AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, NW
Washington, DC 20036

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Sarah A. Miller
Director
Center for Securities, Trust And Investments
Phone: 202-663-5325
Fax: 202-828-4548
smiller@aba.com

July 15, 2004

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C., 20549
Jonathan G. Katz, Secretary

Re: Registration, Reporting and Disclosure Requirements for Asset-Backed Securities—Release Nos. 33-8419, 34-49644, File No. S7-21-04
69 *Federal Register* 26650, May 13, 2004

Dear Mr. Katz:

The Corporate Trust Committee of the American Bankers Association ("ABA") is responding to the request of the Securities and Exchange Commission for comments on Release Nos. 33-8419 and 34-49644 ("Release" or "proposal") concerning registration, disclosure and reporting for asset-based securities.

The ABA, the nation's largest banking trade association, has a nearly 130-year history of bringing together all categories of banking institutions, including community, regional and money-center banks and holding companies, as well as savings associations, trust companies and savings banks. Our comments on the proposal reflect the views of the members of the ABA's Corporate Trust Committee who are corporate trustees for asset-backed securities ("ABS").

As noted in the proposal, the nature and the role of the trustee in asset-backed securitizations has been the subject of increased debate of late, in particular the trustee's level of oversight regarding ABS transactions. We believe that detailed disclosure concerning the role of the trustee in ABS transactions would be beneficial for trustees and investors by helping investors better understand where responsibilities within a given transaction ultimately lie, and by better protecting trustees from liability arising from claims by investors and other participants against trustees for failure to perform duties that were not, in fact, those of the trustee.

We appreciate the efforts of the Commission and its staff to address in a comprehensive and clear way the manner in which information about ABS transactions should be reported and disclosed. We generally support the proposal, subject to our comments.

DISCUSSION

Key Comments

First, ABA strongly believes any final rule should expressly clarify that it does not and is not intended to expand the traditional role of the trustee in an ABS transaction into that of a servicer, an issuer or a responsible party (as each term is defined in the proposal). Any duties above and beyond those traditionally accorded to trustees in ABS transactions that are agreed to by transaction parties should be adequately documented and disclosed. However, we ask that the final rule clarify that any such additional duties do not result in the trustee being deemed to be an issuer, responsible party or servicer with respect to primary disclosure responsibilities.

Second, we believe that the roles and functions of the participants should be more clearly defined in the final rule to make them more readily understandable by investors and other parties, and to avoid misunderstandings of the participants' roles and responsibilities. We propose that standard definitions and functional descriptions for each of the participants in ABS transactions be developed and used in disclosure materials, so that general disclosure can be standardized and therefore easy to review for investors. Any deviations from these standards can be more clearly highlighted and easily determined. In this regard, it is our intention to provide, under separate cover, proposed standard disclosure language for the trustee function in ABS transactions to be included in disclosure materials.

Third, we believe that it is important to establish the fact that the servicer and the backup servicer are not equivalent entities and, in particular, to clarify that to the extent a trustee may have a role in arranging backup servicing as a last resort, the trustee is not deemed a servicer under the proposal and does not assume additional servicer disclosure obligations thereunder. The potential for a backup servicer ever having to perform as servicer in a given circumstance is remote. Backup servicing arrangements are, nevertheless, important. We believe that the emphasis in the disclosure requirements should be less on the entity that would have the responsibility for providing for the servicing and more on the arrangements and circumstances under which the backup servicer could come be invoked.

Fourth, we believe the ramifications of any limitations on funding the costs of successor servicing should be disclosed, and the fact that trustees are not required to expend their own funds in performing their duties as trustees should be included prominently in the disclosure documents. We believe that investors should be informed that, to the extent that the funds made available to the trustee to enforce the investors' rights in a default situation are limited in any way because of rating agencies' or other parties' insistence on caps on certain distributions or the inversion of the order of payments within the waterfall contained in the transaction document, there may not be sufficient funds available to cover successor servicer costs or to otherwise adequately protect investors' interests. Such a limitation may pose a significant risk to the investors and their ability to realize a reasonable return on their investments in a default scenario. This risk should not only be disclosed, but also considered by investors.

Fifth, to the extent significant disclosure and operational changes may be adopted in the final rule, we believe that appropriate grandfathering and transition arrangements need to be considered.

Detailed Observations

Defining and Disclosing the Parties' Roles and Functions

We appreciate the Commission's attempts to provide definitions for each of the participants in a typical asset-based securitization, and to require each of those participants to describe their respective functions as part of the disclosure requirements outlined in the proposal. However, we believe that the differences between the servicer and the trustee must be spelled out in detail.

1. Definitions

Because the definition of "servicer" in Item 1101, as well as elsewhere in the proposal, is very broad, there is the potential that the trustee or trust administrator could be regarded as a servicer or quasi-servicer. This is particularly the case inasmuch as the definition includes "administrators" and thus potentially includes functions that trustees perform in other capacities, *e.g.*, acting as verification agent, calculation agent, issuing and paying agent for asset-backed commercial paper, collateral agent, custodian and, most significantly, backup servicer. In addition, a separate definition should be created for "trust administrator," whose duties are more limited, to distinguish it from a true servicer. Corporate trust providers who act as administrators or subadministrators in conduit transactions should likewise be excluded from the definition of servicer.

It is our understanding that the Committee on Federal Regulation of Securities of the American Bar Association Section of Business Law is submitting an alternative set of the definitions substantially as set forth in Exhibit A. ABA supports the adoption of these definitions, with one modification (noted in Exhibit A), which, for the most part addresses our concerns.

2. Functional Descriptions

In addition, we perceive a possible gap between the definitions contained in the proposal (even as modified by Exhibit A) and the descriptions that are to be included in the disclosure documents. This gap can best be illustrated by the statement contained in paragraph 3.d (Servicers) of the section of the proposal describing the transaction parties: "[G]iven that some of these functions may be performed by the trustee in certain transactions, the definition would clarify that the term "servicer" does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities, if the trustee receives such allocations or distributions from a servicer ***and the trustee does not otherwise perform the functions of a servicer***." [Emphasis added.]

Without a more complete description of what the functions of a servicer actually are, a trustee could unintentionally, by agreeing in the transaction documents to take on one or more minor administrative duties, expose itself to liability as a servicer under the proposal, both for claims for (1) having failed to disclose properly and for (2) having failed to perform the obligations of a servicer with respect to third parties, such as investors. Certain of the servicer functions mentioned by the Commission in various parts of the proposal are, in fact, functions sometimes legitimately performed by trustees in their roles as trustees. The final rule should clearly state that a trustee can contract to provide such additional services in its role as trustee without being considered a servicer.

We also note that in paragraph 3.g of the proposal the Commission asks whether (1) the proposed disclosure regarding the trustee should include more explicit examples of activities that the trustee does and does not do and (2) there should be disclosure of any other entity that would perform such activities if the trustee does not.

ABA believes that the final rule could constructively be expanded to list and describe each of the participants' typical functions in an ABS transaction, *i.e.*, what makes the servicer a servicer, the depositor a depositor, *etc.* These descriptions may and probably should go beyond mere definitions, and list the basic functions of each participant. Once such descriptions have been included in the final rule, it should become clear what the basic functions of the trustee are and that the final rule does not intend to expand them beyond traditional trustee functions. For example, the ABA Corporate Trustee Committee has previously stated,

> [The] basic duties of the trustee are specifically detailed in the transaction documents and consist of:
>
> 1. *as asset custodian and analytics provider*, the receipt, holding and substitution of the assets and the performance of certain, specified analysis thereof;
>
> 2. *as account custodian*, the receipt, maintenance and segregation of funds derived from the asset;
>
> 3. *as paying and calculation agent*, the release of those funds as payments to holders and for other purposes; and
>
> 4. *as trustee*, the holding of a lien on the assets for the benefit of holder, the distribution of certain information to holders and the replacement of the servicer.
>
> Additionally the trustee performs certain traditional duties in respect of the asset-backed securities (authenticating agent, registrar and transfer agent for the asset-backed securities issued under the indenture or pooling and servicing agreement). Although some of these tasks may be complex, they are all ministerial in nature and not discretionary. Trustees accept these duties in reliance upon provisions in transaction documents that limit trustee performance liability to negligence and bad faith, authorize trustee reliance on the servicer for all information and indemnify the trustee.[1]

This is not meant to imply that the parties to an ABS transaction cannot agree within the transaction documents to expand the scope of responsibility of the trustee beyond those typically associated with the trustee, so long as it is made clear that is what is being done. It is not uncommon for trustees to be asked to fulfill such expanded roles, and many are willing to do so if adequately compensated. What we are proposing here, however, is to define the expected roles of the trustee (and of the other participants) so that there is a base position from which any deviation can be clearly noted.

[1] American Bankers Association, Corporate Trust Committee, "The Trustee's Role in Asset-Backed Securities" (March 10, 2003).

Standardized Disclosure Language

In connection with the development of standardized functional descriptions, we propose the development of specific disclosure language that is standard for trustees in all asset-backed securitization disclosure documents (with perhaps certain optional language to be added for specific transaction or asset types).[2] Changes to the standard text and functions of a trustee could then be noted in bolded text or some other obvious manner, in order to highlight the pertinent differences in the particular transaction being reviewed from a more "standardized" transaction. This would not be a difficult task with the development of the detailed description of the various duties and functions of each of the transaction parties previously discussed. Investors and regulators alike would then be alerted to any situation in which the trustee's role is different from the typical one – either because it had been expanded beyond that which was typical, or because it had been reduced.

This methodology would simplify the disclosure process greatly because the emphasis in the disclosure materials could be placed on the manner in which the respective parties' roles in a particular transaction differ from the norm, rather than on repetitive detail on functions that typically differ little from one deal to the next. It would also avoid one party inadvertently exposing itself to liability for failure to meet disclosure obligations it never intended to assume. Moreover, it would simplify the job of the investor navigating through the disclosure statement.

Servicers, Responsible Parties, and Successor and Backup Servicers

ABA believes the final rule should make clear that the trustee does not assume the responsibility of a servicer or a responsible party because the trustee may have the responsibility to provide a backup servicer or even to act as the backup servicer of last resort. Moreover, disclosure of backup servicing should focus more on the procedural arrangements under the transaction documents rather than on extensive disclosure on the backup servicer or conjectural potential successor servicer.

1. Responsible Parties

Paragraph V (Proposed Scope: Entire Servicing Function) discusses the role of the responsible party to monitor the entire servicer function, and notes that this function may be performed by a single entity or split among several participants to the transaction.

[2] We have not endeavored to draft such standard contractual or disclosure language for purposes of this comment letter, but will provide such proposed language to the Commission under separate cover.

The Commission asks whether the trustee (among other participants) should potentially be a responsible party to the transaction. While the trustee may agree to perform additional duties that may include one or more of the duties typically performed by a responsible party, ABA believes that a trustee functioning in such capacity would never rise to the level of monitoring activity contemplated by the proposal such that it would assume the designation of responsible party.

The trustee's function is to protect the assets of the trust for the benefit of the holders, not to act as master servicer over all of the servicers of the trust, including the actual master servicer itself. Thrusting the trustee into the position of monitoring the entire servicer function puts the trustee in a role that is so far outside of the intended role of the trustee, even in its most expanded version, and is inappropriate in virtually any ABS transaction structure. Therefore, ABA does not support the expansion of the concept of responsible party to include the trustee in any respect. The responsible party should be the issuer, the master servicer or the servicer.

2. Successor and Backup Servicers

ABA believes that it should be made absolutely clear that while the trustee may be responsible for backup servicing as a matter of last resort, this does not make it a servicer for disclosure purposes.

Further, the proposal's disclosure requirements seem to contemplate considerable detail with respect to the backup servicer. The role of the backup servicer, however, is a contingent one, and the likelihood that one will ever act as backup servicer is remote. A detailed description of the identity of the backup servicer is often of much less relevance to the investors than the successor and backup servicing arrangements themselves.

We believe that the discussion of the backup servicing function should focus on what is more likely to be of interest to investors:

1. Under what circumstances may the servicer resign? What is the mechanism for replacing a resigning servicer (*i.e.*, who appoints the successor, how much notice does the resigning servicer have to give, how are fees paid in advance handled, how will the transition period work, what happens if no successor is appointed, *etc.*)?

2. Under what circumstances can the servicer be replaced in the absence of a servicer default? Who makes such a determination? Who chooses the successor servicer?

3. What kind of backup servicing arrangement does this deal contemplate - hot, warm or cold? (A detailed description of the arrangements should be included, since these terms, and the transition costs they entail, are not universally accepted within the industry.)

4. What triggers the requirement that the backup servicer take over the servicing of this transaction? Who makes that determination?

5. How much notice is given? Who gives that notice and who gets it?

6. What funding arrangements apply for backup and successor servicing? How much compensation does the backup servicer get versus the original servicer? How does the backup servicer's compensation compare to compensation paid to other backup servicers within the industry servicing approximately the same volume of the similar types of receivables? How will the backup servicer's compensation impact the ability of the investors to realize a reasonable return on their investments?

A discussion of this nature, we believe, would be much more meaningful to investors, particularly because the identity of any successor servicer or the backup servicer may be unknown or may well have changed between the time the disclosure materials were written and the time any successor servicer or backup servicer actually has to perform, if ever.

The Waterfall and Fee Disclosure

The portion of the documents disclosing the trustee's fees and expenses, whether itemized or merely described, should explicitly state that (1) the trustee is not required to advance or incur costs from its own fund to pay extraordinary expenses in a default or for successor servicing and (2) it is impossible for the trustee to estimate costs and expenses in a default or workout situation, and that a formula or fixed amount cannot be applied in such circumstances.[3] In addition, any limitations or caps on or inversions of the waterfall of funds available to fund potentially expensive successor servicing or other extraordinary services should be highlighted. While it would seem clear that it may not be in the best interest of the investors to bind the hands of the trustee by capping or limiting the availability of funds available to protect the interests of the investors in a default scenario, to the extent that a rating agency or other party has imposed such a requirement by capping the trustee's fees in the waterfall, a disclosure of such a cap should be highlighted in a clear and obvious manner.

(On a separate note, the Commission may want to consider its own level of comfort in the case of those transactions having such limits on the ability to effectively service and protect the assets of the trust.)

[3] Although the rating agencies themselves are often quick to cap the trustee's fees in the waterfall, they themselves do not include the trustee's post-default costs and expenses in their own models because they are frequently so unpredictable.

Transition Period and Implementation of New Requirements

ABA believes that existing ABS transactions should be grandfathered to the extent that they do not comply with the new proposed requirements. Although many of these requirements do comport with existing practices and standards, many others do not. Accordingly, the job of combing through each existing document and practice on every current transaction in an industry of the size and complexity of the asset-backed securitization industry in order to assure compliance would be a Herculean task, to put it mildly.

We are particularly concerned that existing transactions be excluded from the new Form 8-K reporting obligations. Compliance with respect to new transactions should be required beginning no sooner than nine months to one year from the date the final rule becomes effective so that all of the ABS transaction participants can thoroughly digest and implement the complex requirements of the proposal. In addition, a phased approach would clearly be preferable to a single, "all-or-nothing" implementation.

Additional Trustee-Related Disclosure Requirements

1. Trustee Never an Issuer

The Commission asks, "[I]n addition to, or in lieu of the depositor, should another entity be considered the "issuer," such as the sponsor, the servicer, the trustee or the issuing entity?" It is our view that in no event should the trustee ever be considered the issuing entity, even in the case where the security being issued is a pass-through certificate and the trustee may arguably have the appearance of being the issuer. Although this question is posed with respect to the filing of the Form S-3 (paragraph 3.d), we believe the principle applies generally as well as specifically to the filing of this particular form. The trustee may authenticate the security being issued, but the trustee itself is not the obligor on that instrument, and should never be characterized as such.[4]

2. Trustee as Signatory

We note that the Commission has determined that the trustee should not sign Forms 10-D, 10-K or 8-K, or the Sarbanes-Oxley Section 302 certification. We agree that the trustee would not sign such form or the Section 302 certification in the normal course, *i.e.*, if it were performing its obligations as trustee in accordance with its base or traditional functions. If, however, the transaction parties designate the trustee as the appropriate party to perform such signatory function in the transaction documents, we believe the trustee should be permitted to prepare and/or file any or all of these forms, so long as it is clear that (1) the

[4] Nor should the trustee be required to sign the registration statement on behalf of the issuing entity if formed prior to effectiveness, a query also raised in this section of the Release.

trustee has no liability whatsoever for information in the report that was provided by a third party (*e.g.*, the servicer) and (2) the appropriate disclosures are made in all required disclosure documents. There would need to be a means within such disclosure documents by which the trustee would be able to disclose the source of information provided to it to make clear that it had no such liability with respect to any such information.

ABA does, however, take strong exception to the requirements of paragraph 6.b (proposal for when Registration Is Required) of the proposal with respect to the trustee. This paragraph requires, among other things, that in an ABS offering where the asset pool includes securities of another issuer and the underlying securities must be registered the prospectus for both the ABS offering and the underlying securities contain no limits on the responsibility by trustee for information regarding the underlying securities. In such a situation, the trustee would likely have no practical means of verifying whether any of the information concerning the underlying asset pool is accurate in any respect. Therefore, we believe the trustee should not be held liable in the manner of an issuer, sponsor, depositor or underwriter.

We also oppose any requirement that the trustee in any manner provide any attestation with respect to the trust or the issuer in any capacity.

3. Disclosure of Litigation

Paragraph 8.b and Item 1115 require disclosure of any legal proceedings pending or known to be threatened against the trustee, or to which any property of the trustee is the subject, that is material to security holders. We believe this standard is much too broad, especially for large institutional trustees. The nature of such threat and its materiality are also both undefined. We believe that this disclosure requirement should be limited to legal proceedings actually pending that if adversely determined would have a material adverse effect on the specific transaction. In addition, the proposal requires disclosure of information as to any proceedings "known to be contemplated by governmental authorities" that is material to security holders. This requirement should similarly be limited to actual current proceedings by governmental authorities that, if adversely determined, would have a material adverse effect on the transaction.

4. Affiliate Relationships

Paragraph 8.c and Item 1117 require the disclosure of any affiliate relationship between the trustee and any sponsor, depositor or issuing entity. Because of the many potential affiliations that a corporate trustee may have with numerous institutional investors and other clients, the trustee may have no knowledge of, and no way of discovering, an affiliate relationship. Therefore, we request that the "to the extent known" to the trustee standard referenced in the fourth sentence of this paragraph clearly apply to the disclosure standard concerning affiliate relationships between the trustee and the other parties to the transaction.

5. Form 10-D Mechanics

The proposal requires that Form 10-D be filed with 15 days after each distribution date on the asset-backed securities, as defined by the transaction documents. The Commission has asked whether that time period should be reduced. We believe that 15 days is the absolute minimum period, and would, in fact, prefer to see the number of days increased. We also believe that the appropriate date for measuring the time period is the distribution date. In no event should the trustee be liable for any such filing or failure to file, or for any of the data on the Form 10-D that the trustee did not itself provide, *i.e.*, that was provided to it by the servicer, which fact the trustee should have a mechanism for disclosing on the Form 10-D.

In addition, the reportable items on Form 10-D should be limited to those required in the distribution date statements by the transaction documents, not to the more extensive list of performance data required by the proposal, or additional items 2-8 as proposed. We also propose that the Form 10-D filings not require graphical presentations or performance calculations based on such data, because of the variety of potential requirements based on the various transaction types and the non-standard definitions that exist around the many possible performance indicators that may appear on distribution reports.[5] The performance data that is required should be dictated by the transaction documents, not by a single standard imposed on all transactions.

[5] In addition, we note that several data elements in the proposal do not have standards that apply across the industry.

6. Form 8-K and 10-K Mechanics

Due to the unique nature of the information required to be filed with the new Form 8-K report, such information should be distinct from that required on Form 10-D and not have a safe harbor that flows to Form 10-D. A minimum of 10 business days would be needed to allow for the flow of reportable in-formation between the various unrelated parties. In addition, an extension of 10 business days should be permitted with no penalties. Finally, the execution of this form should not be specified in the final rule, but instead should be determined by the transaction documents.

Given the extensive coordination efforts involved, particularly with the accounting firms, the Commission should make an effort to delineate responsibilities and time frames among responsible parties. A reasonable mandated due date for all external information required for preparing Form 10-K, including but not limited to certifications and attestations, would be 30 days prior to the due date. The final rule should stipulate that parties providing support and reporting to ABS trusts provide such reports for use in a Form 10-K filing and SEC certifications without restrictions. In addition, all parties must be able to rely upon all tax and SEC filings without restriction.

7. Section 15(d)

In response to the question in the proposal as to whether the ability to suspend reporting under Section 15(d) should be revisited, we believe that the ability to suspend filings under Section 15(d) should not be eliminated for ABS transactions. In addition, the definition of "holders" should be limited to those of record with the trustee as registrar, without resort to the records of the Depository Trust Company ("DTC"), where the securities involved are book-entry securities. In addition, DTC currently charges a per CUSIP charge of $85 to obtain the name of the participant for each class of deal. These charges routinely change and are often negotiated. We also request that a Form 10-K and Sarbanes-Oxley certification not be required in cases where an ABS transaction closes in December (the last calendar month of its reporting period), first pays in January, and a Form 15 is properly filed in January, to terminate any ongoing filings of such transaction, as the Commission has done in the past.[6]

[6] We also request that the EDGAR system allow filings to be made in a wider variety of formats (e.g. allowing attachments of PDF files, Word documents and spreadsheets). The current system requires extensive conversion of documents, thereby increasing costs, potential mistakes, and the possibility of delayed filings to the transactions. The Commission's rules should also extend the filing hour such that electronic transmissions made up to midnight are considered as filed on that date of transmission.

8. Obligors and Enhancement Providers

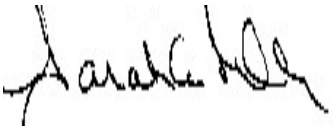
The proposal also requires the reporting of significant obligors and enhancement providers as part of Form 10-D and Form 10-K. This information would be irrelevant to investors, given that the trust owns the assets. That is, the operational performance of such obligors and enhancement providers may be critical to investors, but not specific financial information of such parties. In addition, this data would be very difficult to obtain by any of the parties preparing the Form 10-D, who would not have ready access to this information. We do not believe that this information should be included on either Form 10-D or Form 10-K unless, in the case of Form 10-D, it is already contained in the information otherwise provided to the investors on distribution dates.

CONCLUSION

In conclusion, ABA believes that detailed disclosure of the role of the trustee in ABS transactions would be beneficial for trustees and investors. Such disclosures would be beneficial for both trustees and investors by helping investors better understand where responsibilities within a given transaction lie, and by better protecting trustees from liability arising from claims for failure to perform duties that were not, in fact, those of the trustee.

If you have any questions about the foregoing, please contact Cristeena Naser at 202-663-5332 or cnaser@abalcom.

Sincerely,



Sarah A. Miller

Exhibit A

Proposed Definitions of Committee on Federal Regulation of Securities of the American Bar Association Section on Business Law *(marked with ABA Corporate Trust Committee suggested modifications)*

Servicer: any person that is contractually responsible for the management or collection of any of the receivables or other financial assets underlying the asset-backed securities, provided that no other servicer or master servicer is contractually liable to the issuing entity for such person's activities as to those assets. The term "servicer" also includes any person responsible for making allocations or distributions to holders of the asset-backed securities that also performs servicing functions.

Master servicer: any person that does not itself perform servicing functions but as to the issuing entity is either: (a) contractually liable for the activities of servicers or subservicers in servicing the pool assets, or (b) contractually responsible for monitoring the activities of the servicers or subservicers and replacing them if needed. The term "master servicer" also includes any person responsible for making allocations or distributions to holders of the asset-backed securities that also performs master servicing functions.

Trustee: the person with ~~fiduciary obligations~~ the obligation to protect the interests of the holders of the asset-backed securities under the primary operative document establishing the rights of those holders. The trustee may or may not be responsible for making allocations or distributions to holders of the asset-backed securities.

Administrator: any person responsible for making allocations or distributions to holders of the asset-backed securities, but that does not also perform the functions of a master servicer, servicer or trustee.

Originator: as to any of the receivables or other financial assets underlying the asset-backed securities, the entity whose underwriting or credit granting criteria were applied in making the decision to approve the asset prior to funding, and that agreed to fund or purchase the asset.