

**PUBLIC**

MAY 8 1995

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 95-83-CC  
ESI S.A.  
File No. 132-3

Your letters of February 9, 1995 and April 21, 1995 request our assurance that we would not recommend enforcement action to the Commission if ESI S.A. ("ESI") issues securities without registering under the Investment Company Act of 1940 (the "1940 Act") in reliance on Rule 3a-7 thereunder. 1/

ESI, a Luxembourg limited liability corporation, proposes to conduct a private placement of notes to investors within the United States without registering as an investment company. Each series of notes will be secured by (i) debt securities issued by or on behalf of a European Union member state ("Sovereign Securities") and (ii) the rights of ESI under an interest rate and currency exchange agreement entered into between ESI and a swap counterparty.

You state that ESI has issued and sold multiple series of secured notes outside the United States in accordance with Regulation S under the Securities Act of 1933 ("Securities Act"). ESI obtained legal opinions that registration was not required under the Securities Act or the 1940 Act because ESI did not use U.S. jurisdictional means in connection with its offerings.

Accordingly, counsel did not base its analysis on Rule 3a-7 with respect to each such issuance.

You represent that the previous offshore issuances would have complied with the provisions of Rule 3a-7, except for two provisions relating to the trustee. First, Rule 3a-7(a)(4)(i) requires an issuer to appoint a trustee that, among other things, meets the requirements of Section 26(a)(1) of the 1940 Act, which requires that the trustee be a "bank," as defined in Section 2(a)(5). Chase Manhattan Trustees Limited (the "Trustee"), the trustee for all of ESI's previous issuances, is organized under the laws of England and therefore does not meet the requirements of Section 26(a)(1). The Trustee, however, is a wholly-owned subsidiary of The Chase Manhattan Bank, N.A., which is a "bank" as defined in Section 2(a)(5). You represent that the proposed U.S. private placement and all future offerings using U.S. jurisdictional means will comply with Rule 3a-7(a)(4)(i).

Second, Rule 3a-7(a)(4)(iii) requires an issuer to take actions "necessary for the cash flows derived from eligible assets for the benefit of the holders of the fixed-income securities to be deposited periodically in a segregated account that is maintained or controlled by the trustee consistent with

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1/ Rule 3a-7 excludes from the definition of "investment company" certain issuers that pool certain financial assets and issue securities backed by those assets.

the rating of the outstanding fixed-income securities." You state that, with respect to the previous offerings, cash flow paid from the swap counterparty for the benefit of ESI is deposited in a segregated account held by the applicable paying agent, an affiliate of the Trustee, for the benefit of the holders of the notes. Cash flow derived from the Sovereign Securities is collected in a segregated account by a custodian, also an affiliate of the Trustee, and is then transferred to the swap counterparty in accordance with the terms of the transaction documents. ESI does not satisfy Rule 3a-7(a)(4)(iii) because the funds are not deposited in an account maintained or controlled by the Trustee, but with affiliates of the Trustee acting in their capacities as paying agent or custodian. You represent that the trustee for the proposed private placement and all future offerings using U.S. jurisdictional means will comply with all provisions of Rule 3a-7(a)(4)(iii).

Based on the facts and representations in your letter, and without necessarily agreeing with your legal analysis, we would not recommend enforcement action to the Commission if ESI does not register as an investment company under the 1940 Act in reliance on Rule 3a-7. Our position is based particularly on your representation that (1) the proposed U.S. private placement and all future offerings using U.S. jurisdictional means will fully comply with the provisions of Rule 3a-7, including subsections (a)(4)(i) and (a)(4)(iii), and (2) ESI's previous offshore offerings conformed, and all future offshore offerings will conform, to the requirements of Rule 3a-7, except as described above. 2/ You should note that any different facts or representations may require a different conclusion. This

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2/ We do not believe that Hyperion Capital Management, Inc. (pub. avail. Aug. 1, 1994) supports your argument that each series of ESI's previous issuances should be deemed a separate issuer for purposes of Rule 3a-7. Our position in Hyperion was based on the representation that, in the event of the sponsor's bankruptcy, the sponsor's creditors would have no recourse against the pool, and holders of securities issued by the pool would look to the pool for payment. In your April 21, 1995 letter, however, you state that a bankruptcy court in Luxembourg may or may not enforce contractual provisions limiting the recourse of investors in a particular series to the assets underlying that series. Therefore, we do not believe that each pool of assets backing a series of notes, rather than ESI, should be considered the issuer of the notes.

response expresses the Division's position on enforcement action  
ly, and does not purport to express any legal conclusions on  
the questions presented.

*Janice M. Bishop*

Janice M. Bishop  
Attorney

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**O**RRICK, HERRINGTON  
& SUTCLIFFE

1940 Act/Rule 3a-7

February 9, 1995

Office of the Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Mail Stop 10-6  
Washington, DC 20549

ICA of 1940
Section
3a-7
Availability 5/8/95

Attention: Jack W. Murphy

Re: ESI S.A. -- Investment Company Act  
of 1940, Rule 3a-7

Dear Mr. Murphy:

On behalf of our client, ESI S.A. ("ESI"), we request the concurrence of the staff (the "Staff") of the Division of Investment Management of the Securities and Exchange Commission regarding the availability to ESI, in connection with a proposed private placement of notes into the United States, of the exemption from registration as an "investment company" under the Investment Company Act of 1940, as amended (the "1940 Act"), provided by Rule 3a-7 promulgated under the 1940 Act.

**Background**

ESI was incorporated with limited liability in Luxembourg on April 22, 1994 for the purpose of issuing securities and entering into certain other related transactions. ESI has issued and sold multiple series of secured notes outside the United States in accordance with Regulation S under the Securities Act of 1933, as amended (the "Securities Act"). Each series of notes has consisted of a single class of notes paying interest on a per annum basis based upon either a fixed or floating interest rate. The notes have been denominated in several different currencies.

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Each series of notes is secured by (i) debt securities issued by or on behalf of a European Union member state ("Sovereign Securities") and (ii) the rights of ESI under an interest rate and currency exchange agreement (each, a "Swap Agreement") entered into between ESI and a swap counterparty. To date, all Swap Agreements have been entered into with the same swap counterparty, but the Sovereign Securities acquired by ESI have been of varying types and issues and have had varying maturity dates, payment dates and interest rates.

Each series of notes is secured only by those assets pledged as security for such series and noteholders do not have recourse to any of the assets pledged as security for other series of notes. The Indenture governing the notes provides that each series of notes is payable solely from (i) payments or prepayments of, or with respect to, the Sovereign Securities acquired with the proceeds of such series of notes and (ii) the related Swap Agreement. The notes are not cross-collateralized or cross-defaulted between series. Each series of notes has also been rated "AAA" by Standard & Poor's Ratings Group.

ESI currently wishes to conduct a private placement of notes to investors within the United States without being required to register as an "investment company" under the 1940 Act. To avoid registration under the 1940 Act, ESI proposes to rely upon the exclusion from the definition of "investment company" provided by Rule 3a-7. ESI's previous offshore issuances were accomplished in accordance with Regulation S under the Securities Act and without registration under the 1940 Act and counsel rendered legal opinions to the effect that registration was not required under the Securities Act or the 1940 Act. In reaching its opinions with respect to the 1940 Act, counsel relied on the fact that ESI, a foreign corporation, did not use U.S. jurisdictional means in connection with its offerings and, accordingly, counsel did not base its analysis on Rule 3a-7 with respect to each such issuance. Notwithstanding the absence of a need to comply with Rule 3a-7, as described below, ESI's previous offshore issuances complied with all of the provisions of Rule 3a-7, except for two technical provisions relating to the trustee.

Based upon the analysis set forth below, we believe, in accordance with previous applications of the provisions of the 1940 Act, that each pool of assets securing a series of notes should be considered an individual issuer for purposes of applying the provisions of Rule 3a-7. Accordingly, future issuances by ESI that comply with all the provisions of Rule 3a-7 should be entitled to the exemption from registration under the 1940 Act accorded by the rule. Our position is based, in part, upon the limited recourse of each series of notes and the discrete

nature of the pool of assets securing each series. Additionally, we are of the belief that given the structure of ESI's previous issuances, its substantial compliance with the requirements of Rule 3a-7 and the changes to ESI's issuances using U.S. jurisdictional means as proposed herein, permitting ESI to rely upon Rule 3a-7 in connection with future issuances is neither inconsistent with any statutory objective of the securities laws nor violative of the public policy concerns expressed by the Staff in its application of the securities laws and in the promulgation of the rules thereunder. Therefore, because (i) each pool of assets should be considered an individual issuer and/or (ii) ESI substantially complied with the provisions of Rule 3a-7 in connection with its previous offshore offerings of notes, ESI should not be precluded from issuing future series of notes in reliance on the exemption from registration provided by Rule 3a-7.

#### Application of Rule 3a-7 to ESI's prior issuances

##### Generally

Because ESI was not otherwise required to register under the 1940 Act with respect to its previous issuances, it was not necessary for ESI to seek to satisfy the requirements of Rule 3a-7 in connection with such issuances. However, in retrospect, such issuances complied with all the provisions of Rule 3a-7 except for certain of the technical requirements of Section (a)(4) thereunder.

##### Rule 3a-7

As described above, ESI is engaged in the business of purchasing and holding Sovereign Securities and Swap Agreements (both "eligible assets") and does not issue redeemable securities within the meaning of Section 2(a)(32) under the 1940 Act. Accordingly, ESI satisfies the general requirements of Section (a) of Rule 3a-7.

##### *Section (a)(1)*

The notes issued by ESI "entitle the holder to receive . . . a stated principal amount" and "interest on a principal amount . . . calculated by reference to a fixed rate or to a standard or formula which does not reference any change in the market value or fair value of eligible assets" and are therefore "fixed income securities", as defined in Section (b)(2)(v) of Rule 3a-7. Additionally, because each of the Sovereign Securities and the Swap Agreements are

"financial assets . . . that by their terms convert into cash within a finite period of time", the notes issued by ESI "entitle their holders to receive payments that depend primarily on the cash flow from eligible assets". Therefore, each of ESI's previous issuances complied with the provisions of Section (a)(1) of Rule 3a-7.

*Section (a)(2)*

At the time of initial sale, the notes issued by ESI have been rated in the highest rating category assigned to long-term debt ("AAA") by Standard & Poor's Ratings Group, "a nationally recognized statistical rating organization that is not an affiliated person of the issuer or of any person involved in the organization or operation of the issuer". Therefore, each of ESI's previous issuances complied with the provisions of Section (a)(2) of Rule 3a-7.

*Section (a)(3)*

Although ESI acquires additional eligible assets, each such acquisition occurs only in connection with new issuances of notes and such additional eligible assets are pledged to secure such new issuance of notes. In accordance with Section (a)(3), (i) "the assets are acquired . . . in accordance with the terms and conditions set forth in the agreements, indentures, or other instruments pursuant to which the issuer's securities are issued", (ii) "the acquisition . . . of the assets does not result in a downgrading in the rating of the issuer's outstanding fixed income securities" and (iii) "the assets are not acquired . . . for the primary purpose of recognizing gains or decreasing losses resulting from market value changes". In addition, the documentation governing each issuance of notes prohibits ESI from disposing of the assets securing each series of notes as long as such series is outstanding. The maturity of the Sovereign Securities securing each issuance of notes is also coincident with the maturity of the related series of notes. Therefore, each of ESI's previous issuances complied with the provisions of Section (a)(3) of Rule 3a-7.

*Section (a)(4)*

With respect to the provisions of Section (a)(4)(i), the trustee in respect of all of ESI's previous issuances, Chase Manhattan Trustees Limited (the "Trustee"), "is not affiliated . . . with the issuer or with any person involved in the organization or operation of the issuer",

"does not offer or provide credit or credit enhancement to the issuer" and "executes an agreement or instrument concerning the issuer's securities containing provisions to the effect set forth in Section 26(a)(3)" of the 1940 Act. However, the Trustee is organized under the laws of England and therefore does not meet the requirements of Section 26(a)(1) of the 1940 Act, which requires that the trustee be a "bank", as defined in Section 2(a)(5) of the 1940 Act. We wish to point out though that the Trustee is a wholly-owned subsidiary of The Chase Manhattan Bank, N.A. which is a "bank" as defined in Section 2(a)(5) of the 1940 Act. We believe that the engagement of a qualified trustee in the previous issuances adequately protects investors (even though the Trustee was organized in a jurisdiction outside the United States). As discussed below, with respect to future transactions which are intended to comply with Rule 3a-7, a trustee will be engaged that satisfies the requirements of Section (a)(4)(i) of the rule.

Section (a)(4)(ii) requires that an issuer take "reasonable steps to cause the trustee to have a perfected security interest . . . valid against third parties in those eligible assets that principally generate the cash flow needed to pay the fixed-income security-holders". In connection with each issuance, ESI obtains a legal opinion that the Trustee, on behalf of the related noteholders and swap counterparty, has a first-priority perfected security interest in the Sovereign Securities.

Pursuant to Section (a)(4)(iii), an issuer is required to take "action necessary for the cash flows derived from eligible assets for the benefit of the holders of the fixed-income securities to be deposited periodically in a segregated account that is maintained or controlled by the trustee consistent with the rating of the outstanding fixed-income securities." In general, cash flow paid from the swap counterparty for the benefit of ESI is deposited in a segregated account held by the applicable paying agent, an affiliate of the Trustee, for the benefit of the holders of the notes. Cash flow derived from the Sovereign Securities is collected in a segregated account by a custodian, also an affiliate of the Trustee, and is then transferred to the swap counterparty in accordance with the terms of the transaction documents. Because these funds are not deposited in an account maintained or controlled by the Trustee, but with affiliates of the Trustee acting in their capacities as paying agent or custodian, as a technical matter the provisions of Section (a)(4)(iii) of Rule 3a-7 may not have been fully satisfied. As a general matter, however, since in each such case the funds are held for the benefit of the holders of the notes we believe that investors are adequately protected. In addition, Standard & Poor's Ratings Group believes that this method of handling cash flows is consistent with the "AAA" rating

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afforded to ESI's notes. As discussed below, with respect to future transactions which are intended to comply with Rule 3a-7, the requirements of Section (a)(4)(iii) of the rule will be fully satisfied.

### Application of the Rule 3a-7 to ESI's proposed issuance

Because ESI complied with the provisions of Sections (a)(1), (a)(2), (a)(3) and (a)(4)(ii) in connection with its previous issuances of notes there is no need for any changes to be made to the structure of ESI's securities offerings with respect to those portions of Rule 3a-7. With respect to the provisions of Sections (a)(4)(i) and (a)(4)(iii), ESI proposes to make the following structural changes to comply with these provisions.

#### United States trustee

In connection with the proposed U.S. private placement and all future offerings using U.S. jurisdictional means, ESI would engage a trustee in respect of the notes to be issued which would meet the requirements of Section 26(a)(1) of the 1940 Act.

#### Deposit of Cash Flows with trustee

In connection with the proposed U.S. private placement and all future offerings using U.S. jurisdictional means, cash flow from the related Sovereign Securities and Swap Agreement would be transferred from the paying agent, the custodian or the swap counterparty, as the case may be, to a segregated account that is maintained or controlled by the trustee, thereby satisfying the requirements of Section (a)(4)(iii).

### Analysis

The Staff has previously interpreted discrete pools of assets backing an issue of securities to be the issuer of such securities for the purposes of the 1940 Act, despite the presence of a nominal "issuer". Applying this precedent to the analogous fact pattern presented by ESI, we believe that each of the discrete pools of assets securing each series of notes should

be considered an individual issuer for the purposes of Rule 3a-7.<sup>1/</sup> Accordingly, ESI should be able to comply with Rule 3a-7 in connection with future issuances using U.S. jurisdictional means, notwithstanding the lack of technical compliance in connection with its previous issuances outside the United States.

In Hyperion Capital Management, Inc. (publicly available August 1, 1994) the Staff took the position that, for the purposes of determining compliance with the diversification requirements of Section 5(b)(1) of the 1940 Act, individual pools of assets securing certain asset-backed and mortgage-backed securities could be treated as separate issuers, rather than the

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<sup>1/</sup> We recognize that the Staff, in applying the provisions of the 1940 Act, has developed the doctrine of integration, whereby multiple issuers may be viewed as a single issuer. Application of the doctrine of integration to ESI's situation would lead to a result contrary to our position, however, we do not believe that integration concerns are present in ESI's situation. The standard for integration as developed by the Staff in connection with determining compliance with the 100 beneficial owner limitation of Section 3(c)(1) of the 1940 Act and the Touche, Remnant doctrine, is whether a reasonable investor would consider an investment in two or more entities to be materially different, see Welsh, Carson, Anderson & Stowe (publicly available June 18, 1993) and Pasadena Investment Trust (publicly available January 22, 1993).

We believe that a reasonable investor would consider an investment in one series of ESI notes to be materially different from an investment in a different series of notes. Each series of ESI's notes has targeted the interests of different investors by (i) being denominated in a different currency, (ii) generating a different return based on either a different fixed or floating rate of interest and (iii) possessing different payment and maturity dates.

In light of these differences in the characteristics of each series of notes, we believe that recognized principles of integration do not require two or more distinct series of ESI's notes to be viewed as one issuer. We also do not believe that a series of notes issued in accordance with Rule 3a-7 would, as a result of compliance with Rule 3a-7, be integrated with any other series of notes issued by ESI. Additionally, we are aware that the Staff will no longer respond to letters dealing with issues of integration unless they present novel or unusual issues, see Shoreline Fund L.P. (publicly available April 11, 1994), and accordingly we are not requesting that the Staff provide no action relief with respect to integration.

sponsor or depositor of such pools.<sup>2/</sup> The Staff emphasized that its position derived from the fact that "the sponsor's creditors would have no recourse against the pool, and the holder of the asset-backed or mortgage-backed security looks to the pool for payment." Additionally, the Staff noted that the assets underlying the securities at issue in Hyperion were either "bankruptcy remote" or the trustee or issuer, on behalf of the investors, had a perfected first priority ownership or security interest in such underlying assets.

The Hyperion analysis is consistent with our position that each series of notes should be treated as a separate issuer for the purposes of Rule 3a-7. First, because ESI was established solely for the purpose of issuing securities and entering into certain other related transactions, ESI will not have any creditors other than the investors in each of its discrete series of notes and the swap counterparty. This fact, together with the contractual provisions limiting the recourse of ESI's noteholders to the assets pledged as security for their series of notes, protects ESI's noteholders to the same degree as the holders of the asset-backed and mortgage-backed securities at issue in Hyperion. Second, investors in ESI look solely to the pool of assets underlying their series of notes for payment. The cash flows upon which ESI investors rely derive solely from the Sovereign Securities and the Swap Agreement related to a particular series

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<sup>2/</sup> See also Pennsylvania Tax-Free Income Trust (publicly available March 4, 1977) (for the purposes of Section 5(b)(1) of the 1940 Act, the issuer of revenue bonds was deemed to be the business entity which was solely responsible for the payment of the bond obligation rather than the public authority which nominally issued the bond); T. Rowe Price Tax-Free Funds (publicly available June 24, 1993) (for the purposes of Section 5(b)(1) of the 1940 Act, an investment in a municipal bond refunded with escrowed U.S. Government securities would be viewed as an investment in the U.S. Government securities because, *inter alia*, the bondholder looked to the escrowed U.S. Government securities for payment); Coutts Global Fund (publicly available December 7, 1994) (for the purposes of Section 3(c)(1) of the 1940 Act, each Sub-Fund of an Irish Umbrella Fund would be viewed as a single issuer); and Guide 18 to Form N-1A ("When the assets and revenues of an agency, authority, instrumentality or other political subdivision are separate from those of the government creating the subdivision and the security is backed only by the assets and revenues of the subdivision, such subdivision would be deemed to be the sole issuer for purposes of Section 5(b)(1). Similarly, in the case of an industrial development bond, if that bond is backed only by the assets and revenues of the non-governmental user, then such non-governmental user would be deemed to be the sole issuer for the purposes of Section 5(b)(1).")

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of notes and not to any other assets of ESI. Third, in connection with each issuance, ESI grants to the Trustee, on behalf of the related noteholders and swap counterparty, a security interest in the assets securing such series and ESI obtains an opinion of counsel to the effect that such security interest in the Sovereign Securities is a first-priority perfected security interest.

Thus, the Staff's position in Hyperion and related no-action letters is consistent, we believe, with the conclusion that each series of ESI's previous issuances should be deemed a separate issuer for the purposes of Rule 3a-7. Therefore, the fact that ESI did not comply with certain of the technical provisions of Rule 3a-7 in connection with previous issuances should not preclude ESI from relying on the exemption from registration as an "investment company" under the 1940 Act provided by Rule 3a-7 with respect to the proposed U.S. private placement and other future issuances in connection with which ESI will fully comply with Rule 3a-7.

Even if the Staff declines to conclude that each series of notes should be viewed as a separate issuer for purposes of the 1940 Act, we believe the Staff should agree with our conclusion that ESI's substantial compliance with the provisions of Rule 3a-7 in respect of previous offshore issuances should not preclude ESI from relying on the exemption from registration as an "investment company" under the 1940 Act provided by Rule 3a-7 with respect to future issuances using U.S. jurisdictional means.

### Request

In view of the foregoing, we respectfully request that the Division of Investment Management agree that it will concur with our opinion that the exemption from registration as an "investment company" under the 1940 Act provided by Rule 3a-7 is available to ESI in connection with the proposed private placement of notes in the United States.

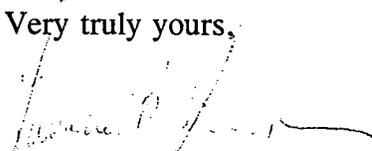
In accordance with the Commission's Rules of Practice, two additional copies of this letter are enclosed.

If the Staff is inclined to refuse to take a no-action position, we would appreciate the opportunity to discuss this matter with you further before any adverse written response to this letter is disseminated. If you have any questions concerning the foregoing or require any

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additional information or clarification, please feel free to call me at (212) 326-8909 or Eric R. Bothwell of this firm at (212) 326-8713.

Very truly yours,



Laurence B. Isaacson

cc: Rochelle Kauffman-Plesset  
Eric R. Bothwell  
David A. Marple

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**ORRICK, HERRINGTON  
& SUTCLIFFE**

April 21, 1995

Office of the Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Mail Stop 10-6  
Washington, DC 20549

Attention: Janice Bishop

Re: ESI S.A. -- Investment  
Company Act of 1940, Rule 3a-7

Dear Ms. Bishop:

We understand that you have inquired as to the enforceability of the limited recourse provisions in the documentation governing the offerings by ESI S.A. (the "Company") of separate series of notes (collectively, the "Notes").

We have been advised by Luxembourg counsel that any clause in the documentation whereby one or more parties agrees that the obligations of the Company in respect of a series of Notes shall only be payable from the collateral securing such series of Notes will be enforceable as between the contracting parties.

We have also been advised that if the Company were to go into bankruptcy, that a bankruptcy court in Luxembourg may or may not enforce such provisions. However, the transactions have been structured such that the Company will have no liabilities or obligations other than the Notes and the swap agreements and, accordingly, the risk of a bankruptcy of the Company has been implicitly rated "AAA" remote. We have also made certain that the risk profile associated with each series of Notes is identical (i.e. each series of Notes is backed by bonds issued by the same member state of the European Union and a swap agreement entered into with the same swap counterparty). In this way, it is extremely unlikely

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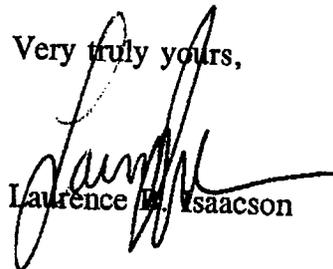
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that an event of default would occur only with respect to a particular or limited number of series of Notes. We also wish to point out that we have been advised by Luxembourg counsel that Luxembourg courts will recognize the security interest granted with respect to each series of Notes. We have separately been advised by local counsel that the trustee with respect to each series of Notes has a perfected security interest in the bonds securing each such series, subject to no equal or prior claims.

We hope this is responsive to your question. If you have any questions concerning the foregoing or require any additional information or clarification, please feel free to call me at (212) 326-8909 or Eric R. Bothwell of this firm at (212) 326-8713.

Very truly yours,



Laurence E. Isaacson