

A SUGGESTED GUIDE FOR MAKING SALE/LOAN DISTINCTION

1. **There are two kinds of “recourse”:** (1) “suretyship” recourse in which the seller of the receivables agrees to be liable to the buyer in some manner in the event the account debtor or “person obligated on collateral” (e.g. the maker of a negotiable promissory note) fails to pay or perform a **legally enforceable obligation**; and (2) “non-suretyship” recourse in which the seller agrees to be liable to the buyer in some manner for reasons **other** than the failure of the account debtor or” person obligated on collateral” to pay or perform a legally enforceable obligation, e.g. if there is a meritorious defense to the obligation which has the effect of relieving the account debtor or “person obligated on collateral” from the obligation to pay or perform.
2. The absence of any “recourse” whatsoever results in the transaction being a “true” sale.
3. The presence of “non-suretyship” recourse in and of itself never results in the transaction being a loan rather than a sale.
4. If there is no “suretyship” recourse the transaction should stand as a sale.
5. The presence of some “suretyship” recourse **may** cause a transaction to be a loan rather than a sale if it results in the seller having risk that is **meaningful** in the context of the overall transaction. There is no clear bright-line as to what is “meaningful” and that has to be determined on a transaction-by-transaction basis.

Donald J. Rapson
February 1, 2001