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VIA FEDERAL EXPRESS
Ms. Suzanne Bielstein
Director of Major Projects and Technical Activities
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06851-5116

Re: File Reference No. 1082-200; Exposure Draft dated June 28, 2002, titled "Consolidation of Certain Special-Purpose Entities, a proposed interpretation of ARB No. 51"

Dear Ms. Bielstein:

The Loan Syndications and Trading Association (the "LSTA") appreciates the opportunity to comment to the Financial Accounting Standards Board (the "FASB") on the FASB's Exposure Draft dated June 28, 2002, and titled "Consolidation of Certain Special-Purpose Entities, a proposed interpretation of ARB No. 51" (the "Exposure Draft"). The LSTA submits this comment letter because of its concerns regarding the impact of the Exposure Draft on risk-dispersing collateralized debt obligation transactions ("CDOs") involving the corporate loan market. The LSTA represents all segments of the $1.1 trillion[1] corporate loan market, including investors in CDOs, broker-dealers, commercial banks, investment banks, mutual funds, merchant banks, market vendors, professional service firms and other investment advisors.[2]

The LSTA agrees with the FASB that the current U.S. GAAP rules requiring consolidation based on ownership of a majority of the voting shares may not be relevant for many special-purpose entities ("SPEs"). Therefore, a different standard relating to SPEs is appropriate. When formulating such a standard, it must be recognized that certain SPEs, such as those used in securitization transactions including CDOs, fulfill genuine goals of dispersing the risks and rewards relating to their assets and/or their activities into identifiable financial components which are dispersed among multiple parties on a non-recourse basis. In addition, control of such SPEs is spread among the various entities involved and generally no one entity has the ability to direct all the significant activities of such SPEs. To require the consolidation of the assets and liabilities of such an SPE will not accomplish the goal of financial transparency in financial statements and will, in fact, be misleading. Thus, a balance between SPEs that should be required to be consolidated and SPEs that should not be required to be consolidated must be achieved through whatever U.S. GAAP standard is ultimately adopted.

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[1] New issue syndicated loan volume in 2001, as reported by Loan Pricing Corporation.

[2] Thus, the LSTA's membership represents new issuance and primary sales, par/near par and distressed trading; and bank institutional portfolio management. Attached hereto as Appendix A is a complete list of the LSTA's members. The LSTA and its members are committed to advancing the public understanding of the corporate loan market and to serving the public interest by encouraging adherence to the highest ethical standards by all market participants and promoting the highest degree of confidence for investors in floating rate corporate loans.

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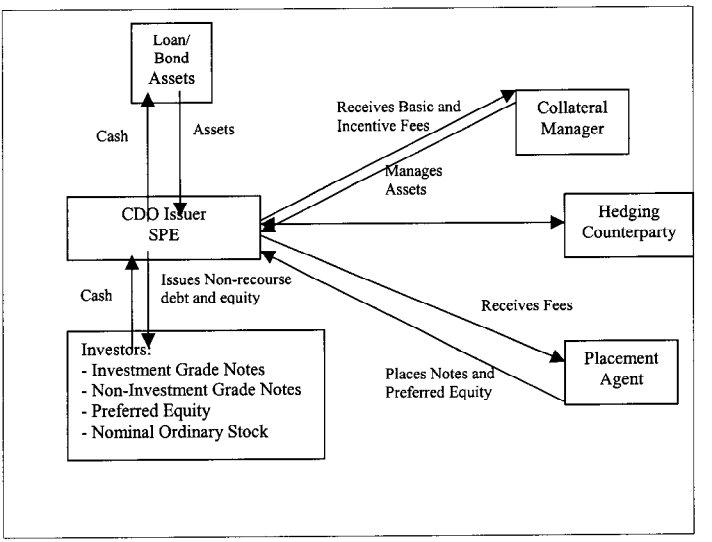
In the introductory section titled "Summary – Differences between this Proposed Interpretation and Current Practice" (at page ii), the Exposure Draft acknowledges this necessity to distinguish the treatment of SPEs that should not require consolidation when it states that "SPEs that effectively disperse risks . . . would not be consolidated [under the Exposure Draft] unless a single party holds an interest or combination of interests that effectively recombines risks that were previously dispersed". Yet many CDOs would have to be consolidated under the Exposure Draft since the analytical frameworks included in it, when applied to a typical CDO, may well require some party to consolidate the CDO. Therefore, the FASB would not achieve its own stated goal of excluding such SPEs from consolidation. The points covered in this comment letter request certain revisions to or clarifications of the Exposure Draft to ensure that SPEs used in risk-dispersing, non-recourse transactions, such as CDOs, will clearly not require consolidation under U.S. GAAP.

I. Typical CDO Structure.



- A typical CDO involves the purchase of assets (e.g. loans or participations in loans or bonds) by an SPE and the issuing by it of various tranches of securities which in economic effect transfer the risks and rewards (represented by the future cash inflows of the assets purchased) to the investors in the various tranches.

- A placement agent or underwriter facilitates the sale of the securities issued in return for a fee.

- The debt securities issued by the SPE are secured by the assets held by the SPE and the investors in all the classes of debt and equity securities are limited in recourse to those assets for repayment of their investment, plus interest or yield, as the case may be.

- The SPE retains a collateral manager to manage the assets pursuant to a detailed management agreement which requires the portfolio of assets to satisfy and maintain eligibility criteria prescribed in detail by the rating agencies rating the securities and set forth in the operative documents. All purchases and sales of assets must comply with such criteria and an independent collateral administrator monitors and verifies compliance with such criteria. The collateral manager generally receives basic and incentive fees in return for managing the assets.

- The SPE also may enter into hedging transactions, for example an interest rate swap, with a counterparty to match the cash flows of the assets to those of the securities being issued.

- The amount of the equity securities issued by the SPE varies based on the risk of the assets and independent rating agency requirements.

II. Executive Summary.

1. Since paragraphs 22 and 23 should not represent a "harsher" standard than the general variable interests standard, we recommend that the Exposure Draft be revised to ensure that an SPE within paragraph 22 has the right to make an election to either apply the analysis under the "variable interests" approach or to apply paragraphs 22 and 23.

2. We recommend that paragraphs 22 and 23 be revised to state that no investor would consolidate an SPE in a CDO transaction if substantially all of its assets are financial assets and if the risk of loss of the investor in such SPE is limited to its investment in purchasing the class or classes the securities in which it is investing.

3. Paragraph 22 should be revised (1) to allow the SPE in a CDO to hold derivative or synthetic instruments that do not combine the risks in a manner that supports the senior debt and (2) to specifically enumerate the necessary characteristics rather than relying on incorporation by reference to another statement (including Statement 140).

4. Paragraph 23 should be revised (1) to add a threshold holding of a majority of the variable interests absent which no consolidation would be required, (2) to clarify that the customary limited discretionary trading allowed in a typical CDO transaction is not within paragraph 23.a., (3) to state that the holding of subordinated securities issued by the CDO will only constitute the provision of asset or credit support within paragraph 23.b. where a non-arm's length price is paid for such securities or where there is a requirement of some form of on-going

payment after the date of investment in the securities and (4) to state that fees to service providers are market-based if negotiated at arm's length under competitive conditions.

5. The "variable interests" approach should be revised to state that (1) a majority (i.e. more than 50%) of the variable interests is required to evaluate consolidation, (2) only derivative instruments that concentrate or recombine risks are considered variable interests within paragraph 18.j. and (3) the presumption that fees are non-market-based should be deleted and fees should be considered market-based if negotiated at arm's length under competitive conditions.

6. The "voting rights" approach (1) should distinguish between the capital required in the case of a substantive operating enterprise and that of a bankruptcy remote SPE, (2) state that a substantive evaluation will assess that the existence of an investment at risk regardless of its form and that in a tranched transaction more than one class of securities may be combined to satisfy the equity investment requirement, and (3) state that the level of required equity investment is a function of the nature of the underlying assets, the related expected losses and the stress levels used by the rating agencies for credit analysis of the senior indebtedness.

7. As a result of the compliance burdens we request that the Exposure Draft adopt a majority of the variable interests approach or, absent such adoption, that at a minimum the FASB undertake a cost-benefit analysis of the "significantly more" requirement prior to finalizing the Exposure Draft. We believe that such an analysis would clearly indicate that the costs of the "significantly more" approach far outweigh any perceived benefits.

III. The Exposure Draft would result in misleading Financial Reporting With An Unintended Negative Impact on the CDO Market.

The LSTA believes that the Exposure Draft, if adopted in its current form, would require many SPEs used in typical CDOs to be consolidated, and, therefore, would result in misleading and distorted balance sheets. For example, one of our members (a publicly held investment management firm, that is an institutional collateral manager for CDOs and who also owns approximately $13 million of the equity issued by the SPEs in such CDOs) could be required to consolidate an additional $1.6 billion of assets that it manages and the related liabilities issued by such CDOs. However, its creditors have no claim to such assets and it has no current or future obligation with respect to such liabilities. In the event of consolidation, its debt to equity ratio would go from a healthy 0.6 to 1 to over 5.0 to 1 without any change in its true financial condition. The original, lower debt ratio appropriately measures the risks faced by the company's general creditors and investors. As a result of such inappropriate consolidation, an entire cadre of analysts will have to be trained to "deconsolidate" the resulting distorted financial statements and to provide a more accurate financial picture.

These unintended accounting results would have a chilling effect on all aspects of the CDO and corporate bank loan market. Public financial institutions, facing the consolidation of non-recourse assets and liabilities, will hesitate in providing asset management services. Equally, investors, faced with the consolidation of non-recourse assets and liabilities, will be reluctant to invest in securities issued by CDOs. Further, the fact that under the Exposure Draft consolidation is re-evaluated quarterly and the result to an investor can depend on the actions of others will be a significant deterrent to CDO investors. Moreover, demand for leveraged loans from the CDO market (which, at the end of 2001, purchased 47.55% of all leveraged loans in the primary market) would be dramatically reduced. The ultimate impact would be to reduce liquidity, diversification and credit for companies who were not considered investment grade. Liquidity and diversification capability provide stability to the financial markets.

IV. Paragraphs 22 and 23 Should Not Represent a "Harsher" Standard than the General Variable Interests Framework and therefore the Exposure Draft Should Provide that an SPE within Paragraph 22 Has the Right to a Make an Election to Either Apply the Analysis Under the Variable Interests Approach or to Apply Paragraphs 22 and 23 of the Exposure Draft.

Paragraphs 22 and 23 appear to be intended to provide relief from consolidation for participants in certain SPEs. We strongly support that objective. However, since the actual results under paragraphs 22 and 23 may be more harsh, we request that a participant in an SPE that may be within paragraph 22 be given the right to elect whether it wishes to be analyzed under either the general variable interests approach or under the special variable interests approach for SPEs holding financial assets under paragraphs 22 and 23. This election right would ensure that a participant in a paragraph 22 SPE was not worse off than it would be if the more general variable interests analysis was applied to it.

V. The Exposure Draft Should Ensure that SPEs used in typical CDOs Would Not Require Consolidation Under Paragraphs 22 and 23.

We understand that the FASB intended paragraphs 22 and 23 to ensure that SPEs that effectively disperse risks, such as in CDO securitization transactions, not be consolidated. Unfortunately, we do not believe that this goal has been realized and request modification and/or clarification of paragraphs 22 and 23 so that risk-dispersing SPEs used in CDOs would unambiguously not require consolidation with any entity under paragraphs 22 and 23.

1. We understand that the conceptual underpinning of paragraphs 22 and 23 is to identify legitimate risk dispersing SPEs and exclude them from requiring to be consolidated. We do not see the relationship between that goal and the requirements of paragraphs 22 and 23. Indeed, the ambiguities raised by the current language of paragraphs 22 and 23 would be best clarified by a clear restatement in paragraph 22 of the conceptual underpinnings. Therefore, paragraph 22 should be revised, consistent with the FASB's stated goal, to state that no investor will consolidate an SPE in a CDO transaction if substantially all of the SPE's assets are financial assets and if the investor's risk of loss in such SPE is limited to its investments in purchasing the class or classes of securities in which it is investing.

2. If the conceptual framework is not modified as suggested above, then we suggest the following specific revisions to paragraph 22:

(1) Paragraph 22. b. incorporates from the qualifying SPE ("QSPE") rules under Statement 140 restrictions on the ability of a paragraph 22 SPE to hold derivative instruments or acquire synthetic assets (see paragraph 35 of Statement 140). In this connection, we note that there should be no prohibition on a paragraph 22. b. SPE holding derivative instruments or synthetic assets that do not combine the risks in a manner that supports the senior debt. That approach would be fully consistent with the proposed conceptual framework. Indeed, limiting the nature of derivative instruments that a paragraph 22. b. SPE may hold on the basis of the rules established with respect to QSPEs does not appear to us to be analogous or helpful in the context of identifying SPEs that disperse risks. The rationale for the limitations placed on the holding of derivatives by QSPEs was largely to ensure that a QSPE remain a passive entity. Given that a paragraph 22 SPE is allowed more activity than a QSPE, the limitation on the holding of derivatives is unnecessary and a paragraph 22 SPE should be allowed to hold such

instruments subject to the restriction that it does not combine the risks in a manner that supports the senior debt.

(2) To ensure clarity, we would recommend that paragraph 22. b. be revised to specifically enumerate the necessary characteristics required for a paragraph 22 SPE (whether they are similar to those in Statement 140 or not) and not merely incorporate them by reference from another statement.

3. We recommend the following revisions to paragraph 23:

(1) Paragraph 23 should be revised to add a threshold holding of a majority of the variable interests absent which no consolidation would be required. This would avoid an investor finding that due to transfers by others, it had become the most significant variable interest holder required to consolidate. Such an accounting surprise would not be a tolerable risk for most investors.

(2) The characteristic of purchase and sale authority and sufficient discretion in exercising such authority identified in paragraph 23. a. does not establish a reason to consolidate an SPE. In a typical CDO, discretionary purchasing and selling (exercised by the collateral manager on behalf of the SPE) with respect to the buying and selling of assets is built into the operative documents. Discretionary purchasing is confined to the initial investing of proceeds from the issuance of securities and for a finite period reinvesting of repayment proceeds in all cases in compliance with the detailed eligibility criteria established by the operative documents. Generally, the ability to conduct discretionary trading (i.e. selling to buy something else) each year is limited to 10 or 15% of the total assets. All such discretion is terminated if a CDO becomes stressed or the rated securities are downgraded or are threatened with a downgrade by the rating agencies. Therefore, paragraph 23. a. should be clarified to indicate that this characteristic does not apply to CDO transactions where the operative documents set forth clear eligibility criteria which support ratings based on statistical default and recovery experience and the entity with the discretion cannot unilaterally change such criteria.

(3) In CDOs, investors often require that the collateral manager or its affiliates purchase a portion of the subordinated debt or equity tranche of securities so as to ensure that the collateral manager's interests are aligned with those of the other investors. When the collateral manager purchases on the same terms as others, such a holding by a collateral manager is a stand-alone investment and only the amount of such investment is at risk. In addition, the collateral manager's holding endows no special rights or obligations and merely entitles it to a pro rata allocation of the distributions relating to the class of securities held. The collateral manager is not required to provide any further investment in the event of losses. Therefore, paragraph 23. b. should be clarified to ensure that the characteristic of the provision of asset or credit support requires either a non-arm's length price or the provision of some form of ongoing payment after the date of investment in the securities.

(4) The paragraph 23. c. characteristic (of receipt of non-market based fees) raises the same issues as those identified below under Section VI. 3. In addition, the guidance in paragraph 19 (to which paragraph 23. c. refers) does not focus on the distinct nature of a provider of services for a fee to an SPE.

VI. <u>Consolidation Based on the Ownership of the Variable Interests</u>.

1. The Exposure Draft specifies a "variable interests" approach for those SPEs not meeting the requirements for evaluation based on voting interests or qualifying as a transfer by a

transferor to an SPE within Statement 140. The variable interests approach would require consolidation by an entity holding either a majority of the variable interests or a significant variable interest that is significantly more than the variable interests held by any other entities. This could result in the consolidation of an SPE by an entity that does not, in fact, have a majority of the variable interests. The "significantly more" approach adopted by the Exposure Draft will make investors unwilling to buy sizable portions of subordinated or mezzanine tranches if they risk having to consolidate an SPE in which they are passive investors. This is likely to increase the cost of capital in CDO transactions as arrangers and underwriters have to seek additional investors. Also, for example in a case where on the closing date the subordinate tranche was held by three investors holding 40%, 40% and 20%, respectively, of such tranche and, at some later date, one of the 40% investors transferred its interest equally to two new investors, the "significantly more" approach may require consolidation by the remaining 40% holder in circumstances where the economic interest of such holder has not changed at all. This result is unwarranted. Therefore, the analysis of what constitutes a variable interest sufficient to require consolidation should be revised so that the variable interest consolidation analysis would only need to be evaluated by an entity holding at least a majority of the variable interests.

2. In paragraph 18. j. of the Exposure Draft, derivative instruments are identified as an example of variable interests. Since derivatives can take a variety of forms, we suggest that, as suggested in V. 2. (1) above, the FASB clarify that only those derivative instruments that concentrate or recombine risks will be considered to be variable interests. For example, a simple fixed/floating interest rate swap or currency swap or credit-linked note structure should not be a variable interest even when substantially in the money to the SPE.

3. Pursuant to the Exposure Draft, a contract to provide services to an SPE is presumed to be for a non-market based fee and hence itself constitutes a variable interest. To rebut the presumption, the fees must be demonstrated to be "comparable to fees in similar observable arm's length transactions or arrangements". We do not believe that a presumption that fees are not market-based is appropriate where the fees are negotiated at arm's length by two independent principals acting for their own account under competitive conditions. In CDO transactions, the fees are negotiated in the context of a Rule 144A investor market and such investors impose a natural constraint on the ability of service providers to impose non-market fees. In such an environment, a presumption that fees are not market-based is inherently inappropriate. In addition, CDO transactions are privately negotiated transactions and it will be difficult, if not impossible, to identify "similar observable arm's length transactions or arrangements". Also, the requirement to compare "similar observable" transactions will necessarily involve a process of discussing fees with others and risks creating an anticompetitive incentive to charge the same fee without regard to extrinsic factors such as the experience of the service provider or the nature of the assets. Therefore, we request that there be no presumption and that a fee be simply described as market-based if it is negotiated at arm's length under competitive conditions. Finally, we request that paragraph 19 specifically provide that the market-based nature of fees is assessed at the time of the closing of a CDO or other transaction and that subsequent market movements would not affect the market-based nature of fees as so determined.

Differing interpretations have been given to paragraph 19 by different readers. Some readers of the Exposure Draft believe that if a collateral manager has an investment-at-risk through its purchase of some portion of a non-rated tranche of securities issued by the SPE, then the fees received by such collateral manager are automatically non-market based. Other readers of the Exposure Draft believe that the fees paid in the circumstances described could be market-based if they are comparable to fees in similar observable arm's length transactions or arrangements. The latter readers believe that paragraph 19 creates two classes of market-based fees: those that are variable interests and those that are not. Paragraph 19 of the Exposure Draft

should be clarified to ensure that fees are market-based for purposes of paragraphs 22 and 23 if they were negotiated at arm's length under competitive conditions.

VII. Consolidation Based on the Voting Rights Approach.

1. Under the voting rights approach, the Exposure Draft requires the sufficiency of an SPE's equity investment to be compared to the amount of equity invested in substantive operating enterprises with similar asset and liabilities, similar activities and similar risks. We do not believe that an SPE's capital should have to be compared to the capital of a substantive operating enterprise since operating enterprises are subject to risks that are not present in SPEs. Thus, the Exposure Draft itself acknowledges (in the section entitled "Summary—Reasons for Issuing this Proposed Interpretation") that "[m]ost SPEs serve valid business purposes, for example, by isolating assets or activities to protect the interests of creditors or other investors". The SPE used in a CDO is, in fact, established as a bankruptcy remote entity pursuant to rating agency requirements of bankruptcy remoteness. As such its capital requirements should reflect the lower level of risks involved as compared to the additional risks involved with a non-bankruptcy remote operating enterprise.

2. We are uncertain whether the "equity investment" must be equity in form. Given the emphasis in the Exposure Draft of substance over form, we do not believe that a particular form should be required. The important question should be what rights and risks are associated with any particular security. Therefore, we request that the Exposure Draft clarify that a substantive evaluation will assess the existence of an investment at risk regardless of its form and that in a tranched transaction more than one class of securities may be combined to satisfy the "equity investment" requirement.

3. The presumption that only an independent equity investment of 10% is sufficient is arbitrary. The level of equity investment required in a CDO should be a function of the nature of the underlying assets, the related expected losses and the stress levels used by the rating agencies for credit analysis of the senior indebtedness and the Exposure Draft should be revised accordingly. Since in many instances, this may result in less than 10% being more than adequate, a presumption of 10% is inappropriate.

VIII. Disclosing the Assets and Liabilities of an SPE in a Footnote in the Financial Statements of the Collateral Manager.

When consolidation is required by a collateral manager with respect to a CDO under the Exposure Draft, we recommend that, rather than conventional consolidation, the collateral manager be required to disclose its investment in the securities issued by the CDO, the amount of CDO assets under management and the related liabilities in a descriptive footnote in its financial reports.

IX. Administrative Burdens.

The Exposure Draft would impose significant burdens to ensure compliance. The most significant burden would be imposed if the Exposure Draft persisted in requiring an evaluation on each reporting date of whether any entity involved in the activities of an SPE had a variable interest that is significant and significantly larger than any other. This evaluation would require considerable information to be gathered by each entity with respect to not just its own involvement but also the involvement of all other parties to the transaction. In a private CDO transaction, information relating to other investors is not available. In addition, the evaluation would require each investor on or prior to each reporting date to assess changes in the nature of

variable interests based on the activities of unrelated parties. In light of the above, we again request that the FASB adopt a majority of the variable interests approach. Absent such an adoption, we request that the FASB undertake a cost-benefit analysis of the significantly more requirement prior to finalizing the Exposure Draft.

Conclusion.

In conclusion, we thank the FASB for the opportunity to comment on the Exposure Draft. We also look forward to participating in the round-table discussion scheduled for September 30, 2002. The issues involved in the Exposure Draft are of extreme importance to the LSTA's membership and we would be happy to discuss any aspect of this comment letter with you. Please do not hesitate to contact Allison A. Taylor, the LSTA's Executive Director, at 212-404-7592 or by e-mail at ataylor@lsta.org) if you have any questions regarding this comment letter.

Very truly yours,

THE LOAN SYNDICATIONS AND TRADING ASSOCIATION

The Loan Syndications and Trading Association

Annex A

LIST OF LSTA MEMBERS - AUGUST 2002

ABN Amro
Alliance Capital Management
Amroc Investments
Ares Management LLP
Bain Capital/Sankaty
Banc One Capital Markets
Bank Hapoalim
Bank of America Securities LLC
Bank of Montreal
The Bank of New York
Bank of Tokyo- Mitsubishi
Barclays Capital
Bayerische HypoUndVereinsbank, AG
Bear Stearns & Company
Black Diamond Capital
BNP Paribas Group
Brobeck, Phelger & Harrison LLP
Brown Rudnick Berlack Israels LLP
Cadwalader, Wickersham & Taft
CDS
Chapman and Cutler
CIBC World Markets
Citibank/SSMB
Cleary, Gottlieb, Steen & Hamilton
Clifford Chance Rogers & Wells
Commerzbank, AG
Credit Industriel et Commercial
Credit Lyonnais
Credit Research & Trading, LLC
Credit Suisse First Boston
CreditTrade
Dechert
Debevoise & Plimpton
Deloitte & Touche LLP
Deutsche Bank Securities Inc.
Drinker Biddle & Shanley LLP
Eaton Vance Senior Debt Portfolio
Emmet, Marvin & Martin
Esbin & Alter
Fidelity Investments
Financial Computer Software
Fitch IBCA
Fleet BankBoston
Four Corners Capital Management
Franklin Mutual Advisers
Goldman Sachs
Goodwin, Procter
Highland Capital Management, L.P.
ING Capital Advisors
ING Investments LLC
Intralinks
INVESCO Senior Secured Management
IQ Financial
JP MorganChase
Kaye Scholer
Kramer Levin Naftalis & Frankel LLP
Lehman Brothers, Inc.
Loan Pricing Corporation
LoanX
Mandel, Katz, Manna & Brosnan LLP
Mayer Brown Rowe & Maw
Merrill Lynch, Pierce Fenner & Smith
Milbank, Tweed, Hadley & McCloy, LLP
Miller Tabak & Roberts
Mizuho Financial Group
Moody's Investors Service
Morgan Stanley Dean Witter
Natexis Banques Populaires
National Australia Group
National City Bank
Nixon Peabody
O'Melveny & Myers LLP
Oppenheimer Funds
Orix USA Corporation
Orrick, Herrington & Sutcliffe
Patton Boggs
Paul, Hastings, Janofsky & Walker LLP
PB Capital Corporation
Pillsbury Winthrop
PIMCO
PNC Capital Markets
PPM America, Inc.
Prudential Financial
Richards Spears Kibbe & Orbe
RBC Capital Markets
San Paolo IMI Bank
Scotiabank
The Seaport Group
Shearman & Sterling
Sidley Austin Brown & Wood
Simpson Thacher & Bartlett
Skadden, Arps, Slate, Meagher & Flom LLP
Societé Genérale
Standard & Poor's/PMD
Stein Roe & Farnham
Stroock & Stroock & Lavan LLP
Sullivan & Cromwell
Sumitomo Mitsui Banking Corporation
Sumitomo Trust & Banking Company
SunTrust Robinson Humphrey
Taconic Capital
TD Securities
Trade Settlement, Inc.
UBS Warburg
The UFJ Bank Limited
Wachovia
Van Kampen Investment
Vinson & Elkins
Washington Mutual Bank
Womble Carlyle Sandridge & Rice