Article Title: ARCHIVE | Legal Criteria: Legal Issues in Italian Asset-Backed Securitizations Data: (Editor's note: These criteria are no longer valid.) This paper seeks to identify certain key legal issues that arise in the context of Italian asset-backed transactions based on Italian Law No. 130 of April 30, 1999 (the Securitization Law), and to set out the approach that Standard & Poor's has developed to attempt to ensure that transactions that it rates display the legal robustness appropriate to that rating. This paper is primarily a practitioner's guide rather than an academic treatise. For this reason it does not seek to set out every legal issue that may be involved in an asset-backed transaction, nor does it purport to be a full legal analysis of the complex underlying legal principles that are discussed. Rather, it focuses on issues that, in Standard & Poor's experience, often arise in practice and on the manner in which Standard & Poor's has adapted and applied its global criteria to these issues. Finally, this paper is not a complete list of all the issues that can be and are relevant to Italian transactions. Market participants seeking a Standard & Poor's rating continue to be invited to familiarize themselves with all the published criteria that may be relevant to their transaction. Standard & Poor's ratings criteria can be found on RatingsDirect, Standard & Poor's on-line credit analysis system, at www.ratingsdirect.com, under Criteria. The published criteria are also available on Standard & Poor's Ratings Services Web-site at www.standardandpoors.com. Under Resource Center, select Ratings Criteria, then Structured Finance. Special-Purpose Entity Legal Status of the Special-Purpose Entity (SPE) The vast majority of Italian asset-backed transactions in the past two years have been governed by the Securitization Law. This Law sets out certain mandatory provisions relating to the securitization entity (the SPE, which is also the issuer*) and its relationship to assigned debtors and third-party creditors. These provisions are substantially more favorable than would be the case for a normal company purchasing receivables. (*While the Securitization Law contemplates the possibility that the issuer of the asset-backed securities is an entity different from the purchaser of the receivables, this paper assumes, in keeping with market practice, that the issuer and the purchaser are the same entity.) Under the Securitization Law, the SPE must be registered as a financial intermediary and, as such, will be regulated by the Bank of Italy. In addition, the noteholders are protected by the principle of "destination" (set out in Article 1.1 (b) of the Securitization Law) and the principle of "segregation" (set out in Article 3.2 of the Securitization Law). Under the principle of destination, amounts paid by the underlying debtors whose receivables have been assigned to the SPE can be applied only in satisfaction of the asset-backed notes and in payment of associated transaction costs. Under the principle of segregation, "the receivables relating to each transaction constitute segregated assets for all purposes from those of the company and from those of any other transaction. In respect of each group of segregated assets (patrimonio separato), no action by creditors other than the holders of the notes issued in order to finance the purchase of the receivables is permitted," (from Article 3.2). Furthermore, under Article 4.2 of the Law, after publication in the Official Gazette (Gazzetta Ufficiale), the only enforcement proceedings that are permitted against the sold receivables are those aimed at protecting the rights contemplated by Article 1.1 (b). In other words, only the noteholders would be able to attach the receivables in any debt action, whether before or after the insolvency of the SPE. Effectively, Article 4.2 provides for an absolute statutory security right over the sold receivables for the benefit of the noteholders. Standard & Poor's criteria specify that, in order for an asset-backed transaction to receive a rating from the highest categories, the SPE that owns the asset must comply with the bankruptcy-remoteness criteria. These are set out in full in Standard & Poor's publication "U.S. Legal Criteria in Structured Finance Transactions," dated April 2000, in the chapter entitled "Special-Purpose Entities" (on the RatingsDirect Criteria page, under Books, select Structured Finance). Despite the provisions of the Law, and notwithstanding the undoubted additional comfort provided by the Bank of Italy's supervisory function, the Securitization Law does not, in and of itself, constitute the SPE as a bankruptcy-remote entity. This is important, notwithstanding the segregation principle, because of the timeliness component of a Standard & Poor's rating. The rating assesses the likelihood, not only of the noteholders receiving in full both the contracted interest and principal, but also of their receiving it on time in accordance with the terms and conditions of the rated notes. Despite the segregation principle, the opening of formal insolvency procedures against the SPE would almost certainly result in a temporary interruption of the cash flows as various parties seek to determine their rights and, possibly, to contest the rights of others. In addition, certain ancillary contracts, necessary for the noteholders to be paid in full (e.g., swap agreements) would in all likelihood fall away in a bankruptcy of the SPE. In order to rate a transaction where the SPE did not comply with the bankruptcy-remoteness criteria, Standard & Poor's would have to be satisfied that the deal contained sufficient liquidity to tide the noteholders over the period of interruption caused by the insolvency and a procedure whereby all terminated ancillary contracts could be immediately replaced. Otherwise, Standard & Poor's would expect to see the SPE benefit from the additional elements that would enable it to meet the bankruptcy-remoteness criteria. Restriction on Objects and Powers In addition to the restrictions provided for by the Securitization Law, the SPE should covenant to restrict its activities to those needed to ensure the sufficiency of cash flow to pay the rated notes. The SPE should not engage in unrelated business activities unless the parties to a transaction are willing to allow the rating to reflect the effect of these activities on the SPE's resources, cash flows, and ability to pay the SPE's obligations in a full and timely manner. These restrictions should appear in a contract to which the noteholders or their representative or trustee is a party. Debt Limitation The SPE should be prohibited from incurring additional indebtedness, except in cases where such indebtedness would not affect the rating on its existing borrowings. Multiple IssuanceStandard & Poor's is, however, satisfied that the protections set out in the Securitization Law, together with an appropriate security structure (see below) will enable an Italian securitization entity to issue different series of notes backed by separate pools of receivables. This is the case even when the different series have different ratings or when some of the series are rated and others are not. However, Standard & Poor's will wish to ensure that prior or subsequent transactions do not contain provisions that materially weaken the bankruptcy remoteness of the SPE or threaten the rights of the rated noteholders, thus weakening the credit quality of the rated notes. This could happen, for example, if a subsequent transaction allowed the SPE to hold large amounts of cash outside of any security net. This would lead to the issuer no longer complying with Standard & Poor's bankruptcy-remoteness criteria and would probably compel a substantial lowering of the ratings on the existing notes. Accordingly, it should be a provision of each rated transaction that the SPE will not issue any additional notes without a confirmation from Standard & Poor's that the new issuance will not have a negative effect on the outstanding existing ratings. Please note that, to be able to provide such confirmation, Standard & Poor's will require access to all the documentation relating to the additional issues (whether rated or not). The evaluation by Standard & Poor's of further unrated issues will be on a fee basis. For guidance as to the criteria for issuance of additional debt from a securitization entity see the chapter entitled "Legal Criteria Applicable to International Transactions--Segregation Criteria" in "U.S. Legal Criteria in Structured Finance Transactions," dated April 2000. Based on its experience in Italy to date, Standard & Poor's expects that the analysis of additional debt issuances by a segregated SPE in Italy will, in addition to its general segregation criteria, require consideration of the following issues: Separate transactions clearly distinguished. Each transaction should clearly distinguish itself as being separate and apart from any previous or future transactions to be entered into by the SPE. Tax status. An assessment of the tax effect of each transaction (i.e., corporate, withholding, stamp duty, transfer, VAT, etc.). Limited recourse and nonpetition. The existence and robustness of "limited recourse" and "nonpetition" provisions in each of the transaction documents. Segregated transaction accounts. The existence of separate accounts for each transaction. No commingling. Confirmation that collections from the purchased assets for each transaction are not commingled with other funds of the SPE (e.g., swap payments), whether from the same transaction or otherwise. Separate security. Consideration as to whether assets of the SPE that are not explicitly segregated by operation of the Securitization Law, such as rights under contracts (e.g., swaps), bank accounts holding funds other than collections, or assets of the SPE located outside of Italy, are effectively secured for each transaction. Legal opinions. Confirmation that each transaction has been structured in accordance with the Securitization Law (see Legal Opinions below). Restriction on further issuances/modification of terms. Confirmation that each transaction explicitly restricts further issuances of debt by the SPE or modification of existing debt (whether rated or unrated) by requiring affirmation by Standard & Poor's of the rated notes. "Master-Trust" IssuanceStandard & Poor's has received advice that, despite the apparent narrowness of the text of the Securitization Law that assigns each purchased pool of receivables to a specific issuance, it is possible for the noteholders to agree in the terms and conditions of the notes to share their collateral with noteholders of subsequent issues. This would result in different series relying on the same "global pool" of receivables, which itself could be supplemented by additional transfers of new receivables. This would replicate, economically, the Anglo-Saxon master-trust structures. Accordingly, Standard & Poor's is prepared to rate such structures provided that it reviews all the series issued by the same SPE on the same basis as set out above under "Multiple Issuance". Corporate Structure Separateness CovenantItalian law will not recognize the opening of insolvency procedures against a company solely because another entity in its group (including its parent) has itself filed for bankruptcy. In addition, there is no doctrine of "substantive consolidation" in Italy, whereby the assets of a solvent subsidiary are consolidated in the insolvency estate of an insolvent parent. The only exception is where the separate corporate existence of the subsidiary is deemed to be a sham. This could occur, for example, where all the assets of the subsidiary are commingled with those of its parent, where it is impossible to determine which property belonged to one and which to the other, where no proper and separate accounting records have been held, and so forth. Accordingly, Standard & Poor's has no objection to the originator holding shares in an Italian securitization entity, so long as the SPE and the originator agree to abide by the separateness covenants set out in the article entitled "Special-Purpose Entities--SPE Criteria" in "U.S. Legal Criteria in Structured Finance Transactions," dated April 2000. Standard & Poor's view on this is not affected by the extended insolvency claw-back period that may apply for certain intragroup transactions. Sole ShareholdingIn order to obtain certain favorable tax groupings, Italian originators may wish to have a controlling interest in the securitization entities. For the reasons set out above, Standard & Poor's does not view this as incompatible with a high level of rating. Nevertheless, a controlling shareholder may, under Italian law, impose certain acts on its subsidiary, notwithstanding the opposition of that subsidiary's board of directors. These could include, in extreme circumstances, forcing a merger on the securitization entity. To reduce the risk of interference by a controlling shareholder affecting the credit of the notes, Standard & Poor's will wish to see at least one other shareholder of the issuing SPE. This shareholder should be an independent entity unconnected to the originator. Furthermore, the constitutive documents of the SPE will need to contain provisions providing that no action that would negatively affect the rating on the notes will be forced on the SPE without a special majority vote of the shareholders. The special majority will need to be set at a level that requires the favorable vote of the independent shareholder for the resolution to be passed. No such special majority provision will be necessary in circumstances where the sole shareholder is independent of the originator or where independent shareholders constitute the majority of the votes. Finally, the non-independent majority shareholder will be required to covenant for the benefit of the noteholders that it is aware of the securitization-related obligations of its subsidiary and that it will not procure that its subsidiary breaches such obligations. Independent DirectorStandard & Poor's will require that at least one of the directors of the securitization entity be independent from the participants to the transaction. Standard & Poor's expects the independent director, within the boundaries of his or her legal duties to the company, to review the operation of the SPE and to provide information to the representative of the noteholders or their trustee if he or she becomes concerned as to the governance of the SPE. Limited Recourse and Nonpetition Language All debt and money payment obligations incurred by the securitization entity must be limited recourse to the cash available to the SPE in accordance with a preagreed order of payment priorities. All parties to the securitization who contract with the securitization entity must covenant not to file for the bankruptcy of the SPE or take any legal action that would or is likely to result in the bankruptcy of the SPE until a period of at least 12 months from the repayment of the last maturing rated obligation. Security Structure A requirement of bankruptcy remoteness is that the SPE grants a security interest over all its assets for the benefit of the noteholders. The purpose of this general security interest is primarily to diminish the incentives for any potential third-party creditor to seek to initiate insolvency proceedings against the SPE. To the extent that there are no free-floating and available assets for such a creditor to seize or share in, the likelihood of such an action is reduced. Standard & Poor's is satisfied that the principle of segregation set out in the Securitization Law does effect the legal and economic equivalent of a valid security interest over the assets that are covered by the Law. Under this principle, the noteholders have an effective security right over the receivables backing the transaction and the collections derived from these receivables. Despite certain academic musings, Standard & Poor's is also satisfied that the right of segregation also extends to monies standing to the accounts of the SPE held in Italy and into which collections have been paid--subject to that cash being traceable. (For a more extensive discussion of the treatment of cash in accounts see Commingling below). If the segregation principle were not extended to collection accounts, the conclusion would be that the Law was meant to cover only actual coins and notes paid by underlying debtors. Since practically no one pays in this manner in Italy, such a narrow interpretation of the Securitization Law would lead to an absurd consequence. In a classic securitization, however, the SPE will also own, in addition to the receivables, a series of assets of economic value that are not covered by the segregation principle. These could include, by way of example, the benefit of derivative contracts (currency and interest rate swaps), liquidity facilities, and subordinated loans. They might include "eligible investments" (see Commingling). These might also include assets outside of Italy. In the case of such foreign assets, it may be unclear, at best, whether the courts of the jurisdiction where the assets are located and to which one would need to turn to seize these assets would recognize an Italian law principle such as the segregation rights set out in the Securitization Law. Therefore, whenever a SPE owns assets that are of non-negligible value and are not clearly covered by the segregation principle, Standard & Poor's will expect to see a valid and enforceable security package covering all such assets. Commingling Credit Loss or Liquidity Stress The problem of commingling will occur whenever cash belonging to the issuer is mixed with cash belonging to a third party or goes into an account in the name of a third party in such a way that, in the insolvency of that third party, such cash is lost or frozen. Such cash would become lost if, following the insolvency of the third party, the issuer's claim to the money would be treated at law as an unsecured debt of the insolvent entity. Under Standard & Poor's criteria, such an unsecured debt claim would be treated as a total credit loss for the issuer. On the other hand, such cash would become frozen if, following the insolvency of the third party, the issuer retained a proprietary claim over the money so that the money did not form part of the insolvent entity's bankruptcy estate. The cash could also be "frozen" if the account was the subject of a valid security interest in favor of the issuer. In both cases, although the issuer's rights to obtain the money would have a solid grounding in law, Standard & Poor's would seek to determine practically how long it would take for the issuer to assert these rights as against the bankruptcy trustee and competing creditors of the insolvent holder of the cash. For this reason, such cases would be treated not as total credit losses but as liquidity strains on the transaction. Accordingly, the transaction will need to demonstrate features that will enable the issuer to meet in full and on a timely basis its current obligations under the rated notes, notwithstanding the delay in cash flows caused by the third party's insolvency. Commingled cash may also be lost in the insolvency of the account holder where the account bank is allowed to assert a set-off. In other words, it may be lost where the account holder owes money to the account bank flowing from other, probably unrelated, obligations and is allowed under the terms of the account or under general principles of Italian law to set off the amounts owed to it by the account holder against monies standing to the credit of the account, including monies belonging to the issuer. Although not the only situation in which commingling can arise, the most common type of commingling seen in Italian transactions arises from the situation in which the underlying debtors will most often continue to make their payments under the sold receivables in accounts in the name of the originator. Insolvency of the Originator/Servicer Under the segregation principle of the Securitization Law, collections going into an account are impressed with statutory protection for the benefit of the noteholders. However, it is clear that such protection cannot follow the money wherever it goes. This is the well-known legal problem of tracing. If money is impressed with a proprietary or security right but is then mixed with other money and/or transferred into third-party hands, at what point does it lose its original legal identity so as also to lose the attached rights? In Standard & Poor's view, the better legal analysis is that, if the issuer takes the collections and on-lends them to a third party (through an eligible investment policy, for example), such investments and the proceeds of such investments are no longer "collections" for the purposes of the Securitization Law. What is somewhat less clear is whether, if the collections are in an account of the originator or the servicer to which other funds unrelated to the securitization are credited and the originator or servicer regularly credits and debits this account, the segregation principle still applies, or whether such commingling destroys the legal nature of the cash as collections. Unfortunately, as the law is still new and there is no judicial authority on this point, it is unclear how an Italian court would treat collections protected by the

Securitization Law that had been commingled in a running account of the originator or servicer. Although a court may still view the money as protected by the segregation principle, in Standard & Poor's view a sufficient uncertainty exists on the point so as to require money commingled in such fashion to be treated as a credit loss rather than a liquidity stress. In addition, most bank account standard terms explicitly allow the account bank to set off obligations of the account holder against amounts standing to the credit of the bank account. Under general principles of Italian insolvency law, unless the bank has formally acknowledged the ownership of the issuer over the cash standing to the credit of the bank account, that bank could use its right of set-off. Dealing with this set-off risk would require either that the account bank specifically acknowledges the issuer's title to the money and waives in writing any set-off rights over that cash, or that the likely set-off risk be estimated and treated in the cash flow models as a credit loss. Standard & Poor's is nevertheless satisfied that, so long as the collections are collected by the originator and/or the servicer in its capacity as agent (mandatario) for the issuer, the mere fact that the money stands in an account in the name of the originator/servicer would not, in and of itself, deprive the collections of the protection of the Securitization Law. The preferred legal view is that, in the insolvency of the originator/servicer, so long as the collections had not been commingled with other monies, the collections would not fall into the bankruptcy estate of the originator/servicer. Therefore, based on the above analysis, Standard & Poor's will not treat money held in an account in the name of the originator and/or servicer as a credit loss so long as the following conditions are met: The collections must go into a dedicated account or set of accounts. The collections must not be commingled with other moneys belonging to third parties (including the originator and/or servicer). The documents must make it explicit that the account holder is collecting the collections as agent for the issuer. The account bank must acknowledge the issuer's right to the monies standing to the credit of the account and waive any set-off rights against the nominal account holder. If such conditions are met, Standard & Poor's will treat the presence of issuer monies in a third-party account as a liquidity stress. The length of the period during which it will be assumed the cash will be delayed by an account holder's insolvency will vary, taking into account the rating sought (higher ratings driving more conservative and therefore lengthier periods) as well as the specific conditions of the transaction and the relative slowness of the Italian judicial process. If such conditions are not met, there are nontrivial risks that, in the insolvency of the account holder, the issuer will be left with only an unsecured claim in the bankruptcy. In such circumstances, the amounts standing to the credit of such accounts will be held to be lost to the transaction. Issuer Insolvency In order to make an insolvency of the issuer as remote as possible, the structured finance criteria require that all the non-negligible assets of the issuer be provided as security for the benefit of the noteholders (see Security Structure under Special-Purpose Entity above). In respect of the collections, this security is normally provided by the operation of the segregation principle of the Securitization Law. However, if the collections are mixed with other cash, their nature as collections protected by the Law may be endangered. Accordingly, Standard & Poor's would not wish to see collections commingled in an issuer account with cash belonging to any third party, unless appropriate measures are taken to ensure the creation of proper security over such cash for the benefit of the noteholders. Also, the ability of the issuer (and its agents) to credit and debit the issuer's accounts must be limited to what is necessary to make the payments contemplated under the transaction documents. Collections may, however, be commingled with other monies belonging to the issuer in an issuer account, provided that all the monies were subject to valid security interests in favor of the noteholder (whether created by the operation of the segregation principle or by a pledge agreement) or it is otherwise clear that the presence of such other monies does not endanger the segregation principle. It may be possible, therefore, to have cash generated by collections commingled in the issuer account with the proceeds of a swap and proceeds of a liquidity facility, both of which are themselves provided as security for the noteholders. This is so because, although a pure technical reading of the Law could lead a court to conclude that the commingling of different monies destroys the effect of the segregation principle, such interpretation would lead to the absurd conclusion that if two sets of cash providing security for the same obligations and for the benefit of the same parties go into one account, the parties lose the contracted protection. In Standard & Poor's view, such interpretation of the Law is extremely unlikely to be adopted by the Italian courts due to its absurdity. Nevertheless, it must be noted that, in practice, market participants may find it difficult to ensure effective security over different cash amounts for the benefit of the same parties. This is especially true of money standing to the credit of Italian bank accounts, in view of the inherent difficulties in providing valid security over running accounts in Italy. In many cases, it is expected that the most appropriate structure will be an Italian account for collections (impressed with the segregation principle) and a foreign account (in a jurisdiction where security over running accounts is easily achieved) for all the issuer's other cash flow. Account Bank Insolvency What happens to money held with a bank when the bank becomes insolvent is not, strictly speaking, a commingling issue. Nevertheless, there is sometimes a degree of confusion between this issue and the issue of commingling in the strict sense. This is particularly the case when the originator is a financial institution and is also the account bank for the transaction. It therefore seems appropriate to deal with the point in this section of the paper. As a matter of Italian law, when a person deposits cash with a bank, that person's rights over the bank account constitute a debt. The account reflects a debt owed by the bank to the account holder, usually payable on demand. Since banks are not in the habit of granting security to their account holders, the debt owed by the bank is a normal unsecured debt and will be treated accordingly in the insolvency of the bank. Therefore, consistent with Standard & Poor's approach to unsecured debt of an insolvent company, all cash held with a bank that is not rated highly enough for the rating of the notes (see Rating Triggers below) will be treated as lost to the issuer. This analysis holds true even when the bank is also the originator. This is due to the fact that, once deposited with the bank originator, the collections are merged with the bank's general funds and used by the bank in the normal course of its business. At this point the collections clearly cease to be protected by the segregation principle. In order to avoid problems with the potential insolvency of the account bank, transactions should be structured in one of two ways: (i) to move the monies into a suitably rated account or (ii) to invest the monies in suitably rated eligible investments, which in turn must be chosen so as to ensure that proper security may be given thereover, thereby protecting the issuer's interests in the event of insolvency of the bank holding the investments. Rating Triggers It is also important to note that under the Standard & Poor's rating methodology, an entity will be assumed to be liable to insolvency only if that entity's current rating is below the rating of the notes (or the entity is unrated). Accordingly, the transaction will not be required to display features designed to mitigate the effects of commingling if the issuer's cash is commingled only with cash belonging to corporations rated as highly as the notes. This is equally true for the account bank. In the absence of such features, however, market participants must also be aware that the rating on the party with whose cash the transaction's cash flows are commingled or the bank with which money is deposited will become a dependant rating for the transaction. All other things being equal, the downgrade of such corporate or the placement of its ratings on CreditWatch with negative implications would normally lead to the transaction being downgraded or similarly placed on CreditWatch with negative implications. Nevertheless, many originators and banks, although highly rated, may not have a long-term unsecured rating high enough for the rating sought on the notes. To mitigate this problem, Standard & Poor's will rely on a short-term rating on an entity with whose cash the issuer's cash is to be commingled or on the account bank. This short-term rating will need to correspond to the long-term rating on the notes, in accordance with Standard & Poor's rating correspondence table. However, such short-term rating contemplates only a one-year horizon. Accordingly, the transaction documents must provide that, if such entity is downgraded so that its short-term rating no longer corresponds to the long-term rating on the notes, appropriate measures will be taken within 30 days to bring all commingling to an end or, in the case of an account bank, find an alternative and suitably rated bank. This is known as a "rating trigger". In addition, it is usually acceptable to rely on an 'A-1' rated entity to support a 'AAA' deal, provided that the amount that is commingled or held with the 'A-1' rated bank is never more than 20% of the face amount of the notes and the money is never at risk for more than one month. In certain cases, reliance may be placed on an entity whose rating does not meet the above criteria where Standard & Poor's is satisfied, after consultation with the finance or corporate analysts who follow the relevant entity, that circumstances exist which make the use of the correspondence table less appropriate. Publication in the Official Gazette Under the Securitization Law, the sale of the receivables to the SPE becomes opposable against third parties in the insolvency of the seller, only upon publication of the relevant notice in the Official Gazette of the Republic of Italy (Gazzetta Ufficiale). Until such publication, if the originator is placed into insolvency proceedings its liquidator will be entitled to ignore the sale and help itself to the receivables for the benefit of the unsecured creditors of the insolvent company. Although publication in the Official Gazette can usually be expected to follow the sale by a few working days, there is no enforceable obligation of the Italian government to procure publication or to procure publication within any given timeframe. Since publication creates the true sale, consistent with Standard & Poor's criteria on contingent transfers, it is a requirement of the issuance of the rated notes that publication in the Official Gazette has already taken place, or that purchase monies are not paid by the SPE to the originator until publication in the Official Gazette has taken place, with provision made to cover expense of any negative carry. Insolvency Claw-Back Pursuant to Article 67 of the Bankruptcy Law of Italy and the Securitization Law, the sale of receivables by the originator may be subject to an insolvency claw-back (revocatoria fallimentare) in two circumstances: If the sale was not at an undervalue--within three months following the transfer, but only if (i) the transferor was insolvent at the time of the transfer and (ii) the liquidator can prove that the transferee was, or ought to have been, aware of such insolvency; or If the sale was at an undervalue--within six months following the transfer, but only if (i) the transferor was insolvent at the time of the transfer and (ii) the transferee cannot prove that it was not, and ought not to have been, aware of such insolvency. Following such claw-back, the liquidator would get the receivables back. The SPE would then be entitled to receive back the purchase price. However, the obligation to return the purchase price would merely be another unsecured payment obligation of the originator and would become part of the general insolvency. From a ratings perspective, this money would be a total credit loss. To protect the transaction against the risk of claw-back in the case of originators that have a current Standard & Poor's rating in the investment-grade category, reliance will be placed on the originator's rating as a strong indication of its solvency. In these cases, the originators will not be required to enter into any additional steps. For originators that do not have a current Standard & Poor's rating or whose rating is in the speculative category, Standard & Poor's would expect to see good standing certificates (certificati di vigenza) on the originator dated shortly before the date of the transfer. In addition, Standard & Poor's would also expect to see solvency certificates signed by the managing director (amministratore delegato o unico) or the finance director (responsabile finanza) of the company (or other appropriate person or body) and dated the date of the transfer of the receivables. These certificates should state without ambiguity that the transferor is solvent as at that date. Clearly, such certificates are not legally dispositive and a court could choose to ignore them in determining whether the SPE was or ought to have been aware of the insolvency of the originator. Nevertheless, in the absence of genuine fraud, such certificates should provide favorable evidence to strengthen the SPE's plea of ignorance. Standard & Poor's does not consider, though, that a mere representation by the originator as to its solvency that is embedded in the transaction documents will provide sufficiently robust evidence. In cases where the originator has an investment-grade rating on the closing date of the transaction but where further sales of receivables are expected (e.g., by way of substitution of maturing assets), the transaction documentation will need to provide that, should the originator ever lose its investment-grade rating, it will then comply with the requirements for a non-investment-grade originator (e.g., the provision of solvency certificates). Furthermore, the shifting of the burden of proof in cases of transactions at an undervalue needs to be taken into account. Therefore, in the case of originators that do not have an investment-grade rating from Standard & Poor's, where the deal exhibits features that could lead a judge to find that the sale of the receivables was at an undervalue (e.g., a sale price at a substantial discount to the face value of the receivables), further evidence of the originator's solvency may need to be produced to the SPE to buttress its claim that it ought not to have been aware of the insolvency. This may, depending on the circumstances, include a current auditor's report or an auditor's comfort letter. Sole Shareholder Guarantee Under Article 2362 of the Italian Civil Code, an Italian company that is the sole shareholder of another company is liable, in case of the insolvency of its wholly owned subsidiary, for all the obligations of the wholly owned subsidiary that were assumed by the subsidiary during the period of time when the parent company was the sole shareholder. This liability functions by operation of law, cannot be disclaimed, and is for the benefit of all the creditors of the subsidiary. In certain transactions, market participants have sought to rely on this sole shareholder guarantee to provide credit to the transaction. For example, when the servicer in whose name certain collection accounts are held is an unrated company but is a wholly owned subsidiary of an originator with a high short-term rating, it has been argued that this statutory guarantee could be relied on to fulfill the various requirements designed to avoid commingling risk (see Commingling above). However, it is unclear what the reference to "insolvency" actually means in Article 2362 and, as a matter of law, whether the Article 2362 guarantee is a guarantee of first payment, that is, a guarantee where a claim can be made by a creditor and must be met by the parent guarantor as soon as there has been a failure by the subsidiary to pay, or a deficiency guarantee, that is, a guarantee where a claim can be made only once the creditor has gone through all the enforcement procedures open to it, including the conclusion of all insolvency procedures against the subsidiary. Even if such guarantee is determined by the courts to be a guarantee of first payment, neither the law nor judicial precedent provide any indication as to how and within what time frame the claim can be made and must be paid. Accordingly, although the existence of such sole shareholder guarantee is undoubted, it is impossible for Standard & Poor's to give any credit to it in light of the very serious concerns as to the timeliness with which claims made under such guarantee must be met. Debtor Set-Off In all asset-backed transactions, it is a concern that, upon the insolvency of the originator, the receivables sold to the SPE may be decreased by the amounts that the underlying debtors set off as against other obligations due to them by the seller. The classical case of debtor set-off would occur when a bank sold, for example, a pool of car loans, some of which had been made to the bank's own customers. Upon the insolvency of the bank it is likely that some, if not all, of these customers would have money owed to them by the bank--namely the amounts standing to the credit of their current accounts. Depending on the jurisdiction, these bank customers may be entitled to deduct from the amounts due under the sold car loans the amounts standing to the credit of their accounts with the seller at the time of the latter's insolvency. This would reduce the amount that the issuer was entitled to collect on the securitized receivables and could, depending on the quantum of such reduction, cause a loss to the noteholders. This form of set-off may be recognized at law and results in a legal diminution of the debt. In addition to this legal set-off, there is also the risk of a practical set-off. This would occur when a debtor is faced with the loss of money due to it by the now insolvent seller. Having neither consented nor, in some cases, been notified of the sale of his or her receivable, such debtor may simply refuse to pay on the grounds that, irrespective of the legal position, the actions of the seller were iniquitous. In the case of a practical set-off, though, the right of the issuer to recover the sold receivable from the underlying debtor is not legally impaired. However, the issuer can expect delays in recovering the amounts due to it. For this reason, Standard & Poor's will treat legal set-off as a credit loss to the transaction while practical set-off will be treated as a liquidity stress. In determining the nature and quantum of the set-off risk, it is necessary to understand the law of the relevant jurisdiction but also the business of the originator. There will be cases where the existence of mutual rights as between the underlying debtors and the originator are extremely unlikely, for example, where the originator is a special-purpose lender who does not have a deposit-taking business. In other cases, the existence of "no set-off" provisions in the contract between the debtors and the originator may be dispositive, as a matter of law, in removing the rights of set-off. In Italy, the general view of legal commentators is that publication of notice of the sale in the Official Gazette constitutes notice to the underlying obligors and, therefore, upon the date of such publication (subject to the exception set out below), all the set-off rights crystallize. The underlying debtors retain the right to set off any amounts due to him or her as of that date, but all amounts due to such debtors by the originator following that date can no longer be set off as against the sold receivables. In the case of bank accounts, the principle of Italian law is that an account is effectively treated as a box. In that box there is money due by the bank to the account holder. When money is withdrawn from the account, the law deems that money to have come from the oldest money deposited. When new money is deposited in the account, this creates a new debt. Accordingly, as the underlying debtor withdraws and deposits money in his or her account, the amount that he or she can set off diminishes since every withdrawal diminishes the debt capable of set-off and every deposit creates a new debt that, after publication in the Official Gazette, is no longer capable of set-off. For this reason, in the case of most financial institutions, set-off due to retail bank account holdings is a swiftly diminishing problem. In quantifying the set-off risk, Standard & Poor's will have regard to the representations made by originators as to the existence and size of the obligations due by them to underlying debtors at the time of the publication in the Official Gazette. An exception to the rule that the publication of notice of sale in the Official Gazette crystallizes the set-off appears to be in the area of consumer lending. Under Article 125 of the Italian Banking Act, borrowers under consumer loans are entitled to assert all and any of their set-off rights, notwithstanding an assignment of their loan, whether notified or not. For the purposes of this law, a consumer loan is defined as a loan of between Italian lira (ITL) 500,000 and ITL60,000,000. However, Article 121(4)(e) excludes from the definition of consumer loan any loan given for the purpose of purchasing real-estate assets, so that the problem does not affect mortgage-backed securities. Therefore, in the case of consumer loan-backed transactions, the set-off problem cannot be treated as a finite and self-reducing one, and analysis will need to be conducted to determine whether additional credit enhancement is required to mitigate the problem. Future Flows A number of participants in the Italian market have been trying to structure transactions securitizing future cash flows not generated from debts due on the date of the transaction but from later anticipated business. In order to understand the legal issues arising from such transactions, it is important to separate these future flows into four distinct categories: Receivables from existing contracts for performed services (unbilled receivables); Receivables from existing contracts for services not yet performed (future contracted receivables); Receivables from expected future contracts (future uncontracted receivables); and Cash receipts that are not receivables, as this term is ordinarily understood, i.e., a right to claim a payment from a debtor on a due date (future cash flows). Unbilled receivables are amounts due under a contract where the originator has fully performed its obligations relating to that receivable but where the debt has not yet been recorded in the originator's systems and/or the bill has not yet been sent to the customer. The classic case is that of a telecommunications company where the telephone has been used and the central computers of the originator have logged the call but the entry has not yet been reconciled to a particular account or the bill has not yet been sent to the customer. Future contracted receivables are amounts that it is expected will come due from existing framework contracts but where the services have not yet been performed. These include, for example, amounts due from existing telephone customers in relation to calls not yet made. Future uncontracted receivables are amounts that it is expected will come due from contracts to be entered into in the future by the originator. Future cash flows are sometimes erroneously described as "future receivables". They are, in fact, cash receipts where the payment of the cash is contemporaneous with the contract. Toll-road payments would fall into this category, as would payments for cinema or theatre performances. The first issue with all future receivables transactions is whether these can be sold or whether any purported sale merely records an agreement for the sale of a receivable as and when the receivable comes into existence. In the second case, such agreement will usually fall upon the insolvency of the seller. The second issue is whether, even if a sale has taken place, the cash paid by the debtor after the seller has gone insolvent goes to the SPE or whether it falls into the insolvency estate of the seller to be used by the liquidator. In Italy, unbilled receivables and future contracted receivables can be sold. In addition, pursuant to a Ministerial Decree of April 4, 2001, future uncontracted receivables can also be sold (in each case as long as the receivables are sufficiently identified or identifiable). Future cash flows probably cannot be sold under the Securitization Law, though, as it is basically unclear whether there is a right to sell. However, in the absence of rules to the contrary in the Securitization Law and, therefore, on the basis of general purposes of Italian insolvency law, if the originator becomes insolvent before the receivable comes into existence the receivable is lost to the SPE. Therefore, it cannot be said that, on the closing of a transaction, there can ever be a true sale of future contracted and uncontracted receivables. In conclusion, it is possible in Italy to have a true securitization only of unbilled receivables. Any securitization of future receivables (whether contracted or uncontracted) and future flows will be linked in some fashion to the rating of the originator. The issue of leases is more complex and is dealt with in the next section. Leases In Italy, three key questions arise in respect of the securitization of lease receivables. The first is whether the future lease payments fall into the category of future contracted receivables, so that upon the insolvency of the originator these rental payments cease to be available to the issuer, or whether they are assimilated to existing receivables, in that the service rendered by the lessor (namely the provision of the leased equipment) has been fully completed and the rentals are merely the staged payments for that service. The second question is whether the leases that are the subject matter of the securitization can be cancelled without the issuer's consent by the liquidator of the original lessor even after that lessor has sold the lease rentals pursuant to the Securitization Law. The third is whether, in the case of a default by the lessee, the issuer can obtain the benefit of the leased equipment either through its re-lease or through its sale. This question is particularly important in cases where the originator is insolvent, since prior to its insolvency, it is merely a matter of contract between the originator and the issuer as to who obtains the economic value of the equipment. After an originator bankruptcy, if the issuer wishes to assert a claim against the equipment, such claim must be legally capable of defeating any challenge by the originator's liquidator. Assignability of Rentals Whether the future lease rentals are existing receivables will depend on whether the services to be provided by the lessor have been entirely discharged. Determining whether this is the case will involve a detailed case-by-case analysis of the lease agreements being securitized. Although there are few precedents for guidance, it is generally considered that leases that can be described in economic terms as finance leases will be treated by the courts as existing receivables and can therefore be securitized. It must be borne in mind, though, that the expression "finance lease" is not a legal term of art but an accounting concept. Broadly, these are leases where the equipment has been delivered, the lessor has no operating duties (such as maintaining the equipment), and the rentals are calculated to pay for the entire purchase price of the equipment plus a finance charge. At the end of a finance lease, title to the equipment usually vests in the lessee through some device or other (e.g., a call option on the title for a nominal amount). In contrast, rental payments on operating leases are very unlikely to be viewed other than as future receivables and, therefore, are unlikely to be able to be suitable for securitization. Liquidator Termination As to the liquidator's rights to terminate existing finance leases, a large number of Italian leading scholars consider (despite a few lower court decisions in which it was held otherwise), that this is not possible. On the other hand, analyzing the issue from the perspective of a bankruptcy lessee, the Italian Supreme Court (Corte di Cassazione) has, since 1989, made the distinction among finance leases between leasing traslativo (purchase leasing) and leasing di godimento (use leasing). The key distinction between leasing traslativo and leasing di godimento is that, in the former, the exercise price of the call option in favor of the lessee at the end of the lease is substantially lower than the expected value of the leased goods at the time of the exercise, whereas in the leasing di godimento the exercise price is commensurate with the expected (minimum) value of the leased goods. The legal principles stated by the Supreme Court in the 1989 decision are such that a leasing traslativo is likely to survive a bankruptcy of the lessor, while it is less clear if a leasing di godimento would do so. It must be borne in mind, though, that the court has never looked at this issue from the perspective of a bankruptcy of a lessor. As a general matter, Standard & Poor's has concluded that, all other things being equal, traslativo leases are suitable for securitization in a way that allows the asset-backed debt to be rated without reference to the rating of the originator. In reaching this conclusion, Standard & Poor's has taken comfort from a combination of the assessment that the liquidator probably does not have termination rights over the lease and the substantial disincentives that exist to the exercise of such rights (should they exist). These disincentives derive from the fact that, if the liquidator were to terminate the leases, the insolvent originator would be faced in all likelihood with two separate claims for damages (on the assumption that the liquidator has no right to terminate the leases). First the lessee would sue for the loss of the equipment, then the issuer would sue for breach of the covenant not to terminate or cause the termination of these leases. These suits would increase the pool of unsecured claims that need to be met from the insolvent estate. In exchange for this increase, the liquidator would get the equipment back. In the context of finance leases, the issuer's claim is very unlikely to be much less than the value of the equipment. In most equipment leases, because of the shape of the depreciation profile of the leased equipment compared with the straight-line rental payment schedule, the issuer's claim for contractual breach will be greater than the value of the equipment. When added to the lessee's claim, it is hard to see what benefit there may be for the liquidator to cancel such leases. On top of these straight economic disincentives one must also note that by canceling the leases, the liquidator would be seeking to exercise a power that, according to the prevailing legal view, he or she does not possess. Therefore, in doing so the liquidator would also have to be willing to risk a suit against himself or herself in his or her personal capacity for abuse of power. For all the above reasons, subject to any specific circumstances of a given transaction that would modify the balance of incentives, Standard & Poor's does not consider the risk of liquidator cancellation of traslativo leases is high enough to make it incompatible with the highest ratings. In relation to di godimento leases, although the disincentives remain broadly the same, pending judicial clarification, the assessment of the legal risk of the liquidator having the right to terminate the lease makes it difficult for deals backed by these assets to achieve the very highest rating categories. However, although the increased risk must be factored into the achievable ratings, it remains the case that the majority legal view rejects the notion of a liquidator's termination rights. Accordingly, Standard & Poor's considers that such deals backed by di godimento leases may achieve ratings higher than that of the originator even if such ratings are constrained by a ceiling reflecting the identified risk. This is in clear contrast with operating leases where the lease payments are very likely to be viewed as future contracted receivables (see Future Flows above) and where, therefore, no improvement on the rating on the originator can be achieved. Benefit of Equipment The question of whether the issuer can have the benefit of the value of the equipment if the lessee either cancels the lease or defaults, in circumstances where the originator is insolvent, is now considered. In a transaction where title to the leased equipment has been sold to the SPE at the close of the transaction and Standard & Poor's has received appropriate legal opinions confirming the true sale of such equipment, there is no difficulty in giving credit in the transaction cash flows to the value of the equipment. In circumstances where the equipment is not transferred to the issuer, arguments have been put forward that the issuer can nevertheless obtain the benefit of the sale proceeds of the equipment or new rentals generated by the re-lease of such equipment, where the original lease has been terminated. This is attempted by providing that the originator assigns, at the same time as the rentals on the current leases, any sale proceeds or future rentals associated with the equipment. In addition to this sale of future proceeds, the position of the issuer is sometimes buttressed by having the originator provide an irrevocable power of attorney to the SPE, entitling the SPE to deal with the leased assets in the insolvency of the originator (mandato in rem propriam). Such a power would not be terminated by the insolvency of the grantor. Under this structure, it has been claimed that the liquidator would have to hand over to the SPE any proceeds of sale or future rentals as a priority payment before paying the other unsecured creditors. Although Standard & Poor's does not assert that such analysis is wrong, it does note certain facts. First, this analysis has not received the support of any reported judicial decision and enjoys neither the unanimous nor the very strong support of the Italian legal community. Secondly, this analysis appears to sit uncomfortably with the general principle that one cannot assign future uncontracted receivables in a way that survives the bankruptcy of the seller. Thirdly, the operation of the mandato in rem propriam requires the SPE to obtain possession of the leased equipment. This could be difficult in practice since a lessee is unlikely to hand over such property to anyone other than the party who holds good title (i.e., the liquidator). In simple terms, if the lessee hands over the property to the issuer pursuant to the mandato and the mandato turns out to have not been valid for whatever reason, the lessee will be liable for damages suffered by the insolvent originator, whereas handing the equipment to the liquidator is entirely risk free for the lessee. Finally, in these circumstances the incentives on the liquidator run entirely in the wrong direction regarding protection of the issuer's interest. Accordingly, Standard & Poor's does not consider that it is possible to give credit to the sale proceeds of the equipment or to new rentals based on the transaction structure outlined above. Public Entity Debtors Following the publication of the notice in the Official Gazette of the sale of a portfolio of receivables (see Publication in the Official Gazette above), the relevant sale will become effective against, among others, any third party and assigned debtors. No formal notice of the sale need be given to each debtor pursuant to Articles 1264 and 1265 of the Italian Civil Code (which impose a general rule that transfers of claims must be formally notified to assigned debtors to make the transfer effective against them and third parties). However, pursuant to Royal Decree No. 2440 of Nov. 18, 1923, in order to make the transfer of a receivable effective against a public entity debtor, certain formalities must be carried out in respect of the transfer, including formalization of the transfer by means of a public deed or authenticated private agreement (a separate deed for each public entity), notification of the relevant public entity through a court bailiff, and acceptance and acknowledgment by the relevant public entity, unless the transferor has performed all its obligations under the agreement pursuant to which the receivable arises (in which case no acceptance and acknowledgement is required). There have been no judgments as to whether the provisions of the Securitization Law supersede the provisions of Royal Decree No. 2440 with respect to the effectiveness of a transfer as against a public entity debtor. There is uncertainty, therefore, as to whether a transfer solely by means of the Securitization Law of receivables owed by public entity debtors will be binding on such debtors. If a transfer is not so binding, the issuer will be dependent on the originator for enforcement of such obligations and, upon an insolvency of the originator, enforcement may become difficult in practice. For Standard & Poor's to give credit to the assignment of debts due from public entities the transaction documents must, at a minimum, contain provisions to the effect that the issuer is entitled to take the steps required by Royal Decree No. 2440 to make a transfer of the receivables effective against the relevant public entity debtors. These will include the execution of a written instrument in the form required by the issuer with the relevant originator confirming the transfer of such receivables, instructing a court bailiff to notify the relevant public entity debtor of the transfer and, unless the originator has performed all of its obligations under the agreement pursuant to which the receivables arise, requesting the public entity debtor to acknowledge and accept the transfer. The issuer must be entitled to take these steps either at any time or upon the occurrence of specified events. Nevertheless, it is unclear, as a matter of law, whether even the performance of such steps would result in the transfer being effective as against the relevant public entity debtors. In other words, even if the issuer performed the relevant steps, the public entities are likely to argue (on the basis of several decisions of the Supreme Court) that the debt was not enforceable by the issuer since the transfer had not been made ab initio (at the outset) by means of a notarized deed. The transfer would remain effective, though, as between the originator and the issuer, but since collection of the receivables would be dependent upon action being taken by the originator upon an insolvency of the originator, Standard & Poor's will need to see clear economic incentives for the liquidator of the originator to collect the debt. These incentives could be, for example, a deferred purchase price payable by the issuer to the originator only upon successful collection of the receivables. In these circumstances, Standard & Poor's will treat the amounts owed by public entity debtors as a liquidity stress. In the absence of such incentives it is very likely that all or part of the receivables due from public entity debtors will be treated as a credit loss. Usury Law The laws on usury prevent lenders from applying interest rates equal to or higher than certain rates (the usury rates) set every three months on the basis of a decree issued by the Italian Treasury. The Italian Supreme Court ruled in 2000 that the laws on usury applied to loans advanced both prior to and after the entry into force of the law in 1996. Moreover, according to a widely held interpretation of the decision, if at any point in time the rate of interest payable on a loan (including a loan entered into before the entry into force of the law or a loan which, when entered into, was in compliance with the law) exceeded the then applicable usury rate, the contractual provision providing for the borrower's obligation to pay interest on the relevant loan became null and void in its entirety. In other words, a fixed-rate loan, the interest on which was lawful at the time the loan was made, would fall foul of the law if, subsequently, interest rates generally were to fall to such an extent that the original fixed rate was now above the rates decreed by the government as being usurious. To restore the status quo ante following a court ruling that would otherwise have effectively prohibited fixed-rate loans in Italy, the Italian Government and Parliament intervened. Law Decree No. 394 of Dec. 29, 2000, converted into law by the Italian Parliament on Feb. 28, 2001, among other things, determined that interest is usurious under Law No. 108 of March 7, 1996 only if the interest rate agreed by the parties exceeded the usury rate applicable at the time the loan agreement was entered into. It also provided, as an extraordinary measure due to the exceptional fall in interest rates in the years 1998 and 1999 and as a political compromise with consumer groups, that interest rates due on installments payable after Jan. 2, 2001 on certain loans are to be substituted with a lower interest rate fixed in accordance with parameters set out in Law Decree No. 394 of Dec. 29, 2000. No official or judicial interpretation of this decree is yet available. More seriously, the legitimacy of the decree has been challenged before the Italian Constitutional Court. Presently, the Italian legal community appears split on the likely outcome of this challenge. Therefore, pending the pronouncement of the Italian Constitutional Court on the constitutionality of the decree, Standard & Poor's considers that fixed-rate loans in securitized pools must be treated as potentially susceptible to the Usury Law as interpreted by the Italian Supreme Court. In assessing the risk posed by this state of affairs, Standard & Poor's may wish to see an analysis of the loan pools indicating how many loans have carried in the past interest rates higher than the prevailing usury rate. Further, in order to prevent future downward movements in the usury rates from rendering the interest obligation on the loans unenforceable, the securitization documentation will need to contain an undertaking by the servicer to monitor the usury rates and appropriately renegotiate the interest rate so as to ensure continuing compliance with the law. In turn, this means that one cannot rely on existing fixed rates to determine future cash flows since those rates may need to be reduced at a later date to comply with new usury rates. To reflect this risk, Standard & Poor's will usually stress future receipts from fixed-rate loans in modeling the expected cash flows. Alternatively, such risk can be absorbed by a third-party swap provider or credit enhancer. Clearly, Standard & Poor's will continue to closely monitor developments in this area and, depending on the outcome of the constitutional challenge, may modify the requirements relating to the Usury Law. Legal Opinions For each Italian securitization transaction that it rates, Standard & Poor's will expect to see appropriate legal opinions dealing with all issues of law raised by the structure that are relevant to the rating. It is not possible to set out a complete list of all the items that need to be addressed in legal opinions since each deal will have its own issues. To maximize the likelihood of a smooth rating process, Standard & Poor's urges legal counsel to the transaction to produce drafts of the legal opinions as early as possible, and to discuss any matters that they expect may be problematic with the analyst assigned to the transaction or a member of the Standard & Poor's legal department. Unless the transaction exhibits some extremely unusual features, the following items will always need to be dealt with in the opinion: That the transaction complies with the requirements of the Securitization Law; As a specific subcategory of the previous item, that the receivables purported to be sold meet the requirements for a blocco (a pool). It is a requirement of that law that, in order to benefit from the Securitization Law, the receivables need to be of the same nature so as to be able to form a blocco. Standard & Poor's recognizes that whether receivables form a pool is a matter of fact and not, technically, the subject matter for a legal opinion. However, the opinion should set out the reasons why, in the informed opinion of the legal advisers, the definition of the receivables set out in the offering memorandum meets the legal requirements for the creation of a pool; That the notice of sale has been published in the Official Gazette; That the transaction has been presented to the Bank of Italy and received a nihil obstat; That the issuer has been enrolled in the Special Register held by the Bank of Italy pursuant to Article 107 of the Banking Act or has made the petition for such enrolment; That a true sale of the receivables has been effected and will not be subject to claw-back, save pursuant to the traditional revocatoria fallimentare. To avoid any doubt, the rules for such claw-back ought to be set out in the opinion so as to enable Standard & Poor's to determine whether any additional risks are present in the relevant transaction; That the segregation principle as set out in the Securitization Law will be effective. The opinion should set out which assets will be covered by the principle in the relevant transaction; That all the other non-negligible assets of the SPE not covered by the segregation principle are subject to effective security that will be recognized by the Italian courts; That the limited recourse provisions set out in the documents will be recognized by the Italian courts and would not fall foul of Article 2740, paragraph 2 of the Italian Civil Code, which provides that "limitations of liability are prohibited if not provided for by law"; That the nonpetition provisions set out in the documents will be recognized by the Italian courts as binding, save that a qualification may be introduced to the effect that, although these form a binding contractual provision, the courts may still elect to hear the suit, leaving the party in breach to face a damages claim from the SPE; That the subordination clauses set out in the documents would be legal, valid, and binding; That, to the extent any document with Italian signatories is governed by a law other than the law of Italy, the choice of that law would be upheld by the Italian courts; To the extent that Standard & Poor's is relying on the crystallization upon publication of the notice in the Official Gazette of set-off rights as between the originator and underlying debtors, that such crystallization will occur; To the extent that any monies belonging to the issuer are left in an account in the name of a third party when Standard & Poor's analysis is not treating these as a total credit loss, that such monies will not form part of the insolvency estate of the account holder but are and will remain the property of the issuer or be subject to a valid enforceable security right in favor of the issuer; That the portfolio purchased and the securities issued are off-balance sheet and/or that the amount of tax payable by the issuer is quantifiable; That the issuer would not suffer from withholding tax on the cash flows it received from the underlying borrowers or under any contracts (e.g., any swaps) or that any such withholding tax is quantifiable; and In the case of lease transactions and based on an analysis of the standard forms of lease used by the originator and subject to the accuracy of statements made by the originator in respect of the price of any purchase option and other relevant matters, that the leases are finance leases and whether they are traslativo or di godimento. In addition, where the documents are governed by a law other than Italian law, Standard & Poor's would expect to see a legal opinion from counsel in the relevant jurisdiction opining on all pertinent aspects of their local law. Further, when the issuer owns property, such as bank accounts, in a jurisdiction other than Italy, Standard & Poor's would expect to see a legal opinion from the jurisdiction in which the asset is situated, to ensure that the security package granted by the issuer will be effective in respect of such asset, thus confirming the status of the SPE as insolvency remote. To the extent that the issuer has the benefit of a derivative contract (swap, cap, or floor) where the counterparty is not Italian, Standard & Poor's would expect to see a tax opinion to the effect that no withholding tax will be imposed by the counterparty's jurisdiction on the payments to the issuer. Such opinion may, however, be provided by the counterparty's in-house counsel. If such opinion cannot, for whatever reason, be given, Standard & Poor's will require a gross-up clause to be inserted in the derivative contract without a corresponding termination clause. As a general matter, highly rated transactions require that clear and unambiguous opinions be expressed on key elements of the structure. Legal counsel to the transactions must be of the firm opinion that the transaction maintains the requisite legal integrity. For this reason, expressions such as the following are not consistent with the highest rating categories: "Although opinions on the matter differ, the majority view seems to be …"; "It is generally held that …"; "It appears more likely, on balance, that …"; "In the absence of judicial precedent, no opinion can be averred on …"; "The courts should …" (rather than "will" or "would"); or "On balance, it is probably correct that …". Finally, these requirements are not exhaustive but are set out to provide guidance. Legal counsel to transactions are invited to contact any member of the Standard & Poor's legal department to seek clarification of any of these points or any other matter that they find problematic. In writing this guide, Standard & Poor's would like to thank Grimaldi Clifford Chance for its assistance and advice, although the content of this paper remains, of course, the responsibility of Standard & Poor's.