedule but is contained in a separate document, Standard & Poor's will also typically review such documentation.

☐ ☐ (b) The Schedule only allows the release of the cap provider from cap provider's obligations under the cap agreement following an assignment where cap provider's obligations are assumed by an institution satisfying Standard & Poor's ratings requirements.

☐ ☐ 7. Amendments. The Schedule prohibits the parties from amending the cap

Yes No

agreement (including the ISDA Agreements, confirmation, schedule and collateral assignment of cap agreement) without Ratings Confirmation.

☐ ☐ 8. Netting. The Schedule amends the ISDA Agreements to preclude netting across different series from applying to vehicles that can issue multiple classes or series of securities and use the same master agreement.

☐ ☐ (a) The cap agreement for each class or series is written as a separate agreement.

☐ ☐ (b) The Schedule requires that Section 2(c)(ii) of the ISDA Agreements applies.

☐ ☐ 9. Costs and Expenses. The Schedule amends Section 11 of the ISDA Agreements to preclude payment by the borrower of any out-of-pocket expenses incurred by cap provider related to the enforcement and protection of cap provider's rights under the cap agreement or any credit support document.

☐ ☐ 10. Termination Payment. Market quotation and Second Method is the first alternative for payment measure with a provision for loss if market quotation is not available.

☐ ☐ 11. Bankruptcy Petition. The cap provider is prohibited from petitioning the borrower into bankruptcy, or joining in any petition to file the borrower into bankruptcy, for 365 days after all outstanding rated securities have been paid in full.

CROSS BORDER CAP AGREEMENTS

The Cross Border Agreement contains certain provisions requiring the cap provider to "gross up" for certain "indemnifiable taxes" which are a result of the nature of cross border transactions. Standard & Poor's may require additional provisions to be amended or deleted in the Schedule and the delivery of additional opinions in such circumstances. Such additional provisions may be required in order to ensure the payment of all amounts necessary to meet payment obligations on the rated securities. *(See also Cap Schedule Section 3(a) language covering termination events related to "indemnifiable taxes".)*

Yes No

1. Indemnifiable Tax.

☐ ☐ (a) The Schedule amends Section 2(d)(i)(4) of the Cross Border Agreement and requires the cap provider to agree to unconditionally

Yes	No		
			"gross up" in the event that a withholding tax is imposed on payments being made by the cap provider.
☐	☐	(b)	The Schedule amends the definition of "indemnifiable tax" in the Cross Border Agreement to cover any and all withholding tax.
☐	☐	(c)	The Schedule to the Cross Border Agreement (i) deletes the provision in Section 2(d)(i)(4) of the Cross Border Agreement allowing cap provider to be excused from having to "gross up" due to borrower's breach of a tax representation or failure to notify cap provider of a breach of a tax representation and (ii) the borrower makes no tax representations in the Schedule. If either of the above are not true, Standard and Poors' will need to review any tax representations made by the borrower and set forth on the Schedule.
☐	☐	(d)	The Schedule amends Section 2(d)(ii) of the Cross Border Agreement to delete any obligation by the borrower to make payments to the cap provider for any payments made by the cap provider without deduction for taxes (for which there is no obligation to gross up). However, there is no such amendment for any payment obligations of cap provider to borrower for such taxes.
☐	☐	(e)	The Schedule to the Cross Border Agreement amends Section 4(e) to delete any payment obligations by borrower to cap provider for any indemnification resulting from stamp registration or other documentary tax levied by borrower's taxing authority on the cap provider. In the event of any uncertainty as to whether such stamp duty or other documentary tax will be payable by borrower, Standard & Poor's may require a local tax opinion. (*See Opinions - Local Tax Opinions*)

CAP AGREEMENT CONFIRMATION

The Confirmation sets forth the method for calculation of payments, the notional amount upon which payment dates are calculated, the payment dates and other information.

Yes	No		
☐	☐	1.	Cap Purchaser. The cap purchaser is the borrower under the loan agreement.
☐	☐	2.	Notional Amount. The notional amount matches the loan amount.
☐	☐	3.	Effective Date. The effective date is prior to or on the closing or funding of the

Yes No

loan.

☐ ☐ 4. Termination Date. The termination date is no earlier than the maturity date of the loan.

☐ ☐ 5. Payment Date. Payments from the cap provider will be received by servicer prior to the dates on which the certificateholders are paid and match the payments dates under the transaction documents.

☐ ☐ (a) The definition of "business day" used in the cap agreement, the loan documents and the securitization documents match.

☐ ☐ 6. Cap Rate. The cap rate matches the interest rate in the transaction documents.

☐ ☐ 7. Calculation of Rate. The method of calculating the interest rate matches the method in the transaction documents. The note, the rated securities and the cap agreement have the same LIBOR interest rate, calculated in the same manner and the same interest accrual period.

The Confirmation typically lists the rate measurement (i.e. USD-LIBOR-BBA). Please confirm that the rate of measurement in the Confirmation (as such measurement is defined in the 2000 Definitions) matches the definition in the related transaction documents (i.e. the loan documents and the securitization documents). If there are any discrepancies in the rate measurement, such discrepancies should be corrected.

☐ ☐ 8. Day Count Fraction. The calculation of interest is identical to the transaction documents (actual/360, actual/365, 30/360).

OPINIONS

Standard & Poor's generally requests the following legal opinions for the cap provider and guarantor, as applicable, under the law of the jurisdiction of organization of the relevant entity and under the governing law of the cap agreement and guarantee, as applicable.

Yes	No		
☐	☐	1.	Enforceability Opinion. An enforceability opinion in connection with the cap agreement and guarantee has been delivered with respect to the cap provider and guarantor, as applicable, and opines that the cap agreement (including the ISDA Agreements, Confirmation and Schedule, together with any guarantees given in connection therewith) will, on execution, be legal, valid, binding and enforceable in accordance with its terms. The enforceability opinion is delivered by outside counsel.
☐	☐	2.	Pari Passu. A pari passu opinion has been delivered and contains an opinion that the payments due under the cap agreement or any guarantee rank at least pari passu with the unsecured and unsubordinated obligations of the cap provider or guarantor, as applicable.
☐	☐	3.	Choice of Law. A choice of law opinion has been delivered and contains an opinion that (a) the courts in the jurisdictions of the cap provider and guarantor, as applicable, would recognize and give effect to choice of law in the cap agreement and guarantee, as applicable, and (b) the choice of law is, prima facie, valid and binding under the law of such jurisdiction.
☐	☐	4.	Judgments. A recognition of claim opinion has been delivered and contains an opinion that the courts in the jurisdictions of the cap provider and guarantor, as applicable, would recognize and enforce as a valid judgment any final and conclusive civil judgment of a court of competent jurisdiction for monetary claims made under the cap agreement and guarantee, applicable. This opinion is only required if the cap provider is a foreign entity.
☐	☐	5.	Local Tax Opinion. A local tax opinion has been delivered and contains an opinion that no stamp, duty or other documentary tax will be payable by the borrower, except to the extent borrower is provided with funds sufficient for paying such a tax. This opinion is delivered in connection with Cross Border Agreements if there is uncertainty regarding payment of stamp, registration or other documentary tax levied by foreign taxing authorities.
☐	☐	6.	Withholding Tax Opinions. An opinion has been delivered with respect to payments in connection with withholding tax under the cap agreement and the guarantee, as applicable (including an opinion from borrower's counsel). These opinions may be waived if Standard & Poor's has previously received similar opinions under the same governing law in similar transactions.

GUARANTEES

<u>Yes</u> <u>No</u>

☐ ☐ 1. <u>Unconditional, Irrevocable and Continuing</u>. For transactions guaranteed by a parent to provide a required rating, the guarantee is unconditional, irrevocable, continuing and a guarantee of payment, not of collection, and satisfies Standard & Poor's other requirements for guarantees, including delivery of any required opinions.

In general, Standard & Poor's will need to review all guarantees for compliance with Standard & Poor's criteria.

2002 ISDA Form

An interest rate cap agreement is an agreement whereby one party agrees to make periodic payments to another party based on a notional amount in the event that certain interest indices (such as LIBOR or commercial paper rates) exceed a certain level. Risks associated with interest rate caps and other swaps typically fall on the first loss class and such risks include, among other things, insufficient swap payments, cap provider defaults, and insufficient collateral necessary to find a replacement cap provider.

In the event that a transaction makes use of a cap agreement, Standard & Poor's will need to review the risks and the terms of the cap agreement itself. The list below does not represent Standard & Poor's criteria but is an illustrative summary questionnaire which is useful in identifying issues and understanding the terms of the related interest rate cap. Standard & Poor's will review the summary questionnaire and those cap agreements, schedules, opinions and guarantees, proposed and evaluate whether the proposed cap agreements are sufficient for, and consistent with, the rating on the transactions.

For purposes of the attached summary/questionnaire, the following terms shall have the following meanings:

ISDA Agreements: collectively the Local Agreement and the Cross Border Agreement.

Confirmation: a document containing the economic terms of the specific cap transaction.

Cross Border Agreement: the 2002 ISDA Master Agreement (Multicurrency Cross Border).

Local Agreement: the 2002 ISDA Master Agreement (Local Currency - Single Jurisdiction).

Ratings Confirmation: written confirmation from Standard & Poor's that such event will not result in a downgrade, withdrawal or qualification of the then applicable ratings on the securities.

Schedule: this document amends and supplements the ISDA Agreements by revising, adding or deleting terms in the ISDA Agreements as agreed by the parties.

SUMMARY CHECKLIST/QUESTIONNAIRE

CAP PROVIDER RISK

Typically, in transactions using a cap agreement, the issuer is relying on payments from the cap provider to make required payments on the loan underlying the securities.

Yes No

1. Rating of the cap provider.

☐ ☐ (a) For most interest rate caps, the cap provider must have either (a) a long term rating of 'A+' or higher from Standard & Poor's or (b) if the long term rating is 'A' or lower by Standard & Poor's, a short term rating of 'A-1' from Standard & Poor's. If the cap provider is not rated, or has an inadequate rating, the cap provider's obligations may be guaranteed by an entity with a credit rating sufficient for Standard & Poor's. If applicable, Standard & Poor's should be provided with the guarantee to review for compliance with Standard & Poor's criteria. (*See Guarantees.*)

2. Downgrading of the cap provider.

If the cap provider is downgraded below the above ratings by Standard & Poor's, the cap provider must:

☐ ☐ (a) within thirty (30) days of the downgrade, either: (i) find a replacement cap provider acceptable to Standard & Poor's with the requisite Standard & Poor's ratings or (ii) post collateral in an amount equal to the greater of: (x) the mark-to-market value of the cap, (y) the amount of the next payment that is due, or (z) one percent (1%) of the outstanding notional amount. The value of the cap must be calculated monthly and if necessary, additional collateral must be posted at such time. However, if the value of the cap fluctuates more than one percent (1%) of the notional amount, then both valuation and postings of additional collateral must be performed weekly. All collateral must be (i) invested in eligible investments (other than the debt of the cap provider) in the currency of the rated securities and invested with an eligible institution (other than the cap provider), (ii) segregated and pledged to the trustee for the benefit of the certificate holders under normal ISDA requirements with terms and conditions approved by the trustee and in the possession of the trustee, and (iii) deposited in an account in the name of the trustee. All costs associated with posting

Yes No

the collateral shall be borne by the cap provider. If funds do not mature before the next interest payment due on the rated securities, additional collateral may be required by Standard & Poor's. Cap provider shall continue to actively pursue efforts to have an acceptable replacement cap provider in place.

☐ ☐ (b) continue to perform its obligations until a replacement cap provider meeting the requirements set forth in (a) above have been satisfied.

☐ ☐ (c) pay all costs and expenses in connection with the replacement of the cap provider.

☐ ☐ (d) If the cap provider fails to replace the cap provider or post collateral specified herein, the borrower is required by the loan documents to obtain a new interest rate cap agreement in a form and with a cap provider subject to Ratings Confirmation.

CAP AGREEMENT FORM (MASTER AGREEMENT)

Yes No

☐ ☐ 1. Form. The ISDA Agreements subject to the 2000 Definitions are the applicable documents.

☐ ☐ 2. Execution. The ISDA Agreements, Confirmation and Schedule have been executed by all necessary parties.

CONDITIONS PRECEDENT

Yes No

☐ ☐ 1. Premium Paid. Confirm that borrower has paid the required premium to the cap provider on or before the closing date of the loan.

☐ ☐ 2. Other Conditions Precedent. Confirm that borrower has complied with any other conditions precedent as specified by the cap provider or set forth in the related documents on or before the closing date of the loan.

CAP AGREEMENT SCHEDULE

Yes No

☐ ☐ 1. Notice and Cure Periods. The Schedule deletes the grace and cure periods available to the cap provider under Section 5 of the ISDA Agreements.

If the response to this statement is "No", please see 1.(a) immediately following.

☐ ☐ (a) If the grace or cure periods under Section 5 of the ISDA Agreements have not been deleted: (i) any grace or cure periods remaining will expire in time to ensure the availability of cap payments by cap provider on a timely basis for distribution to the holders of the rated securities and (ii) if notice is required to trigger a cure period, a party, such as the servicer, must have an affirmative obligation to provide such notice of non-payment to the cap provider on the cap provider payment date.

This ensures that all funds will be available on a timely basis for distribution to the holders of the rated securities.

2. Events of Default. Events of default applicable to a borrower must be severely limited. In most cases, the only allowable defaults for a borrower are non-payment of the cap premium:

☐ ☐ (a) Upon payment of the cap premium by borrower, borrower cannot default. (Paragraph 4 of the May 1989 ISDA Addendum to Schedule to Interest Rate and Currency Exchange Agreement or similar language must be incorporated by reference.)

For example, the following is sample language for illustrative purposes:

Limitation on Events of Default. Notwithstanding the terms of Sections 5 and 6 of this Agreement, if at any time and so long as the borrower has satisfied in full all its payment obligations under Section 2(a)(i) of this Agreement and has at the time no future payment obligations, whether absolute or contingent, under such Section, then unless cap provider is required pursuant to appropriate proceedings to return to the borrower or otherwise returns to the borrower upon demand of the borrower any portion of any such payment, (a) the occurrence of an event described in Section 5(a) of this Agreement with respect to the borrower shall not constitute an Event of Default or Potential Event of Default with respect to the borrower as Defaulting Party and (b) cap provider shall be entitled to designate an Early Termination Date pursuant to Section 6 of this Agreement only as a result of the occurrence of a Termination Event set forth in Section 5(b)(i) of this

Yes No

Agreement with respect to the cap provider as the Affected Party.

Generally, the language should provide that notwithstanding the provisions of Section 5(a), none of the events of 5(a) shall constitute an event of default with respect to borrower.

Therefore, the Schedule to the ISDA Agreements removes the following events of default with respect to the borrower: Sections 5(a)(ii) - Breach of Agreement; Repudiation of Agreement, 5(a)(iii) - Credit Support Default, 5(a)(iv) - Misrepresentation, 5(a)(v) - Default under Specified Transaction, 5(a)(vi) - Cross Default, 5(a)(vii) - Bankruptcy and 5(a)(viii) - Merger without Assumption.

☐ ☐ (b) All events of default set forth in Section 5 of the ISDA Agreements (other than cross default) apply to the cap provider and are not restricted by any amendments to the Schedule.

☐ ☐ (c) To the extent the cap provider's obligations are guaranteed, all events of default set forth in Section 5 of the ISDA Agreements (other than cross default) apply to the guarantor.

3. Termination Events. The ISDA Agreements contain a number of events which give rights to one or both parties to bring about an early termination of the cap agreement. Generally, other than in the case of an illegality (Section 5(b)(i) of the ISDA Agreements), only the trustee should be permitted to bring about an early termination of a cap agreement:

☐ ☐ (a) Notwithstanding the provisions of Section 5(b), none of the events of Section 5(b) constitute a termination event with respect to the borrower.

Therefore, the Schedule to the ISDA Agreements removes the following termination events: Sections 5(b)(iii) - Tax Event, 5(b)(iv) - Tax Event Upon Merger and 5(b)(v) - Credit Event Upon Merger. In addition, Section 5(b)(vi) should be limited to item (d) below.

If the Schedule to the ISDA Agreements does not remove Sections 5(b)(ii) and/or 5(b)(iii), please see 3.(a)(i) immediately following.

☐ ☐ (i) If the Schedule retains the termination events in Sections 5(b)(iii) and 5(b)(iv), the following language is incorporated in the Schedule:

"If an event occurs that would otherwise give rise to a

Yes	No

termination event under Sections 5(b)(iii) and/or 5(b)(iv) of the ISDA Agreements, cap provider must, at the time of such event, either (a) transfer the cap to a replacement cap provider acceptable to Standard & Poor's with the requisite Standard & Poor's ratings at cap provider's sole cost and expense, or (b) continue to perform its obligations under the cap agreement including, without limitation, the obligation to unconditionally "gross up" in the event that a withholding tax is imposed on payments being made by the cap provider."

☐ ☐ (b) The Schedule provides that: (i) Section 5(d) is not applicable; and (ii) Section 5(e) is not applicable.

☐ ☐ (c) Cap provider's payment obligations shall not be subject to any waiting period.

☐ ☐ (d) The Schedule provides that the "Automatic Early Termination" provision of Section 6(a) is not applicable;

☐ ☐ (e) The Schedule provides that all payments under the agreement should be made without setoff, offset, combination of accounts, lien, right of retention, withholding, counterclaim, or similar right or requirement (Section 6(e)).

☐ ☐ (f) The Schedule deletes section 6(e)(iv).

☐ ☐ (g) The Schedule includes the failure of the cap provider to satisfy Standard & Poor's ratings requirements as the sole Additional Termination Event as defined in Section 5(b)(vi) of the ISDA Agreements.

4. Calculations: Payments on Early Termination.

☐ ☐ (a) *Borrower as the Non-defaulting Party*: Any determination of the Close-out Amount and Non-default Rate by borrower, as the Non-defaulting Party, shall be subject to trustee's (or the servicer's on its behalf) prior written approval.

☐ ☐ 5. Governing Law. The cap transaction are governed by the laws of the state which governs the transaction documents.

☐ ☐ 6. Multibranch Party. The Schedule includes a representation from each party that it is not a multibranch party for purposes of the cap agreement.

Yes No

7. Assignment by borrower and cap provider. Under Section 7 of the Master Agreement, neither party can assign its interest in the cap agreement without the prior written consent of the other party.

☐ ☐ (a) The Schedule amends the ISDA Agreements to permit the assignment by the borrower of all of the benefit and interest in the cap agreement to the trustee and in connection with such assignment:

☐ ☐ (1) The Schedule (or other document executed by the cap provider and borrower) requires that all directions (including, without limitation, payment instructions, the Close-out Amount and Non-default Rate, as applicable) to the cap provider will be from the trustee (or the servicer on its behalf) and the cap provider shall not recognize instructions or directions from the borrower.

☐ ☐ (2) The Schedule (or other document executed by the cap provider and borrower) requires that all payments by the cap provider be made to the trustee (or the servicer on its behalf) and not to the borrower (regardless of whether or not an event of default exists under the loan documents).

☐ ☐ (3) The collateral assignment requires that borrower provide trustee (or the servicer on its behalf) with a calculation, including, without limitation, any information and references used in such calculation, of the Close-out Amount and Non-default Rate, as applicable for trustee's (or the servicer's on its behalf) prior written approval and notification to cap provider.

If the collateral assignment or pledge of the rate cap is not addressed in the Schedule but is contained in a separate document, Standard & Poor's will also typically review such documentation.

☐ ☐ (b) The Schedule only allows the release of the cap provider from cap provider's obligations under the cap agreement following an assignment where cap provider's obligations are assumed by an institution satisfying Standard & Poor's ratings requirements.

☐ ☐ 8. Amendments. The Schedule prohibits the parties from amending the cap agreement (including the ISDA Agreements, confirmation, schedule and collateral assignment of cap agreement) without Ratings Confirmation.

☐ ☐ 9. Entire Agreement. The Schedule amends Section 9(a) of the ISDA Agreements to include in the except clause any opinions and any collateral assignment of

Yes	No		
			rate cap agreement, including cap provider's executed counterpart thereto.
☐	☐	10.	Netting. The Schedule amends the ISDA Agreements to preclude netting across different series from applying to vehicles that can issue multiple classes or series of securities and use the same master agreement.
☐	☐		(a) The cap agreement for each class or series is written as a separate agreement.
☐	☐		(b) The Schedule prohibits the application of Multiple Transaction Payment Netting.
☐	☐	11.	Costs and Expenses. The Schedule amends Section 11 of the ISDA Agreements to preclude payment by the borrower of any out-of-pocket expenses incurred by cap provider related to the enforcement and protection of cap provider's rights under the cap agreement or any credit support document.
☐	☐	12.	Termination Payment. Close-out Amount shall be the payment measure.
☐	☐	13.	Bankruptcy Petition. The cap provider is prohibited from petitioning the borrower into bankruptcy, or joining in any petition to file the borrower into bankruptcy, for 365 days after all outstanding rated securities have been paid in full.
☐	☐	14.	No Agency. The Schedule provides that the cap provider is entering the ISDA Agreements as a principal and not as an agent of any person or entity.
☐	☐	15.	Specified Transaction. There shall be no Specified Transaction for purposes of the ISDA Agreements.
☐	☐	16.	Affected Transactions. The current cap transaction shall be the only Transaction and Affected Transaction for purposes of the ISDA Agreements.
		17.	
		18.	

CROSS BORDER CAP AGREEMENTS

The Cross Border Agreement contains certain provisions requiring the cap provider to "gross up" for certain "indemnifiable taxes" which are a result of the nature of cross border transactions. Standard & Poor's may require additional provisions to be amended or deleted in the Schedule and the delivery of additional opinions in such circumstances. Such additional provisions may be required in order to ensure the payment of all amounts necessary to meet payment obligations on the rated securities. *(See also Cap Schedule Section 3(a) language covering termination events related to "indemnifiable taxes".)*

Yes No

1. Indemnifiable Tax.

☐ ☐ (a) The Schedule amends Section 2(d)(i)(4) of the Cross Border Agreement and requires the cap provider to agree to unconditionally "gross up" in the event that a withholding tax is imposed on payments being made by the cap provider.

☐ ☐ (b) The Schedule amends the definition of "indemnifiable tax" in the Cross Border Agreement to cover any and all withholding tax.

☐ ☐ (c) The Schedule to the Cross Border Agreement (i) deletes the provision in Section 2(d)(i)(4) of the Cross Border Agreement allowing cap provider to be excused from having to "gross up" due to borrower's breach of a tax representation or failure to notify cap provider of a breach of a tax representation and (ii) the borrower makes no tax representations in the Schedule.

If either of the above are not true, Standard and Poors' will need to review any tax representations made by the borrower and set forth on the Schedule.

☐ ☐ (d) The Schedule amends Section 2(d)(ii) of the Cross Border Agreement to delete any obligation by the borrower to make payments to the cap provider for any payments made by the cap provider without deduction for taxes (for which there is no obligation to gross up). However, there is no such amendment for any payment obligations of cap provider to borrower for such taxes.

☐ ☐ (e) The Schedule to the Cross Border Agreement amends Section 4(e) to delete any payment obligations by borrower to cap provider for any indemnification resulting from stamp registration or other documentary tax levied by borrower's taxing authority on the cap provider.

In the event of any uncertainty as to whether such stamp duty or other documentary tax will be payable by borrower, Standard & Poor's may require a local tax opinion. (*See Opinions - Local Tax Opinions*)

☐ ☐ (f) The Schedule to the Cross Border Agreement includes a tax

Yes No

representation from the cap provider generally to the effect that payments from the cap provider are not subject to withholding tax.

CAP AGREEMENT CONFIRMATION

The Confirmation sets forth the method for calculation of payments, the notional amount upon which payment dates are calculated, the payment dates and other information.

Yes No

☐ ☐ 1. Cap Purchaser. The cap purchaser is the borrower under the loan agreement.

☐ ☐ 2. Notional Amount. The notional amount matches the loan amount.

☐ ☐ 3. Effective Date. The effective date is prior to or on the closing or funding of the loan.

☐ ☐ 4. Termination Date. The termination date is no earlier than the maturity date of the loan.

☐ ☐ 5. Payment Date. Payments from the cap provider will be received by servicer prior to the dates on which the certificateholders are paid and match the payments dates under the transaction documents.

☐ ☐ (a) The definition of "business day" used in the cap agreement, the loan documents and the securitization documents match.

☐ ☐ 6. Cap Rate. The cap rate matches the interest rate in the transaction documents.

☐ ☐ 7. Calculation of Rate. The method of calculating the interest rate matches the method in the transaction documents. The note, the rated securities and the cap agreement have the same LIBOR interest rate, calculated in the same manner and the same interest accrual period.

The Confirmation typically lists the rate measurement (i.e. USD-LIBOR-BBA). Please confirm that the rate of measurement in the Confirmation (as such measurement is defined in the 2000 Definitions) matches the definition in the related transaction documents (i.e. the loan documents and the securitization documents). If there are any discrepancies in the rate measurement, such discrepancies should be corrected.

Yes No

☐ ☐ 8. Day Count Fraction. The calculation of interest is identical to the transaction documents (actual/360, actual/365, 30/360).

OPINIONS

Standard & Poor's generally requests the following legal opinions for the cap provider and guarantor, as applicable, under the law of the jurisdiction of organization of the relevant entity and under the governing law of the cap agreement and guarantee, as applicable.

Yes No

☐ ☐ 1. Enforceability Opinion. An enforceability opinion in connection with the cap agreement and guarantee has been delivered with respect to the cap provider and guarantor, as applicable, and opines that the cap agreement (including the ISDA Agreements, Confirmation and Schedule, together with any guarantees given in connection therewith) will, on execution, be legal, valid, binding and enforceable in accordance with its terms. The enforceability opinion is delivered by outside counsel.

☐ ☐ 2. Pari Passu. A pari passu opinion has been delivered and contains an opinion that the payments due under the cap agreement or any guarantee rank at least pari passu with the unsecured and unsubordinated obligations of the cap provider or guarantor, as applicable.

☐ ☐ 3. Choice of Law. A choice of law opinion has been delivered and contains an opinion that (a) the courts in the jurisdictions of the cap provider and guarantor, as applicable, would recognize and give effect to choice of law in the cap agreement and guarantee, as applicable, and (b) the choice of law is, prima facie, valid and binding under the law of such jurisdiction.

☐ ☐ 4. Judgments. A recognition of claim opinion has been delivered and contains an opinion that the courts in the jurisdictions of the cap provider and guarantor, as applicable, would recognize and enforce as a valid judgment any final and conclusive civil judgment of a court of competent jurisdiction for monetary claims made under the cap agreement and guarantee, applicable.

This opinion is only required if the cap provider is a foreign entity.

<u>Yes</u> <u>No</u>

☐ ☐ 5. <u>Local Tax Opinion.</u> A local tax opinion has been delivered and contains an opinion that no stamp, duty or other documentary tax will be payable by the borrower, except to the extent borrower is provided with funds sufficient for paying such a tax.

This opinion is delivered in connection with Cross Border Agreements if there is uncertainty regarding payment of stamp, registration or other documentary tax levied by foreign taxing authorities.

☐ ☐ 6. <u>Withholding Tax Opinions</u>. An opinion has been delivered with respect to payments in connection with withholding tax under the cap agreement and the guarantee, as applicable (including an opinion from borrower's counsel).

These opinions may be waived if Standard & Poor's has previously received similar opinions under the same governing law in similar transactions.

GUARANTEES

<u>Yes</u> <u>No</u>

☐ ☐ 1. <u>Unconditional, Irrevocable and Continuing</u>. For transactions guaranteed by a parent to provide a required rating, the guarantee is unconditional, irrevocable, continuing and a guarantee of payment, not of collection, and satisfies Standard & Poor's other requirements for guarantees, including delivery of any required opinions.

In general, Standard & Poor's will need to review all guarantees for compliance with Standard & Poor's criteria.

Appendix X
Standard & Poor's/Foreign Law Real Estate Issues Summary

Ownership And Leasing

1. Does _____________ law (the "Jurisdiction's Law") recognize limited partnerships, corporations and limited liability companies? Explain how entities formed under the law of __________ (the "Jurisdiction") dissolve. Does the Jurisdictions recognize a United States limited partnership, corporation or limited liability company as a legal entity under the Jurisdiction's Law?

2. Explain the manner in which entities enter into bankruptcy (voluntary and involuntary) and the nature of the proceedings under which their insolvency is effected. Explain the effect of the bankruptcy of an affiliate.

3. Does the Jurisdiction's Law permit the structuring of entities as special purpose, bankruptcy remote entities in accordance with the criteria attached hereto. If so, what benefits under the Jurisdiction's Law are associated with such structuring? For example, will such structuring cause the partnership and its partners and a corporation and its shareholders to be treated as separate entities in the event of a bankruptcy of the partners or the shareholders?

4. Are there limitations on direct foreign ownership of real property, and in particular, coastal property? If so, how do foreign investors typically structure their real property holdings?

Lease Issues

5. Explain the consequences of bankruptcy or insolvency of (a) a tenant and (b) a landlord.

Security Interest Issues

6. Briefly describe the method by which liens and security interests are properly perfected in the Jurisdiction. Discuss real property, personal property, fixtures and intangibles.

7. Explain any liens and security interests which would prime a properly recorded first lien mortgage (as to real property and fixtures) and a properly recorded lien on personal property and intangibles.

Environmental Liability

8. Briefly describe the impact of environmental laws on a tenant under a ground lease and a leasehold mortgagee.

Lender Liability

9. Does the Jurisdiction recognize a borrower's right to sue a lender alleging lender liability issues? If so, describe the theories under which a lender might be sued for lender liability.

Enforcement Of Remedies

10. What usury laws apply?

11. Describe the process of judicial and non-judicial foreclosure, including:

- courts in which proceedings may be commenced;
- the time frame to complete the process and costs; and
- any mortgagor redemption or similar rights.

12. Describe timing, notice or other requirements for declaring an event of default or an event of acceleration.

13. Can a lender accelerate and foreclose (either judicially or nonjudicially) for a violation of due-on-sale and due-on-encumbrance clauses?

14. Can a loan be accelerated for a non-monetary default?

15. If a loan includes recourse provisions, can recourse be sought against a borrower for any deficiency after a foreclosure? Does the Jurisdiction's Law require a lender to pursue all collateral and parties contemporaneously or forfeit the right to that collateral and party which are not pursued?

16. Explain how senior and junior liens are affected by a foreclosure sale.

17. Discuss the availability of and explain the procedure for the transfer and enforcement of foreign judgments.

Revenue Capture Prior To Foreclosure

18. Explain the enforcement of an assignment of rents (i.e. notices, procedures, court actions, etc.) prior to a bankruptcy and after the declaration of bankruptcy.

19. May a receiver be appointed to collect rents? If so, explain the procedure, timing, burden of persuasion, time frame, discretion of Lender to recommend party to be appointed, bonding requirements and any potential "mortgagee in possession" liability that might be assumed by a lender requesting such appointment.

20. Does the Jurisdiction have a sequestration of rents statute?

21. Does the Jurisdiction's Law impose requirements with respect to the maintenance of escrows (i.e., location of accounts, types of accounts, etc.)?

22. Can temporary restraining orders be obtained in order to intercept rent before a receiver is appointed?

Perfection Of Assignment Of Rents And Revenues

23. Is the assignment perfected upon recordation? What additional action, if any, is required pre-bankruptcy to perfect the assignment?

Taxes

24. How long after a delinquency in the payment of real estate taxes is the property sold?

25. What is the interest rate accruing on unpaid real estate taxes?

26. Is a deed in lieu or foreclosure transfer subject to transfer tax? If so, how much is the tax?

27. Are there any other local tax issues implicated by this transaction?

Title Insurance

28. Explain how title insurance works in the Jurisdiction (i.e. costs, types of coverage, endorsements). If title insurance is not available, explain the steps a lender traditionally takes to assure itself that its lien is prior to all other parties and the opinions usually obtained.

Appendix XI
Credit-Tenant Loans in Pool Transactions

(Editor's note: This article by Nancy Olson was published on Nov. 3, 1999 and is available on RatingsDirect, Standard & Poor's Web-based credit analysis system at www.ratingsdirect.com, and at www.standardandpoors.com.)

The purpose of this section is to familiarize both issuers and investors with Standard & Poor's approach to assessing the credit and real estate risks posed by credit-tenant loans. Virtually all commercial mortgage pool transactions now include a credit-tenant loan component. For the most part, Standard & Poor's expects that majority of credit-tenant loans will be securitized in combination with other types of loans. As a result, this discussion focuses on credit-tenant loans in the context of pool transactions. the analytical methodology could be applied equally well to a pool consisting exclusively of credit-tenant loans.

Overview of CTL-Backed Transactions

A credit-tenant loan is a commercial mortgage loan secured by one or more properties leased to a "credit tenant;" that is, to an entity that has received a credit rating from one or more nationally recognized rating agencies in order to facilitate its own borrowing in the capital markets. Thus, although the credit quality of a credit-tenant loan is theoretically a function of the related borrower's ability to make debt service payments, that ability can be assumed to be dependent on receipt of lease payments from a tenant of known credit standing.

The real estate analysis of a credit-tenant loan is, however, made somewhat thornier by the fact that, on the strength of the tenant's known credit quality, the property owner has probably borrowed more dollars at a lower debt service coverage ratio than would otherwise have been considered prudent. For example, assuming that all of the expenses associated with operating the property were the responsibility of the tenant, it would not be unusual for the property owner to borrow at a 1.0x debt service coverage ratio on the basis of a lease to a credit tenant; if the owner had a triple-net lease (under which the tenant is responsible for paying for all taxes, insurance, and maintenance) with a non-credit tenant, lenders would probably require some margin for error-coverage of perhaps 1.05x or 1.10x.

The basis for a credit-tenant loan is the anticipated stream of lease payments rather than the intrinsic value of the real estate securing the loan. If that stream of lease payments were to become more uncertain because of a deterioration in the credit quality of the tenant, or if it were to evaporate completely because of the tenant's failure, the loan would no longer be considered well-secured. In addition, whereas a tenant without a credit rating might be assumed to default at any point during the term of its lease, the financial strength of a "credit" tenant should enable it to survive for a longer period of time; over that time, the value of the underlying real estate, without taking into account the remaining value of the in-place credit lease, is likely to be changing and may possibly be declining.

A traditional credit lease securitization provides financing for one or more properties leased on a triple-net basis to a tenant that has received a long-term unsecured credit rating. The issuing entity lends the net proceeds of the securities issuance to the owner of the properties. The loan is evidenced by a note which is secured by a first-lien mortgage on the property or properties and by an assignment of leases and rents. In general, the rating of securities issued in connection with a stand-alone credit-lease transaction reflects the rating of the tenant.

The analysis of multiple credit-tenant loans in the context of a commercial mortgage pool is, of necessity, quite different. While the known credit standing of the tenant makes individual credit-tenant loans somewhat easier to analyze than commercial mortgage loans secured by properties leased to tenants that have not been subjected to formal credit evaluations by nationally recognized rating agencies, the credit-tenant loan component of a pool transaction cannot be viewed merely as a collection of independent credit lease transactions. The ratings assigned to the securities are no longer a function of the rating of a single tenant.

Even in the context of a pool made up exclusively of credit-tenant loans, the tenants' ratings may not be the controlling factor in determining the ratings of the securities issued. The financial strength of multiple credit

tenants is not likely to be uniform, and, although their future credit performance may be inter-related, depending on the industries in which they participate, the nature and extent of those inter-relationships would be virtually impossible to reduce to a formula. Unless there is a general economic depression, any future deterioration in credit quality is likely to affect tenant companies at different times and to have different consequences for each in terms of the length and severity of the downturn.

Furthermore, even though the likelihood of default with respect to any one credit-tenant loan is still roughly equivalent to the likelihood of default by the tenant, a default on any one loan should not trigger a default on the securities or even a shortfall in the amounts available for distribution to investors, at least in the near-term. By contrast, in the case of a traditional credit lease transaction, a monetary default by the tenant on its lease obligations would automatically result in a default on the securities.

A methodology for evaluating the credit support required for commercial mortgage pools that include credit-tenant loans needs to take into account all of the elements that characterize credit leases and that make credit-tenant loans a distinct product type. These elements contribute to the perception that credit-tenant loans are less risky than other commercial mortgage loans because of the improved certainty associated with the lease cash flow stream, but they also make credit-tenant loans more risky from a pure real estate perspective.

Credit Enhancement Requirements in CTL-Backed Transactions

The process of determining how the securities backed by a commercial mortgage pool that includes credit-tenant loans should be tranched so that classes to which lower ratings are assigned provide sufficient credit enhancement for classes with higher ratings is essentially the same as the methodology used to determine the level of credit enhancement required for other types of structured transactions that are dependent on the cash flow generated by a pool of financial assets. The amount of credit enhancement required to support securities at any given rating category is a function of the default or foreclosure frequency assumed for the underlying assets at that rating category multiplied by the average loss severity assumed with respect to defaulted assets at that same rating category. That is, the required credit enhancement is equal to the assumed foreclosure frequency times the assumed loss severity.

In the case of mortgage-backed transactions, this calculation is generally performed on a loan-by-loan basis to determine the credit enhancement required for individual assets. The results are then aggregated to provide an estimate of the credit enhancement required for the pool as a whole, before giving benefit to the fact that, because the transaction depends on the cash flow produced by multiple assets, it may be appropriate to make somewhat less onerous assumptions regarding the frequency of defaults and the severity of losses than would be warranted if the transaction depended on a single asset.

However strong the credit quality of the tenants represented in a commercial mortgage pool, it is likely that, over the 15- to 30-year term of a transaction, some of the underlying mortgage loans will go into default as a direct consequence of tenant defaults and bankruptcies. In some instances, those defaults can be expected to result in losses. Standard & Poor's analysis of credit-tenant loans in the context of a pool transaction is designed to ensure that, when defaults and losses occur, there are sufficient amounts of credit support available to protect investors who hold rated securities against those losses.

Tenant Default Risk

The first step in determining what constitutes an appropriate level of credit support is to develop a conservative estimate of the frequency with which borrowers may default on their loans under increasingly stressful conditions. In the case of credit-tenant loans, that exercise is assumed to be equivalent to determining the frequency with which the related tenants might become subject to bankruptcy proceedings and subsequently reject their leases. Thus, the assumed default or foreclosure frequency for each credit-tenant loan in a commercial mortgage pool is a function of the credit rating of the tenant of the mortgaged property combined with an assumption regarding the probability that the tenant will reject its lease following a bankruptcy filing.

The credit quality of each tenant that the issuer expects to have treated as a credit tenant must have been evaluated by Standard & Poor's. In general, this means that each tenant must have a formal long-term unsecured credit rating. In the case of those tenants that do not have long-term credit ratings, an estimate of the tenant's credit strength, based primarily on publicly available information, can be developed by Standard & Poor's analysts It should be noted, however, that the number of tenants without formal ratings

represented in any particular transaction should be limited; to the extent that lease payments from tenants without formal ratings constitute a substantial percentage of the source of needed cash flow, it may impact the assessment of the overall creditworthiness of the mortgage pool. Each tenant's rating or rating estimate serves as the basis for an assumption regarding the probability that that tenant will default on its lease payment over the term of the lease. That probability assumption is derived from the output of Standard & Poor's Survival Analysis Model (see below).

The Survival Analysis Model is a tool for estimating the cumulative probability of default over specific time horizons for corporate entities with similar current credit ratings. The model was developed utilizing a database of credit histories on more than 5,000 corporate credits comprised of industrials, utilities, insurance companies, banks and other financial institutions, and real estate companies, located primarily in the United States. When the model was first created in 1996, the database spanned fifteen years of credit rating history from January 1,1981, through December 31, 1995. It includes data on a corporation's initial credit rating, information on any credit movements (such as upgrades or downgrades), and current credit rating (or final credit rating if the corporation was no longer in existence as of December 31, 1995).

Because the default probabilities estimated by the model are *cumulative* over specific time horizons, the default probability applied to a particular tenant with respect to a particular lease is also a function of the remaining term of that lease: the longer the remaining term, the greater the probability that the tenant will default prior to the expiration of the lease. Thus, the base probability of default for a tenant rated 'A' under a 20-year lease is 5.80%; the base probability of default rises to 7.74% for the same 'A' tenant under a 25-year lease.

Lease Rejection Analysis

Depending on the specifics of the situation, a business enterprise that is experiencing financial stress may elect to file for protection under Federal or state bankruptcy or insolvency laws; or, in an effort to gain access to the business's assets, its creditors may file a petition to have it declared bankrupt. If a credit tenant defaults on its contractual obligations under one or more leases for space from which it conducts business, it is reasonable to assume that the tenant or its parent company is experiencing financial difficulties and that the tenant may file a bankruptcy petition or may be filed into bankruptcy involuntarily.

The significance of such an occurrence to the fate of a credit-tenant loan is that one of the options available to a bankrupt entity is the right to affirm or reject its obligations under executory contracts and leases. Clearly, a bankrupt tenant that affirms its lease is still in a financially weakened condition, and its ability to continue to make lease payments over the long-term is suspect. But a bankrupt tenant that elects to reject its lease obligations effectively leaves the owner of the property formerly leased to that tenant with no cash with which to pay debt service on any loan secured by the property.

Both voluntary and involuntary bankruptcy petitions can be filed under Chapter 11 of the United States Bankruptcy Code. Under the provisions of Chapter 11, a corporate entity intends to reorganize or its creditors are seeking to have its affairs reorganized, usually under the auspices and supervision of the bankruptcy court. In the case of a Chapter 11 proceeding, the entity that alleges itself, or that is alleged, to be bankrupt has 60 days from the date on which the court order for relief is granted in which to assume or reject a lease, although the debtor may petition to have this deadline extended. In the interim, it is expected to continue to make lease payments unless it has petitioned for interim relief.

Alternatively, a company that intends to cease operations and liquidate its assets will typically file a petition under Chapter 7 of the Bankruptcy Code. Creditors may also seek to have a debtor-company liquidated under Chapter 7. In a liquidation situation, the debtor has the same opportunity to assume or reject leases; while the debtor would no longer need leased space from which to do business, the rights under the lease may constitute a valuable asset of the bankrupt tenant's estate which could be assigned to another tenant. It is not uncommon for bankrupt tenants to assume their leases in order to preserve the value of the leasehold assets.

As might be expected, corporate Chapter 11 filings are more common than Chapter 7 filings. According to information compiled from *Standard & Poor's Semi-Weekly Called Bond Record*, Defaulted Bond Section, approximately 100 companies filed for bankruptcy protection between January 1, 1990, and December 31, 1995. It should be noted that this sample includes data from 1990 and 1991, the two years in which the largest number of corporate defaults occurred. Sixty-two of the 100 bankrupt companies filed under Chapter

11, and only 3 filed under Chapter 7. The filing status of the remaining 35 companies is unknown.

In general, then, it is reasonable to assume that a tenant default will be followed by a Chapter 11 bankruptcy filing, making it necessary to estimate the likelihood that the tenant will reject its lease. If, however, a particular tenant's business position or franchise value is considered particularly weak, Standard & Poor's will assume a Chapter 7 filing, in which case the lease rejection probability is assumed to be 100%.

In order to quantify the probability that a tenant will reject its lease in the course of a Chapter 11 bankruptcy, Standard & Poor's conducted extensive research on lease rejection experience among major property owners. Real estate investment trusts (REITs) and other corporate landlords reported on 242 leases that were affected by Chapter 11 bankruptcies. One hundred forty-five of the leases (60%) were rejected, and the balance were affirmed. Even those bankrupt tenants that initially affirm their leases may, however, eventually fail. In light of this longer-term risk, it is assumed that, on average, 60% of tenants that are adjudicated bankrupt under Chapter 11 will reject their leases immediately and that an additional 20% will experience further financial difficulties following their emergence from bankruptcy and will reject their leases at some later point. Thus, the benchmark lease rejection assumption is 80%.

This benchmark assumption is adjusted upward or downward based on the importance of the leased property to the tenant's business. The most obvious situation in which an upward adjustment would be made is the case of a property which the tenant has vacated but for which it is continuing to pay rent; the tenant clearly does not consider the unoccupied property to be critical to its business operations, and it is reasonable to assume that, if the tenant were subsequently to file for bankruptcy protection, it would almost certainly reject the lease. By contrast, the lease for a corporate headquarters location is probably less likely to be rejected than any other type of lease; as a result, the lease rejection probability assumption for a headquarters lease would typically be adjusted downward.

Other factors that might affect the assumptions regarding the probability that a particular lease for occupied retail space would be affirmed or rejected include the following:

- Current and historic sales per sq. ft. for the store that secures the related loan,
- Average sales per sq. ft. for all of the tenant's stores,
- Sales per sq. ft. for competing stores in the vicinity,
- Rent per sq. ft. paid by the tenant,
- Market rent for similar stores in the vicinity,
- Vacancy rate for comparable space in the same market,
- Demographic support for the store,
- Local competition, and
- Prospects for the growth of competition.

The terms of the lease, particularly those clauses that permit or restrict assignment, may also influence the assessment of whether a tenant might reject or affirm a lease. If, for instance, the tenant is paying a market rent or something less than market, it might consider sub-letting a non-essential facility or even selling its lease, but it may be prevented from doing so if the lease restricts sublets. Alternatively, lease provisions that require leasing the facility to a specialized type of tenant may make it difficult to find a replacement tenant.

In sum, after taking into account the possibility that a bankrupt tenant may, under certain circumstances, affirm a lease, the adjusted cumulative probability of default is somewhat less than the baseline probability of default. Using our earlier example of an 'A' tenant and the standard 80% lease rejection assumption, the default probability adjusted for lease rejection would be 4.642% under a 20-year lease and 6.194% under a 25-year lease.

Rating Category Multiples

While the foregoing analysis is appropriate for estimating, for example, the probability of default associated with an 'A' rated credit in an 'A' environment, it does not completely capture the magnitude of the risk that an 'A' credit will default in an 'AA' or 'AAA' environment. On average, between 4% and 6% of tenants rated

'A' might be expected to default on and disaffirm their leases under conditions characteristic of an 'A' economic environment. Under more stressful conditions, however, it is likely that a higher percentage of 'A' rated tenants would face financial difficulties. Likewise, almost all 'A' rated credits should be able to survive less stressful scenarios.

Therefore, in determining the probability of default to be used to calculate the subordination level needed for securities to be rated at each rating category that is higher than the tenant's own rating, a scaled multiple greater than 1.0x is applied to the adjusted probability of default. The multiple used to calculate subordination for securities to be rated at the same rating category as the tenant is 1.0x, and the multiple used for securities to be rated at lower rating categories is effectively zero.

Determining Loss Severity
Loss severity is defined as the amount of principal that is expected to be lost, on average, with respect to a pooled loan that goes into default and must be liquidated. Loss severity is expressed as a percentage of the outstanding balance of the loan at the time of default.

Loss severity is a function of:

- The amount for which the property that formerly secured the defaulted loan can be sold following foreclosure or, alternatively, the amount for which the defaulted loan itself can be sold;
- The expenses incurred in foreclosing on the defaulted loan and liquidating the mortgaged property, all of which must be paid for out of the proceeds of the sale of the property or the loan;
- The amount of unpaid interest that accrues between the date as of which the borrower made its last debt service payment and the date as of which the property or the loan is liquidated; and
- The unpaid balance of the loan following application of the last debt service payment made by the borrower.

Liquidation Proceeds
A credit-tenant loan is typically extended on the assumption that the tenant will be in place for the full term of the lease and that the tenant's lease payment stream represents a dependable source of repayment. As a result, it is not uncommon for the original balance of a credit-tenant loan to exceed the value of the unleased property by as much as 10% to 50%.

If a default occurs on a credit-tenant loan, it has probably been triggered by a default on the part of the credit tenant. Although the servicer can pursue the standard legal remedies to realize on the real estate collateral securing the loan, in light of the tenant's default, much of the value of the underlying real estate may have evaporated. Consequently, the amount for which the servicer will be able to liquidate the mortgaged property following a foreclosure can be expected to be considerably less than if the property were occupied by a tenant that was not experiencing financial difficulties. It is for this reason that Standard & Poor's requires that each property that secures a credit-tenant loan securitized in a pool transaction be valued on an "as vacant" basis (i.e., unencumbered by a lease).

The "as vacant" value is not a salvage value but rather a realistic market value for the property assuming that the credit tenant is replaced by a market-based tenant. The "as vacant" value should incorporate the impact of expenses associated securing a new tenant, including the reduction in value attributable to lost rental revenue during the period that the property is vacant.

For better or worse, the methodology used for determining an "as vacant" value varies substantially from one appraiser to another, but, as is the case with any other property securing a securitized commercial mortgage loan, it is the factual market-related information presented in the appraisal that Standard & Poor's uses to derive its estimate of the value of the property. The following factors are considered particularly relevant:

Rent comps. The properties used to provide rent "comps" should be net-leased properties of a similar size. The rents received on the comparables should be indicative of what the appraiser believes to be prevailing rents in the marketplace, and these may be above or below those paid by the credit tenant for the property being appraised.

Tenant improvements. The most obvious replacement tenant is probably a competitor of the current tenant. Assuming that this is the case, it is likely that the tenant improvement investment required to attract a new tenant would be relatively low. While Standard & Poor's employs minimum tenant improvement estimates which vary by property type, the appraisal is a valuable guide to instances in which a higher assumption should be used. For example, if the property is one that was built for, or has been converted to accommodate, a special use, the capital investment required may be quite high.

Leasing commissions. The leasing commission should be calculated on the basis of the first five years of a new lease at a market rent.

Downtime. "Downtime" represents the marketing period required to re-lease the property. Generally, the more generic the property (for example, a "big box" retail facility), the shorter the downtime. Special use properties, such as movie theaters, require a much longer marketing period.

Operating expenses. During the marketing period, real estate taxes, insurance premiums, and certain operating expenses will still need to be paid in order to preserve the value of the property. Since the property will be unoccupied, these expenses can be expected to be lower than normal, but they should be estimated at a level that will maintain the physical asset and that will prevent taxing jurisdictions from slapping a tax lien on the property.

Lost rent.

Cap rate. The appraisal generally includes an indication of the cap rate applicable to the as-leased value of the property and another applicable to the "as vacant" value. For purposes of an "as vacant" valuation, the leased fee cap rate has little relevance because it is primarily a function of the credit rating of the existing tenant.

Even the "as vacant" value of a property may not capture the full impact of the decline in value that might be expected under conditions of severe economic stress. To account for the additional decline in value related to the general economic environment, liquidation proceeds are assumed to be a fraction of the "as vacant" value when computing loss severities at every rating category except 'B'. For example, the 'AAA' scenario assumes that the servicer can liquidate a property for only 50% of the appraiser's estimate of the "as vacant" value. By contrast, the 'BB' scenario assumes a discount of 10% to the "as vacant" value.

Expenses
If a bankrupt tenant has rejected its lease, the commercial space may have been vacated early in the foreclosure process. If the borrower also files for bankruptcy, it may be a long time before the servicer has the opportunity to take over operation of the building and to try to re-lease the space. In the meantime, there will be no source of cash flow with which to pay the operating expenses required to keep the property free of tax liens, adequately insured and in reasonable repair.

In the case of a pool transaction, the servicer is expected to make sure that these expenses are paid in order to preserve the value of the investors' security interest in the underlying real estate; otherwise, by the time the servicer has completed the foreclosure, the liquidation proceeds realized upon sale of the asset may be far less than they would have been if real estate taxes had been paid on time and the property had been properly insured and maintained. A defaulting borrower that is motivated to preserve the value of its asset may assume the obligation to pay operating expenses that were formerly the responsibility of the now-bankrupt tenant, or the servicer may have to make what are generally known as "property protection advances" to cover these expenses. The servicer is entitled to reimbursement for property protection advances out of liquidation proceeds.

Often, the most significant foreclosure expense is post-default accrued interest. In view of the fact that the default of a credit-tenant loan is assumed to be related to the tenant's default, no lease payments will be received during the period of foreclosure and liquidation. Again, in the case of a pool transaction, it is expected that the servicer will make advances of unpaid interest and principal, but it is highly unlikely that the property will generate any rental revenue prior to liquidation which could be used to offset those advances. Consequently, advances of periodic interest and principal payments must also be repaid out liquidation proceeds before any amount can be applied to the outstanding principal balance of the loan.

At the 'AAA' and 'AA' rating categories, Standard & Poor's assumes that the foreclosure and liquidation process will take an average of 1.75 years. This period is shortened to 1.5 years at the 'A' and 'BBB' categories and to 1.25 years at the 'BB' and 'B' categories.

Loan Balance: How Much Credit for Amortization?
The other component of the loss severity estimation is the outstanding loan balance. This will be influenced by the time between loan origination and the time of default and by the amount of amortization that has occurred prior to the default. Based on the formal credit rating level or less formal credit assessment of a credit tenant and the term of the lease, each tenant is given a specific number of years of lease payment credit. This credit assumes that some principal will have been paid on the underlying loan before the tenant defaults on its lease payments. The number of years of amortization credit given is based on the average number of years from original credit rating to default as published in Standard & Poor's default study.

Table 1 indicates the number of months of amortization assumed to occur before a credit tenant may default on a 20-year lease. This schedule is used solely to determine the amount by which the outstanding principal balance of the related loan will have been amortized at the time of default. It is not intended to anticipate the actual timing of a tenant's default.

Table 1

Credit Tenant Default Amortization	
Tenant credit rating	**Months of amortization credit**
AAA	78
AA	77
A	76
BBB	68
BB	57
B	50
CCC	28

Lease Terms and Credit Risk in CTL-Backed Transactions

The discussion up to this point has largely ignored the inter-related questions of how the specific terms of a lease may affect the credit quality of a mortgage loan secured by the leased property and how lease terms may give rise to the need for additional credit enhancement. Because the lease payments scheduled to be made to borrowers by rated tenants constitute the primary source of funds used by borrowers to make debt service payments and, thus, the primary source of funds used to make required payments on the securities, it is critical that tenant lease payments not be interrupted, abated or terminated while rated securities remain outstanding. Any provisions in the lease that could disrupt the lease cash flow stream are a potential cause for concern.

The traditional credit lease transaction is based on a "hell-or-high-water" bondable triple-net lease, under which the tenant is responsible for absolutely all expenses associated with operating the leased property. Furthermore, under a bondable triple-net lease, the tenant has the right to abate rent payments or terminate the lease under only the most dire circumstances.

Ideally, of course, securitized credit-tenant loans would also be dependent on bond-type leases. It is more likely, however, that some, if not all, of the leases underlying pooled loans will contain provisions that impose certain monetary (and non-monetary) obligations on the landlord as well as the tenant. If the landlord fails to live up to its obligations, the tenant typically has the right to make reduced rent payments or to take set-offs against rent payments equal to the expense incurred in fulfilling the landlord's unmet monetary obligations. Under some circumstances, the tenant may even have the right to terminate its lease.

The other major difference between the leases underlying traditional credit lease transactions and those that are typically found in commercial mortgage pool transactions is that the traditional credit lease transaction is structured so that the payments due on the lease will be sufficient to amortize the loan balance in full prior to the expiration of the lease. An increasing number of the mortgages originated for securitization in pool transactions are structured as partially amortizing balloon loans. The credit risk

embedded in such a loan is not based solely on the credit quality of the cash flow stream provided by the tenant; it is also a function of refinancing risk.

Landlord Obligations

As noted above, under a bond-type triple-net lease, the tenant is responsible for all expenses associated with operating the leased property. By contrast, under a *non-bondable* triple-net lease, the tenant is responsible for paying for all taxes, insurance and maintenance, but the tenant may have the right to terminate the lease or make reduced rental payments if the property suffers damage as a result of a casualty or condemnation. Under a double-net lease, the tenant pays for taxes and insurance, and the landlord has responsibility for maintenance as well as for structural repairs and capital expenses. The more the terms of a lease deviate from those of a bondable triple-net lease, the more the credit quality of the mortgage loan structured around that lease becomes dependent on the financial strength of the landlord/borrower and the more divorced it becomes from the credit strength of the tenant.

Alternatively, the borrower and the lender may take steps to make the underlying lease "synthetically" bondable.

Unless the landlord/borrower has its own credit rating, higher than or equal to that of the tenant, ownership of the leased property should have been transferred to a special-purpose entity in order to isolate the property from the risk that it may be tied up in the borrower's bankruptcy. By definition, a special-purpose entity has few assets apart from those that are pledged as security for its borrowings. Therefore, none of the landlord/borrowers whose credit-tenant loans are securitized in a pool transaction is likely to have the wherewithal to satisfy anything more than the most minimal monetary obligations imposed by the terms of the underlying space lease.

As a result, landlord obligations in what are otherwise considered to be credit leases tend to create opportunities for situations in which the tenant may abate its rent payments. Given the marginal debt service coverage of most credit-tenant loans, any reduction in the rent paid by the tenant is almost guaranteed to force the landlord/borrower to come out of pocket to pay debt service. If the landlord/borrower does not have the funds to make up the difference or chooses not to, the borrower will be in default.

An understanding of the nature and extent of a landlord's obligations is essential to an assessment of the impact that those obligations may have on the default probability of a credit-tenant loan. Standard & Poor's relies on issuers to furnish that information in the form of lease abstracts. A lease abstract must be prepared and submitted for each credit-tenant loan that will be included in a commercial mortgage pool. The information contained in the lease abstract is used to determine whether the landlord obligations add significantly to the risk that the lease payment stream may be reduced or interrupted.

This information is also evaluated in light of other information about the related loan and the leased property. For example, the engineering report may provide valuable insight into whether the landlord's obligations with respect to repairs and maintenance are likely to be burdensome. Assuming that the engineer has identified all structural elements and systems for which the landlord is responsible and has estimated the remaining useful life, the replacement cost of each element and system, and the number of times that each structural element and system will need to be replaced during the term of the mortgage, the engineering report can serve as the basis for quantifying the average amount that the landlord/borrower is likely to have to spend each year on repairs and maintenance. This, in turn, should be related to the amount by which rental payments exceed the borrower's debt service obligations.

In general, it is preferable for borrowers to be required to make on-going deposits to repair and maintenance reserves out of excess cash flow. Such reserves should be under the control of the loan servicer and available to reimburse borrowers for actual expenditures. If a borrower fails to live up to its repair and maintenance obligations under the terms of the lease, the servicer has a source of cash with which to ensure that the problem is remedied before the tenant decides to take matters into its own hands.

A less desirable alternative is to have debt service coverage in excess of 1.0x without requiring the funding of repair and maintenance reserves. This alternative entails more risk because, although the borrower should have sufficient excess cash flow to meet its maintenance obligations, the only way the servicer can know whether the borrower is actually living up to the terms of the lease is through periodic site inspections.

In the case of a credit lease under which responsibility for maintaining insurance coverage on the property rests with the landlord rather than the tenant, the lease typically requires the landlord to restore the premises to the extent practicable if they are damaged by a casualty which does not result in a termination of the lease. Restoration clauses may also mandate that the work be completed within six to twelve months. To ensure that a commercial mortgage borrower, regardless of the nature of the property that it owns, has the funds with which to respond to a major casualty, Standard & Poor's requires that all borrowers maintain standard fire and other hazard insurance coverage with carriers rated 'BBB' or better. In addition, Standard & Poor's prefers that the mortgage documents require that servicers maintain an escrow for each borrower for the purpose of accumulating annual or semi-annual premiums. In the event of a borrower default, the loan servicer is usually required to obtain force-placed insurance to ensure that coverage does not lapse in spite of the default.

Another common landlord obligation is to mitigate the impact of a partial condemnation, again often within six to twelve months. In this instance, once the landlord/borrower and the governmental authority that ordered the condemnation have agreed on the amount of the condemnation award, the borrower should have the funds with which to restore the property.

If it appears that the additional risk related to landlord obligations under a non-bondable lease is significant and that the risk has not been addressed adequately within the structure of the loan itself, an upward adjustment will be made to the assumption regarding the default probability associated with that loan.

Latent Defects

Credit tenants often lease newly constructed properties from developers. It is not surprising, then, to find clauses in many credit leases that obligate the landlord to correct defects in the construction of the leased property that are discovered after the tenant takes occupancy. In the event that the landlord fails to correct latent defects, such clauses generally permit the tenant to abate or offset rent, or, under extreme circumstances, they may even permit the tenant to terminate the lease. In some instances, the tenant has a specified period of time after the commencement of the lease during which latent defects can be brought to the attention of the landlord; in other instances, the tenant may be able to seek relief from the landlord at any time during the term of the lease.

From Standard & Poor's perspective, it is difficult to quantify the losses that might arise from tenants' assertion of their rights under latent defect clauses. There are, however, a number of factors that serve to mitigate the related risk:

- Many of the properties that serve as security for credit-tenant loans are retail stores. Most modern retail buildings consist of slab foundations, cinder block or tilt-up walls, and flat membrane roofs, with minimal mechanical systems. Given the relatively simple nature of the structures themselves, the potential for material latent defects in retail properties is relatively low. If construction defects are discovered, it is usually relatively inexpensive to correct them.
- Most national retailers provide developers with detailed specifications for their prototype stores. Each company usually works with a group of developers, most of whom have built other projects for the same tenant and are, therefore, experienced in building to the tenant's specifications. Consequently, the economic incentive for developers to provide quality workmanship to repeat customers and to correct any latent defects is strong.
- The tenant often has a sophisticated in-house construction department which monitors the construction of new facilities to ensure that the specifications are met. If the developer does not comply with the specifications, the tenant will not give the landlord a clean estoppel certificate. Monitoring on the part of the tenant during construction should also reduce the likelihood that defects will only be discovered after the tenant has taken possession.
- Typically, the issuance of a certificate of occupancy by the appropriate municipal agency is one of the conditions that must be satisfied before the tenant takes possession of the facility. In addition, the architect supervising the construction must have issued a certificate of completion.
- The property inspection conducted by the independent engineer who prepares the engineering report required prior to the closing of the loan should help to identify any glaring construction problems.
- Before the loan is closed, the landlord must provide an estoppel certificate in which the tenant says that it has accepted the leased property and that it currently has no rights of offset or termination

under the lease.

- Most major building systems (*e.g.*, the roof, the HVAC system) are covered by third-party warranties against manufacturing defects.
- Apart from the difficulty of quantifying the losses that might be caused by latent defects, if a tenant were to discover a construction-related problem after having taken possession of a facility, the borrower would have a strong incentive to make sure that the problem is corrected. By failing to do so, not only would the borrower risk losing its equity in the property, but it might also be subject to tax-recapture liability. And, if the borrower's primary business is developing properties for credit tenants, it would risk doing serious damage to its reputation as a developer.

Lease Termination Rights

Under both triple-net and double-net leases, the tenant may have the right, under certain circumstances, to terminate the lease prior to its expiration. These circumstances may include:

- The occurrence of a major casualty during the last one to two years of the lease term, regardless of whether the landlord intends to repair or rebuild;
- The condemnation of a significant portion of the leased property, such that the tenant is precluded from conducting its business in the space that is available after the condemnation;
- The landlord's leasing of another property within a specified radius to a direct competitor of the tenant; or
- The landlord's failure to provide a specified number of parking spaces for use by the tenant and/or its customers.

Clauses that permit early termination of the lease at the option of the tenant are generally referred to as lease "outs." The fact that a tenant chose to exercise its right to terminate under a lease out could be viewed as an indication that the value of the leased property as a location from which to do business had diminished, at least in the eyes of the tenant. More importantly, the borrower would have lost its source of cash flow with which to pay debt service.

Casualty and condemnation "outs" are typically addressed by obtaining insurance policies that cover the risk that the tenant will exercise its termination rights. Such policies permit the borrower to present a claim to the insurer in the event that a tenant terminates its lease following a casualty or condemnation. The insurance proceeds should then permit the borrower to satisfy its monetary obligations under the related loan. Standard & Poor's reviews each casualty and condemnation termination policy to make sure that it provides adequate coverage.

In the absence of condemnation insurance for a very large loan, it may be necessary to determine the probability that use of a significant portion of the improvements will be lost as a result of a condemnation and what the effect of a condemnation might be. A worst-case analysis assumes that any existing roads that border the property are by widened 30 feet, or the equivalent of 2 traffic lanes. The total amount of land that might be taken and the number of parking spaces that might be lost under this scenario are calculated to ascertain whether the property would then be in violation of local building codes or zoning regulations or whether the tenant's rights under the lease would have been breached.

Next, if the property does not pass this test, aerial photographs of the site are reviewed to determine more precisely which of the adjacent roads are most likely to be widened and by how many lanes. In addition, local and state government agencies are contacted regarding any plans to condemn the property or to widen existing roads. The amount of land that might be taken and the number of parking spaces that might be lost are recalculated, again with an eye to determining whether the property might fail to satisfy local building codes or zoning requirements or whether the tenant might be entitled to break the lease. If the risk of condemnation is not remote, additional subordination or some other form of credit enhancement may be required. It should be noted, however, that a full condemnation analysis is not feasible for the typical credit-tenant loan.

Partial Amortization

An increasing number of credit-tenant loans included in pool transactions do not amortize in full over the term of the underlying leases. The evaluation of these loans is dependent, in part, on the availability of residual value insurance, or a surety bond that functions like residual value insurance, from a rated insurer.

Traditionally, a rated credit lease transaction was structured to be entirely dependent on the rating of the related tenant and on the cash flow stream that was presumed to be available under the terms of the lease. Consequently, the original balance of the underlying loan was pegged at an amount that could be amortized in full over the term of the lease after deducting interest from each net lease payment. The result was that a traditional credit lease transaction involved no refinancing risk unless, of course, the credit quality of the tenant deteriorated over the course of the lease term. If the loan balance had not been fully amortized at the point when the credit lease expired, Standard & Poor's would have assumed not only that the borrower would be unable to refinance the outstanding loan balance, but also that the borrower would automatically file for bankruptcy protection because its only asset with quantifiable value was the now-expired credit lease.

In light of this analysis, it becomes clear that, in the case of a partially amortizing credit-tenant loan enhanced by residual value insurance, the residual value policy should function as a substitute for full amortization. It should, therefore, protect the investor-lenders from refinancing risk under all circumstances, with the possible exception of a monetary default under the related credit lease. Effectively, this means that the residual value policy must be written in such a way that (a) there are no conditions precedent to payment under the policy other than presentation of a claim by the party, usually the trustee, that is the beneficiary or loss-payee under the policy and that is authorized to act on behalf of the investor-lenders and (b) there is no ambiguity about the amount or timing of the payment that the insurer is obligated to make upon presentation of such a claim.

The specific rating assigned to a credit-tenant loan enhanced with a residual value policy is dependent on the ratings of both the credit tenant and the residual value insurer. Based on the "weak link" principle, if the rating of the insurer is lower than that of the tenant, the initial rating will be related to that of the insurer. Similarly, if the rating of the tenant is lower, the initial rating will be related to that of the tenant. Investors should expect that, over time, the credit quality of the loan may change to reflect changes in the rating of either the tenant or the insurer, depending on which is the weaker credit.

Base Policy and Endorsement Format

Certain residual value insurance policies are structured as a base policy plus one or more endorsements. Payment under the base policy is usually predicated on the satisfaction of various conditions, including conditions related to the maintenance of the property in accordance with the terms of the lease. The base policy may also anticipate a lengthy claims procedure, beginning as much as a year prior to the date on which the policy terminates. During this period the insurer has the right to determine whether the "property return conditions" have been satisfied and the borrower may seek to cure deficiencies identified by the insurer. The borrower may be the named insured under the base policy.

By contrast, the only condition precedent to payment under the endorsement should be presentation by the beneficiary of one or more notices of claim within the time frames outlined in the endorsement. There should be no requirements related to the physical condition of the property. Furthermore, the endorsement should contain explicit language to the effect that, if there is a conflict between the terms and provisions of the base policy and those of the endorsement, the terms and provisions of the endorsement will govern. The originator of the loan is usually named as the original beneficiary of the endorsement, but those rights should be assignable to the entity that is servicing the loan or to the trustee.

Heightened Incentive for Borrower Bankruptcy?

Generally, the way in which the residual value insurer seeks to protect itself against loss is by having rights to the real estate that secures the underlying loan if and when it becomes obligated to make a payment under the policy. The insurer can gain access to the real estate asset either by stepping into the shoes of the trustee-lender and subsequently foreclosing on the loan or by having the borrower place the deed to the property in escrow with instructions to the escrow agent to turn the deed over to the insurer in the event that the borrower defaults in making the balloon payment due at the maturity of the loan.

The supposition upon which most credit-tenant loans are made is that the stream of lease payments, rather than the leased real estate, is the asset with true value. At the end of the initial lease term, if the tenant decides not to renew or extend its lease, the borrower may not be able to refinance. Faced with the prospect of losing its property to a residual value insurer that has paid a claim in an amount sufficient to pay off the maturing balloon loan, the borrower may file itself into bankruptcy prior to the expiration of the lease and the maturity of the loan in order to protect its remaining equity in the property.

Of course, the same might be said of any borrower having difficulty obtaining refinancing. In the case of a credit-tenant loan, the borrower may have a heightened incentive to file because of the likelihood that there will be a disparity between (a) the borrower's estimate of the value of the property based on the assumption that the property can and will be re-leased quickly on terms favorable to the borrower as lessor and (b) potential lenders' estimates of the value of a soon-to-be-empty property.

In the event that the borrower were to file itself into bankruptcy voluntarily in order to protect this equity, rental payments due under the unexpired term of the lease would be subject to the automatic stay imposed by the bankruptcy court. Even if the rental payments up to that point had been made directly to the mortgagee, a bankruptcy filing could disrupt the flow of lease payments until the stay was lifted.

It should be noted that requiring a borrower to be "bankruptcy-remote" does not ensure that the borrower will be "bankruptcy-proof", particularly given the amount of leverage seen in the typical credit lease loan. On the basis of the "as-vacant" value of the property, rather than the value of the lease cash flow, the liabilities of a credit tenant borrower are almost guaranteed to exceed its assets. If this is the case, the borrower may be in a position to argue successfully that it does not meet the balance-sheet test for solvency. Assuming that the payment terms of the loan are structured around the terms of the credit lease, the borrower should have sufficient cash flow to satisfy a liquidity test for solvency so long as both the lease and the tenant are in place. When the lease is on the verge of expiring, however, that may no longer be true.

In the context of a pool transaction, the structural liquidity mechanism can be assumed to be available to bridge the gap if the cash flow upon which particular loans depend is interrupted because of one or more borrower bankruptcy filings. The servicer should be willing to make advances to cover the principal and interest payments that are missed as a result of such filings on the theory that a bankruptcy court will ultimately release the stayed rent payments and that such advances are recoverable. In the context of a property specific credit lease transaction, however, which typically has no liquidity mechanism, the possibility of an interruption in cash flow would represent an unacceptable risk to the transaction.

Likewise, a bankruptcy filing by the borrower could also impact the servicer's or the trustee's ability to collect under a residual value policy. If the borrower is the named insured under the base policy, there is a possibility that the borrower could assert that the insurance proceeds are part of its estate in bankruptcy.

Here, again, the more forgiving principal repayment timeframe inherent in a pool transaction structured as a pass-through and collateralized by multiple loans allows for the assumption that, even if the borrower were to challenge the payment of insurance proceeds to the servicer or the trustee, such a challenge would not be successful and the funds would eventually be available for distribution to investors. In a stand-alone transaction, however, there is not the same leeway: if there were any doubt that the insurance proceeds would be available, if needed, to pay the outstanding principal of the bonds on the maturity date, one would have to assume that there would be a default.

Enforceability Opinion Required

As is the case with every form of third-party credit enhancement, the provider of a residual value insurance policy will also be asked to provide an enforceability opinion in connection with the issuance of each policy. Such an opinion should conclude that the insurer's obligations under the policy and, if applicable, the related endorsements, are enforceable in accordance with their terms and that such obligations are consistent with its charter and the rules and regulations under which it operates.

The Importance of Bankruptcy Remoteness

The foregoing discussion of lease terms and landlord obligations serves to highlight the importance of having bankruptcy-remote special purpose borrowers in the case of credit-tenant loans. The degree of leverage that is typical of most credit-tenant loans makes credit lease borrowers particularly vulnerable. To limit the likelihood that a borrower's bankruptcy, unrelated to a default on the part of the tenant, will interrupt the stream of lease payments that is anticipated to be the primary source of payment for a credit-tenant loan, it is critical that the borrower be structured in a way that will ensure that it is isolated, so far as possible, from other business risks. The requirements for bankruptcy-remote borrowers are described in other Standard & Poor's Structured Finance publications.

The Role of the Servicer in CTL-Backed Transactions

The entity that performs the day-to-day servicing of the loans is a key player in any pool transaction. The rights and obligations of the servicer, the master servicer, and/or the special servicer are governed by the pooling and servicing agreement or other comparable document that describes the manner in which the loans should be serviced. This document also prescribes the outer limits of the flexibility that the servicer can exercise in dealing with the borrowers.

The servicer's handling of credit-tenant loans is particularly important because the actions of the servicer can impact whether the anticipated stream of lease payments is, in fact, available for the full term of the lease. The servicer must be familiar with the specific provisions of each credit-tenant lease. As outlined in the next section, each lease should include a provision under which the tenant agrees to notify the mortgagee/servicer of any defaults under the lease and to afford the mortgagee/servicer with additional time and opportunity to cure such defaults.

Consequently, if the servicer determines that the landlord/borrower is not living up to its obligations under the lease, the servicer should attempt to rectify the situation so that the tenant does not have an opportunity to assert that it has a right to pay less than the full amount of rent due under the lease. Likewise, if the tenant is not living up to its obligations, the servicer should first press the landlord/borrower to enforce its rights under the lease. If the landlord/borrower is uncooperative, the servicer may need to deal directly with the tenant to make sure that the leased property is properly maintained and that the real estate taxes and insurance premiums are paid on time.

The servicer must also be aware of the mechanisms that have been put in place to plug lease "outs" or to cover the refinancing risk if a balloon payment is due when the lease expires. Many third-party lease enhancement policies require that no modifications be made to the terms of the lease without the consent of the insurer. The servicer must bear this in mind in making servicing decisions to ensure that its actions do not impair the availability of coverage under the policies. In addition, if it becomes necessary to file a claim under a lease enhancement policy, the servicer must be familiar with the claims process so that it can act quickly.

Representations and Warranties in CTL-Backed Transactions

The huge volume of information that may be pertinent to an assessment of the credit risk associated with each loan included in any kind of pool-based securitization makes it necessary for rating agencies and investors alike to rely, in many instances, on summary information. It would not be possible, for example, for Standard & Poor's to read the lease which forms the basis for each credit-tenant loan included in a pool. Instead, as was noted above in the discussion of landlord obligations, reliance is generally placed on lease abstracts prepared by or for the issuer.

Certain aspects of the information covered in the lease abstracts should also be summarized in the representations and warranties that appear in the documents governing a transaction. At a minimum, the following representations and warranties should be made for each credit-tenant loan that is based on a bondable triple-net lease:

- The lease is in full force and effect, and is a legal, valid, binding and enforceable obligation of the tenant.
- No default by the landlord or the tenant has occurred under the lease, and there are no existing conditions that, with the passage of time or the giving of notice, or both, would result in a default under the terms of the lease.
- The tenant has not been released, in whole or in part, from its obligations under the terms of the lease.
- None of the terms of the lease has been impaired, waived, altered, or modified in any respect. The terms of the related mortgage loan provide that the lease cannot be modified without the consent of the mortgagee.
- The lease is subordinate in right to the related mortgage; any subleases entered into by the tenant will be subject and subordinate to the lease and will not relieve the tenant of any of its obligations under the lease; in the event that the mortgagee acquires title to the leased property by foreclosure or otherwise, the lessor's interest under the lease is freely assignable by the mortgagee and its successors and assigns to any person without the consent of the tenant, and in the event that the

lessor's interest is assigned, the tenant will be obligated to attorn to the assignee as lessor under the lease.

- The tenant has agreed to notify the mortgagee of any default under the lease and to provide the mortgagee with additional time and opportunity to cure.
- The base rental payments due under the lease are greater than or equal to the scheduled payments of interest and principal (with the possible exception of the balloon balance due at maturity if the loan is enhanced with residual value insurance) due under the loan documents and are payable without notice or demand and without right of set-off, counterclaim, recoupment, abatement, reduction or defense.
- The tenant is required to make all rental payments directly to the mortgagee or its successors and assigns.
- There is no right of rescission, set-off, abatement, diminution, defense or counterclaim to the lease, nor will the operation of any of the terms of the lease, or the exercise of any rights thereunder, render the lease unenforceable, in whole or in part, or subject to any right of rescission, set-off, abatement, diminution, defense or counterclaim, and no such right has been asserted.
- The obligations of the tenant under the lease, including, without limitation, the obligation of the tenant to pay fixed and additional rent, are not affected by reason of any damage to, or destruction of, any portion of the leased property; any taking of the leased property or any part thereof by condemnation or otherwise; or any prohibition, limitation, interruption, cessation, restriction, or prevention of, or interference with, the tenant's use, occupancy or enjoyment of the leased property; provided, however, that the lease may permit a lease termination under these circumstances if notice of termination is accompanied by the tenant's exercise of an option to purchase the leased property for an amount at least equal to the outstanding balance of the credit-tenant loan plus accrued and unpaid interest.
- In the event that the lease may be terminated upon the occurrence of a casualty or condemnation, the related mortgage loan has the benefit of a non-cancelable lease enhancement policy for which the entire premium has been paid in full.
- The landlord does not have any monetary obligations under the lease.
- Every obligation associated with managing, owning, developing and operating the leased property, including, without limitation, the obligation to pay the costs associated with utilities, taxes, insurance, ground rents, capital and structural improvements, maintenance and repairs, is an obligation of the tenant.
- Any obligation or liability imposed by any easement or reciprocal easement agreement is an obligation of the tenant and is without recourse or liability to the landlord.
- The landlord does not have any non-monetary obligations under the lease, the performance of which could involve a material expenditure of funds or the breach of which could result in the abatement of rent, a right of set-off or termination of the lease.
- The lease contains customary and enforceable provisions which render the rights and remedies of the lessor thereunder adequate for the enforcement and satisfaction of the lessor's rights thereunder.
- The tenant may not terminate the lease for any reason (other than a default on the part of the landlord) prior to the payment in full of: (a) the outstanding principal balance of the related credit-tenant loan; (b) all accrued and unpaid interest on the related credit-tenant loan; and any other sums due and payable under the terms of the related credit-tenant loan as of the termination date, which date is a date on which a rent payment is due.
- In the event the tenant assigns the lease or sublets the leased property, the tenant will remain fully liable under the lease.
- The tenant has agreed to indemnify the landlord from any claims of any nature relating to the lease and the leased property.
- The tenant has agreed to indemnify the landlord from any claims of any nature arising as a result of any environmental problem affecting the leased property, which problem is caused by the tenant and arises after the commencement of the lease.
- The leased property is a separate tax parcel.
- The leased property is not subject to any lease other than the credit lease. No person has any possessory interest in, or right to occupy, the leased property except under and pursuant to the credit lease. The tenant is in occupancy of the leased property.
- With respect to any lease that is guaranteed by a guarantor, the guarantee represents the unconditional, irrevocable, and absolute obligation of the guarantor, without any right of set-off,

counterclaim, or defense, and is a guarantee of payment and not merely collection. The guarantee is binding upon the guarantor, its successors and assigns and may not be amended or released without the mortgagee's consent. The rejection of the related lease in a bankruptcy or insolvency of the tenant will not affect the guarantor's obligations under the guarantee, and the guarantor will be obligated to pay the tenant's obligations under the related lease as though such rejection had not occurred. In the event that the tenant or the guarantor makes a payment which is subsequently invalidated, in whole or in part, declared to be fraudulent or preferential or set aside under any bankruptcy law or otherwise, the guarantor will be obligated to pay the amount of such payment to the extent invalidated, declared to be fraudulent or preferential or set aside.

- In the case of loans based on non-bondable or double-net leases, issuers should make analogous representations and warranties which describe the ways in which the related loans and leases vary from the bondable triple-net standard. For example, the representation with respect to landlord obligations pursuant to easements and reciprocal easement agreements should summarize each landlord's monetary and non-monetary obligations under the terms of the related lease and any related easement agreements.
- The representations and warranties outlined above are related primarily to the terms of the credit leases themselves. In addition to the these, the issuer will typically give a series of standard representations and warranties with respect to other matters affecting the related mortgage loans and the leased properties. In the case of a credit-tenant loan, the loan-, property-, and tenant-related representations and warranties should include the following:
- The depositor's or seller's assignment of the assignment of leases and rents creates a valid first-priority security interest in favor of the trustee in the landlord/borrower's rights under the lease, including the right to receive periodic payments of basic and additional rent.
- No person owns any interest in any payments due under the lease other than the landlord/borrower and the depositor or seller, which interests have been conveyed to the trustee.
- The tenant has delivered a subordination, non-disturbance and attornment agreement and an estoppel letter.

Required Documentation

Issuers should present the following documentation for each credit-tenant loan (these requirements are described more fully in Standard & Poor's *Legal and Structured Finance Issues in Commercial Mortgage Securities*):

- Lease for the mortgaged property;
- Lease abstract;
- Tenant estoppel certificate, in which the tenant should acknowledge that the lease is in full force and effect, that the landlord/borrower is not in default under the terms of the lease, and that no circumstances currently exist that would give the tenant the right to abate or offset its rent. The estoppel should be dated no more than three months prior to the date when the related mortgage is expected to be securitized;
- Note, mortgage or deed of trust, and assignment of leases and rents. The mortgage documentation must evidence that the loan is secured by, among other things, a mortgage granting a first lien on the mortgaged property and an assignment of the leases and rents with respect to the mortgaged property;
- Casualty, general liability and rental interruption insurance policies. Unless the rating of the tenant is such that it is eligible to self-insure, copies of all major insurance policies should be provided;
- Related ground lease, if any;
- Appraisal of the mortgaged property. In addition to reaching a conclusion as to the leased-fee value of the property based on the three traditional valuation methodologies, the appraisal should also provide an estimate of the "as-vacant" value of the property; this means that the appraiser should assume that the lease to the existing tenant has lapsed and, therefore, does not contribute to the value of the property. The sections detailing the appraiser's conclusions based on the more traditional valuation methods should include information on rental rates and lease terms for comparable space, recent sales of comparable properties, and recent sales of unimproved land with similar zoning;
- Environmental reports; and
- Engineering reports.

In addition, the issuer or the investment bank representing the issuer should summarize information related to each credit-tenant loan to be included in a pool in an electronic spreadsheet formatted in Microsoft Excel or a comparable spreadsheet application. The spreadsheet should include the following information, in the following order:

- Loan number;
- Origination date;
- First payment date;
- Maturity date;
- Original balance;
- Original term to maturity in months;
- Original amortization schedule in months;
- Interest rate which was the basis for principal amortization schedule;
- Loan constant;
- Current balance;
- Current annual debt service;
- Remaining term to maturity in months;
- Remaining amortization schedule in months;
- Principal balance at maturity;
- Current debt service coverage ratio;
- Escrow for immediate repairs;
- Escrow for common area maintenance;
- Escrow for taxes;
- Other impounds;
- Property owner/borrower;
- Property type;
- Gross leasable area in sq. ft. (number of units for multifamily properties, self-storage facilities; number of rooms for nursing homes, congregate care facilities; number of screens for movie theaters);
- Year built;
- Street address of mortgaged property;
- City in which mortgaged property is located;
- State in which mortgaged property is located;
- Zip code for mortgaged property;
- Appraised leased fee value;
- Appraised leased fee value per sq. ft.;
- Appraised "as vacant" value;
- Appraised "as vacant" value per sq. ft.;
- Ground lease? (yes or no);
- Ground rent, if applicable;
- Tenant;
- Lease guarantor, if applicable;
- Tenant (or lease guarantor, if applicable) industry sector;
- Tenant (or lease guarantor, if applicable) industry subsector;
- Current Standard & Poor's credit rating, if any, of tenant or lease guarantor, if applicable;
- Lease type (bondable, triple-net, double-net);
- Original lease term in months;
- Lease commencement date;
- Lease expiration date without taking into consideration extension/renewal options; and
- Name of residual value insurer and policy number, if applicable.

Finally, the issuer or the investment bank representing the issuer should prepare a schedule, patterned

after the sample that appears in the following section, of "lease holes". For each credit tenant loan, the schedule should list every instance in which the landlord has a monetary or non-monetary obligation under the related lease or in which the tenant has the right to abate rent, terminate, or cancel the lease. The lease holes described in the schedule should match the holes described in the related lease abstract. Furthermore, it is anticipated that the exceptions to the lease-related representations and warranties that appear in the documents governing a transaction will largely be built around the facts disclosed in the lease hole schedule. The schedule should also describe how each lease hole has been mitigated. The lease hole schedule should be delivered immediately after an engagement letter is signed.

Sample "Lease Hole" Schedule

Transaction: XYZ Investment Bank
Tenant: Rite Aide of abc, Inc.
Guarantor: Rite Aide Corporation
Loan Number:272
Loan Amount: $13,000,000
Address of Property:1234 Main Street, Omaha, Nebraska
Type of Lease: NN

Table 2					
Sample "Lease Hole" Schedule					
Lease hole	**Termination, (T) offset/ abatement (A), or landlord obligation (LO)**	**Type of mitigant**	**Description of mitigant**	**Amount of mitigant (in dollars)**	**Basis for mitigant (i.e., % of eng. rpt/env. rpt)**
Condemnation The tenant has the right to terminate the lease or abate rent proportionately, if any portion of the Premises is taken.	T/A/LO	Insurance	The lease enhancement insurance policy (condemnation) covers any termination or reduction of rent.		
Casualty Tenant will repair damage after receipt of insurance proceeds and complete such repairs as speedily as circumstances permit. Tenant has the right to abate during any such rebuilding.	T/A/LO	Insurance	The lease enhancement insurance policy (property damage) covers any termination or reduction of rent.		
Environmental Lease required some remediation prior to rent commencement.	T/LO	Lender due diligence	Remediation accomplished, tenant commenced rent.		
Repair obligation of borrower Borrower is obligated to maintain roof, sprinkler system, structural and exterior portions of the premises.	LO	Up-front reserves	Engineer estimate of expenses reserved on a monthly basis	$0.15 per square foot per year	200% of engineer's estimate of expenses to be reserved
Exclusivity Borrower or its affiliates cannot lease to another pharmacy on any property within 5 miles of the leased premises.	T	Borrower recourse	A default by the borrower under this lease provision results in personal liability for the entire indebtedness against the borrower and the guarantor of borrower.		

Standard & Poor's Survival Analysis Model
Survival analysis modeling is a statistical technique developed in the early 1970's for studying the occurrence of events in relation to time by incorporating time-series data on explanatory variables into the analysis. Survival analysis is useful for studying different kinds of events in both the social and the natural sciences. It has been widely used in a variety of contexts, including healthcare and financial services. For example, survival analysis is currently used by several large insurance companies to analyze default risk in their commercial mortgage portfolios for spread analysis and pricing purposes.

With assistance from Mortgage Analytics Inc., Standard & Poor's has applied survival analysis techniques to the problem of estimating the probability that a tenant will default, within a predefined time period, on its obligations under a lease for space that it uses to conduct business. In this instance, the "event" that the model is attempting to predict is the cumulative probability that the financial standing of a credit tenant will deteriorate during the remaining term of its lease to the point where it will default on its obligations.

The foundation of the Survival Analysis Model is Standard & Poor's corporate default database. The database contains information on the credit history of 5,400 corporations with ratings ranging from 'AAA' to 'CCC'. The credits represent most major industries, including manufacturing, utilities, insurance, banking

and other financial services, and real estate. For the most part, the companies are located in the US. For purposes of developing the Survival Analysis Model, the universe of credits was limited to 3,662 entities that had credit ratings (other than 'NR') as of the end of 1995 (except for those companies that had ceased operations prior to December, 31, 1995, in which case the company's last credit rating was used).

The Survival Analysis Model statistically relates a corporate credit's probability of default to key credit variables including its original credit rating, its current credit rating, and the historical volatility of its credit quality as evidenced by rating upgrades and downgrades. At the time when the model was developed, the database covered the period from January 1,1981, through December 31, 1995; the survival analysis results over this 15-year time period were extrapolated in order to estimate cumulative default probabilities for longer time periods.

This corporate default database is updated annually. For more information on the most recent corporate default study, see Standard & Poor's *Rating Performance 1997, Stability and Transition*, August 1998.

Appendix XII
Sample Guarantee Language

The following sample language has been included to illustrate Standard & Poor's guarantee criteria.

1. This guarantee is a guarantee of payment and not of collection.

2. The guarantor hereby waives any requirement that the trustee protect, secure, perfect or insure any security interest or lien or any property subject thereto or exhaust any right or take any action against any person or any collateral (including any rights relating to marshalling of assets).

3. The guarantor hereby guarantees that the guaranteed obligations will be paid strictly in accordance with the terms of the agreement governing such guaranteed obligations or any other agreement relating thereto, regardless of the value, genuineness, validity, regularity or enforceability of the guaranteed obligations, and of any law, regulation or order now or hereafter in effect in any jurisdiction affecting any of such terms or the rights of the trustee with respect thereto. The liability of the guarantor to the extent herein set forth shall be absolute and unconditional, not subject to any reduction, limitation, impairment, termination, defense, offset, counterclaim or recoupment whatsoever (all of which are hereby expressly waived by the guarantor) whether by reason of any claim of any character whatsoever, including, without limitation, any claim of waiver, release, surrender, alteration or compromise, or by reason of any liability at any time to the guarantor or otherwise, whether based upon any obligations or any other agreement or otherwise and howsoever arising, whether out of action or inaction or otherwise, and whether resulting from default, willful misconduct, negligence or otherwise, and without limiting the foregoing irrespective of:

a) Any lack of validity or enforceability of any agreement or instrument relating to the guaranteed obligations;

b) Any change in the time, manner or place of payment of, or in any other term in respect of, all or any of the guaranteed obligations, or any other amendment or waiver of or consent to any departure from any other agreement relating to any guaranteed obligations; any change in the time, manner or place of payment of, or in any other term in respect of, all or any of the guaranteed obligations, or any other amendment or waiver of or consent to any departure from any other agreement relating to any guaranteed obligations;

c) Any increase in, addition to, exchange or release of nonperfection of any lien on or security interest in, any collateral, or any release or amendment or waiver of or consent to any departure from or failure to enforce any other guarantee, for all or any of the indebtedness;

d) Any other circumstance which might otherwise constitute a defense available to, or any other circumstance which might otherwise constitute a defense available to, or a discharge of, the primary obligator in respect of the guaranteed obligations or the guarantor in respect hereof; discharge of, the primary obligator in respect of the guaranteed obligations or the guaranteed obligations or the guarantor in respect here of;

e) The absence of any action on the part of the trustee to obtain payment of the guaranteed obligations from the primary obligor

f) Any insolvency, bankruptcy, reorganization or dissolution, or any proceeding of the primary obligor, or the guarantor, including, without limitation, rejection of the guaranteed obligations in such bankruptcy; or

g) The absence of notice or any delay in any action to enforce any guaranteed obligations or to exercise any right or remedy against the guarantor, or the primary obligor, whether hereunder, under any guaranteed obligations or any agreement or any indulgence, compromise or extension granted."

4. Guarantor further agrees that, to the extent that the primary obligor or the guarantor makes a payment or

payments to the trustee, which payment or payments or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid to the primary obligator or the guarantor or their respective estate, trustee, receiver or any other party under any bankruptcy law, state or federal law, common law or equitable cause, then to the extent of such payment or repayment, this guarantee and the advances or part thereof which have been paid, reduced or satisfied by such amount shall be reinstated and continued in full force and effect as of the date such initial payment, reduction or satisfaction occurred.

Appendix XIII
Revised Legal Criteria for Multi- and Single-Member LLCs

(Editor's note: This article by James Penrose, Esq. and Dina Moskowitz was originally published on Sept. 1, 1999 and is available on RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com, and at www.standardandpoors.com.)

The limited liability company (LLC), a legal entity of fairly recent vintage, provides its owner-members with the limited liability advantages of a corporation and the tax-transparency of a partnership or S-corporation. In rated transactions, the LLC is often used as a "bankruptcy remote," special-purpose entity (SPE) in structured or semistructured transactions, usually as the issuer of the rated debt.

In general, Standard & Poor's SPE criteria attempt to render a corporation, partnership, LLC, business trust, or other entity "bankruptcy remote," in part by contractually restricting its objects and powers, issuance of additional debt, and ability to merge and consolidate, and by providing a mechanism requiring the assent of an independent third party as a condition to filing a voluntary bankruptcy petition (the so-called "independent director" or "golden share" provision).

The SPE criteria have three goals: reducing the possibility that the entity will become insolvent as a result of some activity not contemplated when the debt was rated; minimizing the effect of the insolvency of the "equity" (shareholder, partner, or member) on the SPE; and creating a disincentive for any owner of the SPE to file, or cause to be filed, the SPE into bankruptcy.

In the four years since Standard & Poor's first published its criteria on the subject, the LLC has become an increasingly common participant in rated transactions. Moreover, certain tax law changes have permitted the development of the so-called single-member LLC, which has served in a variety of structured, corporate, project finance, and regulatory-based transactions.

While Standard & Poor's has rated transactions with single-member LLCs, its previously published criteria had not specifically addressed this structure. Standard & Poor's has formalized its criteria for single-member LLCs, which it now publishes, along with a restatement of its criteria for multi-member LLCs.

Characteristics of the LLC

The District of Columbia and each of the 50 states have enacted statutes authorizing and recognizing the LLC. In Delaware (seemingly the preferred organizational jurisdiction), an LLC is formed by filing a certificate of formation and, usually, entering into an LLC agreement. The LLC agreement has its corporate counterpart in the articles of incorporation, by-laws, and shareholders agreement, and its limited partnership counterpart in the limited partnership agreement. Among other things, the LLC agreement defines the objects and powers of the LLC and establishes fundamental organizational matters. An owner of an LLC is termed a "member." In general, members may be corporations, partnerships, other LLCs, trusts, trustees, individuals, or other entities in their personal, or in a representative, capacity. In other jurisdictions, an LLC may be formed by filing "articles of organization," which cover much of the same detail as the LLC agreement.

The defining characteristic of the LLC is its flexibility: The LLC combines many advantageous features of the corporation and the limited partnership. For example, contrary to the practice for limited partnerships, where participation in the management of the partnership by a limited partner brings with it the possibility of unlimited liability, or corporations, where the shareholders' role is restricted to voting for the board of directors and to other limited matters, a member of an LLC is, in principle, free to participate in the management of the LLC. Certain state LLC statutes allow the members considerable latitude in arranging for the LLC's management.

Under the Delaware Limited Liability Company Act (Delaware Act), for example, the LLC can be managed through agreement of the members, by a board of managers (similar to a corporation's board of directors),

or by one or more members individually (similar to the duties of a general partner of a partnership). The Delaware Act also allows a member or manager of the LLC to delegate its rights and powers to agents, officers, and employees of the member or manager, as the case may be.

Analogous to a partnership, but unlike a corporation, the LLC could have a limited life and could be dissolved upon the bankruptcy, death, or dissolution of a member. However, many state LLC statutes (such as the Delaware Act) provide that an LLC shall have perpetual existence unless otherwise specified by its governing documents. Thus, an insolvency of one or more members of the LLC need not, in and of itself, cause the dissolution or termination of the LLC. However, because an LLC may not exist without any members at all, the liquidation, withdrawal, dissolution, or termination of all of the members may affect the existence of the LLC. Consistent with its other SPE criteria, Standard & Poor's believes that if the transaction rating depends on the SPE status of the LLC, it is important to minimize any events that may cause the LLC to dissolve. Accordingly, Standard & Poor's views favorably those state LLC statutes that permit the greatest degree of flexibility in minimizing dissolution events and that do not require the unanimous consent of remaining members to continue the existence of the LLC upon the withdrawal or termination of a member.

But all of this flexibility may come at a price. While the LLC may well have satisfied the "single purpose" and other criteria necessary for SPE status, the hybrid nature of the LLC structure (limited liability with tax transparency) may pose certain "characterization" issues in the event that one or more of the LLC's members were to become insolvent. The relatively undeveloped state of the bankruptcy law applicable to LLCs, along with the fact that the LLC possesses characteristics shared by both corporations and partnerships, raises questions about how an LLC will be treated if one or more of its members becomes insolvent. Standard & Poor's criteria deal with these issues by reducing the likelihood that an LLC would be exposed to the effects of a member insolvency.

The following criteria address concerns arising out of the particular characteristics of LLCs and are designed to be consistent with the criteria for limited partnership and corporate SPEs.

Criteria for Multi-Member LLC

1. The LLC must be established only to engage in the particular activity set forth in its organizational documents. The "particular activity" is that activity (and reasonably incidental other activities) which provides the cash flow necessary to pay timely interest and principal on the rated obligations.

2. To counter arguments that the LLC and an individual member should be substantively consolidated or that "piercing the veil" should be available to a creditor or an insolvent member, the LLC and the members and managers on behalf of the LLC must agree to abide by certain "separateness covenants" whereby the LLC will:

- Maintain books and records separate from any other person or entity;
- Avoid commingling assets with those of any other entity;
- Conduct its own business in its own name;
- Maintain separate financial statements;
- Pay its own liabilities out of its own funds;
- Observe all organizational formalities;
- Maintain an arm's-length relationship with its affiliates;
- Avoid guaranteeing or becoming obligated for the debts of any other entity or holding out its credit as being available to satisfy the obligations of others;
- Allocate fairly and reasonably any overhead for shared office space;
- Use separate stationary, invoices, and checks;
- Avoid pledging its assets for the benefit of any other entity; and
- Hold itself out as a separate entity.

These separateness covenants are required, notwithstanding the fact that many state statutes provide that the LLC will be treated as a separate legal entity from its members.

3. The LLC must have an "independent manager" that is (i) a member that is an SPE as determined by Standard & Poor's published criteria, (ii) an SPE that is not a member, or (iii) a natural person. The "independent manager" of an LLC is an entity correlative to the "independent director" of an SPE corporation whose primary function is to vote for, consent to, or vote against or dissent from, as appropriate, the filing of (or acquiescence in) a voluntary bankruptcy petition against the LLC. *(See graphic 1 for a definition of "independent manager.")*

Graphic 1

Definition of "Independent Manager"

An "independent manager" means a duly appointed manager of the relevant LLC who shall not have been, at the time of such appointment or at any time in the preceding five years, (a) a direct or indirect legal or beneficial owner in such entity or any of its affiliates (other than his or her service as an "independent manager" of the LLC), (b) a creditor, supplier, employee, officer, director, family member, manager, or contractor of such entity or any of its affiliates, or (c) a person who controls (whether directly, indirectly, or otherwise) such entity or its affiliates or any creditor, supplier, employee, officer, director, manager, or contractor of such entity or its affiliates. Under certain circumstances, an "independent manager" may serve in such capacity for affiliated SPE LLCs.

4. The LLC's organizational documents must prohibit it from filing a voluntary bankruptcy petition or from consenting to or acquiescing in an involuntary petition without the affirmative vote of all of the members (including the independent director of the SPE member, if applicable) and the "independent manager" (if the "independent manager" is not a member) of the LLC. The LLC's organizational documents must provide that, when acting on matters subject to the vote of the members, notwithstanding that the LLC is not then insolvent, the members and the "independent manager" shall take into account the interest of the LLC's creditors, as well as those of its members. The Delaware Act permits the duties (including fiduciary duties) and liabilities of a member or manager of an LLC that exist at law or in equity to the LLC or to another member or manager to be expanded or restricted by provisions in the LLC agreement and further provides that no member or manager acting under the LLC agreement shall be liable to the LLC or to any such other member or manager for the member's or manager's good faith reliance on the provisions of such LLC agreement.

5. The assets of any member must not at any time be commingled with the assets of the LLC; any dealings between the LLC and its members must be "arms-length" transactions.

6. The LLC's organizational documents must prohibit it from engaging in a merger, conversion, consolidation, or, except as contemplated by the transaction documents, asset transfer.

7. The LLC's organizational documents must prohibit additional debt or the incurrence of any other actual or contingent liability unless either (a) the additional debt or liability is rated by Standard & Poor's the same as the rating on the obligation in question (at the time of issuance and at all times going forward), or (b) the additional debt or liability is fully subordinated to the rated obligation, and, in either case, is nonrecourse to the LLC or any assets of the LLC other than cash flow in excess of amounts necessary to pay holders of the rated obligation, and does not constitute a claim against the LLC to the extent that funds are insufficient to pay such additional debt or liability.

8. Upon dissolution of the LLC, or upon other events of default, holders of the LLC's rated obligations must have the independent ability to retain the collateral and continue to pay scheduled debt service, or to liquidate the collateral in the event the proceeds would be insufficient to repay all amounts due.

9. To the extent permitted by tax law, the LLC agreement or articles of organization should provide that the LLC should not be dissolved and its affairs should not be wound up solely upon the withdrawal or

termination of a member (other than the last remaining member). If the LLC is dissolved, to the extent permitted by law, the articles of organization must provide that the LLC assets not be liquidated (except as permitted under the transaction documents) without the consent of 100% of the holders of rated obligations. Such holders may continue to exercise all of their rights under the existing security agreements or mortgages, and must be able to retain the collateral until the debt has been paid in full or otherwise completely discharged.

10. The LLC must be qualified under applicable law in the state in which the LLC's assets are located if the LLC is not organized under the laws of that state.

11. The LLC must provide Standard & Poor's with an opinion of counsel that, upon the insolvency of a non-SPE member, neither the LLC nor its assets would be consolidated with such member and, with respect to an SPE member, that upon the insolvency of the parent of such SPE member, neither the SPE member nor its assets would be consolidated with the parent.

12. If the LLC has no SPE members, Standard & Poor's concern is that the insolvency of a non-SPE member may precipitate the insolvency of the LLC itself, despite the fact that the LLC may be solvent and otherwise able to pay its debts as they become due. In addition to the LLC appointing an "independent manager," for a multi-member LLC having no SPE members, Standard & Poor's must receive legal comfort that the members would not be viewed as "general partners" of the LLC for purposes of Section 303(b)(3)(A) of the U.S. Bankruptcy Code and, therefore, in the event of insolvency of a member, the bankruptcy trustee of such a member could not unilaterally file the LLC into bankruptcy as a voluntary proceeding. Recognizing the absence of any direct authority on the issue, Standard & Poor's will accept an opinion premised on (i) the absence of general liability of LLC members under the relevant LLC statute (in contrast to general partners), (ii) the presence of specific provisions in the relevant LLC statute contemplating a single-member structure (in contrast to a partnership), and (iii) the quasicorporate nature of LLC governance.

13. If the LLC has no SPE members, Standard & Poor's must receive an opinion of counsel that (a) the required affirmative vote of the "independent manager" in order for the LLC to file a voluntary bankruptcy petition (see paragraph 3 above) is enforceable under applicable state law, and (b) in a bankruptcy proceeding of the LLC, a federal bankruptcy court would apply such state law in determining who has the authority to file a voluntary bankruptcy petition on behalf of the LLC.

Single-Member LLCs

When Standard & Poor's first published its legal criteria for LLCs, federal tax considerations required LLCs to have at least two members to avoid "entity level" taxation. However, the "check-the-box" amendments to the Internal Revenue Code of 1986 permit a single-member LLC to avoid entity level taxation absent an election to the contrary. These amendments have had other effects: It is not now necessary to restrict transferability, limit the life of the LLC, or provide for minimum levels of capital contributions or capitalization of members in order to ensure pass-through tax treatment.

There appear to be three variations of the single-member LLC: In the first, an SPE single member holds a 100% membership interest in the LLC; in the second, a non-SPE single member holds a 100% membership interest in the LLC but delegates certain rights and duties to an independent third party; in the third, a non-SPE member holds a 100% "economic" membership interest in the LLC with an SPE member or independent natural person holding a 0% "non-economic" membership interest. If not an SPE, the single "economic" member should be a legal entity, not a natural person. If the LLC has no SPE members, Standard & Poor's views the inclusion of the "springing member" provision described below as an advantage in structuring the LLC. With some adaptation, the criteria for multi-member LLCs may be made to apply to single-member LLCs as well.

LLC With SPE Single Member

Structurally speaking, this variation is perhaps the least troublesome, as Standard & Poor's will assume that if the single member meets Standard & Poor's SPE criteria, the LLC is unlikely to become insolvent due to the single member's insolvency. The LLC must comply with the applicable criteria set forth under the above section Criteria for Multi-Member LLCs, including provision of the appropriate nonconsolidation opinions.

LLC With Non-SPE Single Member
Like a multi-member LLC that has no SPE members, Standard & Poor's concern with respect to a single-member LLC whose member is not an SPE is that the insolvency of the member may precipitate the insolvency or dissolution of the LLC itself. This concern is mitigated by compliance with the applicable criteria set forth under the section Criteria for Multi-Member LLCs, including provision of the opinions regarding nonconsolidation and enforceability of the "independent manager" provisions. In addition, for a non-SPE single-member LLC, an opinion should be provided to the effect that the bankruptcy of the non-SPE single member of the LLC will not, by itself, cause the LLC to be dissolved or its affairs to be wound up. See the section The "Springing Member," below.

LLC With "Economic" Non-SPE Member and "Non-Economic" SPE Member
This type of LLC may more closely resemble the limited partnership model except that the "economic member" is generally an unrated (or lowly-rated) operating entity with the "non-economic" member serving as the "independent manager." A "non-economic" member may be either a legal entity or a natural person. As with a multi-member LLC having no SPE members, the concern with the "economic/non-economic" structure is that the insolvency of the non-SPE "economic" member may precipitate the insolvency of the LLC on the theory that the LLC will be treated, for bankruptcy purposes, as a partnership. This type of LLC must comply with the criteria for multi-member LLCs set forth above, except that Standard & Poor's will also require comfort that, like a single-member LLC whose member is not an SPE:

- The "non-economic" member must be functionally established as an SPE, the affirmative vote of which must be secured before the LLC could file a voluntary bankruptcy petition or consent to or acquiesce in an involuntary petition of the LLC;
- The death, bankruptcy, insolvency, or incapacity of the "economic" member will not, by itself, cause the LLC to be dissolved or its affairs to be wound up. See the section The "Springing Member," below; and
- Upon any insolvency of the "economic" member, neither the LLC nor its assets would be consolidated into the bankruptcy estate of such "economic" member.

The "Springing Member"
Standard & Poor's has taken assurance from the inclusion of the so-called "springing member" provision in the LLC agreement of a single-member LLC. This mechanism ensures that, in the event that the non-SPE member ceases to be a member of the LLC, the "independent manager" of the LLC automatically becomes a member of the LLC without any further act, vote, or approval of any person, so that the business of the LLC shall be continued without dissolution. Standard & Poor's must receive an opinion of counsel that such provision is enforceable.

As appropriate, the criteria for single- and multi-member LLCs should be incorporated in the relevant LLC agreement or articles of organization and in the other transaction documents. State law and bankruptcy opinions should be delivered by outside counsel to Standard & Poor's for review well prior to closing. Standard & Poor's may require that the issuer provide a copy of the statute under which the LLC is constituted.

Appendix XIV
U.S. Legal Criteria for "Recycled" Special-Purpose Entities

(Editor's note: This article by James Penrose, Esq. and Dina Moskowitz was originally published on Sept. 19, 2002 and is available on RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com, and at www.standardandpoors.com.)

Reduced to its essentials, securitization enables a lower-rated company to obtain financing at interest rates normally associated with higher-rated borrowers by transferring a pool of the company's cash-generating assets to an entity that is unlikely to become insolvent. Such an entity is commonly nicknamed an "SPE", but the term does not impart its full significance-many entities can be "special purpose" but the key for a securitization is that the entity be "bankruptcy remote" as well.

The transfer of assets often takes the form of a sale, with the purchase price being raised contemporaneously by the SPE issuing notes (debt), certificates (equity), or both. The proceeds from the sale of the securities are paid to the transferor. The transfer also may take the form of a capital contribution by the transferor, as the SPE often is a wholly owned subsidiary of the transferor. The transferor's funding costs go down as a result of transferring its assets to an SPE because the transferor's risk of bankruptcy need not be taken into account (in the simplest form of transaction) in analyzing the creditworthiness of the debt issued by the SPE. Rather, the analysis of the SPE's credit can be based primarily on the size of the debt service payments relative to the cash flow generated by the assets.

But what does it mean to be "bankruptcy remote"? The following are the traditional characteristics of a bankruptcy remote SPE:

- Restrictions on objects, powers, and purposes;
- Limitations on ability to incur indebtedness;
- Restrictions or prohibitions on merger, consolidation, dissolution, liquidation, winding up, asset sale, transfers of equity interests, and amendments to the organizational documents relating to "separateness";
- Incorporation of separateness covenants restricting dealings with parents or affiliates;
- "Non-petition" language (i.e., a covenant not to file the SPE into involuntary bankruptcy);
- Security interests over assets; and
- An independent director (or functional equivalent) whose consent is required for the filing of a voluntary bankruptcy petition.

These characteristics are further explained in various Standard & Poor's publications (most recently in Structured Finance Legal Criteria available at RatingsDirect.com). In sum, however, their function is to minimize the likelihood that the SPE will file itself into (voluntary) bankruptcy, or will be filed by third parties into (involuntary) bankruptcy. Thus, in analyzing the ability of the SPE to make its debt service payments, the bankruptcy of the SPE need not be taken into account.

Rationale for the Newly Created SPE

The advantage of a newly created vehicle for each new transaction is that investors have the assurance that it has no prior history of dealings or disguised liabilities that could affect cash flow. If the vehicle is created just prior to its use in the securitization, it is unlikely that there would be claims that might have to be satisfied at some later date. If the SPE is not newly created for the securitization, an unrated, pre-existing liability of the entity may result in a lawsuit against it which might have to be satisfied out of its assets, and which could give the plaintiff the incentive to put the entity into an involuntary bankruptcy.

For example, with respect to real estate transactions, such pre-existing liabilities could include, among other things, prior contractual obligations, environmental liability, and various other liabilities related to personal injury claims, "dram shop" liability, and employment liability. Of course, none of the SPE's assets should

remain unpledged, as unpledged assets provide an increased incentive for a lawsuit or bankruptcy filing.

For every principle, though, there are exceptions. One such exception lies in Standard & Poor's recognition that an SPE may, if appropriately structured, serve as the issuer for more than one transaction. (See "Criteria for Multi-Use SPEs" at RatingsDirect.com.) Such a multi-use SPE mitigates the potential of a holder of a lower-rated or unrated issuance attempting to place the SPE into bankruptcy by requiring the SPE's debtholders to agree in the transaction documents that they have no rights to collateral held by the SPE in respect of other series, and that if they were deemed by a bankruptcy court to have any rights in such collateral, they would be subordinate to the other debtholders. As an enforceable "subordination agreement" under the Bankruptcy Code, the effect of these provisions is that, upon a default of a particular tranche, holders of the lower-rated defaulted debt would have little to gain by forcing the issuer into bankruptcy.

Another exception is the subject of this article. Currently, securitizations encompass considerably more than pools of liquidating assets. In recent years securitizations have featured a large variety of assets ranging from automobile fleets to "single asset" real estate transactions. On occasion, particularly for first-time entrants into structured finance, it may be impractical or impossible to transfer assets to a newly created SPE. For instance, transactions that have been documented and closed without a Standard & Poor's rating and which require bondholder consent to alter material terms (such as the identity of the obligor on the bonds) may subsequently be submitted for rating. In other instances, the problem arises in real estate loans where the transfer of the mortgaged property to a new SPE may provoke unfavorable mortgage, recording, transfer, or capital gains tax consequences. In still other instances, creation of a new SPE by a regulated entity may require regulatory approval that may not be speedily forthcoming. In such cases, Standard & Poor's has been asked about the possibility of "transforming" the existing operating entity into an SPE. As is usually the case, the answer is, "maybe."

The "Recycled" SPE

As discussed above, the concern with using an existing entity for a new asset-backed transaction is that the entity may have previously incurred material liabilities that could ultimately trigger an involuntary bankruptcy filing.

In transactions where, for reasons described above, it may be onerous to transfer the asset(s) to a newly formed SPE, the transaction sponsor may, in addition to adopting the SPE criteria (including provision of a substantive nonconsolidation opinion), consider removing or mitigating potential liabilities from the existing entity. The now-recycled entity may potentially be treated more advantageously than a non-SPE for rating purposes, though it is likely that some rating penalty may attach to the transaction, particularly at the higher rating levels, unless all risks (regardless of whether known as of the closing date) are specifically mitigated by a creditworthy source. Depending on the rating sought (and in addition to other documents or information that might be required for the rating), such a "recycling" would generally involve:

- A certification by an officer of the company,
- An audit,
- Proof of compliance with environmental standards, and
- Applicable legal comfort.

The officer's certificate should be delivered by an executive officer competent to address each of the matters therein. The certificate should state that the entity:

1. Is and always has been duly formed, validly existing, and in good standing in the state of its incorporation and in all other jurisdictions where it is qualified to do business;

2. Has no judgments or liens of any nature against it except for tax liens not yet due;

3. Is in compliance with all laws, regulations, and orders applicable to it and has received all permits necessary for it to operate;

4. Is not aware of any pending or threatened litigation;

5. Is not involved in any dispute with any taxing authority;

6. Has paid all taxes;

7. [For real estate transactions] Has never owned any property other than the property that is the subject of the current transaction and has never engaged in any business except the ownership and operation of such property;

8. Is not now, nor has ever been, party to any lawsuit, arbitration, summons, or legal proceeding (if it has been a party, the entity should supply evidence of liability insurance acceptable to Standard & Poor's);

9. Has provided Standard & Poor's with complete financial statements that reflect a fair and accurate view of the entity's financial condition;

10. Has passed a Phase One environmental audit for all of its properties;

11. Has (with respect to the nonconsolidation opinion referred to below) materially complied with the separateness covenants referred to in such opinion since its formation (or any material noncompliance is properly addressed and analyzed in the nonconsolidation opinion); and

12. Has no material contingent or actual obligations not related to the mortgaged property.

The audit aspect of the recycling involves the provision to Standard & Poor's of an accounting audit of the entity. The audit should confirm the substance of the representations and warranties in the Officer's Certificate dealing with the entity's financial statements. The legal comfort involves providing Standard & Poor's the following:

- An acceptable legal opinion confirming the relevant representations and warranties (typically 1 to 5 above) set forth in the Officer's Certificate, and
- An acceptable nonconsolidation opinion containing no assumptions with respect to the entity's prior conduct unless (a) the transaction documentation contains representations to the effect that, since its inception, the entity has never violated Standard & Poor's SPE criteria, and (b) the opinion provider states that it has undertaken appropriate investigations as to prior conduct (including, without limitation, review of lien searches, loan documents from prior loans, and certificates) in support of such assumptions.

If the entity holds real property, Standard & Poor's may request a copy of the Phase One environmental audit referred to in the Officer's Certificate.

Ideally, the result of the recycling is a clean bill of "liability" health for the entity. On occasion, however, issuers or sponsors of the existing entity have not been able to give clean certifications. In such instances, the relevant liabilities have been mitigated by acceptable credit enhancement.

While a newly created SPE is, of course, the ideal, Standard & Poor's recognizes that circumstances occasionally conspire to make this impracticable. In such cases, Standard & Poor's will consider the effect that recycling may have on the desired rating. The resulting recycled SPE, by being held to analogous criteria as a newly created SPE, may consequently support a higher rating than might otherwise be possible.

Appendix XV
Typical Factors Considered by Courts in Determining Existence of a True Sale

This appendix summarizes some of the factors relevant to true sale analyses. Standard & Poor's bases its criteria on advice of counsel rendered in connection with each transaction and a review of generally accepted legal concepts as applied by the courts. Courts generally weigh several factors in determining whether a transfer is deemed to be a sale or intended as security.

- Language of transaction documents should reflect the intention of the parties to sell rather than secure and should refer to sale, not pledge or grant of security interest.
- The transfer document should be a formal instrument of transfer, for example, a mortgage loan purchase agreement.
- The sale should be for a valid business or legal reason rather than to loan the Loans to the purchaser.
- The purchaser should not pay the entire purchase price through a promissory note or obligation.
- The purchaser should not pay significantly less than the fair market value of the Loans.
- The seller should not pledge additional collateral designed as security for losses on sold Loans.
- Keep-well agreements by the seller (that is, obligation to add additional Loans) are generally inconsistent with a sale treatment.
- Obligation to repurchase or substitute is generally inconsistent with a sale treatment, except obligations to repurchase or substitute for breach of representations and warranties not related to credit quality.
- An option, as opposed to obligation, to repurchase or substitute defaulted or underperforming Loans may not be viewed as recourse and thus may not be inconsistent with sale treatment.
- An option to repurchase (i.e., clean-up calls) when Loans become a specified percentage of original pool is not viewed as inconsistent with a sale treatment.
- Depending on certain factors, if the seller takes back subordinated certificates, the transfer may not be deemed a true sale. (For a discussion of this issue and Standard & Poor's criteria in this regard, see Section Five on Criteria Related to Retention of Subordinated Interests by Transferor in a True Sale.)
- Payment to the seller that is economically conditioned on the purchaser's receipt of collections on the sold Loans is generally not consistent with a sale treatment.
- If the purported purchase price is too high for the Loans transferred (that is, collections on the Loans would not warrant the purchase price), or, alternatively, if surplus collections are returned to the seller, the transaction may be recharacterized as a loan.
- Recourse to the seller for risks of changes in law or regulations are viewed as inconsistent with a sale treatment.
- The seller should not be able to prevent the purchaser from encumbering or further conveying the Loans sold to it.
- The seller should not have a post-transfer right unilaterally to materially modify terms of any sold Loans.
- If the seller remains as the servicer of the Loans, then the following should apply: (i) there should be a valid business reason for the seller to act as servicer; (ii) the seller should receive a fee equivalent to that which would be paid in an arm's-length transaction; (iii) the purchaser should have the right to remove the seller as servicer in agreed-upon circumstances; and (iv) documents in the seller's possession should be marked to evidence that the transfer was intended as a sale.
- Notice by the seller and purchaser to third parties about the sale and perfection of the transfer of the Loans, for example, notice in seller's financial statements, in its computer and other records, in securities law and other public filings, and in UCC filings (that is, notation to effect that secured party is a purchaser and debtor is a seller constitutes evidence of sale) is consistent with sale treatment.

Appendix XVI
Select Specific Opinion Criteria/Language

General

- As a general matter, Standard & Poor's requires that true sale, nonconsolidation, and security interest opinions be delivered by outside counsel to any participant in a structured transaction.
- As a general matter, Standard & Poor's will not accept an opinion based on the Legal Opinion Accord of the American Bar Association Section of Business Law (1991), unless such opinion specifically identifies (by number) those sections of the Accord on which the opinion is relying. Standard & Poor's will accept an opinion stating that it should be interpreted in accordance with the *Special Report by the TriBar Opinion Committee, Opinions in the Bankruptcy Context; Rating Agency, Structured Financing and Chapter 10 Transactions, 46 BUS. LAW 717 (1991).*
- As a general matter, Standard & Poor's requires "would" opinions.
- Language to the effect that the "issue is not free from doubt" or that the conclusion is "more probable than not" is not acceptable.
- The proviso "although a court may find otherwise" is not preferred but is acceptable.
- A statement that the "opinion is not a guarantee of outcome or result" is acceptable.
- Opinions requested by Standard & Poor's are expected to be given under the law of the applicable jurisdiction; an opinion given under the law of another jurisdiction with an assumption that the laws are identical is not acceptable.
- Security interest creation or perfection opinions should not contain an assumption that the description of the collateral is "reasonably" identified or described in the security agreement or financing statements (as applicable); an assumption that the collateral is "accurately" described is acceptable.
- Amendments to Article 9 of the UCC (effective in all states as of January 1, 2002) overrule *Octagon Gas System Inc. v. Rimmer*, 995 F.2d 948 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 544 (1993); therefore, Standard & Poor's believes it is not necessary or appropriate for true sale opinions to refer to this decision.

Bring-Down Opinion

Counsel delivering a bring-down opinion in the context of a subsequent transfer should state that it has reviewed (i) the facts of the subsequent transfer and that such facts do not differ from those recited in the previously delivered opinion and (ii) the assumptions set forth in the previously delivered opinion, which are the only assumptions being made in the bring-down opinion. Standard & Poor's accepts bring-down opinions only from the same counsel that delivered the opinions being brought down.

Glossary

The definitions set forth below are not intended as legal definitions, but are for the purpose of consistency throughout this publication. A more detailed description of the criteria related to most of the terms set forth below is contained in the body of this publication. The definitions apply both to the singular and plural of the defined terms, as applicable.

Appraisal Reduction Amount - An amount, used as a basis for reducing the interest portion of principal and interest advances, generally equal to the excess of (a) the outstanding principal balance of the loan, plus the sum of (i) unpaid interest on such loan (to the extent not advanced previously), (ii) all unreimbursed advances plus interest at the advance rate thereon, (iii) the total outstanding principal and interest of all subordinate mortgages, (iv) all currently due and unpaid real estate taxes, assessments, insurance premiums, ground rents, condominium fees and (v) all other amounts due and unpaid under the mortgage loan, over (b) 90% of the appraised value of the mortgaged property plus the amount of cash reserves and letters of credit held by the servicer.

Appraisal Reduction Event - An event that triggers a requirement that the servicer obtain an appraisal of the mortgaged property to determine whether a reduction in principal and interest advances is appropriate, such as the following: (i) 60 days after an uncured delinquency occurs in respect of a mortgage loan; (ii) 60 days after the date on which a reduction in the amount of the monthly payments on a mortgage loan or a change in any other material economic term of a mortgage loan (including an extension of the scheduled maturity date) becomes effective as a result of a modification of such mortgage loan; (iii) 60 days after a receiver has been appointed; (iv) the voluntary or involuntary bankruptcy of a borrower; or (v) a mortgaged property becomes REO property.

Bankruptcy Code - United States Bankruptcy Code, 11 U.S.C. §1101, et seq.

Bankruptcy Code Transferor - A transferor of assets that is an entity eligible to become a debtor under the Bankruptcy Code.

Bankruptcy Remote - With respect to an entity, such as a borrower or an SPE managing member or general partner, the status of being unlikely to become insolvent or become a debtor under the Bankruptcy Code for reasons unrelated to the performance of the underlying collateral as a result of separateness covenants (including requirements for an Independent Director) that restrict its own activities and its relationships with affiliates. Generally, bankruptcy remoteness should be confirmed by delivery of a non-consolidation opinion.

Deal-Required SPE - In a structured finance transaction, an entity, such as a depositor, a borrower or an SPE managing member or general partner, that must, pursuant to Standard & Poor's criteria, be a bankruptcy remote SPE.

Either/Or Security Interest Opinion - An opinion of counsel, appropriate for a transfer of loans to a depositor in cases where the facts surrounding the transfer would not support a true sale opinion, concluding that either (i) the transfer of the loans to the depositor would be viewed as a "true sale" such that the loans and payments thereunder and the proceeds thereof would not be viewed as property of the estate of the transferor under Section 541 of the Bankruptcy Code or be subject to the automatic stay under Section 362(a) of the Bankruptcy Code, or (ii) the depositor has obtained, or will have obtained following the taking of certain actions required by the transaction documents, a valid security interest in the loans, the payments thereunder and the proceeds thereof.

Eligible Account - Either (1) an account maintained with a federal or state-chartered depository institution or trust company that complies with the definition of eligible institution, or (2) a segregated trust account or accounts maintained with the corporate trust department of a federal depository institution or state-chartered depository institution subject to regulations regarding fiduciary funds on deposit similar to Title 12 of the Code of Federal Regulations Section 9.10(b) which, in either case, has corporate trust powers, acting

in its fiduciary capacity.

Eligible Institution - In transactions that include 'AAA' rated tranches, a financial institution whose (1) commercial paper, short-term debt obligations or other short-term deposits are rated at least 'A-1' by Standard & Poor's, for funds held for 30 days or less, or (2) long-term unsecured debt obligations are rated at least "A-" by Standard & Poor's, for funds held for more than 30 days.

Eligible Investment - A security or other investment issued by an issuer whose applicable debt ratings satisfy specified criteria so as to insure the availability of the funds as and when needed. For Standard & Poor's criteria on eligible investments and a list of eligible investments, see Appendix VIII, Eligible Investment Criteria for 'AAA' Structured Transactions.

Environmental Laws - All federal, state or local laws, ordinances, rules, regulations, orders, directives, permits licenses or other authorizations or policies governing environment, human health and safety or the use, storage, treatment, transportation, manufacture, refinement, handling, production, disposal or release of hazardous materials or other environmental laws.

FDIA - Federal Deposit Insurance Act, as amended, 12 U.S.C. Sec. 1811 et seq.

FDIC Regulation - The federal regulation entitled "Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation" which establishes certain conditions the satisfaction of which will assure that the FDIC will not reclaim, recover, or recharacterize as property of the receivership estate the financial assets transferred by the FDIC-insured bank in a securitization or participation transaction. The conditions established by the FDIC regulation are (a) the transaction must meet the FDIC regulation's definition of a "securitization" or "participation"; (b) the criteria for sale accounting under generally accepted accounting principles, other than the "legal isolation" condition as it applies to institutions for which the FDIC may be appointed as conservator or receiver (which is addressed by the FDIC regulation) must have been satisfied with respect to the transaction; (c) the documentation effecting the transfer of financial assets must reflect the intent of the parties to treat the transaction as a sale and not a secured borrowing (without regard to the intended treatment of the transaction for tax purposes); and (d) the FDIC-insured bank must have received adequate consideration for the transfer of the financial assets at the time the transfer was made. 12 C.F.R. Section 360.6 (August 2000).

FDIC/Sale opinion - An opinion of counsel to the effect that the conditions listed under the FDIC regulation have been satisfied and accordingly the FDIC will not reclaim, recover, or recharacterize as property of the receivership estate the financial assets transferred by the FDIC-insured bank in a securitization or participation transaction.

FDIC - United States Federal Deposit Insurance Corp.

Hard Lockbox - A cash management regime in which, at origination of the loan, the borrower directs the commercial tenants or, in the case of hotels, the credit card companies, to remit monies payable to the borrower directly into lender-controlled lockbox accounts.

Hazardous Materials - Any hazardous or toxic substances, materials, wastes, pollutants or contaminants including petroleum, petroleum constituents, asbestos, PCBs, and toxic mold.

Impositions - Federal, state and local taxes, assessments, water and sewage rentals, license fees and similar governmental charges that constitute a lien on real property.

Independent Director - A duly appointed member of the board of directors of the relevant entity who is not at the time of appointment, at any time while serving as a director or manager or at any time in the preceding five years, (a) a direct or indirect legal or beneficial owner (beyond a nominal amount) in such entity or any of its affiliates (b) a creditor, supplier, employee, officer, director, family member, manager, or contractor of such entity or any of its affiliates, or (c) a person who controls (whether directly, indirectly, or otherwise) such entity or any of the its affiliates or any creditor, supplier, employee, officer, director, manager, or contractor of such entity or its affiliates.

Large Loan - In a conduit or pool transaction, typically a loan (or a group of loans to related borrowers) with a balance in excess of $35,000,000 or which constitutes more than 5% of the pool balance.

Master Servicer - The servicer who is responsible for collection, administration, reporting and similar servicing functions for performing loans, including ultimate responsibility for servicing performing loans where subservicers are utilized in the transaction.

Modification - A workout, amendment, waiver, modification or extension of a mortgage loan after it has been transferred to a trustee in a securitization.

Multiple-Tier Transaction - A structured securitization in which the assets are transferred to an intermediate SPE which then transfers the assets to another intermediate SPE, the issuing entity or the indenture trustee/custodian, as applicable.

Open-Market Transfer - A transfer that Standard & Poor's deems to be a true sale without receiving a true sale opinion. Generally, if a transfer satisfies the following criteria, Standard & Poor's will deem the transfer to be an open market transfer: (i) the transfer is an arm's-length nonrecourse transfer between unaffiliated entities; (ii) the transferor received payment in full at the time of the transfer; (iii) the transferee is purchasing assets from multiple transferors; and (iv) the transferor does not receive, as payment, any securities issued in the rated transaction. Depending on the type of transaction, Standard & Poor's will consider additional factors in determining whether a transfer is an open market transfer. For example, the transferee in an open market transfer should have purchased the assets in the ordinary course of its business.

Permitted Exceptions - The following types of real property liens, charges or encumbrances: (i) liens for real property taxes, assessments, vault charges, water and sewer rents, not yet due and payable; (ii) statutory inchoate liens of mechanics and materialmen imposed by law incurred in the ordinary course of business for sums not yet due or delinquent; *provided, however*, that any mechanic's lien filed for sums that have become due shall be paid or bonded and removed of record; (iii) rights of tenants, as tenants only, under leases in existence on the closing date and any leases entered into thereafter in accordance with the requirements of the loan documents; (iv) easements, rights-of-way, restrictions, minor encroachments or other similar encumbrances not impairing the marketability of the mortgaged property and not interfering with the use of the mortgaged property as permitted under the loan documents or in the ordinary conduct of the business of the borrower; and (v) liens created by the loan documents. Permitted exceptions, in the aggregate, should not have a material adverse effect on the use, value or operation of the mortgaged property or the ability of the borrower to pay scheduled debt service.

Qualified Letter of Credit - Generally, a clean, irrevocable, unconditional, transferable, "evergreen" letter of credit with respect to which the borrower has no reimbursement obligation, payable on sight draft only, in favor of the holder of the mortgage loan and entitling the holder of the mortgage loan to draw thereon in a convenient location, such as New York, New York, issued by a domestic bank or the United States agency or branch of a foreign bank, the long-term unsecured debt rating of which issuer is not less than 'A' and the short term unsecured debt rating of which is not less than 'A-1'; provided that what constitutes a qualified letter of credit may vary depending on the nature of the transaction and the size and function of the letter of credit.

Qualifying Manager - For a mortgaged property securing a large loan, a property manager that (i) is a reputable management company having at least five years' experience in the management of commercial properties similar to the mortgaged property and in the metropolitan area or other appropriate geographic area in which the mortgaged property is located, (ii) has, for at least five years prior to its engagement as property manager, managed at least five properties of the same property type as the mortgaged property, (iii) at the time of its engagement as property manager has leasable square footage of the same property type as the mortgaged property equal to the lesser of (A) 1,000,000 leasable square footage and (B) five times the leasable square footage of the mortgaged property and (iv) is not the subject of a bankruptcy or similar insolvency proceeding. For very large loans, the tests in clauses (ii) and (iii) should be higher. This general definition should be adapted as necessary for certain types of properties such as luxury hotels, convention centers, regional malls, etc.

Ratings Confirmation - Written confirmation from Standard & Poor's that a contemplated action or

circumstance will not, in itself, result in a downgrade, withdrawal, or qualification of its then-current rating of any rated securities.

Recoverability Standard - As a precondition to any party's obligation to make an advance of principal and interest or a property protection advance, the determination that an advance will be ultimately recoverable from future payments, insurance or liquidation proceeds and net income from or relating to the mortgage loan or related mortgaged property. Such determination is to be made, if the advancing party is a servicer, in accordance with the servicing standard, or for any other advancing party, in the reasonable judgment of such advancing party.

REIT - A "real estate investment trust" within the meaning of the Internal Revenue Code of 1986, as amended.

REMIC - A "real estate mortgage investment conduit" within the meaning of the Internal Revenue Code of 1986, as amended.

Rent - The basic, additional and percentage rent, all pass-throughs of taxes, expenses, or other items, and all other sums payable by the tenant to the lessor or licensor (including, without limitation, utility charges) during the original and any renewal terms thereof.

RVI Policy - A residual value insurance policy.

Separateness Covenants - Restrictions typically contained in an entity's organizational documents and in the loan documents intended to limit the entity's conduct and relationships with its affiliates in order to insulate the entity from claims of creditors of its affiliates, that require the entity, among other things: (i) to maintain books and records separate from any other person or entity; (ii) to maintain its accounts separate from any other person or entity; (iii) not to commingle assets with those of any other entity; (iv) to conduct its own business in its own name; (v) to maintain separate financial statements; (vi) to pay its own liabilities out of its own funds; (vii) to observe all partnership formalities; (viii) to maintain an arm's-length relationship with its affiliates; (ix) to pay the salaries of its own employees and maintain a sufficient number of employees in light of its contemplated business operations; (x) not to guarantee or become obligated for the debts of any other entity or hold out its credit as being available to satisfy the obligations of others; (xi) not to acquire obligations or securities of its partners, members or shareholders; (xii) to allocate fairly and reasonably any overhead for shared office space; (xiii) to use separate stationery, invoices, and checks; (xiv) not to pledge its assets for the benefit of any other entity or make any loans or advances to any entity; (xv) to hold itself out as a separate entity; (xvi) to correct any known misunderstanding regarding its separate identity; and (xvii) to maintain adequate capital in light of its contemplated business operations.

Servicer - Generally, either a special servicer that services defaulted or specially serviced loans or a master servicer that services performing loans. Most transactions provide for both a master servicer and a special servicer, and often these are different entities.

Single Member LLC - A limited liability company that does not have an SPE member that owns equity in the limited liability company.

Single-Tier Transaction - A structured securitization transaction not involving an intermediate SPE, in which a transferor sells or pledges assets directly to an issuing entity, an indenture trustee, or custodian, as applicable.

SPE - A bankruptcy-remote single-purpose or special-purpose entity that satisfies Standard & Poor's criteria relating to SPEs (see section four for a discussion of SPEs).

Special Servicer - The servicer who is responsible for decision-making for defaulted or soon to be defaulted mortgage loans, including determinations with respect to exercise of remedies, enforcement actions, workouts, modifications, and forbearance, including ultimate responsibility for special servicing of such loans where subservicers are utilized in the transaction. Frequently, the special servicer is a party who is different from the master servicer.

Springing Member - With respect to a single member LLC, a person or entity that is not a member at the time of the LLC's formation but is designated to become a member automatically upon the occurrence of certain events, such as dissolution or bankruptcy that affect the sole member.

Stand-Alone Property-Specific Transaction - A loan transaction with one or multiple borrowers, secured by a single property, by multiple cross-collateralized properties, or by a small number of non-cross-collateralized properties that does not constitute a pool.

Subservicer - A party to whom a master servicer or special servicer has delegated by contract some or all of its servicing responsibilities.

Third-Party Payor Program - A medical reimbursement or payment program based upon an agreement with a payor who is not the patient, including Medicare, Medicaid, Blue Cross and/or Blue Shield, and other private commercial insurance, managed care, and employee assistance programs.

Transfer - A sale, pledge, encumbrance, mortgage, assignment, or other disposition of mortgaged property, equity interests or other assets.

UCC - The Uniform Commercial Code as adopted in the applicable jurisdiction.

UCC Property - Any type of property as to which a security interest is created and perfected pursuant to the UCC.

WAC Rate - An interest rate based upon (or capped at) the weighted average net mortgage rate on multiple pooled loans.

In writing this publication, Standard & Poor's would like to thank Dechert LLP for its assistance and advice related to this publication.

Standard & Poor's. *Setting The Standard.*

Standard & Poor's
A Division of The McGraw-Hill Companies

Published by Standard & Poor's, a Division of The McGraw-Hill Companies, Inc. Executive offices: 1221 Avenue of the Americas, New York, NY 10020. Editorial offices: 55 Water Street, New York, NY 10041. Subscriber services: (1) 212-438-7280. Copyright 2003 by The McGraw-Hill Companies, Inc. Reproduction in whole or in part prohibited except by permission. All rights reserved. Information has been obtained by Standard & Poor's from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, Standard & Poor's or others, Standard & Poor's does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or the result obtained from the use of such information.