Model Commercial Paper Dealer Agreement

Guidance Notes

[4(2) 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 4(2) of the 1933 Act.

A separate model agreement is being published contemporaneously herewith, for use in establishing commercial paper programs which are exempt from 1933 Act registration pursuant to the exemption contained in Section 3(a)(3) 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.

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.

Title of Agreement:

Some dealers' practice has been to call agreements relating to 4(2) programs "Placement Agreements" and the dealers "placement agents", at least partly on the basis that "commercial paper" is frequently assumed to mean notes issued and sold pursuant to the 3(a)(3) exemption, and also to reinforce the principle that the "dealer" typically places 4(2) paper rather than buying as principal, the reasons for which are more fully discussed below. The final consensus of the group of Association member firms that prepared this Agreement (the "Working Group") was that it is made sufficiently clear that the program seeks to fit within the 4(2) exemption, if that fact is specifically highlighted in the title of the Agreement.

Section 1.2:

Clause (a) requires that any agreements for 4(2) commercial paper to be issued by the Issuer contain selling restrictions which are "substantially identical" to those contained in this Agreement. This is more restrictive than the 3(a)(3) form, which contains no requirements as to the substance of any other agreements on the same program. The reason for this is that each dealer will need to be certain that the provisions relating to compliance with the 4(2) exemption are substantially identical for the entire program, out of concern that noncomplying issuances and sales would be integrated with, and taint, otherwise complying sales.

Similarly, Section 1.2 in the 4(2) Agreement does not permit sales directly by the Issuer or the Guarantor, as does the same section in the 3(a)(3) Agreement. This is because of the importance of controlling the manner of 4(2) offers and sales, and concern about integration where such controls fail.

Section 1.3:

Unlike Section 3(a)(3), there is no maximum maturity required for the 4(2) exemption. A 397-day maximum maturity has been included reflecting the market's view of the maximum term for commercial paper (pursuant to Rule 2a-7 under the 1940 Act, this is the longest maturity instrument that money market funds are permitted to buy), but in certain cases a shorter maximum may be desirable or required. An example is the case of an issuer that relies on the exemption from the Investment Company Act of 1940, as amended (the "1940 Act") provided by Section 3(c)(1) thereof, which limits maturities of the issuer's securities to 270 days. In addition, in the case of longer maturities of commercial paper, there is the risk of overlap with maturities of other securities issued or guaranteed by the Issuer, in particular under a medium-term note program, whether publicly offered or privately placed. See the discussion of "integration" below under Sections 1.6(i) and 1.7(a).

Section 1.6 generally:

Sections 1.6 and 1.7 contain the requirements for offers and sales which form the basis for availability of the private placement exemption from registration under Section 4(2) of the Securities Act. Issuers and guarantors should make sure they understand the provisions of these sections, and should consult counsel for an explanation of any parts thereof which they do not understand, including the defined terms and references to statutes.

Certain of these requirements also make reference to Rule 506 under the Securities Act, which is part of Regulation D and provides guidance as to how a private placement should be conducted. Regulation D establishes a non-exclusive safe harbor for private placements. The principal advantage to establishing full reliance on Regulation D is that it does not limit the number of offerees, but only the number of purchasers (to 35). As drafted, the Agreement provides for a valid 4(2) exemption based on existing interpretations of that section; it does not establish full reliance on Regulation D, but does take advantage of some of its guidance as to private placements.

In preparing this Agreement for use in any particular transaction, parties may prefer to eliminate references to Rule 506 in the event that they do not wish to place any reliance on its safe harbor. Alternatively, they may wish to fully rely on the safe harbor of Rule 506, in which case a requirement to file Form D and appropriate amendments should be added. (A form of provision requiring such filings and making other conforming changes to the Agreement appears as paragraph 2 on the Addendum to the Agreement; conforming changes to the legal opinion and model corporate resolutions appear in brackets in those documents.)

Generally, information about the offering of the Notes should not be included on the Issuer's or the Guarantor's website in order to avoid such information being deemed general solicitation or general advertising.

Section 1.6(g):

Resales of the Notes may be made (and in some cases will be required to be made) in accordance with Rule 144A under the 1933 Act, which permits resales to certain very large institutional purchasers, called Qualified Institutional Buyers ("QIBs"), subject to compliance with certain conditions. Among the conditions under Rule 144A is that information similar to that published by public companies be made available to prospective purchasers of the Notes. It is this requirement that gives rise to the provision in Section 1.6(g) that if the Issuer or the Guarantor is not (or ceases to be) subject to the reporting requirements of the Securities Exchange Act of 1934, as amended (the "1934 Act"), and (in the case of a foreign issuer) is not furnishing information in accordance with Rule 12g3-2(b) under the 1934 Act, it will make available upon request the information required under Rule 144A. That information consists of:

> a very brief statement of the nature of the business of the issuer or the guarantor and the products and services it offers; and the issuer's or the guarantor's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer or guarantor has been in operation (the financial statements should be audited to the extent reasonably available).

(Rule 144A(d)(4)(i)). Such information must be "reasonably current," which will be presumed to be the case where:

(A) The balance sheet is as of a date less than 16 months before the date of resale, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than six months before the date of resale, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than six months before the date of resale; and

(B) The statement of the nature of the issuer's or the guarantor's business and its products and services offered is as of a date within 12 months prior to the date of resale; or

(C) With regard to foreign private issuers or guarantors, the required information meets the timing requirements of the issuer's or the guarantor's home country or principal trading markets. (Rule 144A(d)(4)(ii)).

Section 1.6(h):

There are several reasons for which a Note may be ineligible for resale under Rule 144A. In the case of commercial paper, the principal reason which is under the Issuer's control is the unavailability of issuer information as described above.

Because the selling restrictions applicable to the Notes provide that resales are permitted to QIBs under Rule 144A (and, as indicated above, in some circumstances the dealers will be required to sell in accordance with Rule 144A), it is necessary for the Issuer to inform the Dealer, and for changes to be made in the Private Placement Memorandum disclosure, if such Rule 144A resales are not permitted for any reason with respect to any particular Notes. The selling restrictions applicable to the Notes appear on Exhibit A to the Agreement.

Section 1.6(i):

This Section is necessary to reduce the risk of integration of this program into other issuances by the Issuer or the Guarantor. Although each of the covenants in this Section relates directly to the Issuer's and Guarantor's 3(a)(3) programs, they are necessary in this Agreement so that the Dealer under this Agreement (which may not be a dealer on such 3(a)(3) programs and therefore would have no way of monitoring the way that program is conducted) has some comfort that the such 3(a)(3) programs are being properly conducted.

Issuers and guarantors are advised to discuss with their counsel the specific requirements to ensure availability of the 3(a)(3) exemption, and establish appropriate internal procedures and controls. This Section may be deleted where neither the Issuer nor the Guarantor has a 3(a)(3) program, or any present intention of establishing one.

Section 1.7(a):

This Section focuses again on measures to prevent integration with other offerings by the Issuer or the Guarantor, although it is more broad than 1.6(i), which focuses only on the contemporaneous 3(a)(3) program. In this Section, the Issuer and the Guarantor confirm that they have not sold Notes or any securities "substantially similar to" Notes except under this Agreement or similar agreements relating to this 4(2) program with other dealers.

Various interpretations under the federal securities laws discuss the "substantially similar" standard in the integration context. The standard is not always clear, and is a factual determination in each case, but it is apparent that it is the substance, not the title of the securities or whether or not they are issued under the same program, that will be scrutinized. For example, offerings of debt instruments that have maturities within one year of each other should be analyzed as to integration. Because of the fact-dependent nature of the question, Issuer and Guarantor officials who are involved in the issuance of Notes under this program should have ongoing discussions with their legal counsel to reduce the risk of integration.

Section 1.7(b):

In order to monitor its compliance with Regulation T as currently interpreted by the Federal Reserve Board, the Dealer needs to know if the Issuer is using the proceeds of Notes issued in a 4(2) program to buy, carry or trade securities, whether in connection with the acquisition of another company or otherwise. If that is the use of the proceeds of the sale of Notes, and the Dealer has purchased the Notes as principal and does not resell them on the day of issue, the Dealer may be required to resell the Notes only to persons it reasonably believes to be QIBs. This provision requires the Issuer to notify the Dealer when its planned use of proceeds of the Notes will potentially place the Dealer in this position.

Section 2.11:

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 2.9 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 2.12:

This representation covers both the Private Placement Memorandum and the Company Information, even though the latter is defined to include the former as well as additional material. The Dealer needs to have the Issuer’s and the Guarantor’s confirmation of the statements made in this Section as to the narrower contents of the Private Placement Memorandum standing alone (since this is the only material the Dealer is actually delivering in all cases to purchasers) as well as to the broader universe of all available Company Information.

Section 4.3:

This Section requires the Issuer and the Guarantor to notify the Dealer when an event occurs that would render the Private Placement Memorandum 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 Private Placement Memorandum if the Dealer is then holding Notes in inventory. If the Issuer and Guarantor do not update in that instance, the Dealer would be unable to resell the Notes held in inventory, since a current Private Placement Memorandum 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 Private Placement Memorandum for the same reason that both are covered under the representation in Section 2.12 (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 Private Placement Memorandum. 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 1934 Act.

Section 6.15:

The requirement of not less than $5 million in investments is based on the definition of a "qualified purchaser" under the 1940 Act and is intended to set a standard believed to be comfortably higher than the "accredited investor" standard in Regulation D under the Securities Act. The definition of "Sophisticated Individual Accredited Investor" is not based on any statutory, regulatory or interpretive standard (other than by analogy to the "qualified purchaser" definition) but rather reflects the sense of the working group that Dealers should not sell privately placed commercial paper to "ordinary" individual accredited investors.

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 private placement legend will appear on all Private Placement Memoranda and all Notes, in substantially the form of Exhibit A. Please note that slight language changes are necessary to adapt the legend for the separate locations: e.g., "The Notes have not been registered..." would become *"This* Note *has* not been registered..." (emphasis added) when appearing as the Note itself.

By appearing on Private Placement Memoranda, it will constitute the principal means by which the resale restrictions are communicated to the holders of the Notes. In most cases the Note will be a book-entry Note certificate held by or on behalf of DTC, so the legend serves no real notice purpose to the beneficial owners of the Notes. However, it may be desirable to have a legend on the Note because of Section 8-204(1) of the Uniform Commercial Code, which provides that:

> "A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without actual knowledge of the restriction unless
>
> (1) the security is certificated and the restriction is noted conspicuously on the security certificate; or
>
> (2) the security is uncertificated and the registered owner has been notified of the restriction; or …"

The Notes, although generally reflected by DTC book entries, are considered certificated under the UCC because DTC actually holds (directly or through an agent) a Note certificate. Therefore, clause (1) of UCC § 8-204 is applicable and would suggest use of a legend in order to make the selling restrictions binding on purchasers. See Comment 4 to UCC § 8-204.

Exhibit B:

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

Exhibit C:

Exhibit C 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 C, 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 C.

Exhibit D:

Exhibit D 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 3.6(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 Private Placement Memorandum 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 2.11 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.