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FINANCIAL REPORTING COMMITTEE
and
SECURITIES REGULATION COMMITTEE

July 12, 2004

Via email: rule-comments@sec.gov
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Attention: Jonathan G. Katz, Secretary

Re: File No. S7-21-04
Release Nos. 33-8419 and 34-49644
Proposed Rule: Asset-Backed Securities

Ladies and Gentlemen:

This letter is submitted on behalf of both the Financial Reporting Committee and the Securities Regulation Committee of The Association of the Bar of the City of New York in response to Release Nos. 33-8419 and 34-49644, dated May 13, 2004 (the "Release"), in which the Securities and Exchange Commission (the "Commission") published for comment the Proposed Rule: Asset-Backed Securities (the "Proposed Rule"). Our Committees are composed of lawyers with diverse perspectives on financial reporting and securities issues, including members of law firms, counsel to corporations, investment banks, investors and academics.

Our Committees' members generally do not include practitioners with extensive expertise in the asset backed securities ("ABS") market, so our comments tend to focus on selected sections of the Proposed Rule that we feel may be applicable to a more generalized securities practice, including possible future proposals the Commission may be considering, as well as ABS offerings. Given the length and complexity of the Proposed Rule and the short comment period, we would respectfully request that the Commission proceed slowly and cautiously, implementing selected provisions, modified as warranted by comments received, in

the same manner that the Form 8-K proposals were adopted in sections, with opportunities and significant time periods for market participants to adjust to a section of significant changes before additional changes are required. We believe the Proposed Rule could easily be broken into sections for gradual implementation. We would also respectfully request that each such section, as modified to take into consideration comments received, be re-proposed for further comments before implementation. We believe the amount of time the Commission took to draft the Proposed Rule is indicative of its complexity and potentially significant impact on the ABS market, which is vital to the financial health of the US financial markets, US financial institutions, and US investors and consumers.

In addition, we respectfully request that existing transactions and all future take-downs from existing shelf registration statements that have been filed with the Commission be grandfathered under existing rules. A gradual incorporation of new regulations similar to the manner in which the plain English rules were implemented by the Commission could be helpful.

In response to the Commission's invitation for comment, the Committees wish to encourage the Commission, in recognition of the substantial financial burden that the Proposed Rule will be imposing and the added complexity that the rule as finally adopted would entail on the ABS market, to monitor the implementation of the Proposed Rule and periodically evaluate whether rule revisions are necessary to avoid unintended outcomes with costs and complexity to the market that far exceed the anticipated benefits to investors.

A. Securities Act of 1933 registration process and requirements.

1. Separate base prospectus for each asset class and each country. (Sec. III.A.3.b.)

Proposed instruction V.A. for Form S-3 requiring a separate base prospectus for each "asset class" generally is consistent with the Staff's current position with respect to the use of a separate base prospectus for different asset types. However, the proposed instruction appears to eliminate a number of the exceptions or refinements that have developed in the Staff's position on this issue that we believe should be preserved. The proposed instruction requiring a separate base prospectus for each country of origin or location of property imposes an unnecessary artificial barrier on transactions with assets from multiple countries. If the base prospectus properly describes the implications of a pool containing different asset classes or assets from each particular country (e.g. legal, tax, governmental issues), we see no reason to prevent transactions that combine assets. We believe this requirement, in many cases, would drive transactions to the Rule 144A market.

To address these matters, we suggest that the Staff remove the requirement that each asset class and country of origin have a separate base prospectus and permit ABS Form S-3 registration statements to be prepared in a manner similar to "universal shelf registration statements" used by corporate issuers. Universal shelf registration statements cover multiple securities that can be issued in multiple currencies. In the case of corporate universal shelf registration statements, the Commission has left the determination of what constitutes an appropriate combination of identified securities and currencies to the issuers, the broker-dealer community and the investors. We believe that because issuers, and to some extent underwriters,

bear the responsibility of providing proper disclosure in a securities offering, the proposed instructions create an artificial and unnecessary limitation on ABS transactions.

If the Commission is unwilling to omit the instructions regarding a separate base prospectus for each asset class and country of origin, we request that the final rule clarify certain matters to preserve currently accepted practices. To this end, we request that the Staff clarify the meaning of "asset class" to avoid the unnecessary use of base prospectuses for assets that are currently included in a single base prospectus, and to permit sufficient flexibility going forward with respect to new asset classes. For example, it is currently permitted industry practice to prepare a single base prospectus covering all types of residential mortgage loans (e.g. first lien mortgage and home equity loans). The proposed instruction to Form S-3 could be read to require a separate base prospectus for sub-types of broader asset types, which would result in significant, and seemingly needless, use of a separate base prospectus for these sub-types. We request that the Staff clarify that the meaning of the term "asset class" applies at the general level and would not apply at the sub-type asset level where a significant portion of the disclosure in a base prospectus would be identical for each type of asset. We also request that the Commission include a formal exclusion in the final rule permitting a pool of securitized assets to include a specified percentage of assets (such as 10%) that are not described in the base prospectus. Such additional assets would then be appropriately described in the prospectus supplement. With respect to assets originated in different countries or properties located in different countries, as an alternative, we propose (i) that a base prospectus be permitted to include assets from different countries, provided that the countries have similar legal systems with respect to the assets (e.g. security interests) and (ii) any transaction may include a specified percentage of assets (such as 10%) that are not described in the base prospectus. Such additional assets, and the relevant information regarding the country of origin (tax, legal and governmental), would be described in the prospectus supplement. Again, we believe that the liability imposed on issuers and underwriters with respect to disclosure and investor demand will ensure sufficient information will be provided to investors.

Finally, if the Commission is unwilling to consider any of the foregoing, we request that the Commission encourage and accommodate pre-filing conferences with the Staff to discuss factors that the Commission may not have addressed in the final rule or to address new developments in the ABS markets.

2. Prospectus supplements should be able to modify base prospectuses. (Sec. III.A.3.b.)

The Proposed Rule requires that a prospectus supplement may only contain structural features described in the base prospectus at the time of effectiveness; additional structural features must be added by a post-effective amendment or a new registration statement. We believe this is consistent with current practice. It is also current practice that (i) many structural features are generally described in the base prospectus and (ii) the specific terms of a feature as applied in a transaction are described with particularity in the prospectus supplement. This approach achieves the Commission's goal of a base prospectus that is much less complex yet, when read together with the prospectus supplement for a transaction, is fully informative in a clear and manageable presentation.

We believe that the last sentence before the questions in Section III. A. 3. b. of the Release confirms this approach, viz., that general concepts described in a base prospectus may be specifically tailored in the prospectus supplement with modification and supplementation. We believe that much of the success of the shelf registration process has been due to the ability of issuers to have "real time" market access where they are able to structure offerings that reflect market conditions and investor preferences. We believe that issuers and investors have benefited from adaptability and marketing flexibility by tailoring prospectus supplements.

We are unaware of any abuses from the ability to provide market flexibility to issuers that the Commission needs to address, particularly since all provisions are included in the prospectus supplement with the base prospectus attached. A requirement that would not permit generally described provisions to be individually tailored in a prospectus supplement would substantially impair the flexibility that the shelf registration process has brought to the US capital markets.

3. As currently permitted, prompt take-downs after shelf effectiveness should be allowed without prior disclosure where no specific offering with identified underwriters is planned and issuers are responding only to subsequent market opportunities. (Sec. III.A.3.b.)

The Commission stated in Note 83 of the Release that "(i)f a registrant plans to conduct a prompt takedown of asset-backed securities, the registration statement at the time of effectiveness must include all available information regarding the offering, including information about the asset pool, subject to any omissions permitted by … Rule 430A …, including a completed prospectus supplement and not just a form of prospectus supplement." We would like to confirm that this does not represent a deviation from the current Staff policy (as reflected in Securities Act Release No. 6964) that the accuracy of the disclosure with respect to a prompt takedown of securities will be treated like any other disclosure issues that are raised after the effectiveness of the registration statement (*i.e.*, was the disclosure, including the fact that an immediate offering of securities is intended, accurately reflected in the registration statement at the time it went effective). In particular, we would like to confirm that there is no presumptive rule, analogous to the concept of a "convenience shelf," that an offering within a specified time period after the effectiveness of the registration statement *per se* will be required to have included a completed prospectus supplement in the registration statement at the time it went effective. We do not believe that any change in this approach is warranted and, therefore, would like to clarify that the Note is not intended to signal any such change.

4. Delivery and updating of prospectuses in connection with market-making or remarketing transactions. (Sec. III.A.3.b.)

The Release at Note 86 states that asset pool information included in a prospectus should be kept current for market-making and remarketing transactions, and indicates that this information may be updated either by filing a new prospectus under Rule 424 under the Securities Act or through the filing of a Form 8-K that contains the updated information and is incorporated by reference into the prospectus. Note 86 also points out that in non-ABS transactions, the prospectus is kept current by the incorporation by reference of subsequent Exchange Act reports, while taking the view that in an ABS transaction, incorporation by

reference of subsequent Exchange Act reports alone, while important, would be insufficient for updating purposes.

a. *We believe that the Commission should (1) clarify how often prospectuses need to be updated in order to be kept current for use in market-making and remarketing transactions, (2) confirm that such updating applies only to certain specified information in the prospectus and (3) allow incorporation by reference of subsequent Exchange Act reports to satisfy any such updating requirements.*

Market-making or remarketing transactions that involve ABS should not be treated differently from non-ABS transactions as both involve the same legal issues and policy considerations. Similarly, complying with applicable registration requirements and related prospectus delivery obligations under the Securities Act should not be more burdensome in ABS transactions than in non-ABS situations. Toward this goal, we suggest that the Commission clarify the frequency with which information in an ABS prospectus must be updated in order to be viewed as current for purposes of continued use in market-making or remarketing transactions. Further, we ask the Commission to clarify that any such updating requirement applies only to certain specified information. While Note 86 of the Release refers to asset pool information, we note that other proposals in the Release may impose new disclosure and information requirements in ABS offerings (including, for example, with respect to static pool data). While we have commented on such proposals in other sections of this letter, we believe that regardless of the final outcome of those proposals, the prospectus updating requirement for market-making and remarketing transactions should be specific as to what information is covered and limited to the information regarding the asset pool of the subject ABS transaction. Accordingly, the Commission should clarify its intent on the frequency and extent of the updating requirement referenced in Note 86.

The Commission in Note 86 of the Release takes the view that for purposes of updating disclosure in prospectuses used in market-making or remarketing transactions, something more than standard incorporation by reference of subsequent routine Exchange Act reports will be necessary for purposes of staying current -- namely, either the filing of a new prospectus under Rule 424 of the Securities Act or the filing of additional Form 8-Ks with updated information that are incorporated by reference into the prospectus. While understanding that disclosure is an ongoing obligation for any public issuer, we believe that the framework of Exchange Act reporting provides a realistic and practical means to update prospectuses through incorporation by reference. This is the model for non-ABS issuers embodied in the current system of reporting under the Exchange Act. There is no reason it should not also be the model for ABS issuers. In the Release, the Commission has undertaken to address comprehensively the registration, disclosure and reporting requirements for ABS under the Securities Act and the Exchange Act. Once final rules are adopted, the Commission will have provided ABS issuers with new rules for Exchange Act compliance. Assuming an ABS issuer complies with the new Exchange Act rules, both in terms of timeliness and content, it should not be required to further amend its prospectus solely because of market-making or remarketing transactions. To the extent information is material to an investment decision, it will be in either the prospectus or the required Exchange Act reports—indeed, the new rules that come out of the Release seek to assure this. To impose an undefined updating requirement outside this framework would be

unduly burdensome to ABS issuers and inconsistent with the integrated disclosure regime of the Securities Act and the Exchange Act.

b. *We believe that the Commission should revisit its policy regarding the delivery of market-making prospectuses and the Securities Act registration of market-making transactions by affiliates.*

In addition to our suggestions regarding the prospectus updating requirements referenced in Note 86 of the Release, we also want to take this opportunity to address an issue with broader applicability. We think it appropriate that the Commission revisit its policy regarding the delivery of market-making prospectuses and the Securities Act registration of market-making transactions by affiliates. In March 1996, the Report of the Task Force on Disclosure Simplification recommended the elimination of an affiliated broker-dealer's prospectus delivery obligation in "regular way" market-making transactions in outstanding securities of a Section 12 reporting company. The Task Force noted its belief that the burden on broker-dealers could be reduced without sacrificing investor protection. In December 1998 in Release No. 33-7606A, the Commission recognized the same burden related to prospectus delivery in market-making transactions and requested comment on exempting all market-making transactions from prospectus delivery requirements or exempting certain market-making transactions from the Securities Act registration requirements entirely.

We believe that, in the secondary market, ABS investors are likely to have made their investment decisions before contact with the market maker and that prospectus delivery serves no meaningful function. To impose the significant cost and burden of maintaining and delivering a current prospectus in secondary market transactions that provide no additional proceeds to an ABS issuer is unwarranted in light of the information that will be available to ABS investors in the secondary market. ABS investors will have access to virtually all relevant material information through the distribution date reports (whether required under the Exchange Act or through transaction-specific contractual reporting obligations), as well as information provided on issuer or trustee websites and by third-party services (such as Bloomberg). We do not think investor protection would be sacrificed by eliminating the prospectus delivery requirement in such circumstances. We agree that the two criteria suggested by the Commission in 1998 would be appropriate—namely that the broker-dealer must engage in the transaction only in its ordinary capacity as a market maker and that the securities must be outstanding securities that the broker-dealer did not acquire directly from the issuer or an affiliate.

We realize that the issue of Securities Act registration and related prospectus delivery regarding market-making transactions by affiliates is broader than the subject matter of the Release. Nonetheless, we ask that the Commission consider revisiting its policy regarding market-making transactions by affiliates. The burden and expense on issuers and broker-dealers resulting from the Commission's current policy do not further investor protection. Requiring Securities Act registration and after-market prospectus delivery based on affiliation with entities other than the issuer that is an operating company is not consistent with the Commission's policy in non-ABS transactions. This policy adds expense for certain issuers with affiliated servicers and broker-dealers, and creates a competitive disadvantage for such affiliated broker-dealers in the execution of secondary market transactions involving ABS. Furthermore, the staff's concerns do not provide a sufficient basis for requiring Securities Act registration and prospectus

delivery since there are other safeguards that assure that broker-dealers will not have access to material nonpublic information in executing market-making transactions. As outlined in the preceding paragraph, ABS investors in the secondary market will have access to relevant material information from several sources, so it is unlikely that affiliated broker-dealers will have access to material non-public information. Should such a circumstance occur, the protections already provided by the anti-fraud and disclosure requirements of the Exchange Act (in particular Rule 10b-5) and self-regulatory organizations will apply to safeguard ABS investors

Accordingly, we respectfully request that the Commission revisit its current policy and consider exempting from Securities Act registration ordinary market-making transactions in addition to eliminating the prospectus delivery requirement in connection with market-making transactions by affiliates in most circumstances. We believe for the reasons stated in the second paragraph of this subsection A.4(b) that the Commission could provide meaningful relief in this area which is burdensome to issuers and provides essentially little or no benefit to investors.

To the extent that the Commission intends to revisit its policy regarding Securities Act registration and prospectus delivery with respect to market-making transactions by affiliates at a later date, we would request that the Commission not act on any matters in the Release that would impose any additional burdens in the ABS context regarding such issues until such later consideration.

5. Form S-3 eligibility requirements/reporting history. (Sec. III.A.3.c.)

Proposed General Instruction A.4 of Form S-3 requires timely filings of Exchange Act reports during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement by the depositor or any issuing entity previously established, directly or indirectly, by the sponsor or the depositor. The Staff has stated that this requirement is aimed at improving the Exchange Act filing practices of asset-backed issuers, and particularly at eliminating the practice of many participants in the industry of filing new shelf registration statements through a different depositor if an existing depositor has lost the use of its shelf registration statement because of a failure to comply with the Exchange Act reporting requirements.

We find the proposed instruction problematic because it could cause a depositor to lose access to shelf registration in instances that are unrelated to that depositor and because it will present practical issues in its implementation. While the proposed instruction seems reasonable in the most basic Form S-3 scenario (i.e. where the depositor and the sponsor are related entities, the sponsor is the same for each transaction and the sponsor and the depositor only securitize one asset class), outside this formulation a number of issues arise. Many companies utilize multiple shelf registration statements for different asset classes. Each shelf registration statement commonly has a different depositor, while the sponsor may be the same. Under the proposed instruction, the failure of the depositor to comply with Exchange Act reporting requirements on one shelf registration statement (for example, autos) would result in the loss of the affiliate depositor's shelf (for example, residential mortgages), regardless of whether the residential mortgage depositor was fully compliant with its Exchange Act reporting requirements. This is tantamount to the Commission linking the Form S-3 shelf eligibility of a

corporate issuer to the reporting history of a sister company. We question the Commission's rationale for creating a system that would result in the loss of Form S-3 eligibility for entities that remain compliant with their Exchange Act reporting obligations and propose an alternative below.[1]

We also note that outside the basic example provided above, determining whether a sponsor or any issuing entity established, directly or indirectly, by the sponsor has complied with its Exchange Act reports could be extremely difficult. As noted in footnote 1, in rent-a-shelf situations, an unrelated sponsor will sell assets to the depositor for sale to the issuing entity. If the sponsor has no on-going relationship with the issuing entity, does the issuing entity constitute an "issuing entity, formed directly or indirectly by the sponsor?" What if the sponsor is the servicer, but is not responsible for filing, signing or preparing the Exchange Act reports for the issuing entity? What if there are multiple sponsors in a transaction? If the registration statement is established to be a rent-a-shelf, who is considered the sponsor at the time of filing the registration statement? These are just a few of the permutations regarding the potential issues with respect to the proposed instructions. We request that the final instruction omit the reporting compliance requirement with respect to the sponsor.

To address the Commission's concern regarding the ability of an ABS issuer to circumvent the Exchange Act reporting requirements for use of Form S-3, we suggest that the instruction provide that, in order to be eligible to file a registration statement on Form S-3 to register an offering of asset-backed securities:

- the registrant depositor and any issuing entity formed by the registrant depositor must be compliant with their Exchange Act reporting obligations, and

- no affiliate depositor of the registrant depositor has failed to file (without regard to timeliness) any required Exchange Act report with respect to a registration statement on Form S-3 to register the same asset class or classes.

If an affiliate depositor has made the good faith effort to cure any failure to comply with the Exchange Act reporting obligations, the failure of such affiliate should not preclude a registrant depositor from filing on a Form S-3 registration statement.

We also suggest the Commission clarify the application of Rule 401(b) (and Telephone Interpretation B.55 and H.72) in this regard, and confirm that the eligibility for take-

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[1] Note that this example assumes the two depositors are related entities. In many circumstances, an originator of assets may sell into a third-party shelf although it has a subsidiary depositor with a shelf registration statement, because the depositor's shelf does not cover a particular asset class. The definition of sponsor, if read broadly, would include such an originator as a person that sells assets "either directly or indirectly, including through an affiliate, to the issuing entity." In these circumstances the sponsor may have no ongoing relationship with the issuing entity formed by the third party depositor, and yet, under the wording of the Proposed Rule, the failure of such issuing entity to comply with its Exchange Act reporting requirements would affect the ability of the unrelated, compliant depositor with respect to that depositor's ability to use its shelf registration statement. In these circumstances the Commission's proposal seems particularly unjust. We believe that the definition of sponsor should be adjusted to avoid this result. These examples are just two of the many that serve to highlight that the Proposed Rule may have unintended consequences.

downs under Form S-3 will be based only on the Form S-3 eligibility of the registrant depositor at the time of material filing of the registration statement and not upon the Form S-3 eligibility of any affiliate depositor.

6. Permanent proposed exclusion of preliminary prospectus delivery requirements should be extended beyond Form S-3. (Sec. III.A.5.)

Consistent with the past eight years of no-action letter relief, we concur with the Commission's proposed exclusion of broker-dealers' preliminary prospectus delivery requirements under Exchange Act Rule 15c2-8(b). We suggest, however, that the preliminary prospectus delivery requirement of Rule 15c2-8(b) should not be applicable to any offerings of investment grade ABS, regardless of whether they are eligible for Form S-3. Even though a separate registration statement is needed for a Form S-1 ABS offering, placing additional timing and delivery obligations on Form S-1 issuers without evidence of significant ABS market malfunctions may simply provide more regulatory burdens with little if any benefit to market participants.

B. Disclosure Requirements

1. Static pool data should not be required in offering documents, although limited static pool data should be made available on a website without Section 11 liability. (Sec. III.B.3.a., Sec. 229.1104(e))

Proposed Item 1104(e) and 1110(e) of Regulation S-K would require disclosure in the prospectus of static pool data regarding the applicable asset type, to the extent material, with respect to the sponsor's portfolio, prior pools formed by the sponsor and the offered pool itself. In addition, "to the extent material", the rule would require that static pool information be presented according to factors relevant to the offered pool, such as by asset term, asset type, yield, geography or ranges of credit scores or other measures of obligor credit quality. We understand that static pool information would be required only to the extent material. We note that in current practice few, if any, registrants include static pool information in their prospectuses, which is some indication that registrants do not believe that such information is material. Registrants currently believe that the historical loss and delinquency information in respect of the sponsor's overall portfolio of the applicable assets discloses what is material to the reasonable investor with regard to the loss and delinquency performance of the offered pool. If the proposal were adopted, without further clarification from the Commission, it would be difficult to continue current disclosure practices despite the Commission's clear use of the phase "to the extent material". While the proposed rule would provide investors with additional information about the historical performance of the type of asset in the offered pool, we believe the Commission should balance the uncertain added benefit of static pool data against the following considerations: It will be very costly to gather and then continually update the information and engage accountants to provide "comfort" on the information. It also will be difficult to determine which stratification factors to use in presenting static pool data. While we appreciate that the Commission is being flexible and adhering to a principles-based approach in this regard, we believe that the static pool requirement will create substantial uncertainty as to what information should be included. Stratification factors will, of course, substantially increase

the cost of presenting static pool information, while in our view not clearly providing additional useful disclosure to investors.

Information about other static pools, when considered in light of the offered pool, will be "apples and oranges." Proper disclosure will require that the registrant state the many reasons why the static pool information may not be indicative of the future performance of the offered pool, in effect informing investors why the information is not relevant to an investment in the offered pools. Without this, registrants would run the risk of including misleading information.

With respect to a "rent-a-shelf" registration statement, the sponsor purchases loans from one or more originators that often are not affiliates of the sponsor and sells them to an issuing entity. A sponsor may therefore have securitized asset pools from many different originators. To gather static pool information from various originators and have the information comforted by accountants would be extremely costly and in many cases totally irrelevant to an investor in the offered pool.

In our view, the extra burden from assembling the increased amount of complex information for which a sponsor and underwriter would have liability under Section 11 of the Securities Act and the significant cost of producing and comforting such information may drive many sponsors to offer their ABS only in the Rule 144A market or more frequently in that market, thus depriving investors of the benefits of Section 11 and foreclosing the Commission from seeing new developments in the ABS markets.

While we believe that the current disclosure practice, under which there is no static pool disclosure, does provide investors with all material information with respect to an offered pool, if the Commission retains a static pool rule in the final rules, we suggest the following modifications:

- The static pool information should be available outside the prospectus and should not be subject to Section 11 liability. Placing the static pool information on a website should provide easy access to investors. As part of this approach, any final rule would state that the static pool information on the website is not a prospectus for purposes of Section 5 of the Securities Act.

- The Commission should permit sponsors and underwriters to be indemnified by originators for use of such static pool information by making an exception to the Commission's position that indemnification relating to liabilities arising under the Securities Act and the Securities Exchange Act is not enforceable as a matter of public policy. Because of the complexity of stratified static pool information and, in the case of sponsors that are not the originator, because the sponsor does not control the production of the information, we believe that is a reasonable approach that will help induce sponsors to continue to do public transactions.

- We request that the Commission clarify what is intended in Item 1104(e) with the use of the phrase "static pools of periodic originations or purchases" (emphasis added). It is not clear whether this phrase implies that the static pool data should be grouped by date of origination of the assets, which we understand is typically the case for information currently provided to rating agencies. If that is the case, it is not clear whether sponsors could use previously securitized asset pools as the static pools to be disclosed, since many securitized pools contain assets originated over several years. If a sponsor cannot use its securitized pools, the cost of compliance could increase substantially.

- To mitigate the cost burden on sponsors that have many securitized pools, any final rule should clearly state that a sponsor need not present static pool data on all of its relevant pools to the extent such data would be repetitive, in terms of materiality, of the static pool data actually presented in the prospectus.

- To mitigate the risk of selecting static pools and related stratification factors that investors later argue are not sufficiently relevant, the Commission should include in the final rule on the inclusion of static pool data an automatic "safe harbor" provision for static pool data similar to the one contained in Item 303(c) of Regulation S-K.

2. No Reg. S-K Item 305 quantitative and qualitative market risk disclosure is necessary.

The Commission has invited comments on whether the information required by Reg. S-K Item 305 on quantitative and qualitative disclosures about market risk should be applicable to ABS offerings. We do not believe such disclosures are necessary given the inherent fixed pool nature of most ABS offerings. Because assets in most ABS are generally held to maturity, market risk disclosure would not be appropriate and could be potentially misleading for securities that are based on cash flows.

3. No audited GAAP financial statements are necessary. (Sec. III.B.1)

We do not believe that audited GAAP financial statements in either Securities Act or Exchange Act filings would provide material information to investors or that financial statements prepared on a basis other than GAAP (such as on the basis of cash receipts and cash disbursements) should be required. We concur with the Commission's statement in Section II of the Proposed Rule that "GAAP financial information about the issuing entity generally does not provide useful information to investors."

4. 10% threshold for separate disclosure on servicers. (Sec. III.B.3.d., Sec. 229.1107)

The proposed disclosure requirements in Item 1107 of Regulation AB would greatly expand the information required to be given in respect of servicers. By analogy to the tiered disclosure rule in respect of significant obligors in Item 1111, we believe that 20% would

be a more appropriate and cost justified cut-off point for the expanded disclosure. We believe that servicers are no more important than significant obligors. One important principle underlying ABS is that the servicer can be replaced if it becomes unable to do its job. Consequently, the rating of an asset-backed security can be, and usually is, higher than the servicer's rating.

Just as full financial statements are required under Item 1111 for a single obligor that represents 20% or more of the asset pool, the expanded disclosure for servicers should apply to servicers that service assets that represent 20% or more of the pool assets. For servicers that service less than 20% of an asset pool but not less than 10%, the disclosure should consist of the name and form of organization of the servicers, the period of time for which it has operated in the servicing business and a brief description of its servicing policies. For servicers servicing less than 10% of an asset pool, the disclosure should consist of the name and form of organization of the servicer and the period of time in which it has operated in the servicing business.

If a servicer is not an affiliate of the sponsor, the depositor will be dependent on the accuracy of the information provided to it by the servicer. We again believe that it would be appropriate for the Commission to state that its position as to the non-enforceability of an indemnification for liabilities arising under the securities laws would not apply to such an indemnification from such a servicer to the sponsor and the underwriters.

5. Disclosure regarding Certain Credit Enhancement Providers. (Sec. III.B.7., Sec. 229.1113(b))

Proposed Item 1113 of Regulation S-K would require, among other things, a description of any derivatives, including interest rate swaps, currency swaps and interest rate caps, used to reduce or alter the risk resulting from financial assets in the asset pool. The instructions to the proposed item specify that if an entity or group of affiliated entities "is liable or contingently liable to provide payments representing 10% or more of the cash flow supporting any offered class of asset-backed securities," then certain descriptive and financial information will be required. In the Release, the Commission rejected a valuation approach for derivatives, stating instead that disclosure for derivatives – even if "out of the money" – should be made on the same basis as other credit enhancements, such as guarantees.

We submit that the Staff's current position of permitting the parties to a securitization to assess the need for disclosure by engaging in an analysis that takes account of the volatility of the relevant currency exchange or interest rates and the tenor of the derivative agreements to assess the likelihood that payment will be required is the correct approach. The proposed approach overlooks important differences between guarantees and derivatives. A guarantee usually is of a specific amount, such that the amount of the exposure is easily calculable. A derivative such as an interest rate swap or a currency swap necessarily requires

certain assumptions concerning, for example, movements of interest rates or currency exchange rates, before the maximum amount and likelihood of exposure can be determined.[2] Thus, permitting parties to make these assumptions by reference to historical and predictive information, as is currently the case, is appropriate.

If the Commission determines that it will depart from its current practice, as outlined in the Release, then a number of points should be clarified. First, some method of calculating the exposure under the relevant derivatives should be specified or guidance on appropriate assumptions given. Otherwise, every swap or cap may require disclosure because ABS issuers may feel that the calculations must be performed assuming hypothetical extremes in rate movements rather than looking at realistic scenarios. This would defeat the stated purpose of the Release, which is not to require nonmaterial disclosure that is not likely to be relevant to an investment decision or to affect performance. Such disclosure would also increase the costs and expenses associated with ABS transactions and perhaps make them uneconomic. Second, the methodology that should be used in determining whether the enhancement is 10% or more of the "cash flow supporting a particular class" needs to be addressed. Is this concept intended to capture both interest and principal payments or some other calculation? This would be particularly relevant for classes that have interest only payments for certain periods and either no or delayed amortization. In addition, as the SEC knows, ABS transactions typically have a priority of payments, or "waterfall", through which payments are distributed in a set order of priority. For ABS transactions in which the derivative supports the entire asset pool or several classes, rather than one specific class, it is unclear how the calculation of whether the 10% disclosure threshold has been met should or could be performed.

In terms of the information to be provided under Item 1113, recognition should be given to the fact that many derivative providers are not themselves Exchange Act reporting entities and many of them achieve their credit ratings on the strength of a parent or affiliate guarantee. If the derivative provider benefits from a guarantee, the final rule should affirmatively permit any required financial information to be provided by the derivative provider's guarantor (rather than the derivative provider itself). If the derivative provider or its guarantor, as the case may be, is an insurance company, bank or other regulated entity that is not subject to Exchange Act reporting requirements, its financial statements prepared in accordance with applicable regulatory accounting principles should be sufficient.

The Release proposes that reference to Exchange Act reports in lieu of the actual inclusion or incorporation by reference into a filing will not be available to significant enhancement providers because of their involvement in the transaction. A derivative provider may but need not be an affiliate of the sponsor, depositor, issuing entity or underwriter of an ABS transaction. We believe that reference to publicly filed reports (whether Exchange Act reports or other reports filed with regulators such as bank call reports) should be permitted.

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[2] Derivatives in ABS transactions are also different from guarantees (other than guarantees of derivative providers themselves) in that, because of rating agency requirements, derivative providers are required to be highly rated and, if they are downgraded during the term of the swap, are typically required to post collateral consisting of highly rated assets or are required to assign their obligations under the derivative to another highly-rated derivative provider. Guarantees typically do not contain such provisions.

If the 10% test is retained in the final rule, we suggest that the Commission clarify that the related calculations should be performed at each date as of which a Form 10-D or Form 10-K is due. This would allow the issuer to omit disclosure concerning its derivative provider if the relevant derivative no longer meets the 10% threshold. Although the proposal requires disclosure of updated information for the addition of a new enhancement or a material change to an enhancement, the proposal does not clarify that information could also be omitted because of a decline in the level of support provided by the derivative provider to below the threshold.

Finally, because of the expense and liability issues associated with the proposed disclosure requirements for derivative providers—none of which were contemplated at the time existing ABS transactions were structured and entered into—we urge that the SEC explicitly grandfather all such transactions.

6. Termination of an ABS transaction upon the failure of a significant obligor to file Exchange Act reports. (Sec. III.B.9., Sec. 229.1100(c))

Proposed Item 1100(c)(2) of Regulation S-K allows an issuer to refer to a significant obligor's Exchange Act reports to meet its disclosure requirements. This ability is conditioned on, among other things, the issuer undertaking to provide such information itself or to terminate all or part of the ABS transaction if the significant obligor ceases reporting under the Exchange Act. Although market practice for single-asset repackagings currently contemplates this procedure, which has been utilized in some cases, the end result of such a requirement is that investors could be harmed by the forced liquidation of assets of the ABS transaction at a time when it is not advantageous to do so. The holder of an ABS security that is backed in whole or in part by the obligations of an entity that is no longer reporting is, as to that portion of its investment, in no different position from a holder of that obligation itself. The position that termination of the ABS transaction is warranted under these circumstances seems to us to cross the line into merit regulation. Thus, there should not be a requirement that the transaction terminate if the ABS issuer is unable to provide the information.

In addition, the proposed timing requirement, which requires termination by the next report that would be due by the significant obligor, is unworkable in practice. This timing requirement assumes that the sponsor or trustee is monitoring every significant obligor and its filings other than on periodic filing due dates to ensure that it has not filed a notice of termination of reporting so that the sponsor receives immediate notice. This de facto intra-period monitoring requirement would be extremely burdensome to sponsors and trustees.

If the Commission adopts its proposal that such termination is required, then at a minimum transactions that are outstanding at the adoption date should not be subject to these requirements if the related documentation is inconsistent with the final rule. The transition rules should specifically exempt such transactions.

7. Clarification should be made by the Staff that reference to third party filings does not require permission from the third party or consents from its auditors. (Sec. III.B.9.b)

We respectfully request that the Commission confirm its current position that referring to information by reference to third-party filings does not require the permission of the third party or the consent of its accounting firm.

C. Communications during the offering process.

1. Extension of informational and computational treatment to Form S-1. (Sec. III.C.1.b., Sec. III.C.1.d.)

The Proposed Rule codifies the existing positions on ABS informational and computational material. We suggest that the applicability of these rules should be extended to Form S-1 transactions, not just Form S-3 transactions as proposed (or at least that for Form S-1 transactions it should be available for investment grade ABS and for non-investment grade ABS for material delivered to qualified institutional buyers and accredited investors). We also believe, for the reasons discussed above in relation to static pool data, that the requirement that this material be filed on Form 8-K and therefore become part of the prospectus presents issues with respect to liability under the securities laws that are inappropriate and unnecessary.

At the very least, we request the Commission to extend the concept contained in Note 193 that underwriters who comply with Rule 167 should not be liable for noncompliance by other underwriters to all other transaction parties. For example, any party that supplies an issuer with material that is not filed should not lose the protection. With respect to future Securities Act reform proposals, we encourage the Commission to exclude underwriters that comply with Rule 167 from any liability for noncompliance by other parties.

2. ABS informational and computational requirements. (Sec. III.C.1.c.)

In response to the Commission's inquiry regarding the proposed definition of ABS informational and computational materials, we note that the definition is narrower than the scope of materials that is used under existing no-action letters. Examples of information that is commonly included in term sheets that would be prohibited under the proposed definition include, among other things:

- whether securities are "ERISA eligible";
- the tax opinions to be rendered with respect to the securities; and
- and the rating agencies rating the securities and the related ratings.

This information, as well as the other information customarily included in term sheets has evolved in response to investor demands. As a result, we request that the Commission adopt a principles-based approach with respect to the items that may be included as ABS informational and computational material that would allow additional information to be included in term sheets if it is material to an investor's decision, or is information commonly provided to

investors to enable the investor to determine if it is permitted to purchase the security. This will permit ABS informational and computational material to continue to evolve in response to investor demand. If the Commission is not willing to adopt a more flexible approach, we suggest that the Commission consider reflecting in its definition the information that is commonly provided in the industry. This would include the information noted above as well as historical loss and delinquency numbers with respect to the servicer, identification of the classes of securities that have been sold and the identity of the trustee, owner trustee and administrator, if applicable.

3. Research reports. (Sec. III.C.2.b.)

In response to the Commission's inquiry regarding whether the relief provided by Section 230.139a is limited appropriately for offerings on Form S-3, we recommend that the relief be extended to offerings of asset-backed securities registered on Form S-1, in instances where the proposed offerings were limited to accredited investors or qualified institutional buyers, as defined in Rule 144A. Additionally, the relief should be extended to offerings on Form S-1 that are investment grade, regardless of the nature of the investors. Limiting the offerings with respect to which research reports may be prepared to accredited investors or qualified institutional buyers in instances where the securities are not investment grade would ensure that those purchasing in the offering were either familiar with the industry or sufficiently sophisticated to assess the information presented in the research report.

4. Ongoing reporting under the Securities Exchange Act of 1934. (Sec. III.D.7.b.)

We believe that the aspect of the Proposed Rule that will have the largest impact and result in the greatest cost of compliance is the requirement that the Form 10-K report contain a new form of "platform level" compliance assessment report by the "responsible party" with respect to the servicing criteria established by the SEC, as well as an attestation report from a registered public accounting firm with respect to this assessment. Because this is based upon servicing criteria, which are extremely prescriptive and, in many respects, new, we suggest the Commission delay the requirements for the assessment report and the attestation report for a period of at least 12 months after the adoption of the new servicing criteria. This will allow the affected parties time for systems changes to capture the relevant data in a reliable manner and allow the Commission an opportunity to evaluate the new criteria in operation and make appropriate adjustments prior to the requirement of the assessment and attestation reports.

5. Form 10-D, Form 8-K, Form 10-K; standard for third-party information. (Sec.III.D.4.)

We note that under proposed Form 10-D and the proposed amendments to Form 10-K, the scope of disclosure has been expanded to cover information regarding third parties. For example: proposed Item 1115 (Legal Proceedings) is required on both Form 10-D and Form 10-K and is broader than the information that is currently provided by most asset-backed issuers in that it covers the credit enhancement provider; in a rent-a-shelf context, Item 1115 disclosure information regarding the sponsor and the originator may require information regarding a third party depending on who is responsible for the Exchange Act reports and the relationship between the sponsor and the depositor; Item 1119 of Form 10-D requires disclosure of breaches of

representations and warranties in the transaction documents; and Item 1117 of Form 10-K requires information regarding related party transactions between the enumerated persons. Because a number of the proposed reporting requirements cover information regarding unaffiliated third parties, we request that the Commission provide that the party responsible for signing such reports is held to an actual knowledge standard with respect to information related to an unaffiliated third-party. We note that this is consistent with the standard the Commission has proposed with respect to third-party information or events in the proposed instructions to Form 8-K (see instructions for Items 1.03 and 6.03 of proposed amendments to Form 8-K). Unlike corporate filers, the rules and regulations governing ABS transactions have expanded the reporting requirements beyond the registrant and its affiliates, officer and directors. As a result, we propose that an actual knowledge standard should apply to avoid unfair liability with respect to information outside the scope of knowledge of the registrant.

Please note that this letter does not necessarily reflect the individual views of all members of the Committees.

Members of the Committees would be pleased to answer any questions you might have regarding our comments, and to meet with the Staff if that would assist the Commission's efforts.

Respectfully Submitted,

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ABCNY COMMITTEE ON FINANCIAL REPORTING MEMBERSHIP

Not all of the Committee members participated in the preparation of this letter, nor did the participation of a member mean that he or she supported the views expressed in this letter. Moreover, the Committee members acted only as individuals and not as representatives of the organizations to which they belong or by which they are employed, and therefore the views expressed in the letter are not to be considered the views of any governmental, commercial or private organization other than the Association.

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