CLIFFORD
CHANCE
ROGERS & WELLS LLP

100664/00005 February 16, 2000

The Bond Market Association
40 Broad Street
New York, New York 10004

Dear Sirs:

We have acted as special New York counsel to The Bond Market Association ("**TBMA**") in connection with the Cross-Product Master Agreement published by TBMA and other Publishing Associations on the date hereof (the "**Agreement**"), including the schedule thereto (the "**Schedule**"). You have requested our opinion as to the enforceability of the netting provisions of the Agreement under the Federal Deposit Insurance Corporation Improvement Act of 1991 ("**FDICIA**") should a Party to the Agreement be subject to insolvency proceedings. Unless otherwise defined herein, terms defined in the Agreement are used herein as defined therein.

I. Operation of Sections 2, 3 and 4 of the Agreement (the "Netting Provisions")

The Agreement provides in Section 2.1 that a Party has a right to Close Out all (but not fewer than all) Principal Agreements if any of the following events has occurred and is continuing:

(a) a Close-Out Event has occurred under the terms of a Principal Agreement;

(b) a representation or warranty made or repeated by the other Party under the Agreement proves to have been incorrect or misleading in any material respect when made or repeated; or

(c) the other Party is in violation of a covenant under the Agreement.

The Close Out of Principal Agreements pursuant to the Agreement is effective on the date specified in a notice given by the Closing-Out Party to the Closed-Out Party. Each Principal Agreement is amended accordingly.

A Party may choose not to exercise the right provided in Section 2.1 to Close Out all (but not fewer than all) of the Principal Agreements. Thus, a Party may choose not to apply the Netting Provisions to any of the Principal Agreements, retaining the flexibility to determine whether or not to Close Out individual agreements and to settle those Principal Agreements according to their terms and without reference to Sections 3 and 4 of the Agreement. Similarly, if all Principal Agreements have Closed Out by virtue of automatic termination, the Closing-Out Party has the right to decide that the Settlement Amounts determined thereunder should be subject to Section 4 of the Agreement, and shall promptly so notify the other Party of that decision.

If the Parties have chosen to amend the Agreement in accordance with Part VII.3 of the Schedule, the foregoing flexibility will not be retained. Part VII.3 provides that when any Principal Agreement is Closed Out, the Closing-Out Party shall Close Out all Principal Agreements pursuant to Section 2 of the Agreement (other than those previously Closed Out by their terms). Similarly, Part VII.3 of the Schedule amends the Agreement to require that, if all Principal Agreements have Closed Out by virtue of automatic termination, all Settlement Amounts are subject to Section 4.

In any case, when a Principal Agreement has been Closed Out by the Closing-Out Party (or automatically Closed Out according to its terms), and the Agreement's Netting Provisions are applied to all the Principal Agreements, the Settlement Amounts due are nonetheless determined in accordance with the terms of each Principal Agreement. However, under Sections 3.3 and 4.1 of the Agreement, the obligation of a Party to settle a Settlement Amount under a Principal Agreement is deferred (with interest accruing at the interest rate specified in the relevant Principal Agreement) from the date on which it would have been due under the terms of the Principal Agreement until the earlier of a date on which the other Party owes a Settlement Amount to the first Party or the Final Settlement Date. On that date, each Settlement Amount which is not in the Base Currency is converted into the Base Currency specified in the Agreement. The Settlement Amounts owed by each Party are aggregated and set off one against the other, so that a Net Set-Off Amount, owed by a single Party, is determined. That Net Set-Off Amount (with interest accruing thereon at the applicable rate specified in Section 4.5(b) of the Agreement) is then carried forward for aggregation with any further Settlement Amounts owed by that Party under other Principal Agreements, for set-off against the Settlement Amounts next determined to be due from the other Party. The sequential set-offs and determination of all Settlement Amounts result in a single final net payment obligation (the Final Net Settlement Amount) being owed by one

Party to the other Party under the Agreement. If the Final Net Settlement Amount is zero, no payment is owed by either Party.

Under Section 2.1 of the Agreement, if in the good faith judgment of the Closing-Out Party it is unlawful to Close Out a Principal Agreement, that Principal Agreement shall be excluded from the application of the Agreement. In addition, if in the good faith judgment of the Closing-Out Party it becomes unlawful to include any Settlement Amount in the set-off procedure provided for in Section 4 of the Agreement, that Settlement Amount will be excluded by Section 3.3.

A Party to the Agreement may be a bank with more than one branch that has entered into Principal Agreements through one or more designated branches. In such circumstances, Section 3.3 of the Agreement specifies that the set-off procedures of Section 4 of the Agreement to arrive at a single Final Net Settlement Amount will apply to all Settlement Amounts, notwithstanding that such Settlement Amounts may be obligations to be performed by branches at different locations or in different currencies under the terms of the relevant Principal Agreements.

II. Requirements of FDICIA

Subtitle A of Title IV of FDICIA provides special treatment to certain netting contracts in the context of the insolvency of a qualifying counterparty. Specifically, FDICIA provides that a "netting contract" between two "financial institutions" will be enforceable, notwithstanding that a financial institution is a "failed financial institution". FDICIA further provides that no stay, injunction, avoidance, moratorium or similar proceeding or order, whether issued or granted by a court, administrative agency, or otherwise shall limit or delay the application of otherwise enforceable netting contracts. The foregoing provisions apply if the netting contract is governed by the laws of the United States, any State thereof, or any political subdivision of any State. 12 U.S.C. §§ 4401-4407.

A "netting contract" is defined as a contract which provides for netting present or future payment obligations or payment entitlements (including liquidation or close-out values relating to the obligations or entitlements) between parties to the contract. The term "netting contract" does not include any contract that is invalid under or precluded by the Federal laws of the United States. 12 U.S.C. § 4402(14).

To be eligible for FDICIA's protections, a netting contract must be between "financial institutions." The term "financial institution" is defined by the statute to include a U.S.-registered broker or dealer, a depository institution, a futures commission merchant and any other institution as determined by the Board of Governors of the Federal Reserve

System (the "**Federal Reserve**"). "Depository institution" for these purposes includes (i) any bank, mutual savings bank, savings bank, credit union or savings association that is insured by the Federal Deposit Insurance Corporation (the "**FDIC**") or that is eligible to apply to be insured by the FDIC, and any member of the Federal Home Loan Bank system, (ii) any branch or agency of a foreign bank, and (iii) any Edge corporation or a corporation having an agreement or undertaking with the Federal Reserve under Section 25A of the Federal Reserve Act.

The Federal Reserve has determined by regulation that the term "financial institution" also includes any U.S. or non-U.S. person that represents, orally or in writing, that it will engage in financial contracts (*i.e.*, any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement as defined in 12 U.S.C. § 1821(e)(8)(D), and spot foreign exchange contract) as a counterparty on both sides of one or more financial markets, and on any day during the previous 15-month period: (i) had one or more financial contracts with unaffiliated counterparties of a total gross dollar value of at least U.S.$1 billion in notional principal amount outstanding; or (ii) incurred total gross mark-to-market positions of at least U.S.$100 million (aggregated across counterparties) in one or more financial contracts with unaffiliated counterparties. 12 C.F.R. § 231.3(a). Any person who qualifies under this definition on the date on which a contract is entered into will be considered a financial institution under FDICIA with respect to that contract for the remainder of its term, whether or not the person satisfies the definition on any subsequent date. 12 C.F.R. § 231.3(b).

As discussed above, FDICIA's protections apply notwithstanding that a financial institution is a "failed financial institution". "Failed financial institution" is defined in FDICIA as a financial institution that:

(a) fails to satisfy a covered contractual payment obligation when due;

(b) has commenced or had commenced against it insolvency, liquidation, reorganization, receivership (including the appointment of a receiver), conservatorship, or similar proceedings ("**Insolvency Proceedings**"); or

(c) has generally ceased to meet its obligations when due. 12 U.S.C. § 4402(7).

III. Assumptions

In connection with our opinions set forth below, we have, with your consent, assumed that:

(a) The Agreement is governed by the laws of the State of New York ("**New York law**").

(b) The Agreement includes Parts I through VI and may include Part VII.3 of the Schedule, and includes no other Parts of the Schedule.

(c) The Agreement,[1] each Principal Agreement (as amended by the Agreement), and each transaction under each Principal Agreement constitutes the legal, valid and binding obligation of each Party under applicable law.

(d) The representation set forth in the first clause of the last sentence of Section 5 of the Agreement is true as to each Party at the time each such representation is to be made.

(e) (i) Parts I through VI of the Schedule have been properly completed by both Parties; (ii) no substantive modifications have been made by the Parties except for completion of Parts I through VI of the Schedule; and (iii) if the optional provisions contained in Part VII.3 of the Schedule are applicable, no substantive modifications have been made to such provisions (and the bracketed language in paragraph 3.1 thereof has been deleted).

(f) The Agreement, each Principal Agreement and each transaction under each Principal Agreement is entered into by each Party acting as principal thereunder.

(g) The Agreement, each Principal Agreement and each transaction under each Principal Agreement is entered into prior to the commencement of any insolvency proceedings against either Party.

(h) Neither Party has entered into the Agreement, each Principal Agreement and each transaction under each Principal Agreement with the intent to hinder, delay or defraud the creditors of either Party.

(i) Each Party is a "financial institution" as that term is defined for the purposes of FDICIA at the time of its execution of the Agreement.

(j) The Closing-Out Party will act in good faith and in a commercially reasonable manner in the exercise of the rights granted to it under the Agreement.

(k) With respect to a depository institution or a branch of a foreign bank in the United States which is insured by the FDIC (an "**Insured Institution**"), the

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[1] We have provided to you a separate opinion dated the date hereof addressing the enforceability of the Agreement under New York law.

written agreement requirements of Sections 11(d)(9), 11(n)(4)(I) and 13(e) of the Federal Deposit Insurance Act ("**FDIA**") are met.

IV. Enforceability of the Netting Provisions of the Agreement Under FDICIA

Based on the assumptions set forth above, and subject to the discussion and qualifications contained herein, in our opinion the Agreement is a "netting contract" and Settlement Amounts, determined under Principal Agreements and subject to the Netting Provisions of the Agreement, are "contractual payment obligations" and "contractual payment entitlements" under a "netting contract" under FDICIA. In our opinion the provisions contained in the Agreement by which a Closing-Out Party may Close Out all Principal Agreements upon the occurrence of a Close-Out Event under any of the Principal Agreements, and by which Settlement Amounts of Closed-Out Agreements are aggregated and, where appropriate, are set off so as to arrive at a single net payment obligation (if any) which is owed by one Party to the other, would be enforceable in respect of a Closed-Out Party notwithstanding that Insolvency Proceedings have been commenced against the Closed-Out Party. The foregoing opinions would not change with respect to an Agreement covering Principal Agreements that are executed on a multibranch basis by a U.S. national or New York state-chartered bank that is a Party. Moreover, the foregoing opinions would not change if the Parties have agreed to the optional provisions in Part VII.3 of the Schedule.

V. Qualifications and Discussion

(a) *Sections 2 and 3 of the Agreement*

This opinion does not address the effectiveness of amendments made by Sections 2 and 3 of the Agreement to each Principal Agreement, nor the enforceability of the Principal Agreements which are so amended. Section 2.1 of the Agreement provides that if a Principal Agreement cannot lawfully be Closed Out (notwithstanding the amendments provided for by Section 2 of the Agreement) then no Settlement Amount in respect of that Principal Agreement will be determined or included in the netting provisions of the Agreement.

FDICIA states that a "netting contract" provides for netting present or future "payment obligations or payment entitlements (including liquidation or close-out values relating to the obligations or entitlements)." Thus, if it is legally impermissible to determine a Settlement Amount for a Principal Agreement (and thereby a payment entitlement or payment obligation related thereto), all other Settlement Amounts which constitute payment entitlements or payment obligations would be subject to the netting procedures of the Agreement and protected by FDICIA.

Section 3.3 of the Agreement provides that if it is unlawful to include a Settlement Amount in the operation of Section 4 of the Agreement, that Settlement Amount shall be excluded therefrom. Section 403 of FDICIA provides that payment obligations which are "covered" by a netting contract shall be netted in accordance with the terms thereof and the only obligation or entitlement that either Party to the netting contract shall have (including a Party which is a "failed financial institution") is the "net obligation" or "net entitlement" as determined by the netting contract. 12 U.S.C. § 4403. "Covered contractual payment obligations" and "covered contractual payment entitlements" are obligations or entitlements which are subject to the netting contract. Thus if a Settlement Amount for a Principal Agreement can be determined but cannot lawfully be covered by the Agreement's netting process, and the Settlement Amount is therefore excluded by the Closing-Out Party pursuant to Section 3.3 of the Agreement, such Settlement Amount would not be a "covered contractual payment entitlement" or "covered contractual payment obligation". FDICIA would protect the enforceability of the Agreement's provisions which net all other Settlement Amounts, *i.e.*, those which are "covered contractual payment obligations" and "covered contractual payment entitlements".

The foregoing analysis is supported by the stated purpose of FDICIA to reduce risk to the banking system and financial markets by facilitation of the netting of payment obligations owed by financial institutions to one another. *See*, 12 U.S.C. § 4401. The Agreement's terms for netting Settlement Amounts which in the good faith determination of the Closing-Out Party legally can be determined and legally can be included in the Agreement's netting provisions, while excluding those that cannot, are aimed at obtaining a final net payment amount between the parties to the maximum extent feasible under applicable laws.

(b) ***The Federal Deposit Insurance Act***

Section 403 of FDICIA applies to Insured Institutions. The FDIC has stated its view in connection with a proposed rulemaking that FDICIA does not preclude the FDIC's exercise of authority under Section 11(e) of the FDIA (12 U.S.C. §1821(e)), as a receiver or conservator of Insured Institutions, to override any contractual right a counterparty might otherwise have to terminate and close out its contracts by reason of the appointment of the FDIC as a receiver or conservator. The FDIC also stated that the exercise of the FDIC's authority would be limited to those circumstances where (a) as a receiver it seeks to transfer a failed institution's contracts to another Insured Institution for

performance (a so-called "purchase and assumption" transaction)[2] or (b) as a conservator it enforces the performance of the contracts. 59 Fed. Reg. 37726, 37730 (July 25, 1994).

Based on the language of FDICIA and the stated purpose of that Act to foster the netting of obligations between financial institutions even in the event of insolvency, we believe that, in a properly presented case, a court would permit the Closing-Out Party to terminate the Principal Agreements in accordance with the terms of the Agreement. Section 403 of FDICIA expressly provides that "notwithstanding any other provision of law" a "netting contract" meeting the requirements of that statute "shall be given effect notwithstanding that a financial institution is a failed institution." 12 U.S.C. § 4403. Section 405 states further that "no stay,...avoidance...or similar proceeding..., whether issued or granted by a court, administrative agency or otherwise, shall limit or delay application of otherwise enforceable netting contracts in accordance with Section [403]." 12 U.S.C. § 4405. However, the issue is not free from doubt and the FDIC may challenge the termination of Principal Agreements in the circumstances set forth above.

(c) ***Obligations Not Covered by FDICIA***

Certain standard form master agreements which are designated as Principal Agreements may contain credit support or other provisions by which a Party may become obligated to return excess collateral, margin securities, or other property to the other Party after the obligation to pay the net amount due under a Principal Agreement has been satisfied. Such obligations to return property

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[2] The FDIC has acknowledged that the FDIA requires it, as receiver or conservator for an Insured Institution, to transfer all or none of such failed institution's qualifying financial contracts ("**QFCs**") with a single counterparty to a single Insured Institution. 59 Fed. Reg. 37726, 37730 (July 25, 1994). Under Section 11(e)(9) of the FDIA, the FDIC is required to transfer to one depository institution (i) all QFCs and claims under such contracts between any person or any affiliate of such person and the depository institution in default or (ii) none of such QFCs and claims. 12 U.S.C. § 1821(e)(9). It is our view that a similar result obtains under FDICIA in respect of a netting contract whether or not the netting contract includes QFCs. That is, the FDIC as receiver of an Insured Institution would be required to assign an Agreement which meets the requirements of FDICIA and all Principal Agreements which are covered by its terms to the same Insured Institution or else assign none of such contracts. To do otherwise would be to negate Section 403(a) of FDICIA which requires that the "covered contractual payment obligations and the covered contractual payment entitlements between any two financial institutions" (*i.e.*, the Settlement Amounts determined under the Principal Agreements) be "netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract." 12 U.S.C. § 4403(a). Under Section 403(e) this requirement applies "notwithstanding that a financial institution is a failed financial institution." 12 U.S.C. § 4403(e).

may not be considered a "payment" obligation or entitlement under FDICIA. We are not aware of any case law, regulation or precedent which defines the term "payment" for the purposes of FDICIA. Thus, there is a risk that a Party's obligation to return property after satisfaction of the obligation to pay a net amount owed under a Principal Agreement will not be protected by FDICIA's netting provisions.

(d) ***U.S. Branches and Agencies of Foreign Banks***

A bank established outside the United States (a "**Foreign Bank**") may enter into the Agreement through a single branch or agency in the United States that is a Federal branch or agency or a New York state-licensed branch or agency so that all Settlement Amounts under Principal Agreements are owed by or to that single branch or agency. Such branch or agency qualifies as a "financial institution" under FDICIA. Accordingly, the opinions expressed in Section IV above should apply to that branch or agency as a Closed-Out Party under the Agreement notwithstanding that the branch or agency is a "failed financial institution" (as defined in FDICIA).

In addition, if a Foreign Bank enters into the Agreement on a multi-branch basis, including through one or more Federal or New York state-licensed branches or agencies, and the Foreign Bank qualifies as a "financial institution" under FDICIA, a court conducting a proceeding in respect of a branch or agency should respect the Netting Provisions of the Agreement, notwithstanding that an Insolvency Proceeding has been commenced with respect to the Foreign Bank. However, in those circumstances, if a proceeding is conducted in respect of a Federal branch or agency of the Foreign Bank, then Section 4(j)(2) of the International Banking Act of 1978, as amended (the "**IBA**"), requires the receiver to apply the assets of the Foreign Bank in the United States to satisfy the obligations of the Foreign Bank's Federal and state-chartered branches and agencies in the United States. 12 U.S.C. § 3102(j)(2). The New York Banking Law ("**NYBL**") similarly requires that the claims of creditors of branches or agencies licensed by the Superintendent of Banks of New York (the "**New York Superintendent**") be satisfied out of the New York assets of the Foreign Bank in a separate proceeding conducted by the New York Superintendent before such assets may be turned over to the head office of the non-U.S. bank or its liquidator or receiver. NYBL §§ 606(4)(a) & (b). Thus, there is a risk that a court may, pursuant to Section 4(j)(2) of the IBA and Section 606 of the NYBL, restrict a Closing-Out Party's ability to collect the full Final Net Settlement Amount due under the Agreement from the assets of a U.S. branch or agency of a Foreign Bank that is the Closed-Out

Party. However, no provision of New York or Federal law prevents the Closing-Out Party from claiming, against the non-U.S. offices of the Foreign Bank, any amount that it is unable to collect from assets of a U.S. branch or agency.

(e) ***Foreign Parties Subject to Ancillary and Concurrent Proceedings in the United States***

Under the U.S. Bankruptcy Code, as amended (the "**Bankruptcy Code**"), a Party that is subject to insolvency proceedings outside the United States may also be subject to full, concurrent proceedings under the Bankruptcy Code or to ancillary proceedings thereunder if such Party has a place of business or property in the United States. The Bankruptcy Code authorizes a court to consider the interests of the debtor, its creditors, as well as those of international comity in deciding whether to hear a case and how to resolve it. Thus, it is not possible to say definitively whether a court conducting a proceeding with respect to a Party that is subject to concurrent or ancillary proceedings would apply FDICIA or instead would apply the insolvency law applicable to such Party in the jurisdiction conducting the other proceedings to determine such Party's rights and obligations under the Agreement. To the extent that the court applies FDICIA, it would be applied in the same manner as is described in this opinion with respect to any U.S. financial institution which is a Party to the Agreement.

(f) ***Rights of an Attaching Creditor***

Section 6202 of the New York Civil Practice Law and Rules ("**NYCPLR**") permits a creditor, under certain circumstances, to obtain an order of attachment against any debt or property against which a money judgment may be enforced as provided in Section 5201.[3] However, the creditor's rights are subject to the general rule that the creditor stands in the shoes of the judgment debtor. NYCPLR § 5201; Practice Commentaries to Section 5201, C5201:15. As described above, the Agreement amends the Principal Agreements to defer settlement of Settlement Amounts until the earlier of a Set-Off Date or Final Settlement Date as set forth in the Agreement. Thus, there is a risk of a third-party creditor of a Party attaching that Party's right to receive a Settlement Amount from the other Party prior to such date. However, after a Party (the "**First Party**") enters into the Agreement, its right to receive a Settlement

[3] Under Section 5201 of the NYCPLR, a creditor may enforce a money judgment against contract rights, such as the right of a Party to receive a Settlement Amount under a Principal Agreement.

Amount under any Principal Agreement is subject to the rights of the other Party to set off Settlement Amounts owed to the First Party against Settlement Amounts owed to the other Party in accordance with the terms of the Agreement. Accordingly, a creditor that obtained an order of attachment against the rights of the First Party to receive a Settlement Amount would be no greater than the rights of the First Party as amended by the Agreement. In our view, and based on the assumption in Section III (d) above, a third-party creditor of a Party should not succeed in an attachment of a Settlement Amount owed to that Party for so long as the Agreement is applicable to the relevant Principal Agreement unless such amount is the Final Net Settlement Amount.

The set-off rights of a Party are further protected by Section 151 of the New York Debtor and Creditor Law. Under Section 151, a Party to a contract can, upon the issuance of a warrant of attachment against the rights of the other Party to the contract, set off the debt which it owes to the other Party against any debt (matured or unmatured) owed to it notwithstanding the issuance of a warrant of attachment by a third-party creditor of the other Party prior to the exercise of the set-off. New York Debtor and Creditor Law § 151.

(g) ***Additional Qualifications***

We express no opinion with respect to the effect of the Trading with the Enemy Act, 50 U.S.C. app. § 1 *et seq*. or the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq*. on the rights or obligations of Parties.

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We are members of the bar of New York and we express no opinion herein as to any matters governed by any laws other that New York law and the Federal laws of the United States of America. This opinion is rendered solely to TBMA for the benefit and use of its members in connection with the Agreement. This opinion may not be relied upon for any other purpose, or quoted or relied upon by any other person, firm or corporation for any purpose, without our prior written consent.

Very truly yours,

Clifford Chance Rogers & Wells LLP