This article is scheduled to be printed in two installments in "The Investment Lawyer". Included here are both installments of the article, plus explanatory attachments that were not available in the printed version. Please note that the format of this version may vary slightly from the printed version.

New Developments in Procedures for Book-Entry Deposit of Rule 144A Securities by Certain Issuers Relying on Section 3(c)(7) of the Investment Company Act

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Issuers that inadvertently fall within the definition of "investment company" under the Investment Company Act of 1940, as amended (the Investment Company Act) face significant restrictions on their ability to offer and sell securities. "Investment company" is defined to include not only traditional mutual funds and private funds, but in some cases also structured finance issuers, foreign holding companies, and other non-fund entities. For some of these non-fund entities, the most efficient way to access the U.S. capital markets is to rely on the Section 3(c)(7) exemption under the Investment Company Act. A U.S. issuer may rely on this exemption if it has a "reasonable belief"[1] that **all** of its investors, U.S. and non-U.S., are "qualified purchasers" (QPs), including initial purchasers and also subsequent transferees. A non-U.S. issuer is generally required to have this "reasonable belief" only about its U.S. investors.

In a typical Section 3(c)(7) transaction, each purchaser that is required to be a QP must sign representations verifying its QP status. However, certain non-fund issuers normally want to deposit their securities in book-entry facilities, which can be The Depository Trust Company (DTC) in the United States, or Euroclear Bank S.A./N.V. (Euroclear) and Clearstream Banking Luxembourg (a division of Clearstream International) (Clearstream Banking) in Europe. If a security is book-entry, it is impossible to require each purchaser (or in the case of non-U.S. issuers, each purchaser that is a U.S. person) to sign QP representations because of the difficulty in monitoring transfers. These securities are generally offered in private placements in the United States pursuant to Rule 144A (Rule 144A) under the Securities Act of 1933, as amended (the 1933 Act), sold only to qualified institutional buyers (QIBs). In some cases, these are global offerings with a Rule 144A tranche. We believe there are procedures (the Procedures), discussed further in this article, which should enable an issuer to establish the required "reasonable belief"

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[2] Rule 2a51-1(h).

that each purchaser (or in the case of non-U.S. issuers, each purchaser that is a U.S. person) of these book-entry Rule 144A securities is a QP. We first wrote about these Procedures in the June, 1999 issue of the *Investment Lawyer*, focusing on securities deposited in DTC.[3]

The Procedures contain recommendations including: specific disclosure and deemed purchaser representations in the offering document; issuer and distributor representations in the distribution agreement; minimum denominations; and specific legends and procedures to be put into place at the book-entry depository and at other service providers.

Since the Procedures were first published, we have had numerous experiences with Section 3(c)(7) issuers and underwriters seeking to use the Procedures. As a result of that experience, we think it is useful to clarify some of the elements described in the original Procedures. In addition, it became clear to us that it would be helpful to certain issuers if it were possible to implement similar Procedures at Euroclear and Clearstream Banking. Those depositories have told us that they are now able to implement, upon the request of Section 3(c)(7) issuers, Procedures that are substantially similar to those available at DTC.

Our update of the Procedures is being published by the *Investment Lawyer* in two installments. In this installment, we discuss certain issues that we have seen recur as the Procedures were put into practice. In the second installment, which follows below, we will provide an updated set of specific Procedures, including the new parallel Procedures available for securities that are held through Euroclear and Clearstream Banking.[4]

Issues Update

The Procedures for book-entry for Section 3(c)(7) issuers focus on several key elements. We have seen certain issues recur with each of them:

1. The issuer should NOT be a classic "investment company," including a hedge fund or other type of private fund.

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[3] *See* Attachment L. Please see that article for additional background on Section 3(c)(7), and on the SEC's interpretation of the "reasonable belief" standard.

[4] This article is available on the Web site of each law firm that collaborated on this article:

Cleary, Gottleib, Steen & Hamilton:
http://www.clearygottlieb.com/newsworthy-categories.cfm?strNwsCatName=Alerts%20and%20Publications

Davis Polk & Wardwell:
http://www.dpw.com/1485409/3c7procedures.pdf

Shearman & Sterling:
http://www.shearman.com/documents/144A-3c7.pdf

Sidley Austin Brown & Wood, LLP:
http://www.sidley.com/3c7bookentry

Sullivan & Cromwell:
http://www.sullcrom.com/display.asp?section_id=897

The Procedures are designed to be used only by issuers that are not managed investment companies. Hedge funds and other fund entities whose business consists of investing and trading in private equity or other investment securities should use the traditional practice of obtaining written QP representations from each initial purchaser and each subsequent transferee, and should not deposit their securities in a book-entry facility.

The Procedures are designed for structured finance issuers, such as special purpose vehicles (SPVs) and collateralized debt obligations (CDOs). They are also appropriate for certain foreign issuers, for example, a foreign operating company that may not fully satisfy the Investment Company Act's asset and income tests (such as a holding company with valuable minority subsidiaries), or that does not have the ability due to market conditions or commercial demands to take the lead time necessary to do a detailed analysis of its assets and income.

As explained in more detail in our 1999 article, these structured finance and foreign issuers typically differ from classic private investment companies in that 1) their return to securityholders is largely from sources other than the management of investment securities, or 2) they are foreign issuers holding minority interests in operating companies (which operating companies are often affiliates of the issuer). We also note that these securities are generally traded through financial intermediaries (e.g. broker-dealers who would be consulting a Bloomberg screen), and not directly from one holder to another.

2. All initial purchasers and all subsequent transferees (for non-U.S. issuers, all initial purchasers and all subsequent transferees that are U.S. persons) should be on notice that only QIB/QPs may purchase the Section 3(c)(7) securities.

The Procedures provide for notice to the initial purchasers of the QIB/QP requirement primarily through the disclosure and deemed representations in the offering document. Secondary market purchasers cannot normally be presumed to be aware of the offering document disclosure, so certain additional Procedures are required. One important feature is the placement of prominent Section 3(c)(7)/QP and Rule 144A/QIB notations on the pricing and information screens that traders would consult in the secondary market. We understand that Bloomberg L.P. (Bloomberg) would normally be an important source of secondary market information for the types of structured finance and foreign issuers that would use these Procedures. In some cases, Reuters Group plc (Reuters) and Telekurs Holding Ltd. (Telekurs) may also be important sources of information. It is important in deciding whether a Section 3(c)(7) issuer can use the Procedures for a particular offering that the issuer and the underwriter determine that one or more of these services will in fact be important sources of pricing information for secondary market traders of the securities, and will implement the specific Procedures that we suggest, or similar procedures.[5] Bloomberg and Telekurs have agreed to make available upon request of an issuer the specific 144A/3(c)(7) legends we recommend. (See "Information Sources –Bloomberg" and "Information Sources – Telekurs", below). Reuters has been asked to make similar legends available, but has not confirmed it will do so. Consequently, if Reuters will be an important source of secondary market information for a particular security, the issuer must

[5] *See* the second installment of this article, below, for the specific procedures we recommend at Bloomberg, Reuters and Telekurs.

discuss the legends with Reuters, and if they are not made available, the issuer should not use book-entry facilities.[6]

Having considered numerous inquiries concerning the Procedures since they were initially published, we think they generally should not be used for offerings by 3(c)(7) issuers of equity securities (or securities convertible into equity.) For equity offerings, there are generally a variety of information sources available, and the issuer cannot determine which sources secondary market traders will use (whereas with debt securities, the issuer is generally able to rely on the fact that secondary market traders will consult a service such as Bloomberg for information about the security, and can verify that the service carries notification of the QIB/QP restrictions.) Equity offerings are also more likely to appeal to retail investors, who may not purchase these types of QIB/QP securities (as discussed further, below.) Consequently, in equity offerings, it can be more difficult for the issuer to develop the requisite reasonable belief about the QIB/QP status of secondary market equity purchasers, and it may not be appropriate to rely on the Procedures. However, we note that there are in fact some circumstances in which issuers may be able to rely on the Procedures for equity. One example would be equity securities traded exclusively through the proprietary system of a broker-dealer that agrees to sell only to QIB/QPs. Another example would be complex equity securities, with limited sources of pricing information, for which traders in the secondary market would consult Bloomberg, (or another service that has agreed to make 144A/3(c)(7) legends available). The issuer could potentially rely on these alternative facts, along with the rest of the Procedures, to maintain the requisite reasonable belief.

3. Each distributor of QIB/QP securities should be a sophisticated investment bank with the ability to screen purchasers, and should implement internal procedures similar to those recommended by The Bond Market Association.

In connection with the implementation of the Procedures in 1999 for securities deposited in DTC, The Bond Market Association published its own set of recommended procedures relating to secondary market trading of book-entry 3(c)(7) securities.[7] These recommendations focus on internal procedures to be put in place at member firms, and are intended to facilitate identification of 3(c)(7) securities and to further facilitate limiting sales to QIB/QPs. We think these internal procedures are very helpful, and we encourage 3(c)(7) issuers to confirm that the underwriters for their book-entry securities (or in the case of non-U.S. issuers, the underwriters for their Rule 144A tranche) have implemented these internal procedures, and that they require syndicate members to implement them also. It is advisable to address these issues with non-U.S. underwriters early in any transaction, since they are less likely to already have implemented these internal procedures.

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[6] We understand that for some of these issuers, the original underwriter or a designated market maker may also be important sources of secondary market pricing information. This should not hinder the issuer's ability to rely on these Procedures, as long as the underwriter or market maker undertakes to implement internal procedures so that secondary market traders will see the same type of disclaimers about the 144A/3(c)(7) purchase restrictions that Bloomberg displays.

[7] *See* Attachment K for the Bond Market Association procedures.

4. U.S. issuers are responsible for the QP status of all of their securityholders worldwide, and can book-entry deposit only Rule 144A securities.

Section 3(c)(7) effectively requires a U.S. issuer to have a "reasonable belief" that **all** of its securityholders, and **all** of their subsequent transferees, are QPs.[8] This is true even for initial purchasers and subsequent transferees that are non-U.S. persons. In the context of the Procedures, this means that a U.S. issuer must be able to implement controls worldwide that support a conclusion that only QPs will purchase its securities. It is fundamental to this issue that the Procedures are designed to be used only for Rule 144A offerings. This is because the QP standard is very similar to the well-known QIB standard[9]; also, the QIB market is well-established and sophisticated, so the issuer can reasonably expect that the applicable transfer restrictions will be followed. In book-entry offerings that are not subject to Rule 144A requirements, we believe it is questionable whether the QP standard will be properly applied. We believe U.S. 3(c)(7) issuers should only offer book-entry securities under Rule 144A, and should not offer book-entry securities under Regulation S.

Section 3(c)(7) issuers should consider whether their securities have retail appeal in the United States, because that could make use of the Procedures inappropriate. For example, if an issuer would publicly offer its securities but for problems complying with the Investment Company Act that force it to rely on 3(c)(7), the securities are a greater risk of being purchased by non-QPs in the secondary market (even if they are initially offered under Rule 144A). We think that the minimum denomination requirements of the Procedures are helpful, but they are not alone necessarily enough to prevent sales to retail investors.

Furthermore, because Euroclear and Clearstream Banking are automatically eligible (through other entities that are participants in DTC) to hold positions in any DTC security, we think it would be prudent for U.S. issuers that anticipate meaningful offshore interest in Rule 144A securities that have been deposited in DTC to directly request Euroclear and Clearstream Banking (and also Reuters and Telekurs if secondary market traders are likely to consult those services) to implement their portions of the Procedures with respect to those securities.

5. Non-U.S. issuers are responsible only for the QP status of securityholders who purchase their U.S. offerings, and can book-entry deposit Rule 144A or Regulation S securities.

The Staff of the SEC has interpreted Section 7(d) of the Investment Company Act to require non-U.S. issuers who rely on Section 3(c)(7) to have a reasonable belief that any U.S. person who purchases a security is a QP, and also that any subsequent transferee of that security is a QP.[10] Any non-U.S. person who purchases a non-U.S. issuer's securities is not required to be a QP, nor is any subsequent transferee of such securities (as long as neither the issuer nor its

[8] Section 3(c)(7)(A).

[9] *See* Rule 2a51-1(g).

[10] *See Goodwin Proctor & Hoar* (Feb. 28, 1997) and *Investment Funds Institute of Canada* (March 4, 1996).

agents, affiliates or intermediaries are involved in any sales that are made in the United States or to U.S. persons).[11] Consequently, a non-U.S. 3(c)(7) issuer may book-entry deposit Rule 144A offerings in the United States (as long as the Procedures are followed). No comparable procedures should be necessary for an offshore issuer's book-entry deposited Regulation S securities.

As an additional step toward maintaining the U.S. restrictions in the aftermarket, we have recommended that the parties consider a distribution agreement representation by foreign issuers that reflects the standard the SEC has articulated: that the issuer will not, and will not permit its agents, intermediaries or affiliates to, resell any Regulation S securities to U.S. persons (unless they reasonably believe those U.S. persons are QIB/QPs, and the securities are subject to the restrictions required by these Procedures going forward.)[12]

Underwriters should also represent that during the distribution (or otherwise as required by Regulation S) they will not resell any Regulation S securities to U.S. persons (unless they reasonably believe those U.S. persons are QIB/QPs and the securities are subject to the restrictions required by these Procedures going forward.) The standard representation made by an Underwriter would normally cover this point.

In addition, we note that non-U.S. 3(c)(7) issuers should also carefully consider whether their securities have retail appeal in the United States, because that could make use of the Procedures inappropriate. For example, if the Rule 144A securities sold in the United States are sold to retail investors offshore, or are fungible with securities sold to retail investors offshore, it could indicate a potential for retail interest in the United States. As stated above, we think the minimum denomination requirements of the Procedures are helpful, but they are not necessarily alone enough to prevent sales to U.S. retail investors.

Euroclear and Clearstream Banking Procedures

Euroclear and Clearstream Banking are now able to implement at issuer request Procedures that parallel those available at DTC. It is the issuer's responsibility to request the Procedures at these service providers with respect to a particular security, although we note that as a practical matter the distributor generally assists in that process.[13]

Finally, as a result of our consultations with Euroclear and Clearstream Banking, we recommend that, for all Section 3(c)(7) book-entry securities, the deemed representations in the disclosure document should include a new representation: "The investor understands that the issuer may receive a list of participants holding positions in its securities from one or more book-entry depositories." Under various European bank secrecy laws, the depositories and

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[11] *Id*.

[12] Note that, under some circumstances, market makers may be considered agents of the issuer for this purpose.

[13] *See* the second installment of this article, below, for the specific Procedures we recommend at Euroclear and Clearstream Banking.

participants will not be permitted to give the issuer that information without this disclosure in the offering documents.

Conclusion

In the course of updating the Procedures, we have discussed issues and procedures with Euroclear, Clearstream Banking and other service providers. We have also discussed various aspects of the initial offerings and anticipated secondary market offerings with each other, and with clients. As always, continued practice and experience may suggest that some additional procedures may be appropriate, or that some of those included here may be amended or eliminated.

Dated: February 5, 2003

Revised Procedures
for Book-entry Deposit of Rule 144A Securities
by Certain Issuers Relying on
Section 3(c)(7) of the Investment Company Act

This is Part 2 of a two-part article. Part 1 appeared in the March 2003 issue of the *Investment Lawyer*, and was written by a group of law firms.

Part 1 discussed certain requirements facing issuers who rely on Section 3(c)(7) of the Investment Company Act of 1940, as amended, and our belief that certain structured finance issuers and foreign holding companies may satisfy those requirements notwithstanding the fact that they deposit their securities in book-entry facilities.

Please see Part 1 for important information about the nature of Section 3(c)(7) restrictions, and limitations on the types of issuers that we believe may rely on these Procedures. Please note that we do NOT recommend these Procedures for classic "investment companies," including hedge funds or other types of private funds.

Part 2 discusses the specific Procedures that we recommend for these issuers, so they can establish the requisite "reasonable belief" that their holders are QPs, as required by Section 3(c)(7). Capitalized terms not defined here are used as defined in Part 1.

All Section 3(c)(7) issuers who rely on these Procedures and deposit their securities in book-entry facilities (whether in the United States or Europe) should follow the Procedures in Section I. If the securities are deposited in DTC, issuers *also* should follow the Procedures in Section II. (If there is expected to be meaningful offshore interest in the DTC-deposited securities, issuers *also* should consider whether it is advisable to ask Euroclear and Clearstream Banking to implement the Procedures described in Section III.) If the securities are deposited in Euroclear or Clearstream Banking, issuers *also* should follow the Procedures in Section III.

We note that while the issuer must assume responsibility for instructing the book-entry facilities and other service providers to implement these Procedures, as a practical matter the distributor often takes the lead in that process.[14]

I. All Book-entry (United States and Europe)

Disclosure. Each initial investor must receive an offering memorandum that contains disclosure and deemed representations that: (1) the investor is a QIB who is a QP (a QIB/QP); (2) the investor is not a broker-dealer which owns and invests on a discretionary basis less than $25 million in securities of unaffiliated issuers; (3) the investor is not a participant-directed employee plan, such as a 401(k) plan; (4) the QIB/QP is acting for its own account, or the

[14] We note that the entity functioning as "distributor" in Rule 144A deals is often called the "initial purchaser" or sometimes referred to as the "underwriter." To avoid confusion we use the term "distributor" here.

account of another QIB/QP; (5) the investor is not formed for the purpose[15] of investing in the issuer; (6) the investor, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of securities; (7) the investor understands that the issuer may receive a list of participants holding positions in its securities from one or more book-entry depositories; and (8) the investor will provide notice of the transfer restrictions to any subsequent transferees. Subsequent transferees must be deemed to make the same representations.[16]

Legend. The global security must contain a legend to the same effect, and also to the effect described under "Issuer right to force sale or redemption," below, and should not provide for removal of the legend. In Rule 144A transactions the QIB restriction may be removed after the security is eligible for resale under Rule 144(k) of the Securities Act of 1933, but the issuer should covenant that it will not remove the legend as long as it is relying on 3(c)(7) (which will presumably be for the life of the issuer.)

Issuer representation. The issuer must represent in the distribution agreement (based on discussions with the distributor and other factors that the issuer or its counsel deem necessary or appropriate) that based on these Procedures the issuer has a reasonable belief that initial sales and subsequent transfers of its securities will be limited to QIB/QPs.[17] The issuer must also covenant that it will not offer the securities in its own or any affiliated participant-directed employee plan. Foreign issuers should also represent that they will not, and will not permit their agents, intermediaries or affiliates to, resell any Regulation S securities to U.S. persons (unless they reasonably believe those U.S. persons are QIB/QPs, and the securities are subject to the restrictions required by these Procedures going forward.)

Distributor representation. Each distributor (or, in the case of non-U.S. issuers, each distributor of Rule 144A securities) must be a sophisticated investment bank with the ability to screen purchasers, and should implement internal procedures similar to those recommended by The Bond Market Association.[18] Each distributor must represent in the distribution agreement that (1) it is itself a QIB/QP and (2) it has only sold and will only sell to persons (including any other distributor and any dealers) that are or that it reasonably believes are QIB/QPs that can

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[15] Note, however, that Rule 2a51-3 would allow an investor that is "formed for the purpose" to invest in the issuer if each beneficial owner of the purchaser is a QIB/QP. Rule 144A(a)(1)(v) similarly includes as a QIB any entity all of the equity owners of which are QIBs.

[16] The issuer's counsel may also want the investor to represent that, if it is a 3(c)(1) or 3(c)(7) private investment company (or a 7(d) foreign investment company relying on Section 3(c)(1) or 3(c)(7) with respect to its U.S. holders) and was formed on or before April 30, 1996, it has received the necessary consent from its beneficial owners.

[17] In the alternative, this representation may be made by a person acting on behalf of the issuer (*e.g.*, where the issuer is a special purpose vehicle or structured finance company).

[18] *See* Attachment K.

make the representations in clauses (1) to (8) under "Disclosure." Investment banks generally keep lists of customers who are QIBs, and many also keep lists of customers who are QPs. If they have sufficient knowledge of their customers, distributors should be able to determine that they are selling to a purchaser who meets the requirements of clauses (1) to (8) under "Disclosure."

Issuer right to force sale or redemption. The issuer must have the right under its charter, by-laws or other documents to force any holder who is determined not to be a QIB/QP to sell the securities to a QIB/QP. The issuer must also have the right to refuse to honor a transfer to a person who is not a QIB/QP. This right must be disclosed in the offering memorandum and global security legend. This requirement could be satisfied by requiring a redemption rather than a sale. We have concluded that this right should be enforceable under New York law, and the laws of England and Wales, against a person the issuer discovers is not a QIB/QP.

Minimum denominations or minimum purchases. The securities must be sold only to QIB/QPs, with minimum denominations or minimum purchases that are high enough, in the judgment of the issuer and distributor, to help protect against purchase by non-QIB/QPs. Minimum denominations should be disclosed in the offering memorandum and the global security legend.

Notification. Each time the issuer sends an annual or other periodic report to its holders, the issuer must include a reminder that: (1) each holder is required to be a QIB/QP that can make the representations set forth in clauses (1) to (8) under "Disclosure," (2) the securities can only be transferred to another QIB/QP that can make the same representations, and (3) the issuer has the right to force any holder who is not a QIB/QP to sell or redeem its securities. The issuer must send the report and the reminder to participants identified by the book-entry system(s) in which its securities are deposited, with a request that participants pass them along to beneficial owners. The issuer must send at least one notice per year.

Information Sources. We understand that almost all dealers and institutional buyers that would be involved in offerings by 3(c)(7) issuers of book-entry securities of the type we are addressing have a Bloomberg, Telekurs and/or Reuters screen (or access to one or more of these screens through fax or other means). We also understand that almost all traders that would be involved in trading securities issued by 3(c)(7) issuers would review one or more of these screens before making a trade in the security (unless they frequently traded the security and knew the limitations on sale). The issuer therefore should determine which of these services is likely to be an important source of information in the secondary market for its particular securities. The issuer and underwriter should ensure that the screens of *each* service that is expected to be an important source contains the following applicable language (or similar language).

- **Bloomberg**. Bloomberg makes these (or similar) legends available to issuers: [19]

[19] The format in which this information is presented by Bloomberg may vary for certain types of securities.

- "Note Box" on bottom of "Security Display" page describing the security states: "Iss'd Under 144A/3c7".

- "Security Display" page has flashing red indicator "Additional Note Pg."

- That indicator links to the "Additional Security Information" page, which states that the securities "are being offered to persons who are both (i) qualified institutional buyers (as defined in Rule 144A under the Securities Act) and (ii) qualified purchasers (as defined under Section 3(c)(7) under the Investment Company Act of 1940)".

- **Telekurs**. Telekurs has told us they can make these (or similar) legends available to issuers:

  - The name of the security, as many times as it appears on any "Invest Data" screen (or other primary information screen), should include a "144A - 3c7" notation.

  - The name of the security on any "297 screen" (or other primary pricing screen) should include a "144A - 3c7" notation. The 297 screen should also state: "Sell only to both 144A/QIB and 3c7/QP."

  - A Telekurs "Issue Conditions" screen relating to the 3(c)(7) securities should be readily accessible to all subscribers and should state that: "The securities may be sold or transferred only to persons who are both (i) qualified institutional buyers (as defined in Rule 144A under the Securities Act), and (ii) qualified purchasers (as defined under Section 3(c)(7) under the U.S. Investment Company Act of 1940)."

- **Reuters.** Reuters is reviewing whether they can make these legends available to issuers. If Reuters will be an important source of secondary market information about an issuer, and Reuters cannot make these (or similar) legends available, the issuer should not use book-entry facilities:

  - The security name field at the top of the Reuters Instrument Code screen should include a "144A-3c7" notation.

  - A <144A3c7Disclaimr> indicator should appear on the right side of the Reuters Instrument Code screen.

  - The <144A3c7Disclaimr> indicator should link to a disclaimer screen on which the following language will appear: "These securities may be sold or transferred only to persons who are both (i) qualified institutional buyers (as defined in Rule 144A under the Securities Act), and (ii) qualified purchasers

(as defined under Section 3(c)(7) under the U.S. Investment Company Act of 1940)."

II. U.S. Book Entry (DTC)

DTC. DTC has told us that they are able to do the following to facilitate the issuer's ability to monitor resales. The issuer must specifically instruct DTC to take these or similar steps with respect to its securities.

- **3(c)(7) marker:** DTC 20-character security descriptor and 48-character additional descriptor can indicate with the marker "3c7" that sales are limited to QIB/QPs.[20]

- **Settlement notice:** After settlement DTC sends a deliver order ticket to purchasers. Where the deliver order ticket is physical, it will have the 20-character security descriptor printed on it. Where the deliver order ticket is electronic, it will have a "3c7" indicator and a related user manual for participants, which will contain a description of the relevant restrictions.[21] We understand from DTC that most participants use the electronic system.

- **Important notice**: DTC will, at the issuer's request, send an "Important Notice" outlining the issuer's 3(c)(7) restrictions to all DTC participants in connection with the initial offering. This notice can be customized to address the circumstances of each issuer.[22]

- **List of participants**: Upon request, DTC can provide to the issuer a list of all DTC participants holding positions in an issuer so the issuer can send a notice to those participants (as described under "Notification") stating that sales are limited to QIB/QPs.

- **List of securities and user manual**: DTC makes available to all DTC participants a "Reference Directory" which includes a list of all issuers who have advised DTC that they are 3(c)(7) issuers, as well as CUSIP numbers for the 3(c)(7) securities. It also includes a paragraph explaining the QIB/QP restrictions in more detail.[23] DTC is in the process of making this information available on its Web site (www.dtc.org).

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[20] *See* Attachment A.

[21] *See* Attachment B.

[22] *See* Attachment C. The issuer should submit this notice on its own letterhead to DTC's Underwriting Department for distribution.

[23] *See* Attachment D.

CUSIP Number. We have been told that according to market practice, "confirms" of trades in DTC contain numbers from the CUSIP Service Bureau (CUSIP). The 9-digit CUSIP number itself cannot currently contain a "3c7" indicator. However, the "fixed field" attached to a CUSIP number can have "3c7" and "144A" indicators. The fixed field is available to entities that receive electronic data from CUSIP, and is searchable. Issuers should verify with CUSIP that the CUSIP number the bureau will provide will contain this "fixed field."

III. European Book Entry (Euroclear and Clearstream Banking)

Euroclear. Euroclear has indicated that they are able to do the following to facilitate the issuer's ability to monitor resales. The issuer must specifically instruct Euroclear to take these or similar steps with respect to its 3(c)(7) securities.

- **3(c)(7) marker:** The security name will reference "144A/3(c)(7)" in the Euroclear securities database. All Euroclear participants who settle 3(c)(7) securities in the Euroclear System will see that descriptor in the name field of 3(c)(7) securities.[24]

- **Settlement notice:** Participants receive a daily securities balances report listing their positions in all securities held through Euroclear and a daily securities transaction report confirming settlement in all trades executed by the participant that day. In each report, securities will be listed by name, which will include "144A/3(c)(7)". The 3(c)(7) restrictions will be further explained in the New Issues Acceptance Guide.

- **User manual:** The New Issues Acceptance Guide, Euroclear's user manual for participants, will include a description of the Section 3(c)(7) restrictions.[25] The manual is continually accessible to all Euroclear participants on the Euroclear Web site (updated on a bi-monthly basis) and is also distributed monthly to Euroclear's participants via CD Rom.

- **Important notice:** Euroclear will periodically (and at least annually) send to the Euroclear participants holding positions in 3(c)(7) securities an electronic "Important Notice" outlining the restrictions applicable to 3(c)(7) securities.[26]

- **List of participants:** Euroclear will provide to the issuer, upon its request, a list of all Euroclear participants holding positions in its 3(c)(7) securities so that the issuer can periodically (and at least once per year) send a notice to all such

[24] *See* Attachment E.

[25] *See* Attachment F.

[26] *See* Attachment G. The issuer must provide a completed notice to Euroclear.

participants outlining the restrictions applicable to 3(c)(7) securities.[27] Note: To accommodate European banking laws, the disclosure documents provided to investors must clearly disclose that Euroclear will provide this information to the issuer upon request (see "Disclosure," above).

- **List of securities:** Euroclear will also distribute monthly to all participants a list of all securities accepted within the securities' database (updated on a bi-monthly basis). The 3(c)(7) marker will be included in the name of all 3(c)(7) securities. The 3(c)(7) restrictions will be explained in more detail in the New Issues Acceptance Guide.

Clearstream Banking. Clearstream Banking has indicated that they are able to do the following to facilitate the issuer's ability to monitor resales. The issuer must specifically instruct Clearstream Banking to take these or similar steps with respect to its 3(c)(7) securities.

- **3(c)(7) marker:** The security name will reference "144A/3(c)(7)" in the Clearstream Banking securities database. All Clearstream Banking participants who settle 3(c)(7) securities through Clearstream Banking will see that descriptor in the name field of 3(c)(7) securities.[28]

- **Settlement notice:** Participants receive a daily portfolio report listing their positions in all securities held through Clearstream Banking and a daily settlement report confirming settlement in all trades executed by the participant that day. In each report, securities will be listed by name, which will include "144A/3(c)(7)." The 3(c)(7) restrictions will be further explained in the Clearstream Banking Customer Handbook.

- **User manual:** The Customer Handbook, Clearstream Banking's user manual for participants, will include a description of the Section 3(c)(7) restrictions.[29] The Customer Handbook is continually accessible to all Clearstream Banking participants on the Clearstream Banking Web site.

- **Important notice:** Clearstream Banking will periodically (and at least annually) send to the Clearstream Banking participants holding positions in 3(c)(7) securities an electronic "Important Notice" outlining the restrictions applicable to 3(c)(7) securities.[30]

- **List of participants:** Clearstream Banking will provide to the issuer, upon its request, a list of all Clearstream Banking participants holding positions in its 3(c)(7) securities so

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[27] *See* Attachment G.

[28] *See* Attachment H.

[29] *See* Attachment I.

[30] *See* Attachment J. The issuer must provide a completed notice to Clearstream Banking.

that the issuer can periodically (and at least once per year) send a notice to all such participants outlining the restrictions applicable to 3(c)(7) securities.[31] **Note:** To accommodate Luxembourg banking laws, the disclosure documents provided to investors must clearly disclose that Clearstream Banking will provide this information to the issuer upon request (see "Disclosure," above).

- **List of securities:** Clearstream Banking will also make available to all of its participants, via its Web site, a continually updated list of all securities accepted within its database. The 3(c)(7) marker will be included in the name of all 3(c)(7) securities. The 3(c)(7) restrictions will be explained in more detail in the Customer Handbook.

IV. Subsequent Offerings

In connection with a subsequent offering by any issuer using these Procedures, there will have to be a due diligence investigation to confirm the Procedures have been observed in any prior offerings. In addition, the issuer will have to follow these Procedures for the new offering.

[31] *See* Attachment J.

Sample DTC security descriptor for 3(c)(7)/Rule 144A issue:

For a global corporate bond issued by "Issuer Name" on April 22, 1998, bearing interest at a rate of 8.000%, payable in May and November of each year and maturing in 2004, issued and sold in reliance on Section 3(c)(7) of the Investment Company Act of 1940 and Rule 144A of the Securities Act of 1933:

20 character descriptor: GCB144A3C7I8.00%BE-#

48 character descriptor: GCB 144A 3C7 ISSUERNAME D04/22/98 8.000%MNO4BE-#

Actual contents of security descriptor will vary according to deal.

Form of insert for DTC User Manual (to describe notations in DTC security descriptor for 3(c)(7) issuers)

"3c7": Indicates the issuer of the security has informed DTC that it is relying on the exemption from the definition of "investment company" provided by Section 3(c)(7) of the Investment Company Act of 1940, as amended (the "Investment Company Act"). DTC has been informed by counsel to certain of these issuers that:

> Section 3(c)(7) requires that all holders of the outstanding securities of such an issuer (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons) are "qualified purchasers" ("QPs"), as defined in Section 2(a)(51)(A) of the Investment Company Act and related rules. Under the rules, the issuer must have a "reasonable belief" that all holders of its outstanding securities (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons), including transferees, are QPs. Consequently, all sales and resales of the securities (or, in the case of non-U.S. issuers, all sales and resales in the United States or to U.S. Persons) must be made pursuant to Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), solely to purchasers that are "qualified institutional buyers" ("QIBs") within the meaning of Rule 144A and are also QPs ("QIB/QPs"). Each purchaser will be deemed to represent that: (i) the purchaser is a QIB/QP; (ii) the purchaser is not a broker-dealer which owns and invests on a discretionary basis less than $25 million in securities of unaffiliated issuers; (iii) the purchaser is not a participant-directed employee plan, such as a 401(k) plan; (iv) the QIB/QP is acting for its own account, or the account of another QIB/QP; (v) the purchaser is not formed for the purpose of investing in the issuer; (vi) the purchaser, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of securities; (vii) the purchaser understands that the issuer may receive a list of participants holding positions in its securities from one or more book-entry depositaries; and (viii) the purchaser will provide notice of the transfer restrictions to any subsequent transferees.
>
> The charter, bylaws, organizational documents or securities issuance documents of an issuer relying on Section 3(c)(7) of the Investment Company Act and Rule 144A of the Securities Act with respect to an offering of securities typically provide that the issuer will have the right to (i) require any holder of securities (or, in the case of a non-U.S. issuer, any holder that is a U.S. Person) that is determined not to be both a QIB and a QP to sell the securities to a QIB that is also a QP or (ii) redeem any securities held by such a holder on specified terms. In addition, such an issuer typically has the right to refuse to register or otherwise honor a transfer of securities to a proposed transferee (or, in the case of a non-U.S. issuer, a proposed transferee that is a U.S. Person) that is not both a QIB and a QP. As used herein, the terms "United States" and "U.S. Person" have the meanings given such terms in Regulation S under the Securities Act.

ATTACHMENT C (DTC)

Form of DTC "Important Notice" for a proposed Rule 144A Section 3(c)(7) issue:

THE DEPOSITORY TRUST COMPANY

IMPORTANT

B#: [number]

DATE: [date]

TO: ALL PARTICIPANTS

FROM: [name], [title], Underwriting Department

ATTENTION: [Managing Partner/Officer; Cashier, Operations, Data Processing and Underwriting Managers]

SUBJECT: Section 3(c)(7) restrictions for [Issuer name] [title of security]

(A) CUSIP Number	[CUSIP number]
(B) Security Description	[issuer name] [title of security]
(C) Offer Amount:	$[amount]
(D) Managing Underwriter	[name of managing underwriter]
(E) Paying Agent	[name of paying agent]
(F) Closing Date	[closing date]

Special Instructions:

See Attached Important Instructions from the Issuer.

[ISSUER LETTERHEAD]

[Title of Security]

[CUSIP No. of Security]

The Issuer and the lead [Distributor(s)/Agent(s)] are putting Participants on notice that they are required to follow these purchase and transfer restrictions with regard to the above-referenced security.

In order to qualify for the exemption provided by Section 3(c)(7) under the Investment Company Act of 1940, as amended (the "Investment Company Act"), and the exemption provided by Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), offers, sales and resales of the [insert title of securities] (the "Securities") [within the United States or to U.S. Persons][*] may only be made in minimum denominations of $_____ to "qualified institutional buyers" ("QIBs") within the meaning of Rule 144A that are also "qualified purchasers" ("QPs") within the meaning of Section 2(a)(51)(A) of the Investment Company Act. Each purchaser of Securities (1) represents to and agrees with the Issuer and the [Distributor(s)/Agent(s)] that [(A)][*] (i) the purchaser is a QIB who is a QP (a "QIB/QP"); (ii) the purchaser is not a broker-dealer which owns and invests on a discretionary basis less than $25 million in securities of unaffiliated issuers; (iii) the purchaser is not a participant-directed employee plan, such as a 401(k) plan; (iv) the QIB/QP is acting for its own account, or the account of another QIB/QP; (v) the purchaser is not formed for the purpose of investing in the Issuer; (vi) the purchaser, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of Securities; (vii) the purchaser understands that the Issuer may receive a list of participants holding positions in its securities from one or more book-entry depositaries; and (viii) the purchaser will provide notice of the transfer restrictions to any subsequent transferees; [or (B) it is not a U.S. Person and is purchasing the Securities outside the United States][*] and (2) acknowledges that the Issuer has not been registered under the Investment Company Act and the Securities have not been registered under the Securities Act and represents to and agrees with the Issuer and the [Distributor(s)/Agent(s)] that, for so long as the Securities are outstanding, it will not offer, resell, pledge or otherwise transfer the Securities [in the United States or to a U.S. Person][*] except to a QIB that is also a QP in a transaction meeting the requirements of Rule 144A. Each purchaser further understands that the Securities will bear a legend with respect to such transfer restrictions. See ["Transfer Restrictions"] in the [insert title of private offering memorandum].

The charter, bylaws, organizational documents or securities issuance documents of the Issuer provide that the Issuer will have the right to (i) require any holder of Securities [that is a U.S. Person][*] who is determined not to be both a QIB and a QP to sell the Securities to a QIB that is also a QP or (ii) redeem any Securities held by such a holder on specified terms. In addition, the Issuer has the right to refuse to register or otherwise honor a transfer of Securities to

[*]If a non-U.S. issuer, insert bracketed text.

a proposed transferee that is [a U.S. Person who is][*] not both a QIB and a QP. [As used herein, the terms "United States" and "U.S. Person" have the meanings given such terms in Regulation S under the Securities Act.][*]

The restrictions on transfer required by the Issuer (outlined above) will be reflected under the notation "3c7" in DTC's User Manuals and DTC's Reference Directory.

Any questions or comments regarding this subject may be directed to [Issuer contact person] (212) ___-____.

[*]If a non-U.S. issuer, insert bracketed text.

Form of insert for DTC Reference Directory:

DTC Issuers Relying on Section 3(c)(7) of the Investment Company Act[*]

"3c7": Indicates the issuer of the security has informed DTC that it is relying on the exemption from the definition of "investment company" provided by Section 3(c)(7) of the Investment Company Act of 1940, as amended (the "Investment Company Act"). DTC has been informed by counsel to certain of these issuers that:

> Section 3(c)(7) requires that all holders of the outstanding securities of such an issuer (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons) are "qualified purchasers" ("QPs"), as defined in Section 2(a)(51)(A) of the Investment Company Act and related rules. Under the rules, the issuer must have a "reasonable belief" that all holders of its outstanding securities (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons), including transferees, are QPs. Consequently, all sales and resales of the securities (or, in the case of non-U.S. issuers, all sales and resales in the United States or to U.S. Persons) must be made pursuant to Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), solely to purchasers that are "qualified institutional buyers" ("QIBs") within the meaning of Rule 144A and are also QPs ("QIB/QPs"). Each purchaser will also be deemed to represent that: (i) the purchaser is a QIB/QP; (ii) the purchaser is not a broker-dealer which owns and invests on a discretionary basis less than $25 million in securities of unaffiliated issuers; (iii) the purchaser is not a participant-directed employee plan, such as a 401(k) plan; (iv) the QIB/QP is acting for its own account, or the account of another QIB/QP; (v) the purchaser is not formed for the purpose of investing in the issuer; (vi) the purchaser, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of securities; (vii) the purchaser understands that the issuer may receive a list of participants holding positions in its securities from one or more book-entry depositaries; and (viii) the purchaser will provide notice of the transfer restrictions to any subsequent transferees.
>
> The charter, bylaws, organizational documents or securities issuance documents of an issuer relying on Section 3(c)(7) of the Investment Company Act and Rule 144A of the Securities Act with respect to an offering of securities typically provide that the issuer will have the right to (i) require any holder of securities (or, in the case of a non-U.S. issuer, any holder that is a U.S. Person) that is determined not to be both a QIB and a QP to sell the securities to a QIB that is

[*] DTC Reference Directory listing for Section 3(c)(7) Issuers includes the following fields: 1) Issuer, 2) Designation, and 3) CUSIP Number.

also a QP or (ii) redeem any securities held by such a holder on specified terms. In addition, such an issuer typically has the right to refuse to register or otherwise honor a transfer of securities to a proposed transferee (or, in the case of a non-U.S. issuer, a proposed transferee that is a U.S. Person) that is not both a QIB and a QP. As used herein, the terms "United States" and "U.S. Person" have the meanings given such terms in Regulation S under the Securities Act.

DTC does not represent or warrant the accuracy of the information set forth above, and takes no responsibility for such information.

ATTACHMENT E (EUROCLEAR)

Sample Euroclear security descriptor for Section 3(c)(7) / Rule 144A issue:

For a global corporate bond issue by [XYZ] on [, 200_] bearing interest at a rate of [ ]%, payable on [ ] each year and maturing in 200_, issued and sold in reliance on Section 3(c)(7) of the U.S. Investment Company Act of 1940 and Rule 144A of the U.S. Securities Act of 1933:

Name filed: XYZ/144A/3C7 [ ] 0_/[ ]/0_

3(c)(7) Insert for Euroclear "New Issues Acceptance Guide"

"3c7": Indicates the issuer of the security is relying on the exemption from the definition of "investment company" provided by Section 3(c)(7) of the Investment Company Act of 1940, as amended (the "Investment Company Act"). Section 3(c)(7) requires that all holders of the outstanding securities of such an issuer (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons) are "qualified purchasers" ("QPs"), as defined in Section 2(a)(51)(A) of the Investment Company Act and related rules. Under the rules, the issuer must have a "reasonable belief" that all holders of its outstanding securities (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons), including transferees, are QPs. Consequently, all sales and resales of the securities (or, in the case of non-U.S. issuers, all sales and resales in the United States or to U.S. Persons) must be made pursuant to Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), solely to purchasers that are "qualified institutional buyers" ("QIBs") within the meaning of Rule 144A and are also QPs ("QIB/QPs"). Each purchaser will also be deemed to represent that: (i) the purchaser is a QIB/QP; (ii) the purchaser is not a broker-dealer which owns and invests on a discretionary basis less than $25 million in securities of unaffiliated issuers; (iii) the purchaser is not a participant-directed employee plan, such as a 401(k) plan; (iv) the QIB/QP is acting for its own account, or the account of another QIB/QP; (v) the purchaser is not formed for the purpose of investing in the issuer; (vi) the purchaser, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of securities; (vii) the purchaser understands that the issuer may receive a list of all participants holding positions in its securities from one or more book-entry depositaries; and (viii) the purchaser will provide notice of the transfer restrictions to any subsequent transferees.

The charter, bylaws, organizational documents or securities issuance documents of an issuer relying on Section 3(c)(7) of the Investment Company Act and Rule 144A of the Securities Act with respect to an offering of securities typically provide that the issuer will have the right to (i) require any holder of securities (or, in the case of a non-U.S. issuer, any holder that is a U.S. Person) that is determined not to be both a QIB and a QP to sell the securities to a QIB that is also a QP or (ii) redeem any securities held by such a holder on specified terms. In addition, such an issuer typically has the right to refuse to register or otherwise honor a transfer of securities to a proposed transferee (or, in the case of a non-U.S. issuer, a proposed transferee that is a U.S. Person) that is not both a QIB and a QP. As used herein, the terms "United States" and "U.S. Person" have the meanings given such terms in Regulation S under the Securities Act.

Euroclear does not represent or warrant the accuracy of the information set forth above, and takes no responsibility for such information.

Form of Euroclear "Important Notice" for a Rule 144A/ Section 3(c)(7) issue:

EUROCLEAR

IMPORTANT

B#: [number]
DATE: [date]
TO: ALL PARTICIPANTS
FROM:
(A) ISIN/Common Code
(B) Security Description
(C) Offer Amount
(D) Managing Underwriter
(E) Paying Agent
(F) Closing Date

Special Instructions

Euroclear has been informed by the Issuer and the [Distributor(s)/Agent(s)] that Participants are required to follow the instructions below:

In order to qualify for the exemption provided by Section 3(c)(7) under the Investment Company Act of 1940, as amended (the "Investment Company Act"), and the exemption provided by Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), offers, sales and resales of the [description of securities] (the "Securities") [within the United States or to U.S. Persons][*] may only be made in minimum denominations of [ ] to "qualified institutional buyers" ("QIBs") within the meaning of Rule 144A that are also "qualified purchasers" ("QPs") within the meaning of Section 2(a)(51)(A) of the Investment Company Act. Each purchaser of Securities (1) represents to and agrees with the Issuer and the [Distributor(s)/Agent(s)] that [(A)][*] (i) it is a QIB that is also a QP (a "QIB/QP"); (ii) the purchaser is not a broker-dealer that owns and invests in a discretionary basis less than $25 million in securities of unaffiliated issuers; (iii) the purchaser is not a participant-directed employee plan, such as a 401(k) plan; (iv) the QIB/QP is acting for its own account or the account of another QIB/QP; (v) the purchaser is not formed for the purpose of investing in the Issuer; (vi) the purchaser, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of Securities; (vii) the purchaser understands that the Issuer may receive a list of all participants holding positions in its securities from one or more book-

[*]If a non-U.S. issuer, insert bracketed text.

entry depositaries, and that those participants may further disclose to the Issuer the names and positions of holders of its securities; and (viii) the purchaser will provide notice of the transfer restrictions to any subsequent transferees; or [(B) it is not a U.S. Person and is purchasing the Securities outside the United States][*] and (2) acknowledges that the Issuer has not been registered under the Investment Company Act and the Securities have not been registered under the Securities Act and represents to and agrees with the Issuer and the [Distributor(s)/Agent(s)] that, for so long as the Securities are outstanding, it will not offer, resell, pledge or otherwise transfer the Securities [in the United States or to a U.S. Person][*] except to a QIB that is also a QP in a transaction meeting the requirements of Rule 144A. Each purchaser further understands that these special instructions do not necessarily describe all of the transfer restrictions applicable to the Securities and that the Securities will bear a legend with respect to such transfer restrictions. Each purchaser should refer to "[Transfer Restrictions]" in the [insert title of private offering memorandum] for further information.

The securities issuance documents of the Issuer will give the Issuer the right to (i) require any holder of Securities [that is a U.S. Person][*] who is determined not to be both a QIB and QP to sell the Securities to a QIB that is also a QP or (ii) redeem any Securities held by such a holder on specified terms. In addition, the Issuer has the right to refuse to register or otherwise honour a transfer of Securities to a proposed transferee that is [a U.S. Person][*] not both a QIB and a QP. [As used herein, the terms "United States" and "U.S. Person" have the meanings given such terms in Regulation S under the Securities Act.][*]

The restrictions on transfer required by the Issuer (outlined above) will be reflected in Annex 3(c)(7) of Euroclear's New Issues Acceptance Guide.

Any questions or comments regarding this subject may be directed to ***[Provide contact name and number at Dealer or Issuer]***

[*] If a non-U.S. issuer, insert bracketed text.

Sample Clearstream Banking security descriptor for Section 3(c)7 / Rule 144A issue:

For a global corporate bond issue by [XYZ] on [, 200_] bearing interest at a rate of [ ]%, payable on [ ] each year and maturing in 200_, issued and sold in reliance on Section 3(c)(7) of the U.S. Investment Company Act of 1940 and Rule 144A of the U.S. Securities Act of 1933:

Name field: XYZ/144A/3(c)7 0_-0_

3(c)(7) Insert in the Clearstream Banking "Customer Handbook"

"3(c)7": Indicates the issuer of the security is relying on the exemption from the definition of "investment company" provided by Section 3(c)7 of the Investment Company Act of 1940, as amended (the "Investment Company Act"). Section 3(c)7 requires that all holders of the outstanding securities of such an issuer (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons) are "qualified purchasers" ("QPs"), as defined in Section 2(a)(51)(A) of the Investment Company Act and related rules. Under the rules, the issuer must have a "reasonable belief" that all holders of its outstanding securities (or, in the case of a non-U.S., issuer, all holders that are U.S. Persons), including transferees, are QPs. Consequently, all sales and resales of the securities (or, in the case of non-U.S. issuers, all sales and resales in the United States or to U.S. Persons) must be made pursuant to Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), solely to purchasers that are "qualified institutional buyers" ("QIBs") within the meaning of Rule 144A and are also QPs ("QIB/QPs"). Each purchaser will also be deemed to represent that: (i) the purchaser is a QIB/QP; (ii) the purchaser is not a broker-dealer which owns and invests on a discretionary basis less than $25 million in securities of unaffiliated issuers; (iii) the purchaser is not a participant-directed employee plan, such as a 401(k) plan; (iv) the QIB/QP is acting for its own account, or the account of another QIB/QP; (v) the purchaser is not formed for the purpose of investing in the issuer; (vi) the purchaser, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of securities; (vii) the purchaser understands that the issuer may receive a list of all participants holding positions in its securities from one or more book-entry depositaries; and (viii) the purchaser will provide notice of the transfer restrictions to any subsequent transferees.

The charter, bylaws, organizational documents or securities issuance documents of an issuer relying on Section 3(c)(7) of the Investment Company Act and Rule 144A of the Securities Act with respect to an offering of securities typically provide that the issuer will have the right to (i) require any holder of securities (or, in the case of a non-U.S. issuer, any holder that is a U.S. Person) that is determined not to be both a QIB and a QP to sell the securities to a QIB that is also a QP or (ii) redeem any securities held by such a holder on specified terms. In addition, such an issuer typically has the right to refuse to register or otherwise honor a transfer of securities to a proposed transferee (or, in the case of a non-U.S. issuer, a proposed transferee that is a U.S. person) that is not both a QIB and a QP. As used herein, the terms "United States" and "U.S. Person" have the meanings given such terms in Regulation S under the Securities Act.

Clearstream Banking does not represent or warrant the accuracy of the information set forth above, and takes no responsibility for such information.

Form of Clearstream Banking "Important Notice"
for a Rule 144A/ Section 3(c)(7) issue:

CLEARSTREAM BANKING

IMPORTANT

B#:	[number]
DATE:	[date]
TO:	ALL PARTICIPANTS
FROM:	[name], [title], Underwriting Department
ATTENTION:	[Managing Partner/Officer; Cashier, Operations, Data Processing and Underwriting Managers].
SUBJECT:	Section 3(c)(7) restrictions for [ ]

(A) ISIN/Common Code
(B) Security Description
(C) Offer Amount
(D) Managing Underwriter
(E) Paying Agent
(F) Closing Date

Special Instructions:

Clearstream Banking has been informed by the Issuer and the [Distributor(s)/Agent(s)] that Participants are required to follow the instructions below:

In order to qualify for the exemption provided by Section 3(c)(7) under the Investment Company Act of 1940, as amended (the "Investment Company Act"), and the exemption provided by Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), offers, sales and resales of the [description of securities] (the "Securities") [within the United States or to U.S. Persons]* may only be made in minimum denominations of [ ] to "qualified institutional buyers" ("QIBs") within the meaning of Rule 144A that are also "qualified purchasers" ("QPs") within the meaning of Section 2(a)(51)(A) of the Investment Company Act. Each purchaser of Securities (1) represents to and agrees with the Issuer and the [Distributor(s)/Agent(s)] that [(A)]* (i) it is a QIB that is also a QP (a "QIB/QP"); (ii) the purchaser is not a broker-dealer that owns and invests in a discretionary basis less than $25 million in securities of unaffiliated issuers; (iii) the purchaser is not a participant-directed employee plan, such as a 401(k) plan; (iv) the QIB/QP is acting for its own account or the account of another QIB/QP; (v) the purchaser is not formed for the purpose of investing in the Issuer; (vi) the purchaser, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of Securities; (vii) the purchaser understands that the Issuer may receive a list of all participants holding positions in its securities from one or more book-entry depositaries; and (viii) the purchaser will provide notice of the transfer restrictions to any

subsequent transferees; or [(B) it is not a U.S. Person and is purchasing the Securities outside the United States][*] and (2) acknowledges that the Issuer has not been registered under the Investment Company Act and the Securities have not been registered under the Securities Act and represents to and agrees with the Issuer and the [Distributor(s)/Agent(s)] that, for so long as the Securities are outstanding, it will not offer, resell, pledge or otherwise transfer the Securities [in the United States or to a U.S. Person][*] except to a QIB that is also a QP in a transaction meeting the requirements of Rule 144A. Each purchaser further understands that these special instructions do not necessarily describe all of the transfer restrictions applicable to the Securities and that the Securities will bear a legend with respect to such transfer restrictions. Each purchaser should refer to "[Transfer Restrictions]" in the [insert title of private offering memorandum] for further information.

The securities issuance documents of the Issuer will give the Issuer the right to (i) require any holder of Securities [that is a U.S. Person][*] who is determined not to be both a QIB and QP to sell the Securities to QIB that is also a QP or (ii) redeem any Securities held by such a holder on specified terms. In addition the Issuer has the right to refuse to register or otherwise honour a transfer of Securities to a proposed transferee that is [a U.S. Person][*] not both a QIB and a QP. [As used herein, the terms "United States" and "U.S. Person" have the meanings given such terms in Regulations S under the Securities Act.][*]

The restrictions on transfer required by the Issuer (outlined above) will be reflected in Chapter 7 ("Custody Business Operations - New Issues"), Section 7.3 ("General Procedure for the admission and distribution of new issues of syndicated international instruments") in Clearstream Banking's Reference Directory.

Any questions or comments regarding this subject may be directed to ***[Provide contact name and number at Dealer or Issuer]***

[*] If a non-U.S. issuer, insert bracketed text.

The Bond Market Association, October 1999: Recommended Policies and Procedures for Secondary Market Trading in Book-Entry Section 3(c)(7) Securities

I. Introduction

Section 3(c)(7) of the Investment Company Act of 1940 (the "Investment Company Act") excludes from regulation under the Investment Company Act entities whose outstanding securities are owned exclusively by persons who are, at the time they acquire the securities, "qualified purchasers" ("QPs") as defined in Section 2(a)(51)(A) of the Investment Company Act. When a Section 3(c)(7) issuer engages in a placement of its securities (usually in reliance on Rule 144A for 1933 Act purposes), the issuer and the other participants in the transaction will seek to ensure that all purchasers of the securities are persons that the issuer and other persons in the transaction "reasonably believe" to be QPs.

Section 3(c)(7) and Rule 2a51-1 under the Investment Company Act require, however, that the Section 3(c)(7) issuer (or a designated "Relying Person" acting on such issuer's behalf) reasonably believe ***at all times*** that the holders of the issuer's securities are persons who, at the time of their acquisition of the securities, are QPs. This means that the issuer is required to have this belief for the life of its securities.

After secondary trading commences in Section 3(c)(7) securities, and especially where the securities settle on a book-entry basis through The Depository Trust Company ("DTC"), it becomes more difficult for the issuer on an ongoing basis to acquire and maintain information about the holders of its securities. Moreover, the SEC staff stated in an April 1999 letter to the American Bar Association that a Section 3(c)(7) issuer could not rely on another person's reasonable belief about the QP status of the holders of its securities (unless that other person were "acting on its behalf"); rather, the Section 3(c)(7) issuer must be able to make its own reasonable determination that all holders of its securities are QPs at the time they acquire the securities.

Market participants have developed procedures under which DTC acts as custodian for Rule 144A securities. In the April 1999 letter, however, the SEC staff declined to confirm that the procedures developed for resales in the Rule 144A market were necessarily sufficient for Section 3(c)(7) purposes. The letter did state, however, that certain procedures (such as CUSIP indicators and dealer lists) "could be components of

* The Bond Market Association has told us that it is in the process of updating these procedures to reflect the developments discussed in the attached article.

reasonable compliance procedures. "Actual compliance with Section 3(c)(7) would depend on all facts and circumstances, and the staff stated that it would not respond to requests to assess any particular set of procedures.

A group of law firms, in cooperation with DTC, has developed a set of procedures (the "Recommended Procedures") designed to enable Section 3(c)(7) issuers to establish the requisite reasonable belief that all of the holders of their securities are QPs notwithstanding the deposit of those securities in DTC. A copy of those procedures and an explanatory memo are attached hereto as Exhibit 1. It should be noted that the Recommended Procedures state that they are recommended only for certain issuers such as foreign issuers (e.g., Tier 1 Capital issuers) and structured finance issuers (e.g., certain debt tranches of CBOs) and not for "classic" private investment companies or hedge funds.

Members of The Bond Market Association (the "Association") have concluded that it would be helpful for the Association to provide its member firms with recommended policies and procedures in connection with *secondary market transactions* in Rule 144A securities of Section 3(c)(7) issuers deposited in DTC. The Association believes that, as a supplement to the Recommended Procedures, these additional recommendations serve to advance the common interests shared by Section 3(c)(7) issuers, dealers and purchasers in maintaining Section 3(c)(7) issuers' nonregulated status under the Investment Company Act.

While the Association recommends that its members and other market participants implement and observe the following policies and procedures for secondary market trading in book-entry Section 3(c)(7) securities, it does not intend to imply that these policies and procedures are the exclusive means by which dealers may facilitate compliance with Section 3(c)(7). Depending on a dealer's particular situation, other policies and procedures may be equally appropriate. Similarly, the Association does not intend to suggest, and makes no representation as to whether, the adoption of any or all of these policies and procedures constitutes a necessary or sufficient legal basis upon which to conclude that compliance with Section 3(c)(7) has been achieved in any particular circumstance.

The Association's recommendations are summarized in Section II below and are discussed in Section III.

II. Summary of Recommended Policies and Procedures

1. Establish internal policies, procedures and database/systems capabilities that facilitate the identification of securities of Section 3(c)(7) issuers.

2. Establish internal policies and procedures that result in the ongoing identification of purchasers as QIBs/QPs and maintenance of updated QIB/QP lists.

3. Consult individual transaction documents for particular restrictions applicable to securities of Section 3(c)(7) issuers.

4. Provide buyers with notification of Section 3(c)(7) restrictions.

5. Observe minimum denomination or purchase requirements, if any.

6. Disseminate and redistribute reminders and notices from 3(c)(7) issuers.

7. Provide assistance to issuers in respect of legends appearing on third-party vendor screens.

III. Details of Recommended Policies and Procedures

1. Establish internal policies, procedures and database/systems capabilities that facilitate the identification of securities of Section 3(c)(7) issuers.

Upon instruction received from an issuer, DTC's security descriptor identifies Section 3(c)(7) securities, and DTC's deliver order tickets sent to DTC participants carry a "3c7" indicator. At the issuer's request, DTC will send an "Important Notice" to all DTC participants in connection with the initial offering of a Section 3(c)(7) security, and will distribute periodically to all DTC participants a "Reference Directory" that includes a list of all issuers who have advised DTC that they are Section 3(c)(7) issuers as well as CUSIP numbers for these issuers' securities. The Reference Directory will be updated monthly. The CUSIP number for Section 3(c)(7) securities will have an attached field that will have "3c7" and "144A" indicators.

The Association recommends that member firms incorporate relevant information regarding securities of Section 3(c)(7) issuers, including but not necessarily limited to the DTC and CUSIP information described above, into their firmwide securities databases. Database systems should be designed to alert firm personnel responsible for settling transactions to the fact that the security is a Section 3(c)(7) security. In principle, these policies and procedures are not different from those employed to identify Rule 144A, other restricted securities and Regulation S securities.

Information that is collected and maintained in this manner should distinguish between Section 3(c)(7) issuers that are U.S. persons and those that are non-U.S. persons. In the case of non-U.S. issuers, a Section 3(c)(7) issuer's reasonable-belief requirement applies only to holders of its securities who are U.S. persons.

2. Establish internal policies and procedures that result in the ongoing identification of purchasers as QIBs/QPs and maintenance of updated QIB/QP lists.

In principle, this is no different from being in a position to have a "reasonable belief" that a purchaser of a Rule 144A security is a QIB. The Association recommends that member firms who rely on a customer certificate of QIB status should expand the certificate to

account for the fact that not all QIBs are QPs. (In particular, certain smaller securities dealers and certain participant-directed employee plans, e.g., 401(k) plans, are excluded from the definition of QP even though they may be QIBs). A sample certificate that the Association recommends for this purpose is attached as Exhibit 2.

Not all member firms rely exclusively on customer certificates of QIB status. For example, some firms regard customers as QIBs based on information provided by the customers or information that the firms obtain from third-party sources. To the extent that these firms choose to continue to follow these procedures, those procedures should be modified to obtain the additional information necessary to establish QP status.

In either case, the Association recommends that member firms implement procedures that result in a periodic updating of information regarding the QIB and QP status of their customers. The Association recommends that this updating cycle be no less frequent than every sixteen (16) months, which is the general time frame prescribed under Rule 144A(d) for obtaining current financial and other information with respect to a QIB.

3. Consult individual transaction documents for particular restrictions applicable to securities of Section 3(c)(7) issuers.

There is no guarantee that all Section 3(c)(7) issuers will have adopted the Recommended Procedures. This means that resales may be subject to different substantive and/or procedural requirements from deal to deal. Such requirements may supersede the procedures discussed in these recommendations.

4. Provide buyers with notification of Section 3(c)(7) restrictions.

Member firms who sell securities in reliance on Rule 144A are already required to notify the purchaser that they (or a seller for whom they are acting as agent) may be relying on Rule 144A. The Association recommends that firms follow a parallel procedure to inform purchasers of the fact that a security is a Section 3(c)(7) security. Although a variety of methods may be used to effect such notification, the procedure should include the addition of a trailer to the confirmation for a transaction in a Section 3(c)(7) security that calls attention to the fact that the security is a Section 3(c)(7) security. Firms should bear in mind that the Section 3(c)(7) restrictions continue to apply even after the securities are no longer subject to the conditions of Rule 144A.

5. Observe minimum denomination or purchase requirements, if any.

Where the underlying transaction documents call for minimum denominations or minimum purchase amounts, the Association recommends that firms avoid making sales of Section 3(c)(7) securitiesCeven to QPsCin amounts less than those specified.

6. Disseminate and redistribute notices and reminders from 3(c)(7) issuers.

The Association understands that issuers using the Recommended Procedures must send annual or other periodic reminders of the Section 3(c)(7) restrictions to the holders of their securities. Since member firms will be receiving these reminders in their capacity as DTC participants, the Association recommends that they follow their usual procedures for forwarding them to their customers.

7. Provide assistance to issuers in respect of legends appearing on third-party vendor screens.

Section 3(c)(7) issuers will generally arrange for third-party vendor screens (including those maintained by Bloomberg, L.P.) to include appropriate legends regarding Rule 144A and Section 3(c)(7) restrictions. Member firms should communicate with issuers and the relevant information vendors if they discover that these legends are missing, inaccurate or incomplete.

Exhibit 1 (to BMA memo)

[DELETED, SEE "ADDENDUM", ABOVE.]

Exhibit 2 (to BMA memo)

Certificate of Rule 144A Qualified Institutional Buyer and Section 3(c)(7) Qualified Purchaser

TO: [ ]

I. The undersigned certifies that it is familiar with Rule 144A under the Securities Act of 1933, as amended, and represents and warrants that:

(i) it is a Qualified Institutional Buyer ("QIB") as described in Annex A hereto;

(ii) as of _____, ___,[1] the undersigned owned or invested on a discretionary basis $_____[2] in eligible "securities" (as defined and calculated as set forth in Annex A);

(iii) if the undersigned decides to purchase Rule 144A securities for the accounts of others, it will only purchase Rule 144A securities for accounts that independently qualify as QIBs as defined in Rule 144A (unless the undersigned is an insurance company (as described in Annex A) and is purchasing for the account of one or more of its "separate accounts" (as defined in Annex A));

(iv) the undersigned has listed below those of its accounts that are QIBs and, if the undersigned is an insurance company (as described in Annex A), those of its accounts that are separate accounts (as defined in Annex A), and for which it intends to purchase Rule 144A securities; the undersigned has accurately provided the information requested for each of the accounts listed below; and the undersigned agrees that any of the accounts listed below for which it purchases Rule 144A securities will be deemed to be a part of and subject to the representations contained in this certification; and

(v) the undersigned's current fiscal year ends on _____, _____.

[1] Insert a specific date on or since the end of the undersigned's most recent fiscal year.

[2] The amount must be a specific amount in excess of $100 million or such lesser amount as contemplated by paragraph (b), (j), (k) or (o) of Annex A.

II. The undersigned certifies that it has read Annex B, "Restrictions on Sales of Book-Entry Securities Designated QIB/QP or 3(c)(7)," attached hereto. The undersigned certifies that it is a "Qualified Purchaser" as defined in Sections 3(c)(7) and 2(a)(51) of, and the related rules under, the Investment Company Act of 1940, as amended, and the undersigned represents and warrants that (if the undersigned certifies that it is unable to make the representations and warranties contained in II(i), it should so indicate on the signature line below):

(i) it is **not** a:

"dealer" described in (j) of Annex A that owns and invests on a discretionary basis less than $25,000,000 in eligible "securities" (excluding securities constituting the whole or part of an unsold allotment to or subscription as a participant in a public offering);

"plan" described in (f) or (g) of Annex A or a "trust fund" described in (h) of Annex A that holds assets for such a plan, the investment decisions of which are made by the beneficiaries of the plan and not solely by the fiduciary, trustee or sponsor of the plan;

(ii) the undersigned has indicated with a check mark each of the sub-accounts listed below which can independently make each of the representations and warranties in this Section II. If the undersigned decides to purchase securities designated QIB/QP or 3(c)(7) for the accounts of others, it will only purchase for accounts which are checked below, and those accounts will be deemed to make the representations and warranties in I(i) and this Section II. (An insurance company may purchase for one or more of its separate accounts without regard to whether the account could independently make those representations and warranties);

(iii) it is not an entity that was formed for the specific purpose of investing in Section 3(c)(7) securities (or if it was formed for such purpose, then each beneficial owner of its securities is a QP);

(iv) it is not an entity that was formed or is operated as a device for facilitating individual investment decisions of its participants or securityholders;

(v) if it was formed prior to April 30, 1996, and is an investment company excepted from the Investment Company Act pursuant to Section 3(c)(1) or Section 3(c)(7) thereof, then its treatment as a Qualified Purchaser has been consented to (in the manner required by Section 2(a)(51)(C) of the Investment Company Act and rules thereunder) by its beneficial owners who acquired their interests on or before April 30, 1996; and

(vi) except as set forth in (ii) above, it will not hold Section 3(c)(7) securities for the benefit of any other person, and it will not sell participation interests in the securities to any other person or enter into any other arrangement pursuant to which any other person shall be entitled to a beneficial interest in the distributions on the securities.

III. The u**n**dersigned agrees to promptly advise _____ if any of the representations or warranties in this certificate relating to it or any of the accounts identified below ceases to be true.

Date:_____,____ _____
Name of Institution

_____ By:_____[4]
Name of Contact at Above Institution for Questions and Updates

_____ _____
Mailing Address Title of Executive Officer[5]

_____ _____
Telephone Number Account Number

[4]If the undersigned is unable to make the representation and warranties contained in II(i), it should clearly so state below the signature line.

[5]Certification must be signed by the institution's chief financial officer or another executive officer, except that if the institution is a member of a "family of investment companies," the certification must be signed by an executive officer of such institution's investment advisor.

List of Accounts and Sub-Accounts
(other than Separate Accounts of an Insurance Company)
(attach separate sheet as necessary)

Name of Entity	Account Number	✓ Check Box if Applicable, See II(ii) Above
		☐
		☐
		☐

List of Separate Accounts of an Insurance Company
(attach separate sheet as necessary)

Name of Entity	Account Number

Annex A (to Exhibit 2 to BMA memo)

I. Rule 144A provides that a "Qualified Institutional Buyer" ("QIB") can be any of the following institutions, provided that such institution owns and/or invests on a discretionary basis at least $100 million in eligible "securities" (defined in II below).

(a) an *insurance company* as defined in Section 2(13) of the Securities Act of 1933 (the "Act");

(b) an *investment company* registered under the Investment Company Act of 1940, acting for its own account or for accounts of other QIBs that are part of a *family of investment companies* (as defined in Rule 144A) which family of investment companies owns in aggregate at least $100 million in eligible securities;

(c) an *investment advisor* registered under the Investment Advisers Act of 1940;

(d) a *corporation* (other than a bank as defined in Section 3(a)(2) of the Act or a savings and loan association or other institution referenced in Section 3(a)(5)(A) of the Act or a foreign bank or savings and loan association or equivalent institution);

(e) a *partnership* or Massachusetts or similar business trust;

(f) a *plan established and maintained by a state*, its political subdivisions or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees;

(g) *an employee benefit plan* within the meaning of Title I of the Employee Retirement Income Security Act of 1974;

(h) any *trust fund* whose trustee is a bank or trust company and whose participants are exclusively plans of the types identified in paragraph (f) or (g) above, except *trust funds* that include as participants individual retirement accounts or H.R. 10 plans;

(i) a *not-for-profit organization* described in Section 501(c)(3) of the Internal Revenue Code;

(j) a *dealer* registered pursuant to Section 15 of the Securities Exchange Act of 1934 (a dealer only is required to own and/or invest at least $10 million in eligible "securities," excluding securities constituting whole or a part of an unsold allotment to or subscription by a dealer as a participant in a public offering);

(k) a *bank* as defined in Section 3(a)(2) of the Act, a savings and loan association or other institution as referenced in Section 3(a)(5)(A) of the Act, or any foreign bank or savings and loan association or equivalent institution, acting for its own account or accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with

it, and that has an audited net worth of at least $25 million as demonstrated in its latest annual financial statements;

(l) a *business development company* as defined in Section 2(a)(48) of the Investment Company Act of 1940;

(m) a business development company as defined in Section 202(a)(22) of the Investment Advisers Act;

(n) a *Small Business Investment Company* licensed by the U.S. Small Business Administration under Section 301(c) or (d) of the Small Business Investment Act of 1958;

(o) any entity, all of the equity owners of which are QIBs.

II. Eligible "Securities." In determining the aggregate amount of securities owned and invested on a discretionary basis by an entity, the following instruments and interests shall be *excluded:* securities issued by issuers that are affiliated with the purchaser or, if the purchaser is an investment company, are part of that purchaser's "family of investment companies"; bank deposit notes and certificates of deposit; loan participations; repurchase agreements; securities owned but subject to a repurchase agreement; and currency, interest rate and commodity swaps.

The value of eligible securities must be calculated based on cost (or on the basis of market value if the entity reports its securities holdings in its financial statements on the basis of their market value, and no current information with respect to the cost of those securities has been published).

In determining the aggregate amount of securities owned by an entity and invested on a discretionary basis, securities owned by subsidiaries of the entity that are consolidated with the entity in its financial statements prepared in accordance with generally accepted accounting principles may be included if the investments of such subsidiaries are managed under the direction of the entity, except that, unless the entity is a reporting company under Section 13 or 15(d) of the Securities Exchange Act of 1934, securities owned by such subsidiaries may not be included if the entity itself is a majority-owned subsidiary that would be included in consolidated financial statements of another enterprise.

III. "Separate account" for purposes of this certification means a separate account as defined by Section 2(a)(37) of the Investment Company Act of 1940 that is neither registered under Section 8 of such Act nor required to be so registered.

Annex B (to Exhibit 2 to BMA memo)

Restrictions on Sales of Book-Entry Securities
Designated QIB/QP or 3(c)(7)

The Investment Company Act of 1940, as amended (the "Investment Company Act"), requires that all holders of the outstanding securities of an issuer relying on Section 3(c)(7) (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons) be "qualified purchasers" ("QPs") as defined in Section 2(a)(51)(A) of the Investment Company Act and related rules. Under the rules, the issuer or an agent acting on its behalf must have a "reasonable belief" that all holders of its outstanding securities (or, in the case of a non-U.S. issuer, all holders that are U.S. Persons), including transferees, are QPs. Consequently, all sales and resales of the securities (or, in the case of non-U.S., issuers, all sales and resales in the United States or to U.S. Persons) must be made pursuant to Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), solely to purchasers that are "qualified institutional buyers" ("QIBs") within the meaning of Rule 144A and are also QPs ("QIB/QPs"). Each purchaser of a security designated QP or 3(c)(7) will be deemed to represent at the time of purchase that: (i) the purchaser is a QIB/QP; (ii) the purchaser is not a broker-dealer which owns and invests on a discretionary basis less than $25 million in securities of unaffiliated issuers; (iii) the purchaser is not a participant-directed employee plan such as a 401(k) plan; (iv) the QIB/QP is acting for its own account, or the account of another QIB/QP; (v) the purchaser is not formed for the purpose of investing in the issuer; (vi) the purchaser, and each account for which it is purchasing, will hold and transfer at least the minimum denomination of securities; and (vii) the purchaser will provide notice of the transfer restrictions to any subsequent transferees.

The charter, bylaws, organizational documents or securities issuance documents of an issuer relying on Section 3(c)(7) of the Investment Company Act and Rule 144A of the Securities Act with respect to an offering of securities typically provide that the issuer will have the right to (i) require any holder of securities (or in the case of a non-U.S. issuer, any holder that is a U.S. Person) that is determined not to be both a QIB and a QP to sell the securities to a QIB that is also a QP or (ii) redeem any securities held by such holder on specified terms. In addition, such an issuer typically has the right to refuse to register or otherwise honor a transfer of securities to a proposed transferee (or, in the case of a non-U.S. issuer, a proposed transferee that is a U.S. Person) that is not both a QIB and a QP. As used herein, the terms "United States" and "U.S. Person" have the meanings given such terms in Regulation S under the Securities Act.

ATTACHMENT L

This is the text of the original 1999 memo.

DTC Deposit of Rule 144A Securities Issued by Structured Finance and Certain Foreign Issuers Relying on Section 3(c)(7) of the Investment Company Act

The Issue

Certain issuers, particularly foreign issuers and issuers in structured finance transactions, often find that they may be "investment companies" as defined under the Investment Company Act of 1940, as amended (the Investment Company Act). The statute defines "investment company" broadly, including all issuers primarily engaged in the business of owning, holding, or trading in securities. The statute and related rules include exceptions for certain issuers (such as banks, insurance companies and private companies with a small number of investors). However, foreign and structured finance issuers may not readily fit into any existing category of exempt issuer. At the same time, market conditions and commercial demands may not allow them the lead time necessary to do a detailed factual analysis to determine whether they fall within the definition, or if they do to seek exemptive relief under the Investment Company Act.

These issuers typically want to offer their securities in global offerings which include a tranche under Rule 144A (Rule 144A) of the Securities Act of 1933, as amended (the 1933 Act), sold only to qualified institutional buyers (QIBs). The only exception from the definition of investment company which effectively meets their business objective is often Section 3(c)(7), which requires all of their investors to be "qualified purchasers" (QPs). Because the concepts of QP under the Investment Company Act and QIB under the 1933 Act are not identical, issues arise when investors and their transferees must satisfy both exceptions.

An issuer may rely on Section 3(c)(7) if it, or another relying person acting on its behalf, such as a distributor, has a "reasonable belief" that the securityholders of the issuer are QPs.[1] Unfortunately, these issuers or other persons are required to have a reasonable belief not only that all the initial purchasers are qualified purchasers, but also that all transferees are QPs. In a typical Section 3(c)(7) transaction, each initial purchaser and each subsequent transferee is required to sign representations verifying its QP status. While this is not convenient for the issuer or the purchasers, it provides assurance that the Section 3(c)(7) reasonable belief standard is satisfied. However, this system presents problems for foreign and structured finance issuers which typically deposit their Rule 144A securities in The Depository Trust Company (DTC). The standard DTC deposit procedures used in Rule 144A offerings do not work for Section 3(c)(7) issuers for two reasons. First, not all QIBs are QPs. For example, Rule 2a51-1 generally includes QIBs as QPs, but it specifically excludes QIBs that are (i) dealers which own and invest

[1] Rule 2a51-1(h).

less than $25 million in securities or (ii) participant-directed employee plans. Second, the 144A QIB-only rules can fall away after two years, but the requirement that a Section 3(c)(7) issuer's securityholders be QPs lasts for the entire life of the issuer.

The Procedures

The SEC staff recently clarified its view that it is possible for issuers to satisfy the "reasonable belief" standard by establishing procedures.[2] The SEC staff also said that it is not sufficient for the "reasonable belief" to be formed by the seller of securities, but rather it must be held by the issuer (or other relying person acting on behalf of the issuer.) At the same time, the SEC made it clear that it would not approve any particular set of procedures. The Procedures described in the attached memo are designed to address these issues, and to enable Section 3(c)(7) issuers and relying persons to establish a "reasonable belief" that all of an issuer's securityholders and their transferees are QPs, notwithstanding the deposit of the issuer's Rule 144A securities in DTC.

In its recent letter, the SEC staff said that any procedures set up to establish the "reasonable belief" required under Rule 2a51-1(h) must be "designed to provide a means by which the [issuer] can make a reasonable determination that all of the purchasers of the [issuer's] securities were qualified purchasers at the time that they acquired the securities." In order to interpret this "reasonable belief" standard, it is helpful to look to the "reasonable belief" standard of Rule 144A(d)(1). The Rule 144A standard is incorporated in Rule 2a51-1(g), which includes as a QP an entity that the issuer reasonably believes is a QIB (with exceptions noted above.)[3] What this standard requires an issuer or other relying persons to establish is reasonable belief, not absolute certainty. Furthermore, the rules that adopt a reasonable belief standard for accredited investors and QIBs establish that there is more than one way to satisfy the standard. Consequently, procedures that are reasonably designed to limit an issuer's holders to QIB/QPs should be sufficient to establish a reasonable belief under Rule 2a51-1.

Furthermore, in assessing whether a "reasonable belief" existed, a court should consider the nature of the issuer and the nature and number of the issuer's holders. Therefore, it is important to note that the Procedures are designed for certain **foreign and structured finance** issuers, and not classic private investment companies. These issuers typically differ from classic private investment companies in that 1) they are foreign issuers holding minority interests in operating companies (which operating companies are often affiliates of the issuer), or 2) their return to securityholders is largely from sources other than the management of investment securities. It is also important to note that the SEC implicitly acknowledged that QIBs are reliable in observing transfer restrictions, and as a result that Rule 144A securities are not likely

[2] *See* Response of the Office of the Chief Counsel, Division of Investment Management to the American Bar Association, Section of Business Law (avail. April 22, 1999.) *See also* "Section 3(c)(7) in Bloom," by Mercer Eaton Bullard, The Investment Lawyer, May 1999.

[3] *See* discussion in Section II(A)(6) of the SEC release adopting Rule 2a51-1. (Release No. IC-22597, April 3, 1997).

to leak into the non-QIB market. We also note that these securities are generally traded through financial intermediaries (e.g. broker-dealers who would be consulting a Bloomberg screen), and not directly from one holder to another. **These Procedures would be appropriate for use by many Tier 1 Capital issuers and certain debt tranches of CBOs; however, we do not believe they would be appropriate for hedge funds or U.S. or foreign mutual funds**.

In the course of developing the Procedures, we have met and discussed issues and procedures with DTC and discussed various aspects of the initial offerings and anticipated secondary market transactions together and with clients and other major securities law firms, both in transactional and general contexts. Of course, practice and experience may suggest that additional procedures may be appropriate or that some of those included here may be eliminated.

Dated: May 1, 1999

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