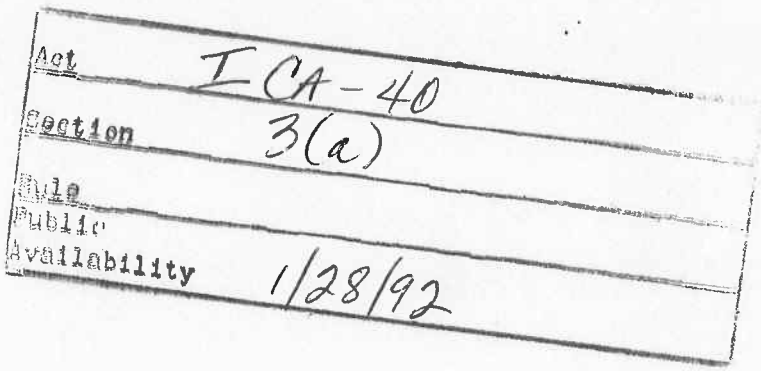
UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C 20549

DIVISION OF
CORPORATION FINANCE

January 28, 1992

Stuart H. Coleman, Esq.
Stroock & Stroock & Lavan
Seven Hanover Square
New York, NY 10004-2594



Re: Bear, Stearns & Co. Inc.

Dear Mr. Coleman:

In regard to your letters of June 18, July 24, and November 12, 1991 our response thereto is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in your letter.

Sincerely,

Abigail Arms
Deputy Chief Counsel

January 28, 1992

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE

RE: Bear, Stearns & Co. Inc. (the "Company")
Incoming letters dated June 18, July 24, and
November 12, 1991

Based on the facts presented, this Division will not recommend enforcement action to the Commission if the Company operates the proposed custodial receipt program for SBA guaranteed Confirmations of Origination Fees ("COOF") as described in your letters, without registration under the Securities Act of 1933 ("1933 Act"). In reaching this position, the staff notes your opinion that COOFs are exempt from registration under section 3(a)(2) the 1933 Act. We further note the following: (1) the holder of a custodial receipt will have all the rights and privileges of ownership of the underlying COOF, (2) the receipt holder, as a real party in interest, will have the right, upon default in payment on the underlying COOF, to proceed directly and individually against the SBA or FTA; and (3) the receipt holder will not be required to act in concert with other receipt holders or the custodian. 1/ Our position is conditioned on the sponsor obtaining an opinion of counsel on the foregoing as well as to the following: (1) the custodial receipt will evidence an entire and undivided ownership interest in each COOF underlying the receipt; (2) the custodian will perform only clerical and ministerial services on behalf of the holder of the custodial receipt; (3) neither the custodian nor the Company additionally will either guarantee or otherwise enhance the creditworthiness of either the COOF or the custodial receipt; (4) the custodian will undertake to notify receipt holders in the event of a default, and to forward to receipt holders copies of all communications relating to any payment default on a COOF; (5) the COOFs underlying a custodial receipt will not be considered assets of the custodian or sponsoring firm; and (6) no other factors are present, such as remarketing agreements, that will require the custodial receipt holders to rely upon the custodian or other third party to obtain the benefit of their investment. 2/

1/ You should not that this position does not apply where either the SBA has officially disavowed any obligation to the receipt holders or has not fully and unconditionally guaranteed payment on the COOF.

2/ In this regard, we emphasize that, as described above, the custodial arrangements generally are structured to ensure that the custodian's role is essentially passive and that in all material respects the receipt holder is the real party in

The Division of Investment Management has asked us to inform you that it would not recommend that the Commission take any enforcement action if the Company operates the Proposed Program without registration under the Investment Company Act of 1940, provided the Company operates the Program according to the representations and conditions set forth in the foregoing response of the Division of Corporation Finance, particularly the representation that each custodial receipt will evidence and entire and undivided ownership interest in each COOF underlying the receipt.

Because these positions are based on the representation made in your letter, any different facts may require a different conclusion. Further, these positions only express the Divisions' positions on enforcement action and do not express a legal conclusion on the question presented.

Sincerely,

John C. Brousseau
Special Counsel

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interest and otherwise treated as the beneficial owner of the underlying COOF. Any material changes in the nature of the custodian receipt program could lead to a different result. See, e.g., Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F. 2d 230 (2nd Cir. 1985) and SEC v. American Board of Trade, 751 F. 2d 29 (2nd Cir. 1984).

Stroock & Stroock & Lavan

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Securities Act of 1933, Section 5
Investment Company Act of 1940,
Section 3(a)

June 18, 1991

Division of Corporation Finance
Office of Chief Counsel
Division of Investment Management
Office of Chief Counsel
Securities and Exchange Commission
450 Fifth Street, N.W.
Judiciary Plaza
Washington, D.C. 20549

Re: Bear, Stearns & Co. Inc.

We are writing on behalf of Bear, Stearns & Co. Inc. ("Bear Stearns") in connection with its proposed Custodial Receipt Program for SBA-guaranteed Confirmations of Originator Fees (the "Proposed Program").

The custodial arrangements of the Proposed Program are similar in all material respects to those that formed the basis for no-action positions of the Division of Corporation Finance and the Division of Investment Management relating to custodial receipts for components of stripped municipal bonds. Merrill Lynch, Pierce, Fenner & Smith Incorporated (September 26, 1990). Accordingly, we are seeking your advice not because we believe the Proposed Program differs significantly from the program described in the Merrill Lynch letter, but because we would appreciate receiving your advice addressed to the specific facts of the Proposed Program.

Washington, D.C. 20036-4852
1150 Seventeenth Street N.W.
202 452 8250

Los Angeles, CA 90067-3086
2029 Century Park East
213 556 5900

Miami, FL 33131-2385
200 South Biscayne Boulevard
305 358 9900

H-1052 Budapest, Hungary
Vörösmarty u. 16
361 118 9491 / 118 9037

We respectfully request that you confirm that:

(i) the Division of Corporation Finance will not recommend that the Securities and Exchange Commission (the "Commission") take any enforcement action under the Securities Act of 1933, as amended (the "Securities Act"), against Bear Stearns or any other party involved in the Proposed Program, if the Proposed Program operates without registration of the custodial receipts under the Securities Act; and

(ii) the Division of Investment Management will not recommend that the Commission take any enforcement action under the Investment Company Act of 1940, as amended (the "Investment Company Act"), if, in connection with the Proposed Program, the Custodian described below operates without registration of the Proposed Program as an investment company under the Investment Company Act.

We are not requesting relief with respect to the status of the COOFs under the securities laws.

Pursuant to the Proposed Program, Bear Stearns would sell, from time to time, a custodial receipt, representing a 100% ownership interest in a number of Confirmations of Origination Fees or "COOFs", to a single institutional accredited investor in an amount expected to exceed $1,000,000. Bear Stearns anticipates that, at any time, more than one investor would own separate custodial receipts, each representing 100% ownership interests in separate COOFs (but no two investors would own undivided interests in the same receipt). Each COOF represents the right to receive a portion of the future interest payments due on obligations guaranteed by the full faith and credit of the United States government through the U.S. Small Business Administration (the "SBA"). The COOFs arise primarily from the process of pooling the SBA-guaranteed portions of loans into SBA-guaranteed loan pool certificates and from the requirement that all of the loans in a pool must have the same interest rate. Since the underlying loans generally are originated with different rates of interest, many of these loans

have interest rates exceeding the pool rate. This excess interest is stripped from the loan by the SBA's Fiscal and Transfer Agent (the "FTA"). The interest payments represented by each COOF are guaranteed by the full faith and credit of the U.S. government. Once the loans from which the interest is stripped are retired, the COOF is extinguished, but the guarantee continues in effect with respect to accrued, but unpaid, interest.

Anticipating that the proposed investors desiring to purchase many COOFs would not want the inconvenience of receiving multiple payments or the administrative responsibilities of monitoring payments, Bear Stearns proposes to create a custody arrangement with an independent custodian, expected to be a financial institution (the "Custodian"), to provide certain administrative services. For ease in comparing the custodial arrangement with the arrangement described in the Merrill Lynch letter, we will analyze the nine factors deemed significant by the Staff in the Merrill Lynch letter based on the facts of the Proposed Program. We have enclosed a copy of the proposed form of custody agreement. We do not believe that any other facts are present which are inconsistent with the facts deemed relevant in the Merrill Lynch letter:

1. The receipt holders will have all the rights and privileges as holders of the underlying securities.

> Each custodial receipt represents a direct interest in a number of specific COOFs. While each COOF will be registered on the books of the FTA in the name of the Custodian or its nominee for the benefit of the receipt holder, the custodial arrangement may be cancelled as to any COOF by the receipt holder at any time upon notice to the Custodian. Upon cancellation, the Custodian promptly will arrange to have the relevant COOF reregistered in the name of the beneficial owner, to have the existing custodial receipt cancelled and to have issued to the beneficial owner a new custodial receipt evidencing ownership of the remaining COOFs represented by the cancelled custodial receipt. If the receipt holder no longer desired the administrative benefits of the custodial arrangement, it could request that all COOFs be reregistered in its name. In

connection with the transfer of registration of the COOFS, the Custodian may require the custodial receipt holder to file certain information, execute certificates and make such representations and warranties as the Custodian reasonably may deem necessary or proper to comply with applicable law and to pay any taxes or governmental charges due in connection therewith. It is anticipated that these requirements would not entail any material delay or burden on the receipt holders. The Custodian will charge only a nominal administrative fee for its services.

2. Each receipt holder, as a real party in interest, will have the right, upon default of the underlying securities, to proceed directly and individually against the issuer of those securities.

Each receipt holder will retain the right to proceed directly against the SBA in the event of a default with respect to any COOF. The Custodian will be prohibited without the consent of the affected receipt holder from taking any action to enforce the SBA guarantee with respect to a COOF. If requested, the Custodian will use its best efforts to take such action, at the expense of the receipt holder, as may be necessary or appropriate to assist a receipt holder in proceeding against the SBA or the FTA or to preserve the right of the holder to proceed against to SBA or FTA, but there is no reason other than the receipt holder's administrative convenience for it to do so.

3. The receipt holder will not be required to act in concert with other receipt holders or the custodian.

An individual receipt holder will not be obligated to join the Custodian or any other receipt holder to exercise any rights. Each COOF will relate to a single loan in which no other person will have any interest in the excess interest applicable thereto. Again, the

> Proposed Program is intended to create a discretionary arrangement whereby a COOF buyer is relieved of administrative burdens. It is designed to be used by each COOF buyer without the necessity of acting in concert with any other COOF buyer.

The position of the Division of Corporation Finance was further conditioned on the sponsor obtaining an opinion of counsel to the effect of the three factors enumerated above; such an opinion will be obtained in connection with the Proposed Program.

4. Each receipt represents the entire interest in a discrete, identified interest payment or principal payment on the underlying security.

> Each custodial receipt will evidence a 100% ownership interest in each COOF covered by the custodial receipt.

5. The custodian bank performs only clerical or ministerial services on behalf of the receipt holders.

> As described above, the custodial arrangement is intended only as an administrative convenience to a purchaser of more than one COOF. The Custodian will perform only clerical or ministerial services on behalf of the receipt holders, such as collecting and distributing payments on the COOFs and notifying receipt holders of borrower defaults. For its services, the Custodian will be paid a nominal annual administrative fee, currently not expected to exceed $26 per COOF, which will be deducted annually from the payments to be delivered by the Custodian to the receipt holder.

6. Neither the custodian nor sponsor additionally will guarantee or otherwise enhance the creditworthiness of the underlying security or the stripped coupon security.

> No third party guarantee is provided in connection with the Proposed Program. We

understand that the purchaser will be buying its beneficial interest in the COOFs based in large measure on the SBA guarantee that is an intrinsic part of a COOF.

7. The custodian undertakes to notify receipt holders in the event of a default, and to forward to receipt holders copies of all communications from the issuer of the underlying security to the bondholders.

The custody agreement will provide that upon written notification by the FTA that a borrower has defaulted on payment of a COOF, or if the FTA fails to forward payment, the Custodian will give prompt notice to the related receipt holder setting forth (a) the identifying number and borrower's name with respect to the affected COOF, (b) the date of notice of default, (c) the face amount as to which such default relates and (d) any other information in the possession of the Custodian that the Custodian deems appropriate.

8. An opinion of counsel is provided indicating that the underlying securities will not be considered assets of either the sponsoring firm or custodian bank.

Such an opinion will be provided in connection with the Proposed Program.

9. Other factors are not present, such as remarketing agreements, that would require the investors in the securities to rely upon the sponsor to obtain the benefit of the their investment.

Neither Bear Stearns nor any third party has agreed to make a market in the COOFs or the receipts on behalf of or in connection with the Proposed Program, although Bear Stearns understands that an independent market currently exists for SBA guaranteed loans and COOFs. Bear Stearns may, but is not obligated to, participate in such market.

No other factors are present in the Proposed Program that would require receipt holders to rely on Bear Stearns to obtain the benefit of their investment.

Based on the foregoing, we are of the opinion that the Proposed Program neither gives rise to any security separate from the COOFs for purposes of the Securities Act nor creates an investment company within the meaning of the Investment Company Act. For the reasons set forth above, we request that you confirm that (i) the custodial receipts may be issued without registration under Section 5 of the Securities Act and (ii) the Custodian may operate without registration of the Proposed Program as an investment company under the Investment Company Act.

If you determine that you are unable to render the requested advice, we would appreciate the opportunity to discuss our request with the Staff prior to the issuance of a written reply to this letter.

Should members of the Staff have any questions or comments concerning this letter, please do not hesitate to telephone the undersigned at the number set forth above.

Sincerely,

Stuart H. Coleman

BEAR, STEARNS & CO. INC.

and

CHEMICAL BANK
as Custodian

and

OWNERS OF CUSTODIAL RECEIPTS

CUSTODY AGREEMENT

Dated as of _____, 1991

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CUSTODY AGREEMENT

This CUSTODY AGREEMENT, dated as of _____, 1991, among Bear, Stearns & Co. Inc. (the "Depositor"), Chemical Bank, a New York banking corporation, as custodian (the "Custodian"), and all owners from time to time of Custodial Receipts delivered hereunder.

W I T N E S S E T H :

WHEREAS, the Depositor desires to provide for the deposit of COOFs from time to time with the Custodian and for the delivery by the Custodian of Custodial Receipts evidencing ownership of all right, title and interest in such COOFs.

NOW THEREFORE, in consideration of the premises and of the agreements contained herein, the Depositor and the Custodian agree as follows:

ARTICLE I

Definitions

The following definitions shall for all purposes, unless otherwise clearly indicated, apply to the related terms used in this Agreement:

"Business Day" shall mean any day other than (a) a Saturday or Sunday or (b) a day on which the offices of the Custodian in New York are authorized or obligated by law or executive order to be closed.

"COOF" shall mean a Confirmation of Originator Fee issued by the FTA on behalf of the U.S. Small Business Administration ("SBA").

"Custodial Receipt" shall mean a Custodial Receipt, substantially in the form set forth in Exhibit A hereto, evidencing ownership of all right, title and interest in one or more COOFs.

"Custodial Receipt Series Designation" shall mean the series designation given to an issuance of Custodial Receipts.

"Custodian" shall mean Chemical Bank, and any successor Custodian appointed pursuant to Section 4.7 hereof.

"Face Amount" shall mean with respect to any COOF or Custodial Receipt, the principal balance at the time of the issuance of the COOF or COOFs as evidenced by the Custodial Receipt.

"Final Maturity Date" shall mean the latest maturity date of a COOF underlying a Custodial Receipt.

"FTA" shall mean the Fiscal and Transfer Agent appointed by the SBA with respect to the SBA's Section 7(A) program.

"Lender" shall mean the institution which made the loans underlying a COOF.

"Order" shall mean a written order, substantially in the form of Exhibit B hereto, delivered to the Custodian by the Depositor pursuant to Section 2.3(b) and signed by any Senior Managing Director of the Depositor listed in a certificate of the Secretary or any Assistant Secretary of the Depositor delivered to the Custodian.

"Payment" with respect to any COOF shall mean each scheduled interest payment due on such COOF.

"Register" shall have the meaning given it in Section 2.2(a) hereof.

"Series" shall mean the Custodial Receipt delivered hereunder bearing the Custodial Receipt Series Designation and evidencing ownership of all right, title and interest in the COOFs deposited with the Custodian pursuant to the Order authorizing such Custodial Receipt Series.

"Weighted Average Maturity Date" shall mean the weighted average maturity date of the COOFs underlying the Custodial Receipt.

ARTICLE II

Form and Delivery of Custodial Receipts; Transfer and Exchange of Custodial Receipts; Deposit of COOFs

Section 2.1 Form and Delivery of Custodial Receipts.

(a) The Custodial Receipt of each Series shall be substantially in the form set forth as Exhibit A annexed to this Agreement, with appropriate insertions, modifications and omissions as hereinafter provided. The Custodial Receipt of any Series may be endorsed with or have incorporated in the text thereof such legends, recitals, disclosure provisions or changes not inconsistent with the provisions of this Agreement as may be required to comply with any applicable law or regulation.

(b) The Custodial Receipt of each Series may be delivered hereunder only in the Face Amount specified in the Order authorizing the Custodial Receipt of such Series.

(c) Each Custodial Receipt shall be executed by the Custodian by the manual signature of one of its duly authorized officers. No Custodial Receipt shall be entitled to any benefits under this Agreement or be valid or obligatory for any purpose unless such Custodial Receipt shall have been executed as above provided by a duly authorized officer of the Custodian.

Section 2.2 Transfer and Exchange of Custodial Receipts.

(a) Custodial Receipts shall be deliverable in registered form only. The Custodian shall keep at an office designated by it in the City of New York a register (the "Register") in which it shall record for the Custodial Receipt of each Series the name and address of the registered holder of the Custodial Receipt of such Series, the Face Amount and Final Maturity Date of the Custodial Receipt of such Series, and such other information furnished to the Custodian as may be required by applicable law or regulation. Custodial Receipts shall be transferable only upon the Register, subject to such reasonable regulations as the Custodian may prescribe.

(b) Upon surrender for registration of transfer of any Custodial Receipt at an office designated by the Custodian in the City of New York, the Custodian shall execute and deliver, in the name of the transferee, a new Custodial Receipt evidencing ownership of the same COOFs and having the aggregate Face Amount as the Custodial Receipt so surrendered.

(c) Custodial Receipts surrendered for registration of transfer shall be duly endorsed by the registered holder thereof, or be accompanied by a written instrument of transfer, in form reasonably satisfactory to the Custodian duly executed by such registered holder or by its attorney-in-fact duly authorized in writing. As a condition to the registration of transfer or exchange of any Custodial Receipt, the Custodian will require the certified taxpayer identification number of the registered holder of the Custodial Receipt (or certification satisfactory to the Custodian that a certified taxpayer identification number is not required to be obtained under applicable laws and regulations), and payment by such holder of a sum sufficient to cover any tax or other governmental charge imposed in connection therewith. As a further condition, each proposed transferee of a Custodial Receipt shall furnish to the Custodian a certification that (i) such transferee is a corporation, and files its income tax returns as a corporation and (ii) such transferee is an "accredited investor" as defined in Rule 501(a) of the Securities Act of 1933, as amended. As a condition to the delivery of any

Custodial Receipt upon transfer, the Custodian may require payment of a reasonable service charge.

Section 2.3 Deposit of COOFs; Execution and Delivery of Custodial Receipts.

(a) Each Custodial Receipt of a Series shall evidence the ownership of all right, title and interest in the COOFs deposited hereunder with respect to such Series (and with respect to no other Series), including all the Payments due thereon.

(b) The Depositor, for its own account or as agent, at any time and from time to time and subject to the consent of the Custodian, may deliver one or more Orders for a Custodial Receipt of a Series to the Custodian directing the Custodian to execute and deliver the Custodial Receipt evidencing ownership of the COOFs described therein, upon deposit of such COOFs with the Custodian, on the date specified therein. Any such Order shall be delivered to the Custodian not less than three days prior to the date on which the applicable Custodial Receipt is to be delivered. Each Order shall contain the information set forth in Exhibit B hereto.

(c) The Depositor represents and warrants that the Depositor will be duly authorized to deliver any COOFs deposited with the Custodian hereunder, and that immediately prior to the deposit of any COOFs hereunder, the Depositor will own such COOFs free and clear of any right, charge, security interest, lien, pledge, encumbrance or claim, other than such as may have been granted to the purchaser under the Purchase Agreement to which this Agreement from time to time may be an exhibit. The foregoing representations and warranties shall survive the delivery to the Custodian of any COOFs deposited hereunder, and the delivery by the Custodian of the Custodial Receipt of the related Series. The Custodian shall have no responsibility for the information supplied by the Depositor in any Order or any descriptive memorandum.

(d) The Custodian shall execute and deliver to the Depositor for the benefit of the purchaser thereof, on the date any COOFs are deposited hereunder, at the Depositor's offices located at 245 Park Avenue, New York, New York, or to a safekeeping account in the Depositor's name at Chemical Bank, the Custodial Receipt that conforms in all respects to the specifications set forth in the Order authorizing such Custodial Receipt Series. It shall be a condition to the Custodian's obligation to deliver each Custodial Receipt of a Series hereunder that the Depositor shall have previously delivered to the Custodian the opinion of its internal counsel, substantially in the form attached hereto as Exhibit C (provided that the first such opinion shall be rendered by Stroock & Stroock & Lavan).

(e) The Custodian shall have no obligation to effect transfers or pledges of COOFs or parts thereof in accordance with Section 8-320 of the Uniform Commercial Code.

Section 2.4 Surrender of Custodial Receipts and Withdrawal of COOFs. Upon surrender at an office designated by the Custodian in the City of New York of the Custodial Receipt evidencing ownership of the underlying COOFs, the owner of such Custodial Receipt shall be entitled to have the registration of any or all the related COOFs transferred to the name of the person or entity designated by such owner. As promptly as practicable after such surrender, the Custodian shall cause the surrendered Custodial Receipt to be cancelled and cause the reregistration of the COOFs that are being transferred, and shall deliver (a) to the person or entity designated by the owner of the surrendered Custodial Receipt, the COOFS that have been reregistered, together with executed assignment forms and such description of the COOFs provided by the FTA as required by applicable law or regulation, and (b) to the owner of the surrendered Custodial Receipt, a new Custodial Receipt of the same Series evidencing ownership of the remaining COOFs of such Series (to the extent any COOFs represented by the surrendered Custodial Receipt are to remain registered in the name of the Custodian). As a condition to so transferring registration of any COOFs, an owner of the Custodial Receipt may be required to provide such proof of residence or other information, to execute such certificates and to make such representations and warranties as the Custodian may reasonably deem necessary or proper to comply with applicable law, and to pay any reasonable service charges of the Custodian and any taxes or other governmental charges due in connection therewith. Any COOFs received in exchange for the Custodial Receipt subsequently may be deposited hereunder by the Depositor for a Custodial Receipt of a new Series pursuant to Section 2.3, but may not be exchanged by any other person for a Custodial Receipt of any Series.

Section 2.5 Mutilated, Lost, Stolen or Destroyed Custodial Receipts. In case any Custodial Receipt is mutilated, lost, stolen or destroyed, the Custodian, in its discretion and upon payment by the registered holder of such Custodial Receipt of all related expenses and any reasonable fee which the Custodian may impose, may execute and deliver a Custodial Receipt of the same Series and Face Amount evidencing ownership of all right, title and interest in the same COOFs in exchange and substitution for such mutilated Custodial Receipt upon cancellation thereof, or in lieu of and in substitution for such lost, stolen or destroyed Custodial Receipt, upon the registered holder thereof filing with the Custodian evidence satisfactory to the Custodian of the destruction, loss or theft of such Custodial Receipt and the authenticity thereof and of the registered holder's ownership thereof and furnishing the Custodian with indemnification satisfactory to it.

Section 2.6 Cancellation and Destruction of Surrendered Custodial Receipts. A Custodial Receipt surrendered to the Custodian shall be cancelled by the Custodian. The Custodian is authorized to destroy Custodial Receipts so cancelled.

Section 2.7 Persons Deemed Owners. Prior to due presentment of a Custodial Receipt for registration of transfer, the Custodian may treat the person in whose name such Custodial Receipt is registered as the owner of such Custodial Receipt for the purpose of receiving payment on such Custodial Receipt and for all other purposes whatsoever, whether or not payment of such Custodial Receipt is overdue, and neither the Custodian nor any agent of the Custodian shall be affected by notice to the contrary.

ARTICLE III

Payments with Respect to the COOFs and Custodial Receipts

Section 3.1 Payments of Amounts Received with Respect to COOFs.

(a) The Custodian, by itself or acting through an agent, shall establish and maintain with respect to the Custodial Receipt of each Series a special account, separate from all other assets of the Custodian or such agent (including the assets of any other owner of a Custodial Receipt), for all of the Payments received by it on the related COOFs.

(b) Any Payment received by the Custodian on a COOF deposited hereunder shall be applied by the Custodian to the payment of the Custodial Receipt evidencing ownership of such Payment subject only to any applicable tax or other governmental or FTA charges. Subject to the preceding sentence and to Section 4.4 hereof, all Payments received by the Custodian on a COOF deposited hereunder shall be held by the Custodian without interest in the special account for the COOFs of such Series until required to be disbursed in accordance with the provisions of this Agreement or as otherwise required by law, and such moneys shall be segregated by separate recordation on the books and records of the Custodian.

(c) The Custodian, acting directly or through any agent appointed pursuant to Section 3.2, shall make all payments with respect to a Custodial Receipt (to the registered holder as of the 15th day of the month) by check, or upon the written request of the owner of a Custodial Receipt with the consent of the Custodian, by wire in Federal funds at a charge of $15.00 per wire, on the last day of the month with respect to payments

received on or before the 27th day of such month. If the last day of the month falls on a day that is not a Business Day, the Custodian will forward the check or transmit the wire on the next Business Day. Payments received after the 27th day of the month will be paid by check or wire on the payment date in the following month.

Section 3.2 Maintenance of Offices for Payment. So long as any Custodial Receipts remain outstanding, the Custodian shall maintain an office in the City of New York. The Custodian has initially designated the office of Chemical Bank, located at 55 Water Street, Room 610, New York, New York 10041, in the City of New York as the office for such purpose. In the event the Custodian shall designate or appoint a new office or agency for payment of a Custodial Receipt of a Series theretofore delivered hereunder, in place of the office or agency referred to in the preceding sentence, notice of such designation shall be given in the manner prescribed in Section 5.5.

Section 3.3 Receipt of Insufficient Funds. If the funds received by the Custodian in respect of any Payment due on any COOF deposited hereunder are insufficient to pay the Custodial Receipt evidencing ownership thereof, the owner shall bear any loss. Nothing in this Agreement shall require the Custodian to advance, expend or risk its own funds.

ARTICLE IV

The Custodian and the Depositor

Section 4.1 No Liability of the Custodian or the Depositor on the COOFs; Owner to Proceed Against SBA, FTA or Lender.

(a) Neither the Custodian nor the Depositor shall have an obligation on or with respect to the COOFs or parts thereof, except as provided in Section 3.1 with respect to the Custodian. The respective obligations of the Custodian and the Depositor with respect to a Custodial Receipt shall be solely as set forth in this Agreement.

(b) Upon written notification by the FTA that a borrower has defaulted on the payment of a COOF or if the FTA fails to forward payment, the Custodian shall promptly give notice to the owner of the related Custodial Receipt, setting forth (a) the FTA identifying number and borrower's name with respect to the COOF affected thereby, (b) the date of the notice of default from the FTA, (c) the Face Amount to which such default relates, and (d) any other information in the possession of the Custodian that the Custodian may deem appropriate. In cases where the Custodian has received notice of default, the Custodian may, upon receipt of a request from the owner of the related Custodial Receipt, submit

the appropriate COOF and the redemption fee to the FTA on behalf of such owner for the final distribution payment. The redemption fee payable to the FTA will be deducted from the monthly payment required to be paid to the owner of the Custodial Receipt.

(c) The Custodian and the Depositor are prohibited from proceeding against SBA, FTA and/or the Lender in the event of a default and asserting the rights and privileges of owners of COOFs, and neither has a duty to do so, except that the Custodian, at the request of any owner of a Custodial Receipt, but at the expense and risk of such owner, shall use its best efforts to take such action as may be necessary or appropriate (a) to assist such owner in proceeding against SBA or FTA, or (b) to preserve the right of such owner to so proceed. As a condition to taking any such action, the Custodian may require that the owner of a Custodial Receipt provide the Custodian with security or indemnity deemed satisfactory and sufficient in the sole judgment of the Custodian. Nothing herein shall in any way limit the right of an owner of Custodial Receipts to request withdrawal of the COOFs represented by such Custodial Receipts, as provided in Section 2.4, and to proceed against SBA, FTA and/or the Lender.

Section 4.2 Prevention of or Delay in Performance by the Parties.

(a) The Custodian undertakes to perform only such duties as are expressly set forth in this Agreement. The Custodian shall not incur any liability to any owner of Custodial Receipts or to the Depositor if by reason of any provision of any present or future law or regulation or any action of any governmental authority, or by reason of any act of God or war or other circumstance beyond its control, the Custodian shall be prevented or forbidden from, or subjected to any civil or criminal penalty on account of, doing or performing any act or thing which by the terms of this Agreement is to be done or performed by it. The Custodian shall not incur any liability to any owner of Custodial Receipts by reason of any non-performance or delay, caused as aforesaid, in the performance of any act or thing which by the terms of this Agreement is to be done or performed by it, to the extent of and for the duration of the aforesaid disability.

(b) The Depositor undertakes to perform only such duties as are expressly set forth in this Agreement. The Depositor shall not incur any liability to any owner of Custodial Receipts or to the Custodian if by reason of any provision of any present or future law or regulation or any action of any governmental authority, or by reason of any act of God or war or other circumstance beyond its control, the Depositor shall be prevented or forbidden from, or subjected to any civil or criminal penalty on account of, doing or performing any act or thing which by the terms of this Agreement is to be done or performed by it. The

Depositor shall not incur any liability to any owner of Custodial Receipts by reason of any non-performance or delay, caused as foresaid, in the performance of any act or thing which by the terms of this Agreement is to be done or performed by it, to the extent of and for the duration of the aforesaid disability.

Section 4.3 Obligations of the Custodian and the Depositor.

(a) Neither this Agreement nor the Custodial Receipts shall be deemed to evidence or to create any fiduciary relationship between the Custodian or the Depositor and the owners from time to time of Custodial Receipts.

(b) Neither the Custodian nor the Depositor assumes any obligation or shall be subject to any liability under this Agreement to owners of Custodial Receipts, other than by reason of willful misconduct, bad faith or gross negligence, in the performance of such duties as are specifically set forth in this Agreement. Neither the Custodian nor the Depositor shall be liable for indirect, special or consequential damages arising in connection with their obligations under this Agreement. Neither the Custodian nor the Depositor shall be under any obligation to take any action hereunder which may tend to involve it in any expense or liability, the payment of which within a reasonable time is not, in its reasonable opinion, assured to it.

(c) Subject to their liability for willful misconduct, bad faith or gross negligence as provided in paragraph (b), neither the Custodian nor the Depositor shall be liable to any owner of a Custodial Receipt for any action or non-action by it in reliance upon the advice of or information from legal counsel, accountants, such owner of a Custodial Receipt or any other person believed by it in good faith to be competent to give such advice or information. The Custodian and the Depositor may each rely and shall be protected in acting upon any written notice, order, request, direction or other document believed by it to be genuine and to have been signed or presented by the proper party or parties. Any such document evidencing the authority of various persons to act for or on behalf of the Depositor or the Custodian may be considered as in full force and effect until notice to the contrary is given to the Custodian or the Depositor, as appropriate.

(d) The Custodian or the Depositor (for itself or others) may own and deal in the COOFs or parts thereof and in the Custodial Receipt of any Series.

(e) For the benefit of the Parties, including any owner from time to time of the Custodial Receipt of any Series issued hereunder, the Parties have agreed to allocate federal tax reporting duties relating to a Custodial Receipt as set forth in this subsection. Such allocation of duties in connection with

the issuance or maintenance of a Custodial Receipt or the performance of any other duties hereunder shall not relieve any owner of a Custodial Receipt of any tax reporting or payment obligation arising from the ownership or transfer of a Custodial Receipt, or assume any state or local tax obligation otherwise imposed on the owner of a Custodial Receipt. Subject to the foregoing, (i) upon execution of this Agreement the Depositor will furnish to the Custodian an opinion of counsel confirming that no tax reporting requirement is then applicable to Custodial Receipt Series One, (ii) the Custodian hereby confirms that it will maintain arrangements with a qualified national accounting firm to monitor future developments in tax law for changes which may apply to or affect Custodial Receipts outstanding from time to time, and such accounting firm will be obligated to advise the Custodian of such requirements and procedures to comply therewith, (iii) to the extent required in order for the Custodian to satisfy any future reporting requirements arising out of the issuance or maintenance of any Custodial Receipt, the Depositor will provide to the Custodian a schedule of original issue discount based upon the assumption of prepayment rate determined by the then owner of each respective Custodial Receipt so affected from time to time, or any other information in the Depositor's possession which the Custodian deems necessary to satisfy any future reporting requirements and (iv) in accordance with the advice of the accounting firm retained by it, the Custodian will comply with any applicable tax reporting responsibilities arising out of the issuance or maintenance of the Custodial Receipts.

Section 4.4 Charges and Expenses. The Depositor will pay all the fees and expenses of the Custodian in connection with the delivery of the Custodial Receipts in accordance with the written agreements to be entered into by the Depositor and the Custodian from time to time. Any charges of the Custodian under Section 2.2(c), 2.4 or 2.5 and any annual administration fees related to the performance of the Custodian's duties hereunder shall be paid by the owner of the applicable Custodial Receipt. Such annual administration fees shall be in the amount set forth on Schedule B of the Purchase Agreement to which this Agreement from time to time may be an exhibit, and shall be paid by deduction from the amounts otherwise required to be delivered by the Custodian to the owner of the applicable Custodial Receipt pursuant to Section 3.1 on January 1st of each year. The Custodian in no event shall acquire any lien upon any COOFs deposited under this Agreement, or upon any moneys received with respect thereto, nor shall the Custodian acquire any claim against the owners from time to time of Custodial Receipts, by reason of the failure of the Depositor to pay any charges or expenses of the Custodian that the Depositor may be required to pay.

Section 4.5 Insurance. The Custodian shall at all times maintain a fidelity bond in reasonable form and amount to protect

against loss due to dishonest or fraudulent action by its employees in connection with its obligations under this Agreement.

Section 4.6 Indemnification and Contribution.

The Depositor agrees to indemnify the Custodian against, to defend, and to hold it harmless from, any losses, claims, damages, expenses or other liabilities, joint or several, arising from any reason (including, without limitation, violation of applicable laws or trademarks or service marks) (referred to in this Section 4.6 as "liabilities"), and any related out-of-pocket expenses (including, without limitation, reasonable fees and expenses of legal counsel), which may arise out of acts performed or omitted in accordance with this Agreement, as the same may be amended, supplemented or modified from time to time, in relation to the COOFs, or the Custodial Receipts delivered in respect of such COOFs, other than any liabilities and expenses arising out of the Custodian's gross negligence, willful misconduct, or bad faith.

If the indemnification provided for in the preceding paragraph is invalid or unenforceable, then the Depositor shall contribute to the amount paid or payable by the Custodian as a result of such liability in such proportion as is appropriate to reflect the relative benefits received by the Depositor, on the one hand, and the Custodian, on the other, from the delivery and sale of the COOFs and the related Custodial Receipt of the Series to which such liability relates. For this purpose, the benefits received by the Depositor shall be the aggregate amount received by it upon the sale of the COOFs and the related Custodial Receipt of such Series, less the costs and expenses of such sale, including the cost of acquisition of the COOFs, and the benefits received by the Custodian shall be the aggregate amount of fees received by it as Custodian, less the costs and expenses incurred by it as Custodian in respect of the Custodial Receipt of such Series and the COOFs evidenced thereby. If, however, the allocation provided by the immediately preceding sentence is not permitted by applicable law, then the Depositor shall contribute in such proportion as is appropriate to reflect not only such relative benefits but also the relative fault of the Depositor, on the one hand, and the Custodian, on the other, in connection with the actions or omissions which resulted in such liability, as well as any other relevant equitable consideration.

Section 4.7 Resignation and Removal of Custodian; Appointment of Successor.

(a) The Custodian may resign at any time as Custodian hereunder by written notice of its election to do so, delivered to the Depositor, such resignation to take effect only upon the appointment of a successor custodian and its acceptance of such

appointment as hereinafter provided. In the event the Custodian resigns hereunder, the Custodian shall use its best efforts to assist the Depositor in obtaining a successor custodian.

(b) If at any time the Custodian shall become incapable of acting or shall be adjudged bankrupt or insolvent or a receiver of the Custodian or of its property shall be appointed or any public officer shall take charge or control of the Custodian or of its property or affairs for the purpose of rehabilitation, conservation or liquidation, then the Custodian shall promptly notify the Depositor of such disability, and the Depositor may, upon 30 days' written notice to the Custodian, remove the Custodian and appoint a successor custodian meeting the qualifications set forth in paragraph (c).

(c) In case at any time the Custodian acting hereunder shall resign or be removed, the Depositor shall use its best efforts to appoint a successor custodian within 30 days after the delivery of a notice of resignation or a notice of removal. Any successor custodian shall be a bank or trust company organized and doing business under the laws of the United States of America or of any State thereof, authorized to act as custodian. If no successor custodian has been appointed as successor custodian within 30 days after the Custodian has given written notice of its election to resign, the resigning Custodian may petition any court of competent jurisdiction for the appointment of a successor custodian.

(d) Notice of each resignation and each appointment of a successor custodian shall be given by the mailing of notice to the Depositor and to the registered holders of Custodial Receipts.

(e) Every successor custodian appointed hereunder shall execute and deliver to the Depositor and the retiring Custodian an instrument accepting such appointment and thereupon the resignation of the retiring Custodian shall become effective and such successor custodian shall become vested with all the rights and duties of the retiring Custodian. Consistent with the written agreement to be entered into by the Depositor and the Custodian referred to in Section 4.4 and the provisions of such Section, the retiring Custodian shall (i) upon payment of its charges, duly assign, transfer and deliver to such successor custodian all records, COOFs and rights to all unmatured interest thereon and moneys held by such retiring Custodian hereunder, and (ii) pay over to such successor custodian any fees or charges previously paid to the Custodian in respect of duties not yet performed under this Agreement which remain to be performed by such successor custodian. Any Custodial Receipts issued by the Custodian that remain outstanding at the time of retirement of the Custodian will remain valid notwithstanding the appointment of a successor custodian.

Section 4.8 Merger, Conversion, Consolidation or Succession to Business.

(a) Any corporation into which the Custodian may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Custodian shall be a party, or any corporation succeeding to all or substantially all of the corporate trust business of the Custodian, shall be the successor of the Custodian hereunder, provided such corporation shall be otherwise eligible under Section 4.7(c) hereof, without the execution or delivery of any paper or any further act on the party of the parties hereto.

(b) Any corporation into which the Depositor may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Depositor shall be a party, or any corporation succeeding to all or substantially all of the securities business of the Depositor or its parent, shall be the successor of the Depositor hereunder, provided such corporation shall be otherwise eligible to conduct the securities activities of the Depositor and its affiliates, without the execution or delivery of any paper or any further act on the part of the parties hereto.

Section 4.9 Termination. This Agreement shall terminate one year following the payment in full of the Payments due on the COOFs deposited hereunder or the loan underlying the COOF having been retired from the secondary market.

ARTICLE V

Miscellaneous

Section 5.1 Amendments. This Agreement may be amended from time to time by the written agreement of the Custodian and the Depositor to effect any change which they may deem necessary or desirable. No amendment to this Agreement shall affect the obligations of the Custodian under Section 3.1 or otherwise adversely affect the rights of owners of Custodial Receipts of Series theretofore issued or cause Custodial Receipts to be anything other than evidences of the ownership of all right, title and interest in the COOFs deposited hereunder.

Section 5.2 Execution in Counterparts; Inspection of Copies. This Agreement and any amendment hereto may be executed in any number of counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument. Copies of this Agreement shall be open to inspection

during business hours at an office designated by the Custodian in the City of New York by any registered holder of Custodial Receipts.

Section 5.3 Agreement for Exclusive Benefits of Parties. This Agreement is for the exclusive benefit of the parties hereto and their respective successors hereunder, and shall not be deemed to give any legal or equitable right, remedy or claim to any other person whatsoever.

Section 5.4 Effect of Invalidity of Provisions. In case any one or more of the provisions contained in this Agreement or in any Custodial Receipt of any Series should be or become invalid, or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein or therein shall in no wise be affected, prejudiced or disturbed thereby.

Section 5.5 Notices. Any and all notices to be given to the Depositor shall be deemed to have been duly given if personally delivered or sent by cable, telex, telecopy or facsimile transmission confirmed by letter, addressed to the Depositor at its offices at 245 Park Avenue, New York, New York 10167, Attention: [ ], telecopy number: [ ], or, upon notice given in accordance with the provisions of this Section 5.5, to any other place to which it shall have transferred its main office, with a copy to the Custodian in the case of any notice given by the owner of a Custodial Receipt.

Any and all notices and orders to be given to the Custodian shall be deemed to have been duly given if personally delivered or sent by cable, telex, telecopy or facsimile transmission confirmed by letter, addressed to the Custodian at its designated office at 55 Water Street, Room 610, New York, New York 10041, Attention: Mortgaged-Backed Securities, telecopy number: (212) 820-5898, or, upon notice given in accordance with the provisions of this Section 5.5, to any other place to which the Custodian shall have transferred its designated office in the City of New York.

Any and all notices to be given to any owner of a Custodial Receipt shall be deemed to have been duly given if personally delivered or sent first class mail postage prepaid, addressed to such registered holder at the address of such registered holder as it appears on the Register. Delivery of a notice to any owner of a Custodial Receipt sent by mail or by cable, telex, telecopy or facsimile transmission shall be deemed to be effected at the time when a duly addressed letter containing the same (or a confirmation thereof in the case of a cable, telecopy, telex or facsimile transmission message) is deposited, first class mail postage prepaid, in a post-office letter box.

Section 5.6 Owners of Custodial Receipts as Parties. The owners of Custodial Receipts from time to time shall be parties to this Agreement and shall be bound by all of the terms and conditions hereof and of the Custodial Receipts by their acceptance thereof or by their execution of the Purchase Agreement to which this Agreement from time to time may be an exhibit.

Section 5.7 Successors. This Agreement shall bind the parties hereto and their respective successors.

Section 5.8 Survival. The provisions of Sections 2.3(c), 4.3(b) and 4.6 shall survive any termination of this Agreement.

Section 5.9 Governing Law. This Agreement and the Custodial Receipts and all rights hereunder and thereunder and all the provisions hereof and thereof shall be governed by and construed in accordance with the internal laws of the State of New York, without giving effect to principles of conflict of laws.

IN WITNESS WHEREOF, the Depositor and the Custodian have duly executed this Agreement as of the day and year first above written and all owners of Custodial Receipts shall be parties hereto by virtue of the acceptance by them of such Custodial Receipts or by their execution of the Purchase Agreement to which this Agreement from time to time may be an exhibit.

BEAR, STEARNS & CO. INC.

By:_____
Title: Senior Managing Director

CHEMICAL BANK

By:_____
Title:

Stroock & Stroock & Lavan
Seven Hanover Square
New York, New York 10004-2696

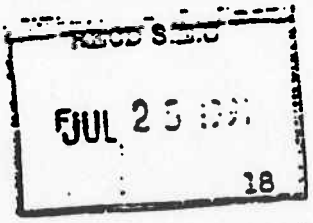
July 24, 1991

212 806 5400
Telecopier:
212 806 6006
212 806 6113
Telex:
177865 STROOCK UT

Robert H. Coleman
212 806 5549

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Attn: Thomas A. Jones, Esq.



Gentlemen:

Reference is made to our letter of June 18, 1991 regarding Bear, Stearns & Co. Inc. ("Bear Stearns") and its proposed Custodial Receipt Program from SBA-guaranteed Confirmations of Originator Fees. A copy of our June 18th letter is attached and capitalized terms defined therein are used herein with their defined meanings.

In response to a telephone conversation today with Thomas Jones of the Commission's Staff, we wish to provide certain additional information, as follows:

1. The COOF--which is the government guaranteed security to be deposited in the proposed custodial arrangement--is created pursuant to SBA authority in connection with the assembling of SBA-guaranteed loan pools and not pursuant to the proposed custodial arrangement. For your information, we enclose a July 15, 1988 opinion of the SBA's General Counsel which we believe provides useful background information concerning COOFs and the process resulting in their formation. We also enclose a June 20, 1991 letter from the SBA's Acting General Counsel advising of the continued applicability of the July 15, 1988 opinion. In our earlier letter, we stated on page 3 that the Fiscal and Transfer Agent (the "FTA") strips the loans to create the COOFs. As more precisely described on page 5 of the July 15th opinion, the FTA allows pool assemblers to strip the loans and the SBA has supported the FTA's actions. Bear Stearns is an approved SBA pool assembler and COOFs in respect of pools it assembles would be included in the proposed custodial arrangement.

Treat & Trock & Tavan

2. The custodial arrangement will hold only COOFs and their proceeds. It will not hold SBA loans or other interests therein or any other securities.

We hope the foregoing has been helpful. Should members of the Staff have any further questions or comments concerning this or our earlier letter, please do not hesitate to telephone me at the number set forth above.

Very truly yours,

snw
Enc.

Exhibit A

DATE: JUL 15 1981

TO: Edwin T. Holloway
Associate Administrator
for Finance and Investment

FROM: General Counsel

SUBJECT: Full Faith and Credit Obligation with Respect to Payment by Fiscal and Transfer Agent of Originator Fee

This is in response to your request as to whether the full faith and credit of the United States supports the Agency's guarantee to the holder of an "originator fee" as defined below. For the reasons discussed, the answer to your inquiry is yes. In order to reach this determination, it is useful to review the background of the Small Business Administration's participation in the secondary market.

Section 7(a) of the Small Business Act (Act) (15 U.S.C. § 636(a)), since its enactment in 1958 (Pub. L. 85-536), has authorized the SBA to guarantee the repayment of portions of loans made by participating lenders. Presently, the Agency guaranty cannot exceed an amount of $500,000. As described in SBA regulations (13 C.F.R. § 120.3-3) a guaranteed loan is made by a lender to a small business under a guaranty agreement between the lender and SBA. "The Lender advances the total funds for the loan and SBA agrees to purchase, upon demand by the Lender and subject to specific conditions, an agreed portion of the outstanding balance."

COMPTROLLER GENERAL AND SEC RULINGS - BACKGROUND

In 1972, the Comptroller General acknowledged the importance of the secondary market as a mechanism for the sale and purchase of SBA guaranteed portions of loans, and described the extent of the guaranty SBA makes vis a vis a third party purchaser of the guaranteed portion. In that opinion (51 Comp. Gen. 474), the Comptroller General ruled that the SBA could pay a holder (investor) of an SBA guaranteed portion "where SBA has knowledge of the possibility of negligence, fraud, or misrepresentation on the part of [the lender], but where the present holder of the note did not participate in and was not aware of such negligence, fraud, or misrepresentation at the time it purchased the note from the bank." The Comptroller General added: "In our opinion, payment to an innocent holder of an SBA guaranteed loan note is clearly distinguishable from payment to a bank which may be

guilty of negligence, fraud, or misrepresentation in obtaining the SBA loan guarantee." This opinion is the basis for the now oft-stated declaration that the SBA guaranty to the investor is unconditional while the guaranty obligation to the participating lender is conditional since the Agency cannot pay a lender which may be guilty of negligence, fraud or misrepresentation. The Agency's guaranty, in all cases and in all documentation (including the tri-party secondary market agreements), extends to the payment of all principal and interest due on the outstanding balance under the note when the Agency makes its purchase.

In 42 Op. A.G. 21 (1961), the Attorney General noted that a series of Attorney General opinions issued between 1953 and 1959 "has established that a guaranty by a Government agency contracted pursuant to a congressional grant of authority for constitutional purposes is an obligation fully binding on the United States despite the absence of statutory language expressly pledging its 'faith' or 'credit' to the redemption of the guaranty and despite the possibility that a future appropriation might be necessary to carry out such redemption." The Agency has interpreted this opinion to mean that the Agency guaranty with respect to 7(a) loans is supported by the full faith and credit of the United States. The Comptroller of the Currency, as the administrator of national banks, on August 2, 1972, ruled that the guaranteed portions of SBA loans are general obligations of the United States and thus are eligible for use by national banks as collateral security for uninvested trust funds. (For general rules of the Comptroller of the Currency in this respect, see 12 C.F.R. §§ 1.110 and 9.10.)

In 1974, the Agency sought the approval of the Comptroller General for authority to purchase from an investor the SBA guaranteed portion of a loan when the borrower had not defaulted but the primary lender had failed to forward borrower's payments to the investor. In an opinion issued December 3, 1974 (B-140673), the Comptroller General assented. In making the request, the Agency had acknowledged that the secondary market was essential to the activities of the participating lenders and that any impairment would drastically curtail the guaranteed loan program. The Agency also promised to monitor closely the performance of the lenders participating in the program. The Comptroller General, in his opinion, recognized the broad authority Congress gave the SBA Administrator to take any and all actions determined by him to be necessary or desirable in making, servicing, compromising, modifying, liquidating, or otherwise dealing with loans (Section 5(b)(7) of the Act, 15 U.S.C. 634(b)(7)). The Comptroller General also referred back to an opinion he had issued October 12, 1959, in which he

had stated that the power under Section 7 of the Act to make loans is broad and vests in the Administrator "considerable discretion as to the details for executing the loan arrangements."

On March 6, 1975, the Securities and Exchange Commission issued a no-action letter with respect to the SBA guaranteed portions sold by participating lenders. This was based on the 1974 Comptroller General opinion together with the SBA representation that it intended to implement its guarantee in all circumstances where defaults on the SBA-guaranteed portions of loans occur. The ruling expressly excluded from its applicability "those situations in which private lenders form pools of SBA-guaranteed loans and sell participation interests in such pools to investors."

In an opinion issued August 11, 1978 (B-181432), the Comptroller General ruled that SBA had the authority to appoint a private entity as a fiscal agent to serve as a central registry of holders for the lenders and SBA. The fiscal agent would have the responsibility of receiving loan payments from the respective lenders and remitting the appropriate amounts to the proper investors. Further, the Agency could guarantee the investor against the failure by either the lender or the fiscal agent to forward the investor's share of the borrower's payment on the guaranteed portion of the loan. On November 2, 1978, the Securities and Exchange Commission extended its earlier no-action ruling to include sales of the SBA-guaranteed portions of loans made by lenders through SBA's fiscal agent. In seeking this extension the Agency had represented to the SEC that the Agency would guarantee the investor against the fiscal agent's failure to properly forward loan payments (just as the Agency had earlier guaranteed investors against the lender's failure to forward such loan payments directly).

As described in the opinion of the Comptroller General, the procedure worked in the following manner. When the lender sells the SBA guaranteed portion of a loan, the sale is evidenced by a tripartite agreement (presently SBA Form 1086) between the lender, the investor (registered holder), and SBA. The SBA and the lender warrant to the investor that, as of the date of the agreement, a certain specified sum of money is owed by the borrower to the lender with a specified percentage of the principal being guaranteed by SBA with interest. The lender promises to promptly forward to the fiscal agent the payments made by the borrower (less any servicing charges) and the fiscal agent promises to forward those payments to the investor (less any servicing fee). SBA would guarantee the investor against a failure by the borrower to make timely repayment or a failure by either the lender or

the fiscal agent to forward the borrower's payment on the guaranteed portion.

STATUTORY AUTHORITY FOR POOLS

The secondary market in SBA guaranteed portions of loans operated under the above authorities until 1984 when Congress first statutorily authorized SBA to allow pools to be formed consisting of the SBA-guaranteed portions of loans. Section 5(g) of the Act (15 U.S.C. § 634(g)) authorizes the Agency to issue certificates representing ownership of undivided interests in SBA-guaranteed portions backed by an SBA-approved pool of such guaranteed portions. Section 5(g)(3) of the Act provides that the "full faith and credit of the United States is pledged to the payment of all amounts which may be required to be paid under any guarantee" of such certificates issued by SBA or its agent [emphasis added]. Section 5(h) of the Act (15 U.S.C. § 634(h)) authorizes the Agency to promulgate regulations and to contract with a fiscal and transfer agent to act as a central registry for all SBA guaranteed portions sold in the secondary market whether or not destined for pools. Section 5(f)(3) of the Act (15 U.S.C. § 634(f)(3)) authorizes SBA to "develop such procedures as are necessary for the facilitation, administration, and promotion of secondary market operations." Toward that end, the Agency has promulgated implementing regulations which are found in Title 13, Code of Federal Regulations, Part 120: Subpart F - Central Registration for Secondary Market; Subpart G - Pooling of SBA Guaranteed Portion; Subpart H - Individual SBA Guaranteed Portion Sold in the Secondary Market. On April 13, 1987, the Securities and Exchange Commission issued a no-action letter to SBA interposing no objection if the Agency issues, through its fiscal and transfer agent, SBA guaranteed certificates representing fractional undivided interests in SBA-guaranteed portions of loans made by private lenders. The SEC based this ruling on the representation that both the payments due on the SBA guaranteed portions and the payments due on the certificates are guaranteed by the full faith and credit of the United States.

ORIGINATOR FEE

When the Agency promulgated the pertinent regulations to describe the operation of pools of SBA guaranteed portions, it made a policy decision on the interest rate available to investors in the pool. It decided that the rate on a pool certificate must be equal to the lowest net rate on an individual guaranteed portion in the pool (§ 120.706(g) of SBA regulations, 13 C.F.R. § 120.706(g)). For example, if a pool contained several loans, half with a coupon rate of prime and half with a coupon rate of prime plus two, the rate on all

pool certificates would be the prime rate. Therefore, pursuant to 13 C.F.R. § 120.706(g), two points from half of the guaranteed portions in the pool could not be distributed to holders of certificates backed by the guaranteed portion in the pool.

This regulatory framework created a potential problem for pool assemblers who have to pay market prices for the loans they purchase; meaning the prime plus two loans in the above example cost more than the prime loans. If the pool assemblers were not able to sell the income stream on the extra percentage points on the prime plus two loans, they might be forced to absorb losses, and lenders would not have the liquidity which the secondary market contemplates. Thus, the SBA pooling regulations might unnecessarily hinder the facilitation, administration, and promotion of secondary market operations. (See § 5(f)(3) of the Act.) Consequently, SBA's fiscal and transfer agent (FTA), with SBA's knowledge, in order to ameliorate the problem inherent in 13 C.F.R. § 120.706(g), has allowed pool assemblers to strip off the extra percentage points from loans carrying interest above the certificate rate and to sell this income stream to third parties; this stream is called an "originator fee." SBA, pursuant to its authority in Section 5(f) of the Act, has supported this action of its FTA even though the secondary participation agreement (SBA Form 1086) does not presently refer to such originator fee. This was felt to be proper since support for the FTA's actions in this regard emanates from the statute, not from the form.

In case of a default by a borrower on a loan whose guaranteed portion has been placed in a pool, the FTA, on behalf of the investor of an SBA-guaranteed portion sold in the secondary market, makes demand on the lender to repurchase. If the lender refuses, the FTA makes demand on SBA. The Agency verifies the amount of outstanding principal and accrued interest due on the loan and makes payment to the FTA for distribution. If there has been no originator fee, for whatever reason, the FTA, after deducting its servicing fee, will transmit the funds to the registered holder. If stripping has occurred, the FTA will separate the strip and transmit funds representing principal and interest to date to both the registered holder and to the investor of the originator fee income stream. In either case, the liability of the Agency on its guaranty has not been increased. The amount calculated by the Agency as due is the same. The FTA is paying off two investors in the same guaranteed portion as indicated in its central registry, each investor holding a separate interest in its share of the SBA-guaranteed portion.

It is our view that the same language which supports the full faith and credit obligation to pass through payment of all principal and interest to a registered holder of a guaranteed portion also supports the full faith and credit obligation of the Agency to pass through the originator fee to the owner of the originator fee. The Agency's full faith and credit guarantee of the underlying obligation in a pool includes the payments of the originator fees which may have arisen in the assemblage of a pool. Further, the FTA's actions in paying the originator fee income stream are fully consistent with the Agency's mandate to create pools and set policies with respect thereto. Therefore, SBA as a matter of law guarantees the holder of the originator fee against the FTA's failure to properly forward the appropriate amount. I hasten to add that, as we have previously discussed, we intend to follow through with your staff to develop regulations and forms necessary to document the effect of this ruling.

Larry R. Parkinson

Larry R. Parkinson
General Counsel

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JUN 20 1991

Ms. Lauren Austin
Stroock & Stroock & Lavan
Seven Hanover Square
New York, NY 10004-2594

Dear Ms. Austin:

You have requested, in your letter of June 17, 1991, the status of a 1988 opinion that the full faith and credit of the United States supports the Small Business Administration guarantee to the holder of an originator fee. This is to advise you that such opinion continues to reflect the position of this Office.

Sincerely,

Martin D. Teckler

Martin D. Teckler
Acting General Counsel

Seven Hanover Square
New York, New York 10004-2616

November 12, 1991

212 806 5400
Fax: 212 806 6006
Telex: 177880 STROCK NY

Stuart M. Cohen
212 806 5540

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Bear, Stearns & Co. Inc.

Gentlemen:

Reference is made to our letters of June 18 and July 24, 1991 regarding Bear, Stearns & Co. Inc. ("Bear Stearns") and its proposed Custodial Receipt Program for SBA Guaranteed Confirmations of Originator Fees. In response to conversations with members of the Divisions of Corporation Finance, Market Regulation and Investment Management, we are providing the information set forth below. Terms defined in our June 18 and July 24 letters are used herein with their defined meanings.

1. Pursuant to Section 7(a) of the Small Business Act (15 U.S.C. § 636(a)) (the "Act"), the SBA is permitted to guarantee the payment of portions of loans made by certain eligible lenders. These guaranteed portions of loans may be sold individually or may be pooled. Pursuant to Section 5(g) of the Act (15 U.S.C. § 634(g)), the SBA is permitted to issue certificates representing ownership interests in an SBA-approved pool of such guaranteed portions. Section 5(g)(3) of the Act provides that the "full faith and credit of the United States is pledged to the payment of all amounts which may be required to be paid under any guarantee" of such certificates issued by the SBA or the FTA (emphasis added). Section 5(h) of the Act (15 U.S.C. § 634(h)) authorizes the SBA to contract with a fiscal and transfer agent, here the FTA.

We understand that when the SBA promulgated regulations to describe the operation of pools of SBA guaranteed portions, it made a policy decision on the interest rate available to

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These arrangements have been the subject of the following SEC no-action letters: U.S. Small Business Administration (Avail. April 13, 1987); U.S. Small Business Administration (Avail. December 4, 1978); and SBA Guaranteed Loans (Avail. March 6, 1975).

investors in the pool. It decided that the rate on a pool certificate must be equal to the lowest net rate on any individually guaranteed loan in the pool.

The following example of the operation of this rule was given in a July 15, 1988 opinion of the SBA's General Counsel, a copy of which was enclosed with our July 24th letter (the "Opinion"): "if a pool contained several loans, half with a coupon rate of prime and half with a coupon rate of prime plus two, the rate on all pool certificates would be the prime rate. Therefore . . ., two points from half of the guaranteed portions in the pool could not be distributed to holders of certificates backed by the guaranteed portion in the pool."

The Opinion continues as follows:

> This regulatory framework created a potential problem for pool assemblers who have to pay market prices for the loans they purchase; meaning the prime plus two loans in the above example cost more than the prime loans. If the pool assemblers were not able to sell the income stream on the extra percentage points on the prime plus two loans, they might be forced to absorb losses, and lenders would not have the liquidity which the secondary market contemplates. . .. Consequently, the [FTA], with SBA's knowledge, . . . has allowed pool assemblers to strip off the extra percentage points from loans carrying interest above the certificate rate and to sell this income stream to third parties; this stream is called an "originator fee."

We refer to the originator fee in our proposal as a COOF.

The Opinion concludes:

> It is our view that the same language which supports the full faith and credit obligation to pass through payment of all principal and interest to a registered holder of a guaranteed portion also supports the full faith and credit obligation of the [SBA] to pass through the originator fee to the owner of the originator fee. . .. Therefore, SBA as a matter of law guarantees the holder of the originator fee against the FTA's failure to properly forward the appropriate amount.

We requested that the SBA's General Counsel confirm its 1988 opinion. On June 20, 1991, the Acting General Counsel did so, as evidenced by his letter attached to our July 24th letter. As we discussed with the Staff members, we are of the opinion that, as

a result, the COOFs are exempt from the provisions of the Securities Act by virtue of Section 3(a)(2) thereunder.

2. We wish to confirm that each custodial receipt will evidence a 100% ownership interest in each COOF covered by the custodial receipt. An individual receipt holder will not be obligated to join the Custodian or any other receipt holder to exercise any right. Each COOF will relate to a single loan in which no other person will have any interest in the excess interest applicable thereto. A receipt holder may cancel the custodial arrangement as to any COOF at any time upon notice to the Custodian. Upon cancellation, the Custodian will be obligated to arrange to have the relevant COOF promptly reregistered in the name of the beneficial owner, to have the existing custodial receipt cancelled and to have issued to the beneficial owner a new custodial receipt evidencing ownership of the remaining COOFs represented by the cancelled custodial receipt.

3. As we discussed, we do not believe that the elements of the proposed arrangement are the same as the elements present in Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., a case in which a certificate of deposit ("CD") marketing program was found to involve the issuance of a separate, unregistered security. In Gary Plastic,

(a) CD issuers were reviewed and approved by Merrill Lynch and monitored by Merrill Lynch on a regular basis;

(b) Merrill Lynch offered to maintain a secondary market which would enable its customers to sell their CDs back to Merrill Lynch at prevailing market rates without payment of prepayment penalties imposed by the issuing banks; and

(c) Merrill Lynch customers were discouraged from dealing directly with the issuing banks.

The court in Gary Plastic found that by investigating issuers, marketing the CDs and creating a secondary market, Merrill Lynch was engaged in a common enterprise within the meaning of the relevant precedent. The court also found that customers expected profits derived solely from the efforts of Merrill Lynch and the participating banks and that Merrill Lynch's activity was significantly greater than that of an ordinary broker or sales agent, particularly because Merrill Lynch possessed significant economic power that permitted it to negotiate with the issuing banks to obtain favorable rates. As a result, the court found that a separate security had been created.

In contrast, as we have outlined in our earlier letters, the Proposed Program is merely an administrative convenience to custodial receipt holders. The COOFs are not established pursuant to the proposed custodial arrangement, but rather pursuant to SBA authority in connection with the assembling of SBA-guaranteed loan pools. Neither Bear Stearns nor any third party has agreed to make a market in the COOFs or the custodial receipts on behalf of or in connection with the Proposed Program. In fact, a market for COOFs exists independent of Bear Stearns. Finally, neither Bear Stearns nor any third party has guaranteed any return to COOF or custodial receipt holders or to protect them from loss beyond the government guarantee. Accordingly, we do not believe that the elements that troubled the court in Gary Plastic are present in the Proposed Program.

4. We have been advised that Bear Stearns is not the sole source of COOFs and that COOFs can be purchased from others in the market.

5. We understand that a CUSIP number will not be assigned to any custodial receipt.

We hope the foregoing has responded to the Staff's questions. Should members of the Staff have any further questions, please do not hesitate to telephone me at the number set forth above.

Very truly yours,

Stuart A. Coleman /LA

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