



Guidance Notes

[3(a)(3) Program; Guaranteed]

The Bond Market Association (“the Association”) is publishing a guaranteed form of Model Commercial Paper Dealer Agreement (the “Agreement”) for use by issuers and dealers in establishing guaranteed commercial paper programs which are exempt from registration under the U.S. Securities Act of 1933, as amended (the “1933 Act”), pursuant to the exemption contained in Section 3(a)(3) of the 1933 Act.

A separate model agreement is being published contemporaneously herewith, for use in establishing guaranteed commercial paper programs which are exempt from 1933 Act registration pursuant to the exemption contained in Section 4(2) of the 1933 Act.

After consideration by representatives of market participants, it was decided that a guaranteed form of model commercial paper agreement would be useful in providing guidance to market participants and would also provide increased consistency and precision in documenting the relationship among issuers, guarantors and dealers of commercial paper.

As with other Association model agreements, use of this Agreement is not intended to be mandatory, and indeed even the firms that participated in its preparation may vary its terms from transaction to transaction. However, it is hoped that market participants will become comfortable with most of the Agreement’s provisions, thereby limiting negotiation in any particular case to a relatively small number of provisions.

To assist users of the Agreement, the Association has prepared the following Guidance Notes that explain certain sections of the Agreement. They are aimed principally at issuers and guarantors and their counsels, who may be unfamiliar with this model agreement and the reasons behind certain of its provisions. In many cases the notes highlight the differences between the 3(a)(3) and the 4(2) model agreements, to explain why it may be inappropriate to have the two agreements identical in certain contexts. However, in many cases the differences between the Agreements arise because the availability of the 4(2) exemption requires covenants, representations and other statements to be made, for which there are no analogous statements in the 3(a)(3) version of the Agreement. As a result, many of the differences are discussed in the Guidance Notes for the 4(2) version. Reference is made to those discussions in the 4(2) Guidance Notes.

These Guidance Notes should not be relied upon by any party to determine, without appropriate legal or other relevant professional advice, whether any provision of the Agreement, or the Agreement as a whole, is suitable to that party’s particular circumstances and needs.

Capitalized terms not otherwise defined have the meanings given to them in the Agreement.

The Bond Market Association is the trade association representing securities firms and banks that underwrite, trade and sell debt securities and money market instruments, including investment grade and non-investment grade corporate debt securities, commercial paper and mortgage and other asset-backed securities.

Section 2.10:

In most cases, the phrase "or an entity controlled by an investment company" will not be included following the language "Neither the Issuer nor the Guarantor is an 'investment company'" in the representation in Section 2.10 of the Agreement and in the Model Opinions. However, where both the Issuer [or the Guarantor] and its parent are U.S. domiciled companies, 25% or more of the voting securities of the Issuer [or the Guarantor] are owned by a company (a "Control Person") and (i) material transactions (e.g., material purchases or sales of goods or services, or material lending or borrowing arrangements) exist between such issuer and an "affiliated person" of the Control Person, or (ii) the proceeds of the securities are to be used to acquire some or all of the securities of an investment company, insurance company, broker/dealer, underwriter or investment adviser, the phrase should be included. In cases where it is contemplated that the phrase will be included, the Issuer and the Guarantor should discuss the inclusion of such language with counsel.

Section 2.11:

This representation covers both the Offering Materials and the Company Information, even though the latter is defined to include the former as well as additional material. Since the Dealer distributes to potential purchasers only the more abbreviated Offering Materials in making offers and sales, however, the Dealer needs to have the Issuer's and the Guarantor's confirmation of the statements made in this Section both as to the narrower contents of the Offering Materials (the material the Dealer is actually delivering to purchasers and potential purchasers) and as to the broader universe of all available Company Information.

Section 3.5:

The covenant requiring that proceeds from sales of the Notes will be used for "current transactions" is one of the statements required to ensure availability of the 3(a)(3) exemption. In addition to the "current transactions" requirement, Notes must also be of prime quality (see the representation to that effect in Section 2.6 of the Agreement) and have a maturity of nine months or less (see the statement to that effect in Section 1.3 of the Agreement). Issuers are advised to discuss with their counsel the specific requirements to ensure the continuing availability of the 3(a)(3) exemption, and establish appropriate internal procedures and controls.

Section 4.3:

This Section requires the Issuer and the Guarantor to notify the Dealer when an event occurs that would render the Offering Materials incomplete or inaccurate. It does not necessarily require the Issuer or the Guarantor to give the Dealer or anyone else specific information about the event, and only requires the Issuer and the Guarantor to promptly update the Offering Materials if the Dealer is then holding Notes in inventory. If the Issuer and the Guarantor do not update in that instance, the Dealer would be unable to resell the Notes held in inventory, since current Offering Materials would not be available. Positioning of Notes in inventory by the Dealer enhances the Notes' liquidity, thereby creating an important benefit for the Issuer.

Section 5.1:

The indemnification provision covers both Company Information and the Offering Materials for the same reason that both are covered under the representation in Section 2.11 (see note above with respect to that Section).

Section 6.2:

The defined term “Company Information” includes a large amount of Guarantor-related information beyond that which is included in the Offering Materials. In light of the brevity of materials formally distributed in commercial paper programs (and the trend toward even briefer sales notices), investors are presumed to be basing investment decisions on the Guarantor’s publicly available information, including reports and other documents filed pursuant to the Securities Exchange Act of 1934, as amended.

Sections 7.2 and 7.3:

If the Dealer is not located in New York City, appropriate changes may be made in these sections to reflect another governing law and jurisdiction where lawsuits may be brought.

Agreement — General:

The Internal Revenue Service (“IRS”) has issued regulations that require the disclosure to the IRS of certain transactions classified as “reportable transactions.” One class of reportable transactions are transactions where one or more of the parties are subject to explicit or implicit confidentiality or nondisclosure restrictions that are applicable to the tax treatment or tax structure of the transaction, and the tax consequences of the transaction are discussed in the transaction documents. There is no confidentiality or nondisclosure requirement in the Agreement nor is one intended to be implied with respect to the tax treatment or tax structure of the transaction. An issuer concerned about this issue may wish, however, to consider adding tax confidentiality waiver language to avoid any question as to whether the transaction would be required to be disclosed as a “reportable transaction.”

Addendum — General:

As indicated by the first footnote to the Addendum, its purpose is to provide a method for the parties to alter the model Agreement language in ways that reflect the particular details of the transaction or other negotiated matters. As a starting point, the Addendum provides model language for provisions that will be appropriate only in certain cases, as indicated in the respective footnotes.

The Addendum can also be used to tailor the model Agreement to the transaction. Parties to each transaction where the model Agreement is used will need to determine how to tailor it to their needs: whether by actually amending certain provisions; by using the model Agreement as if it were a printed form and describing all additions and deletions to the model language on the Addendum; or by other means.

Exhibit A:

The provisions in Exhibit A lay out the procedural arrangements that would apply in any case where indemnification is sought.

Exhibit B:

Exhibit B sets forth a standard form of Statement of Terms for interest-bearing commercial paper notes that can be delivered to purchasers in the increasing number of cases where interest-bearing notes are issued.

Although provisions for optional redemption are not provided in Exhibit B, issuers and dealers may consider adding such provisions to the Supplement. In the event that a redemption option is included in any Notes, the Supplement should incorporate the mechanics of the redemption option

and include any other relevant disclosure. In addition, the Issuer should be required to provide notice of any proposed redemption to the Dealer that sold the Notes.

Issuers and dealers should bear in mind, in the case of floating rate interest-bearing notes, that market conventions for the different interest rate indices (such as applicable screen pages) may change from time to time requiring modifications to Exhibit B.

Exhibit C:

Exhibit C sets forth a standard form of Guarantee.

Model Opinions — General:

The model opinions are provided as a starting point for the Dealer's opinion request made to the Issuer's counsel and the Guarantor's counsel. Such opinions addressed to the Dealer are required by Section 3.7(a) of the Agreement. The specific details of the transaction and the circumstances of the Issuer and the Guarantor will have to be taken into account in determining the appropriate coverage of any particular opinion. All parties should also recognize that applicable local laws may require that counsel add limitations or make certain assumptions in giving these opinions, and differences in opinion practices of law firms may necessitate changes. In this connection, note in particular the discussion of paragraph 2 of the opinion below, relating to enforceability of the Agreement.

Finally, it should be noted that the form of these model opinions should not be taken to mean that all matters in the opinion need be covered by the same counsel. For example, paragraphs 6 through 8 (5 through 7 in the Guarantor's opinion) might be covered by an in-house attorney familiar with the Issuer's or Guarantor's full range of operations, whereas paragraphs 2 through 5 (2 through 4 in the Guarantor's opinion) might be covered by an outside firm retained to represent the Issuer or the Guarantor in this transaction, and paragraphs 1 and 9 through 14 (8 through 13 in the Guarantor's opinion) (if applicable) might be covered by local counsel in the Issuer's or Guarantor's jurisdiction of organization.

All parties to the transaction should bear in mind that opinion negotiations, especially if not begun early in the transaction, can disrupt the transaction and take on undue significance in it. Early attention to these matters is recommended.

Parties to the transaction should also consider the circumstances under which updated legal opinions and officer's certificates may become appropriate in the future, and incorporate those requirements into the Agreement as necessary. Such circumstances might include the addition of dealers to the program, other changes to the program or changes in relevant laws.

Model Opinions — Paragraph 2:

In contrast to opinions delivered in connection with standard underwritings, the model opinions contemplate that counsel will be requested to address enforceability of the Dealer Agreement, citing the appropriate exception for the indemnification and contribution provisions. In a standard underwriting, opinions would typically not address enforceability of the underwriting agreement at all.

The enforceability opinion is requested here because of the ongoing nature of the Agreement. The Agreement contains numerous covenants, the most important of which relate to keeping the Dealer up-to-date with respect to developments that could affect disclosure to purchasers in connection with sales of Notes, and making corresponding amendments to the Offering Materials and

Company Information. The Dealer has a strong interest in knowing that these covenants will be enforceable during the life of the program. This is in contrast to a typical underwriting agreement, which normally remains executory for only the three days between execution and closing, except for the indemnification provision, which is generally stated to survive closing. In underwritten deals, most practitioners believe it better to forego the enforceability opinion altogether than to receive it with a specific carveout for the only provision that has an extended life.

Model Opinions — Paragraph 8 (Issuer); Paragraph 7 (Guarantor):

See the note above relating to Section 2.10 of the Agreement, with respect to the inclusion of the phrase “or an entity controlled by an investment company.”

Model Opinions — Paragraphs 9 through 14 (Issuer); Paragraphs 8 through 13 (Guarantor):

As noted in the footnotes, these opinion paragraphs are only needed in the case of a foreign issuer or guarantor. Where they are applicable, the parties should be aware that local counsel in the jurisdiction of organization of the Issuer or the Guarantor may need to tailor the language to fit the local laws, and may also advise that there are certain local requirements that should be met in order to ensure that these statements are true.

Where a foreign issuer or guarantor is involved, the transaction in general and the opinion in particular should be discussed with local counsel in the jurisdiction of organization as early as possible in the course of the transaction. The general problems described above relating to delays in addressing opinion issues can be exacerbated by foreign law concerns which may be more difficult to resolve quickly.