The following Advisory Opinion is to advise the reader of the current position of the Kentucky Department of Insurance (the "Department") on the specified issue. The Advisory Opinion is not legally binding on either the Department or the reader.

Kentucky Department of Insurance

Advisory Opinion 2002-04

TO: ALL LIFE INSURERS

FROM: JANIE A. MILLER, COMMISSIONER OF INSURANCE

RE: GLOBAL FUNDING AGREEMENT-BACKED SECURITIES

****

The Department of Insurance has received numerous requests for interpretive opinions on the application of the Kentucky Insurance Law to various proposed funding agreement/guaranteed investment contract ("GIC") backed securitization transactions. This Advisory Opinion is based on the aggregate descriptions of the transactions submitted.

Issues

Generally, the requests concern:

1. whether the proposed securities or series of securities are "insurance contracts" under Kentucky law;
2. whether Kentucky investors in the securities need to be licensed as insurers or reinsurers;
3. whether the issuer or underwriter (and any controlling person or intermediary) who is issuing or selling the securities will not be deemed to be an insurer, reinsurer, insurance agent, consultant, limited insurance representative, surplus lines broker, managing general agent, or reinsurance intermediary for licensing purposes; and
4. whether there is any other basis that the securities would not be enforceable according to their terms under the Kentucky Insurance Law.

-

Description of Transaction

In a typical transaction of this kind, one or more life insurers issue one or more funding agreements that will be used to secure debt or equity securities. The funding agreements may be initially issued directly to a Special Purpose Vehicle ("SPV") or, alternatively, may be initially

issued to one or more securities firms or other persons or entities not otherwise a party to the transaction and subsequently transferred to the SPV. The funding agreements provide for periodic payments by the issuing insurer to the SPV based on an agreed upon schedule. The payments are not be tied to a loss or to a morbidity or mortality contingency. The SPV may be organized under the laws of a jurisdiction within or outside of the United States. The SPV is organized as a business trust, limited liability company, or other type of single purpose entity. The SPV is not an authorized insurance company. The life insurer(s) are organized under the laws of a jurisdiction within the United States and are subject to the supervision of the state of domicile.

The SPV will issue securities, or a series of securities, to be marketed to large institutional buyers within and/or outside the United States. The SPV will be managed and controlled by an independent trustee. The trustee will have a fiduciary duty to protect the rights of the holders of the securities. The securities will be freely transferable subject to the restrictions of the relevant federal and state securities laws. Typically, purchasers of the securities (initially, and if any resales) are limited to qualified institutional buyers as defined in 17 CFR 230.144A. The securities are issued pursuant to Rule 144A, Regulation D, or another applicable exemption under the Securities Act of 1933 or, if outside of the United States, pursuant to Regulation S; however, securities are also sold pursuant to registered offerings.

The SPV uses the proceeds from the sale of the securities to purchase, or otherwise fund the purchase or transfer of the rights or interests in, the funding agreements from the insurers or the initial purchasers. Once the funding agreements have been transferred to the SPV, they are not eligible for further transfer or assignment by the SPV without the prior consent of the issuing insurers. The SPV may enter into one or more swap transactions with persons or entities not affiliated with the insurers.

The securities are issued in denominations smaller than the face amount of the funding agreements held by the SPV. The securities may be issued in a series (or "tranches") and each series may be secured by separate funding agreement(s). Generally, the amounts due under the funding agreement(s) will be sufficient to pay all amounts due under the related series of securities and to make additional payments into a reserve account that will be used to pay up-front expenses, ongoing expenses, and fees. The terms of the securities and funding agreement may or may not be identical. The periodic payments made by the insurance company to the trust may be higher than or equal to the periodic payments due to the securities holders.

The securities holders have no direct privity of contract with, or recourse against, the insurer under the funding agreement. Payments are not directly or indirectly guaranteed by the insurer(s). The securities holders' rights against the funding agreement are to be enforced by an indenture trustee acting on their behalf. In the event of nonpayment by the SPV, the sole enforcement right of the investor is against the SPV and its assets.

Opinion

These types of proposed securities offerings do not appear to be the transaction of insurance within the meaning of KRS 304.3-070 and do not appear to be contracts of insurance under KRS 304.1-030. Accordingly, the purchasers of such securities are not required to become licensed insurers or reinsurers. The issuer, underwriter, and any controlling persons or intermediaries, who are issuing or selling the securities, are not required to be licensed as an insurer, reinsurer, insurance agent, consultant, limited insurance representative, surplus lines broker, managing general agent, or reinsurance intermediary, etc. Furthermore, the Department will not provide an opinion regarding (1) the enforceability of the securities in the Commonwealth of Kentucky; (2) whether these types of securities will be considered admitted assets; and (3) the accounting treatment for issuing funding agreements or purchasing securities in these types of transactions.

The Department reiterates that this opinion is advisory only and does not constitute a binding declaratory ruling by the Commissioner with respect to this matter. Accordingly, the Department of Insurance reserves the opportunity to reevaluate its position with regard to such securities.

If you have any further questions or comments, please call the Legal Division at (502) 564-6032, ext. 4235.

____

Janie A. Miller, Commissioner of Insurance

Date: June 1, 2002