

Article Title: ARCHIVE | Legal Criteria: Independent Directors' Role Clarified For English SPEs Data: (EDITOR'S NOTE: —This criteria article is no longer current. It has been superseded by the article titled "European Legal Criteria For Structured Finance Transactions," published on Aug. 28, 2008.)

Some market participants have questioned why independent directors are considered a necessary component of the SPE criteria if the risk of administration could be minimized through additional structuring. This question has been raised in the context of requests for rating affirmations regarding existing corporate securitizations and certain CMBS transactions involving an English SPE. On Dec. 16, 2005, Standard & Poor's Ratings Services published amended criteria for English SPEs. These criteria made clear that, for future transactions, Standard & Poor's requests that a bankruptcy-remote English SPE has and maintains an independent director. This article confirms the reasons why the independent director component of the SPE criteria is important. The requirement applies not only to new transactions, but also for transactions seeking rating affirmation in the context of tap issuances and restructurings.

Legal Rationale For Independent Directors The amended SPE criteria explained in detail the legislative background and perceived legal implications from a rating perspective, referring to the significant erosion of the rights of floating charge holders. One response to this has been the inclusion in some transactions of an additional mechanism (sometimes referred to as "hardwiring"). This mechanism is designed to make the appointment of an administrative receiver more certain. This in turn is intended to increase the likelihood of the business of the SPE continuing until noteholders are repaid, and/or for enforcement to take place in a manner consistent with the relevant rating approach. Standard & Poor's considers this measure contributes materially to certainty of outcome on the insolvency of the relevant entity. However, Standard & Poor's does not see this as completely obviating the need for independent directors.

Practical And Commercial Realities/ Good Corporate Governance The amended SPE criteria also focused on certain practical and commercial realities. Although the ingredients of good corporate governance may sometimes be difficult to define precisely, it seems hard to argue that the presence of at least one independent director is not one of them. The case for independent directors is strengthened where the SPE is owned by a non-SPE operating parent, especially where directors of the parent are also the directors of the SPE board.

Global Consistency The presence of independent directors is a common feature in Standard & Poor's SPE criteria that apply in most jurisdictions. For these reasons, the presence of independent directors or their functional equivalent will continue to be an important element of the SPE criteria for English SPEs. This will be the case even in structures that include additional legal protections intended to minimize the risk of the appointment of an administrator, or to act as a disincentive to the directors not to seek to wind-up the company.

What To Expect And When This article provides advance notice that, as from Jan. 1, 2007, originators, arrangers, and their legal advisers should expect to provide independent directors to all English companies intended to comply with the SPE criteria.

Related Criteria "Amended Structured Finance Legal Criteria For English and Welsh SPEs" (published on Dec. 16, 2005). "European Legal Criteria for Structured Finance Transactions" (published on March 23, 2005). "Structured Finance Criteria Introduced for English and Welsh Special-Purpose Entities" (published on April 25, 2001). All criteria are available on RatingsDirect, the real-time Web-based source for Standard & Poor's credit ratings, research, and risk analysis, at www.ratingsdirect.com. The criteria can also be found on Standard & Poor's Web site at www.standardandpoors.com.