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American Institute of Certified Public Accountants
1211 Avenue of the Americas
New York, New York 10036

Attention: Ms. Julie Anne Dilley
Technical Manager
Audit and Attest Standards
File 2605

Re: Proposed Amendment to Interpretation of AU Section 336 (SAS No. 73)

Ladies and Gentlemen:

The Bond Market Association[1] appreciates the opportunity to comment on the December 21, 2000 draft amendment to the above-referenced interpretation, entitled "The Use of Legal Interpretations as Evidential Matter to Support Management's Assertion That a Transfer of Financial Assets Has Met the Isolation Criterion in Paragraph 9(a) of Statements of Financial Accounting Standards Nos. 125 and 140" (the "Proposed Interpretation").

The Association understands that the Proposed Interpretation has been drafted by the AICPA's Audit Issues Task Force ("AITF") following the recent adoption by the Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA) of regulations regarding transfers of financial assets, and the issuance by the Financial Accounting Standards Board ("FASB") of FASB Statement 140 ("Statement 140"). We appreciate the efforts of the AITF to provide timely audit guidance to assist practitioners in applying Statement 140 in light of, among other things, these new regulations.

Given the Association's organizational focus on our members' interests as they relate to the primary issuance, underwriting and secondary market trading of securities, the following comments focus on certain aspects of the Proposed Interpretation that would affect audit standards for legal isolation opinions in the context of securitization transactions by regulated depository institutions.

I. Examples of Proposed Legal Opinion Language for Entities Not Subject to the U.S. Bankruptcy Code

With respect to entities not entitled to become debtors under the U.S. Bankruptcy Code (the "Bankruptcy Code"), Paragraph .14 of the Proposed Interpretation provides an example of legal opinion language that would, absent contrary evidence, provide persuasive evidence to support management's assertion that transferred financial assets

have been placed presumptively beyond the reach of a transferor and its creditors, even in liquidation, conservatorship or receivership of the transferring institution.

The operative language included in this example characterizes the transfer of financial assets as a "sale" or alternatively as a "true sale," such that the transferred assets "would not be deemed to be the property of…the Seller." The Association appreciates that this language sets forth only one example of acceptable opinion language, thereby (implicitly, at least) suggesting that other formulations would be equally acceptable.

In the context of securitization-related transfers of financial assets by institutions not subject to the Bankruptcy Code, we do not believe that legal specialists will be able in all cases to render opinions concluding that such transfers are "sales" or "true sales," or that the assets are not the "property" of the seller thereof. These conclusions may be supported by the application of relevant statutory principles and judicial doctrines to the facts surrounding securitization-related asset transfers by Bankruptcy Code entities. In contrast, in the case of transfers by entities not subject to the Bankruptcy Code, we are advised that there is no body of law or judicial precedent that may readily be used to analyze whether, as a legal matter, asset transfers by regulated financial institutions constitute "sales" or "true sales" under relevant banking statutes and regulations, or by which it may be determined whether such assets constitute "property" of the seller.

That is not to say, however, that equally robust conclusions supporting the effective legal isolation of transferred assets cannot be given in the case of securitization-related transfers of financial assets by non-Bankruptcy Code entities. The Association believes that the operative language set forth in the above-mentioned FDIC and NCUA regulations offers a useful and appropriate alternative formulation of such an opinion standard. Those regulations provide that the relevant financial regulatory body, acting in its capacity as conservator or receiver for a regulated institution, would not "reclaim, recover, or recharacterize as property of the institution or the receivership any financial assets transferred by the institution" in connection with a securitization or loan participation transaction that meets the criteria set forth in the regulation.

We believe that this formulation articulates an appropriate standard for establishing whether the "legal isolation" requirement set forth in paragraph 9(a) of Statement 140 has been met for non-Bankruptcy Code entities that are subject to FDIC or NCUA receivership/conservatorship powers, and as to which conforming legal opinions may, in appropriate circumstances, be given. Moreover, we believe that this formulation sets forth a legal opinion standard that is directly analogous to that suggested by the AITF as appropriate for transfers by Bankruptcy Code entities. Just as an appropriately formulated "true sale" opinion may provide "reasonable assurance" that transferred assets would not be considered property of a bankruptcy debtor's estate (and thus not capable of being reached by a bankruptcy trustee), an equal level of assurance should be capable of being drawn from a legal opinion concluding, in effect, that a conservator or receiver of a failed financial institution would similarly be unable to reach assets transferred in qualifying securitization transactions prior to the institution's insolvency. Accordingly, we suggest

that an example containing this alternative formulation of acceptable legal opinion language be added to Paragraph .14.[2]

II. Opinion Requirements Addressing Qualification Requirements and Continuing Legal Force and Effect of Relevant FDIC and NCUA Regulations

With respect to powers of a receiver, conservator or liquidator which may not be exercised under the above-referenced FDIC and NCUA regulations, Paragraph .14 of the Proposed Interpretation states that "it is acceptable for attorneys to rely upon the effectiveness of the limitation on such powers set forth in the applicable regulation, provided that the attorney opines, based on reasonable assumptions, that: (1) the affected transfer of financial assets meets all qualification requirements of the regulation and (2) the regulation had not, as of the date of the opinion, been amended, repealed, or held inapplicable by a court of competent jurisdiction with respect to such transfer [emphasis added].

The Association does not believe that it is necessary or appropriate to require attorneys to provide legal opinions on the two matters enumerated above in order to validate management's assertion that transferred assets have been legally isolated. The qualification requirements embodied in the FDIC and NCUA regulations are predominately fact-based, and depend additionally on whether the relevant transfer constitutes a sale under GAAP (assuming that legal isolation of the assets has been established). While these matters may properly be the subject of factual representations/certifications by management, or the product of an accountant's expert analysis, respectively, neither is amenable to a legal opinion. The Association in particular does not believe that it would appropriate to require legal opinions to address any accounting standard-dependent qualification requirement of the regulations.

Moreover, a legal opinion concluding that a receiver or conservator would not reclaim, recover or recharacterize the assets transferred in qualifying transactions under the above-cited regulations would, of necessity, be based upon the continuing validity, and legal force and effect, of those regulations as of the date the opinion is given. As a consequence, we do not believe that it should be necessary to require legal specialists separately to opine that the FDIC and NCUA regulations had not been amended, repealed or held inapplicable by a court with respect to any such transfer, as the absence of such facts are conditions to the operative conclusion stated in the legal opinion itself.

III. Opinion Requirements Addressing Other FDIC and NCUA Powers

The Association notes that Paragraph .14 of the Proposed Interpretation also states the following:

The opinion should separately address any powers of repudiation, recovery, reclamation, or recharacterization exercisable by a receiver, conservator, or liquidating agent notwithstanding [the above-cited FDIC and NCUA regulations] (for example, rights,

powers, or remedies regarding transfers specifically excluded from the regulation) in a manner that provides the same level of assurance as would be provided in the case of opinions which conform with requirements of Paragraph .13 [which sets forth opinion requirements for asset transfers by entities subject to the Bankruptcy Code], except that such opinion shall address powers arising under the Federal Deposit Insurance Act or the Federal Credit Union Act, as applicable.

This language would appear to require, in connection with securitization-related financial asset transfers by banks, legal opinions (at a "would" level of assurance, as more fully set forth in the Proposed Interpretation) concluding that a receiver or conservator would not be successful in exercising its rights, powers or remedies to reach assets transferred for less than reasonably equivalent value, in contemplation of the institution's insolvency, or with the intent to hinder, delay or defraud the institution or its creditors-in effect, opinions concluding that such transfers do not constitute voidable preferences or fraudulent conveyances.

In the first instance, our understanding is that it has not historically been standard commercial practice in bank securitizations to require that legal opinions address these issues. We understand this to be the case because whether or not a transfer amounts to a voidable preference or fraudulent conveyance depends on inquiries that are principally factual, rather than legal, in nature. Because such facts can be inferred from the structural features and characteristics of the transaction (where necessary, supplemented by representations and certifications by management), it has not generally been deemed necessary to require legal opinions to address these matters. The Association believes such facts should be recognized by the AITF as part of the "available evidence" that may support management's assertion of legal isolation of transferred assets.[3] Legal opinions addressing voidable preferences and fraudulent conveyances (with their attendant burden and cost) should not be universally required.

However, to the extent that a legal opinion addressing voidable preference and/or fraudulent conveyance issues is deemed to be necessary in a particular securitization, the Association believes that it should be both possible, and generally acceptable to AITF, for such opinions to be given (at the level of assurance set forth in the Proposed Interpretation) in reliance upon reasonable assumptions and certifications of fact needed to support legal conclusions relating to those issues.

IV. Conclusion

Again, the Association is grateful for the opportunity to comment on the Proposed Interpretation, and supports the adoption of modified interpretive guidance by the AITF consistent with the suggestions set forth in this letter. Should you have any questions, or desire additional elaboration or clarification of any of the issues discussed herein, please do not hesitate to contact the undersigned at 212.440.9403.

Sincerely,

/S/

George P. Miller
Senior Vice President,
Deputy General Counsel

cc: Arleen Thomas, Vice President-Professional Standards and Services, AICPA
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FOOTNOTES

[1] The Bond Market Association represents securities firms and banks that issue, underwrite, distribute and trade debt securities, both domestically and internationally. Among other roles, the Association's members issue and underwrite a wide range of mortgage-backed and other asset-backed securities in transactions subject to generally accepted accounting principles and related audit guidance, including that set forth in FASB Statement 140 and the instant AICPA auditing interpretation. The views expressed in this letter are based upon input received from a broad range of Association members and associate members who are active in the securitization markets, including securities firm and bank capital markets business professionals, and their internal and external legal counsel and accounting advisers. Additional information about the Association may be obtained from our Internet website at www.bondmarkets.com.

[2] The Association notes that the New York Clearing House has submitted draft, alternative opinion language that is consistent with this recommendation; we would be pleased to continue to work with the AITF to develop a refined formulation of this (or any similar) alternative language.

[3] The Association notes in particular that the NCUA and FDIC regulations would not by their terms apply unless the insured depository institution received adequate consideration for the transfer of financial assets at the time of the transfer. This requirement would appear to eliminate the possibility of challenging the transfer on the grounds that it is a constructive fraudulent conveyance, which generally requires the transferor to receive less than a reasonably equivalent value for the assets conveyed. Similarly, we believe that such a transfer would be highly unlikely to be viewed as an

actual fraudulent conveyance (which would require a showing that the transferor intended by the transfer to hinder, delay or defraud the institution or its creditors) where, as is typically the case, the securitization transaction is designed and structured to sell financial assets at their market value, and to utilize the proceeds from that sale to finance the continuing business operations of the seller.