Article Title: ARCHIVE | Legal Criteria: New Criteria for Representations and Warranties for Collateral Assignments of Funding Agreements Issued by U.S. Life Insurance Companies Data: (EDITOR'S NOTE: —This criteria article is no longer current. It has been superseded by the articles titled "Legal Criteria For U.S. Structured Finance Transactions: Criteria Related To Asset-Backed Securities" and "Legal Criteria For U.S. Structured Finance Transactions: Appendix V: Model Representations And Warranties For Collateral Assignments Of Funding Agreements," both published on Oct. 1, 2006.) Standard & Poor's Ratings Services routinely provides ratings for notes that are secured primarily by funding agreements issued by U.S. life insurance companies in connection with note issuance programs. Standard & Poor's has recently revised its legal criteria for these programs to provide the issuer of the notes (Issuer) with the option of either: (1) providing an opinion of counsel relating to the common law collateral assignment of a funding agreement, or (2) setting forth in the transaction documents representations and warranties relating to such collateral assignment. The following is Standard & Poor's rationale for revising its legal criteria and provides a form of model representations and warranties for such collateral assignment. Structure of Transactions The Issuer in these programs is usually either a statutory trust or a common law trust. If the Issuer is a statutory trust, either: (1) the statutory trust issues notes from time to time in discrete series, or (2) each series of notes is issued by a newly formed separate and distinct statutory trust. If the Issuer is a common law trust, each series of notes is usually issued by a newly formed separate and distinct common law trust. In these programs, the notes are issued pursuant to an indenture and sold to investors in either a private placement or public offering. The net proceeds from the sale of a series of notes are invested by the Issuer in one or more funding agreements issued by an insurance company. The Issuer then pledges and collaterally assigns its rights under the funding agreement(s) to the indenture trustee for the benefit of the holders of that series of notes. The primary asset of the Issuer for each series of notes is the funding agreement(s) acquired with the net proceeds from the sale of such notes. Principal and interest payments on any series of notes are made primarily from the proceeds of the funding agreement(s) purchased with respect to that series of notes. The rating assigned to each series of notes generally is based on either the issuer credit rating or the insurer financial strength rating of the insurance company issuing the funding agreements. When a funding agreement is issued by an insurance company, it is not clear in many jurisdictions whether a pledge of the funding agreement is governed by Article 9 of the applicable Uniform Commercial Code (UCC). Due to this uncertainty, these programs are usually structured to provide for: (1) the grant by the Issuer to the indenture trustee of a first priority, perfected security interest in the applicable funding agreement, and (2) in the event the UCC is not applicable, a common law collateral assignment of the funding agreement by the Issuer to the indenture trustee. Historically, to provide Standard & Poor's comfort with respect to these matters, Standard & Poor's has requested (1) inclusion of certain UCC representations and warranties in the transaction documents (see Rating Process), and (2) an opinion of counsel (Opinion) to the effect that, to the extent the UCC is not applicable, the funding agreement has been collaterally assigned by the Issuer to the indenture trustee, and such collateral assignment is valid and enforceable against and prior to certain other claims and creditors. Rating Process A rating is Standard & Poor's opinion of the creditworthiness of the debt being issued. The rating is based on information provided by the Issuer and its advisors, including representations and warranties included in the transaction documents. Some of these representations and warranties contained in transaction documents address legal matters. Currently, Standard & Poor's requests legal opinions from transaction counsel to provide further comfort on some of these legal matters, for example, on true sale and nonconsolidation issues. Regarding enforceability issues, however, Standard & Poor's generally assumes, without reviewing legal opinions, that the transaction documents are legal, valid, and binding, and that the provisions will have their intended legal effect. Similarly, Standard & Poor's in general no longer reviews opinions relating to the creation, perfection, or priority of security interests. Due to the substantial revisions to Article 9 of the UCC in 2001 and other considerations, Standard & Poor's revised its legal criteria in 2001 to provide that, for most structured finance transactions, it would no longer request legal opinions for the creation, perfection, and priority of security interests. Nevertheless, to obtain comfort that a secured party will have a valid, perfected, first priority security interest, Standard & Poor's generally requests that certain representations and warranties be set forth in the transaction documents that, when viewed in their entirety, provide sufficient comfort on these matters. To provide guidance to market participants as to what specific representations and warranties the analysts at Standard & Poor's would be looking for in the transaction documents, in June 2001 Standard & Poor's published forms of model UCC representations and warranties for a number of the different categories under Article 9. For a comprehensive discussion of Standard & Poor's forms of model UCC representations and warranties, see the article titled "Revised Article 9 of the Uniform Commercial Code: New Standard & Poor's Criteria," published June 6, 2001. The article is available on RatingsDirect, Standard & Poor's Web-based credit analysis system, at www.ratingsdirect.com under Criteria. The article is also available on the Standard & Poor's Web site at www.standardandpoors.com, under Credit Ratings, select Credit Ratings Criteria, and then find the article under SF Legal Criteria. New Criteria Consistent with its legal criteria for enforceability and security interests issues, Standard & Poor's believes that, generally, for purposes of the rating process, it is appropriate to assume that counsel for the transaction has drafted collateral assignment documents that are effective to collaterally assign a funding agreement under the common law of the relevant jurisdiction. Accordingly, for these programs, to provide Standard & Poor's with comfort that the Issuer has duly and properly collaterally assigned the funding agreement to the indenture trustee, in general, Standard & Poor's will request that the Issuer either (1) provide Standard & Poor's with the Opinion, or (2) include in the transaction documents representations and warranties relating to the common law collateral assignment of a funding agreement and the priority of such assignment. Standard & Poor's is not expressing any view as to whether a legal opinion regarding the common law collateral assignment of a funding agreement should be requested by any participant in a transaction. On a case-by-case basis, Standard & Poor's may request an opinion of counsel in lieu of representations and warranties, depending on the structure of a program or changes in any applicable laws, rules, or regulations. To facilitate the timely review of the transaction documents, Standard & Poor's has prepared a form of model representations and warranties for the common law collateral assignment of a funding agreement. These model representations and warranties will provide guidance to market participants regarding what the Standard & Poor's analyst will be looking for in the transaction documents. Standard & Poor's encourages Issuers to incorporate the model representations and warranties in substantially the published form; material changes will likely require review by Standard & Poor's legal department. The form of model representations and warranties is provided in Exhibit A and may be directly copied. The representations and warranties in Exhibit A should survive the closing, and their breach should not be waivable by any of the transaction parties while the rated debt is outstanding. Standard & Poor's encourages counsel for the transaction parties to contact Standard & Poor's legal department if there are issues regarding the applicability of the model representations and warranties to a particular transaction. These issues, as well as any other legal issues, should be discussed early in the rating process with Standard & Poor's legal department. Consultation With Counsel Like all other representations and warranties relating to legal matters, Standard & Poor's will assume that the representations and warranties relating to the common law collateral assignment of a funding agreement are made by the Issuer after consultation with counsel. Exhibit A Form of Representations and Warranties (i) Under the applicable Uniform Commercial Code (UCC) either (a) the Funding Agreement constitutes insurance and the creation and perfection of a security interest therein is excluded from the coverage of the applicable UCC by virtue of Section 9-109(d)(8) thereof* or (b) the Funding Agreement constitutes [specify one or more UCC classifications]¶ for purposes of the applicable UCC; (ii) The [Issuer] [series trust] owns and has good and marketable title to the Funding Agreement free and clear of any [Lien], claim, or encumbrance of any Person (other than the indenture trustee); (iii) Pursuant to the [assignment letter] [acknowledgment letter] [specify other relevant agreement[s]] the [Issuer] [series trust] has duly and properly collaterally assigned the Funding Agreement to the indenture trustee for the benefit of each [series ____] noteholder and such collateral assignment is valid against and prior to: (a) any other claim of an interest in the Funding Agreement created by the [Issuer] [series trust]; (b) any lien creditor of the [Issuer] [series trust]; or (c) any other secured or unsecured creditor of the [Issuer] [series trust]; (iv) All original executed copies of the Funding Agreement have been delivered to the indenture trustee for the benefit of each [series ____] noteholder or to a duly appointed agent for the indenture trustee; (v) The [Issuer] [series trust] has given [name of insurance company] written notice of the collateral assignment of the Funding Agreement from the [Issuer] [series trust] to the indenture trustee for the benefit of each [series _____] noteholder; and (vi) [Name of insurance company] has: (a) duly given its express written consent to the collateral assignment of the Funding Agreement to the indenture trustee for the benefit of each [series _____] noteholder; and (b) [represented and warranted] [affirmed]§ in writing that it has marked its books and records to reflect such collateral assignment and that its books and records do not reflect any Person other than the [Issuer] [series trust] or the indenture trustee for the benefit of each [series _____] noteholder having any ownership or other interest in the Funding Agreement. Additional Items to Be Included in Agreement The following items should be included in the transaction documents: Survival of the foregoing representations and warranties; and Non-waiver of the foregoing representations and warranties. Footnotes *If the applicable UCC is the California UCC, then this representation cannot be given, as the California UCC is applicable to insurance. If the applicable UCC is California law, then the following should be substituted therefore: "under the applicable Uniform Commercial Code (a) the creation and perfection of a security interest in the Funding Agreement is subject to the applicable Uniform Commercial Code and the Funding Agreement constitutes either insurance or [specify one or more UCC classifications]." In addition to the Standard & Poor's model representations and warranties for the other UCC classifications selected, the representation and warranty in paragraph (v) above must also be included. ¶An Issuer will be expected to also include in the transaction documents Standard & Poor's model representations and warranties for the UCC classifications that it inserts into clause (b). The Issuer should consult with its counsel as to the appropriate UCC classifications to insert in clause (b). §Issuer may select either "represented and warranted" or "affirmed."