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Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attn: Jonathan G. Katz, Secretary

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

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law (the "Committee")[1] in response to the request of the Securities and Exchange Commission (the "Commission") for comments on Release Nos. 33-8419 and 34-49644, dated May 3, 2004 (the "Release"). The Release sets forth proposals intended to address comprehensively the registration, disclosure and reporting requirements for asset-backed securities (sometimes referred to as "ABS") under the Securities Act of 1933, as amended (the "Securities Act"), and the Securities Exchange Act of 1934, as amended (the "Exchange Act").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

OVERVIEW

We appreciate the tremendous effort made by the Commission and its staff (the "Staff") to develop a set of comprehensive regulations for ABS. We believe that rules designed for the special characteristics of the ABS market will be a great service to investors as well as other participants in the industry. We endorse the Commission's objective largely to reflect market practices and to take a principles-based approach to disclosure.

While the Release in many cases merely codifies existing practice, no-action letters and informal Staff positions, many other parts of the Release significantly change or impact existing practice, particularly in the areas of disclosure and reporting. Market participants will need a substantial amount of time to understand the new requirements and adapt existing mechanisms and procedures (many of which have been in place for over 20 years) for collecting and reporting the information required under the proposed rules. It is these new requirements, not the codification of existing practices and formal and informal Staff guidance, that have been the focus of most of the comments and concern from market participants and other interested parties. It is vital that the Commission fully understand and appreciate the significant impact the new requirements would have on existing practices in the current, efficient ABS market. Continuing dialogue with industry participants, sponsoring a roundtable discussion and re-publishing the Release for another round of comments would be ways to allow all market participants and interested parties an opportunity to review and analyze fully any modified versions of the new requirements contained in the Release and to assist the Commission in identifying and implementing any further needed improvements to facilitate compliance.

We believe the amount of time the Commission spent in the task of drafting the Release is indicative of its complexity and potentially significant impact on the ABS market. In light of the substantial degree of investor protection already provided by the existing system, we do not believe that the goals of the federal securities laws would be compromised in any material respect if the Commission allowed further opportunity for consideration of the numerous new proposals in the Release before adopting any of the requirements as a final rule. Indeed, we believe that acting too hastily could cause great harm to a market that is currently operating very efficiently. Some of the new requirements in the Release, if not modified, could cause certain ABS issuers and segments of the ABS industry to abandon the public markets and issue ABS in the private markets or not at all. The ramifications of this withdrawal or shift on the liquidity of the ABS market and its impact on market participants, including investors, would be enormous.

We strongly urge the Commission to take the time necessary to refine these important and voluminous rules for an integral part of the U.S. financial and capital markets, the efficient operation of which is vital to the financial health of U.S. financial institutions, to investors and to consumers, as well as to the many industries (just a few examples being automobile and truck manufacturers and their suppliers and dealers, as well as builders and sellers of housing and commercial real estate) that now depend on the ABS market.

There is precedent for the Commission to proceed slowly and cautiously, implementing selected provisions only once they have been modified as warranted by comments received. This is the approach followed with the Form 8-K proposals, which were adopted in sections, with opportunities and significant time periods for market participants to adjust to a section of significant changes before additional changes were required. We believe the Release could easily be broken into sections for gradual implementation, with those portions that have generated the least concern from market participants implemented first.

We have organized our comment letter around the major topics in the Release: registration, disclosure, communications, reporting, transition period, and additional concerns. The discussion of each topic begins with an executive summary. The executive summary highlights our key concerns and lists our proposals for the topic. We then discuss the topic, generally following the order of the discussion in the Release and responding to the questions in the Release. In addition to the proposed regulations under the Securities Act and the Exchange Act, we have proposed changes to requirements or regulations under the Trust Indenture Act of 1939, as amended (the "Trust Indenture Act"), and the Investment Company Act of 1940, as amended (the "Investment Company Act").

We have eight overriding concerns regarding the Release:

First, we urge the Commission to allow sufficient time to implement the regulations. Compliance with the proposed regulations will require substantial changes in procedures, additional costs to participants, and the cooperation of unaffiliated third parties. For these reasons, we strongly recommend grandfathering existing transactions and allowing a substantial time period before applying the regulations to new takedowns off existing shelf registration statements and new shelf registration statements.

Second, we suggest that the Commission take a consistent approach for all ABS and related transactions. We propose various ways to expand the use of Form S-3 and confirm the availability of Rule 3a-7 under the Investment Company Act. We propose that the same rules on ABS informational and computational material apply to offerings on both Form S-1 and Form S-3. In addition, we encourage the Commission to make clear that the Staff has the authority in pre-filing conferences to allow parties to apply the rules for ABS in appropriate cases even if the transaction does not fit all of the detailed requirements for treatment as an "asset-backed security," but principles-based disclosure would merit use of the forms and disclosure rules designed for ABS.

Third, we recommend that the Commission modify the disclosure requirements regarding static pool information and transaction parties. We believe the proposed requirements regarding static pool data would be unduly burdensome and would create an environment of legal uncertainty as to whether all material information has been disclosed. For fixed pools of fungible assets, we suggest emphasizing, when available, certain data about prior securitized pools and otherwise certain data pertaining to time periods of origination. For the pool being securitized, we do not think that static pool information should be required in either the offering process or Exchange Act reports with respect to the specific pool. For the transaction parties, we have attempted to refine how the parties could be defined and what would be material but not overly burdensome disclosure.

Fourth, the proposed rules involve assessment of compliance by a responsible party who may have neither the skills nor the access to information to perform the assessment effectively. We recommend that the parties actually responsible for performing material servicing functions provide, subject to Exchange Act liability, certifications as to their performance. The compliance statement of a servicer could include its servicing platform as distinguished from a single transaction, and the accountant review could be done most appropriately by the servicer's auditor.

Fifth, although we acknowledge that all Exchange Act reports should be filed in a timely manner, we encourage the Commission to avoid disproportionate consequences for late filings. Typically, Exchange Act reports for ABS are filed for only a brief period but on a monthly basis during this period; timely filing of Exchange Act reports often depends on the cooperation of unaffiliated third parties; and regardless of whether Exchange Act reports are filed, investors basically rely on distribution reports that are distributed to them or available on Web sites. Under these circumstances, loss of shelf registration is a draconian consequence for late filing. Moreover, loss of shelf registration for late filing by a non-registrant sponsor of other transactions is contrary to the rules applied to corporate issuers and their affiliates. We have proposed a method of encouraging timely filing while avoiding disproportionate consequences for late filing.

Sixth, we strongly support eliminating the requirement for a market-making prospectus. Virtually all material information relating to ABS relates to the asset pool, and that information is freely available to secondary market purchasers through distribution date statements required in each transaction, whereas for corporate equity and debt securities information about the issuer is usually crucial and is not always accessible. Frequently, Exchange Act reports for ABS are filed solely to satisfy the market-making prospectus delivery requirement with no investor protection benefit. To the extent that a market-making prospectus is required, we urge the Commission to affirm the customary practice of updating the prospectus by filing routine Exchange Act reports without requiring additional disclosures.

Seventh, we encourage the Commission to take this opportunity to assess the best way to disseminate information in light of today's technology. We believe that posting information on a Web site is the most convenient way to make information regarding ABS available to investors. We recommend that the Commission encourage the use of Web sites as the primary means of disseminating static pool information, periodic reports and other information. To the extent that information is required to be filed with the Commission, we have suggested ways to improve the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system.

Eighth, we urge the Commission to take into account the roles of various parties and the nature of the information when imposing liability for a transaction. If the Commission retains the requirement for static pool disclosure, we believe that a safe harbor would be appropriate for the selection of static pool information because the market has never developed a standard practice as to what information is material for investors. For ABS informational and computational material, we recommend an antifraud standard for computational material and a safe harbor under Section 11 of the Securities Act for omissions in informational material. We further recommend differentiating the roles of various parties in imposing liability for ABS informational and computational material, the prospectus and Exchange Act reports.

The discussion below sets forth in greater detail our proposals for modifying the proposed regulations and the reasons why we have taken these positions.

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I. SECURITIES ACT REGISTRATION

A. Executive Summary

In this section we urge the Commission to make the definition of "asset-backed security" more inclusive, since there is no principles-based rationale for excluding what the market regards as an "asset-backed security" from the applicability of the specialized disclosure and regulatory regime for ABS. In a context in which the registrant is dependent on third parties to comply with Exchange Act reporting requirements, we offer some procedures to prevent the loss of Form S-3 eligibility due solely to the failure to make timely filings.

The following is a summary of the key points we raise with respect to the portion of the Release related to Securities Act registration:

- We believe the Commission should adopt a principles-based definition of "asset-backed security" and have proposed such a definition for use in Item 1101(c)(1) of proposed Regulation AB. In addition, we do not believe there is a principles-based analysis for arriving at the various percentage limitations and time period restrictions contained in Item 1101(c)(2) and (3) of Regulation AB and related provisions. We therefore recommend the elimination of those limitations and restrictions and, failing that, propose changes, some of which are market-based, to those limitations and restrictions.

- We believe that series trusts should be permitted because they do not violate any basic securitization principles described in the Release. In any event, the Commission should make clear that certain structures that are common under current practice (issuance trusts, titling trusts that issue special units of beneficial interest ("SUBIs"), real estate mortgage investment conduits ("REMICs") and vehicles with multiple mortgage loan pools) are not series trusts and therefore continue to be permitted.

- We agree with the Commission that there is no reason to require ABS to be registered on a form other than Form S-1 or Form S-3. However, we believe the Commission should make clear that, pursuant to Rule 415(a)(vii) under the Securities Act, "mortgage-related securities," as defined in Section 3(a)(41) of the Exchange Act, may continue to be registered on Form S-3, even in cases in which they do not qualify as ABS (because, for example, they are backed by non-performing assets or a higher than permitted percentage of delinquent assets).

- We urge the Commission to eliminate the requirement for market-making prospectuses for ABS.

- We strongly oppose the current proposal under which Form S-3 eligibility would be forfeited when a report required to be filed under the Exchange Act is not timely filed as required. We also strongly oppose extending the loss of Form S-3 eligibility in such cases to non-registrant sponsors. We offer an alternative proposal for dealing with non-compliant Exchange Act filings.

- With respect to Exchange Act Rule 15c2-8(b), we are seeking extension of the relief from the 48-hour delivery requirement with respect to preliminary prospectuses to offerings of ABS registered on Form S-1, as well as clarification regarding the delivery requirements related to final prospectuses in transactions where no preliminary prospectus is prepared.

- With respect to the proposed rules regarding registration of underlying pool assets, we are requesting further refinements to the proposed rules in the area of unsold allotments and certain revisions related to the proposed exceptions from disclosure and delivery conditions to streamline the registration process related to financial assets that qualify for such exceptions.

B. Definition of "Asset-Backed Security"

1. Basic Definition

We request comment on our proposed definition. Are any further modifications to the definition necessary? If so, what modifications should be made and why?

While we are in agreement with the effort to define "asset-backed security" in a way that will expand the types of ABS eligible for registration on Form S-3, we believe that some modifications to the proposed definition of "asset-backed security" are necessary to avoid the adoption of a definition that would not include transactions that are currently treated as "asset-backed securities" even if they do not satisfy the requirements for Form S-3 qualification. Under current practice, ABS offerings that do not satisfy the "asset-backed securities" definition for Form S-3 qualification may still be treated as ABS that can be registered on Form S-1 or Form S-11. Overall, the proposed definition along with the bright-line tests relating to delinquencies, defaults, prefunding and revolving periods and residual values for leases would create a more restrictive standard for qualification as an "asset-backed security" than currently exists. The Release states that the changes to the definition "are designed to remove regulatory uncertainty and reduce regulatory obstacles and costs of securitization." We note that the securitization market is much broader than the ABS market and includes collateralized bond obligations and similar securities (CBOs/CLOs/CDOs), intellectual property securitizations, synthetic securitizations and other future flow transactions and the asset-backed commercial paper market. The ABS market is a subset of this larger securitization market. The proposed definition would create a subset of the ABS market. Securitization transactions that fall outside of this defined subset of the ABS market would continue to face regulatory uncertainty and the additional costs associated with issuance in private markets. The asset-backed securities definition is the gateway to the application of proposed rules that provide a framework for meaningful disclosure for ABS transactions for the benefit of issuers, investors and other market participants. While the proposed asset-backed rules may be viewed as providing a form of relief from operating company disclosure requirements, they establish rigorous and quite burdensome disclosure standards that, subject to the comments set forth in this letter, we believe are generally appropriate given the special characteristics of ABS. An inclusive definition would extend the application of these rules to transactions for which there are no better rules. A narrow definition that is strictly imposed will cause certain transactions that fall outside the confines of the definition (whether through failure of a bright-line test or by specific exclusion, such as synthetic securitizations) to be done privately because the corporate disclosure requirements could produce misleading and inappropriate disclosures. We therefore recommend that an inclusive principles-based definition be adopted, which substantially follows Item 1101(c)(1) of Regulation AB:

> "Asset-backed security" means a security that is primarily serviced by the cash flows of, or by cash flows that correspond to cash flows of a fixed or revolving pool of (i) receivables or other financial assets, that by their terms convert into cash (without regard to actual performance), or (ii) leases and equivalent receivables, including the proceeds from the disposition of any such assets or property related to such assets, in each case together with any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.

We also recommend deleting the word "passively" from Item 1101(c)(2)(ii) and deleting Item 1101(c)(2)(iii), (iv) and (v) and Item 1101(c)(3).

To the extent that the proposed definition of "asset-backed security" in Item 1101(c)(1), (2) and (3) of Regulation AB is not to be replaced by a principles-based alternative, we believe that the modifications set forth below are appropriate and would be consistent with the principles underlying the definition. The remainder of this Section I.B proposes those modifications.

(a) ***Leases***. First, the use of the phrase "financial assets that are leases" in the definition of "asset-backed security" has caused some to inquire whether the Commission was differentiating "finance leases" from "operating leases." Those terms have meaning in the accounting treatment and, in our view, are not relevant to the definition of "asset-backed security," which focuses on assets that produce cash flow. We request that the final rules make clear that any type of lease that provides for cash payments is included in the term "lease" as used in the definition of "asset-backed security." Second, we request that the term "automobile lease" be replaced with "motor vehicle lease" or "automobile or truck lease" to reflect current market practice. Third, there exist in the market motor vehicle balloon loans that are the functional equivalent of motor vehicle leases in that the obligor has a large balloon payment due at the maturity date and may either pay the amount due in cash or return the vehicle to the lender. Such motor vehicle balloon loans are used in states where unfavorable tax treatment applies to motor vehicles or vicarious liability laws apply to motor vehicle lessors. We believe that the definition of "asset-backed security" should be adjusted to make clear that a functional equivalent of an auto lease should be treated as a lease.

We will address the percentage limitations on the residual values of the physical property subject to leases below in Section I.B.4.

(b) ***Synthetic Securities***. In the Release, the Commission states that it believes that the definition of "asset-backed securities" does not include synthetic securitizations. Footnote 62 of the Release describes a synthetic securitization in which the payments on the asset-backed security are based on the market value of the reference assets and the occurrence of certain specified trigger events. However, there are synthetic securitizations in which the payments on the synthetic asset-backed security are based on the actual cash payments on the reference assets (including repossession proceeds). Such synthetic securitizations put investors in the same position as if the reference assets had been transferred to the issuer. We recommend that the final rule provide that such synthetic securities satisfy the definition of "asset-backed security."

(c) ***Limited Life Equity Securities***. We request that the Commission make clear in the adopting release that equity securities with a finite term and a mandatory redemption, such as preferred securities (*e.g.*, preferred stock and trust preferred securities) with those attributes, are within the definition of "asset-backed security." Otherwise, footnote 60 in the Release might create some confusion as to whether these types of securities constitute permissible financial assets. We also believe that any equity securities subject to a liquidity, repurchase or other arrangement that will convert the equity security into cash in an amount specified at the time of issuance of the related asset-backed security should qualify as a financial asset within the definition of "asset-backed security."

(d) ***Securities Viewed as ABS in the Market but Which Do Not Satisfy the Proposed General Definition***. The Release states that the alternative disclosure regime for ABS would not be available for securities that fall outside the proposed definition. This statement implies that a registrant with an asset pool containing, for example, a few non-performing assets would have to use a disclosure document that applies the Regulation S-K operating company disclosure rules rather than, as a starting point, the alternative asset-backed disclosure rules. We suggest that the adopting release for the final rule state that the starting point for disclosure for such "near" ABS will be the alternative disclosure regime, that registrants registering such securities should consult in pre-filing conferences with the Staff as to what additional disclosure will be required and that the Staff has the authority to apply the ABS disclosure regime to such "near" ABS. A more direct way of accomplishing this is, as suggested above, to adopt our proposed definition of asset-backed security, which substantially follows Item 1101(c)(1) of Regulation AB.

2. Nature of Issuing Entity

We request comment on the proposed conditions regarding the nature of the issuing entity. Is the proposed condition on the passive and restricted nature of the issuing entity appropriate? Is any additional specificity or clarification needed for the condition? Should there be any exceptions to the condition? If so, what would they be and how would they be consistent with the notion of an "asset-backed security"?

We are in agreement with the principle that the activities of the issuing entity must be restricted to ABS transactions. However, we do not see what the word "passively" adds to Item 1101(c)(2)(ii) and would ask the Commission to delete it or to explain its usage.

Additionally, we disagree with the position taken in footnote 63 of the Release that securities issued by a series trust would not qualify as ABS. Use of a series trust that issues separate securities backed by a discrete pool of assets may be less costly than establishing a separate trust for each issuance, particularly in circumstances where series trusts are used to address licensing requirements. The result is the same — the asset-backed security is supported by a discrete pool of assets that is not managed and merely liquidates. We therefore request that series trusts be permitted under the final rule.

If, however, the Commission is unwilling to change its position that series trusts do not qualify as eligible issuing entities, we suggest that the Commission clarify that certain structures will not be considered to be series trusts, including: (i) issuance trusts that themselves hold an asset-backed security that evidences a pool of receivables (usually credit card receivables or dealer floorplan receivables) and allow separate pools of collateral to support different series of ABS; (ii) the underlying "titling" trust used in lease securitizations that issues separate SUBIs relating to a specific pool of vehicles to the issuing entity in a securitization, where the SUBI supports the ABS issued by such issuing entity; and (iii) the structure used in the securitization of mortgage loans in which, within one trust, two or more separate pools of mortgage loans each separately support one or more different series or one or more groups of mortgage-backed securities simultaneously issued by the trust. The structures in clauses (i) through (iii) are commonly used. A prohibition on the use of any structure described in such clauses would substantially impair the ability to securitize those assets without any apparent benefit to investors. Also, for the avoidance of doubt, the Commission should make clear that multi-tiered REMICs, which are used to satisfy technical requirements under the Internal Revenue Code of 1986, as amended, will not be treated as a series trust arrangement.

Should there be any additional conditions on the nature of the issuing entity?

No.

3. Delinquent and Non-Performing Pool Assets

We request comment on the codification of these existing interpretations. Is there a reason to re-evaluate these interpretations? In particular, should there still be an absolute bar on non-performing assets? We also request comment on the proposed delinquency concentration limits. The 50% non-shelf limit is designed to help assure that even those asset-backed securities that do not qualify for shelf registration are appropriately subject to our proposed ABS disclosure and reporting regime. Should either limit be higher or lower? Should these tests be conducted at any time other than issuance of the asset-backed securities?

We request comment on our proposed definitions of "non-performing" and "delinquent." Should the definition of non-performing be tied to the charge-off policies of both the transaction documents and the sponsor? Is it necessary to require disclosure of the sponsor's charge-off policies? Is the proposed clarification regarding re-aging appropriate?

*Should there be a specific delinquency date for when an asset is non-performing? What would that date be (*e.g.*, 90 or 180 days delinquent)? If possible, please provide supporting data in relation to current market practices.*

Our comments under this Section I.B.3 and Sections I.B.4 and 5 attempt to address the bright-line tests that the Release would adopt to determine Form S-3 and Form S-1 eligibility. Our comments are based in part on our belief that there is no principles-based analysis that leads one to select particular percentages or time periods. Many of the bright-line tests do not apply easily to all asset types and structures and may have inadvertent and unforeseen adverse effects on some asset types and structures. In such a case, we believe that the market should determine such parameters, especially in light of the fact that most investors in this market segment are institutions. In addition, the market approach will maintain a level of flexibility in the rules that will allow the public ABS market to grow at the same rate as, if not faster than, the private ABS markets.

(a) ***Measurement Date***. We assume that footnote 66 of the Release is controlling — *i.e.*, that the determination of whether an asset is delinquent or non-performing is permitted to be made on the cut-off date for the transaction in the case of transactions that use a cut-off date concept (as opposed to the date of issuance of the asset-backed security). Any other approach would be impracticable due to the time required to determine accurately the delinquency percentage with respect to an asset pool. For the avoidance of doubt, we suggest that the rule itself (clauses (iii) and (iv) of proposed Item 1101(c)(2)) use the phrase "at the cut-off date for the transaction, if applicable, or any subsequent date prior to or at the issuance of the asset-backed securities" rather than "at the time of issuance of the asset-backed securities." Also, for transactions that do not use a cut-off date concept, such as master trusts, we suggest that the measurement date be the latest date as of which loss and delinquency information is given in the prospectus.

(b) ***Prohibition of Non-Performing Assets***. We believe that some minor level of non-performing assets should be permitted. Because every securitization poses the risk that its financial assets will become non-performing assets that require additional servicing to realize cash from that asset, allowing some minor level of non-performing assets at the start of a transaction would not change the fundamental character of such transaction as an asset-backed transaction that looks to payment from cash flows on the underlying assets. To the extent non-performing assets were permitted, appropriate disclosure could be added.

Irrespective of whether the Commission elects to permit some level of non-performing assets, we ask the Commission to consider a specific carve-out for transactions in which the sponsor transfers its entire portfolio of a particular type of financial asset into the securitization. Such an asset pool will inevitably contain some portion of non-performing assets. However, the transaction mechanics may be structured to neutralize the effects of the inclusion of the non-performing assets (*e.g.*, losses on such non-performing assets will not be charged against the investors' interests). We believe that such securitizations should be permitted to come within the definition of asset-backed security, particularly as certain foreign transactions require such a structure to obtain the necessary perfection of a security interest in the underlying assets. This issue is more appropriately dealt with through disclosure, rather than through a blanket prohibition against inclusion of non-performing assets.

(c) ***Definition of Non-Performing***. We believe that the phrase "or the pool asset meets the charge-off policies of the sponsor" in the second clause of the definition of "non-performing" should be revised for clarity to read as follows: "or the pool asset would be treated as wholly or partially charged-off under the charge-off policies of the sponsor, the affiliate of the sponsor that originates or services such pool asset or the third-party servicer that services such asset pool." This proposed change is intended to ensure that the definition covers the appropriate person's charge-off policy with respect to the assets.

We note with respect to the first clause of the definition of "non-performing asset" that the transaction documents for a securitization often do not contain a definition of charged-off receivables, but, rather, may incorporate by reference certain charge-off standards in defining terms such as liquidated receivables or mortgage loans. Consequently, we question the utility of this first clause while noting that the definition works because of the second clause.

Moreover, we believe that the charge-off concept applies only to certain asset types, usually non-real-estate consumer assets, and does not apply with respect to many classes of assets, such as residential and commercial mortgage loans. *See* the discussion below under Section II.C.1. If the Commission were to apply the charge-off concept to assets where the originators and servicers do not currently apply that concept, the burden on the industry would be substantial, and the information given to investors would add nothing to the delinquency information already required.

In response to the Commission's inquiry regarding a bright-line test for determining when underlying assets should be considered charged-off, because charge-off policies may vary by asset type and quality and because such period may vary among sponsors, originators or servicers (*e.g.*, prime versus sub-prime, bank versus finance company), we believe that such a bright-line test is inappropriate. We believe that the term "charge-off" is generally used to indicate when the owner/servicer believes that a delinquent receivable will most likely not be brought current again in terms of its scheduled payments. At that point the servicer commences realization procedures beyond the collection of past due payments (*e.g.*, suing for the entire amount of the obligation; repossessing or foreclosing on collateral). Servicers that are depositary institutions may be required to follow regulatory guidelines with bright-line rules in determining charge-offs that may differ from the charge-off policies of finance companies that are not subject to such regulation. In each case, some portion of the value of the receivable is charged off under the servicer's standards. Regardless of whether the Commission agrees or disagrees with this view of what is meant by the term "charge-off," it should clarify its position in the final rule.

Finally, the last sentence in the definition of "non-performing" could be read to suggest that an asset with at least one past due payment will be treated as non-performing. We suggest that the last sentence read as follows:

> A pool asset that would be treated as non-performing under the preceding sentence except for the effect of a restructuring of that pool asset will still be treated as non-performing unless the related obligor has contractually agreed to such restructuring.

(d) ***Master Trusts***. We recommend that the Commission adopt a formal exception for master trusts in relation to any prohibition or limitation on non-performing assets. Because the same asset pool supports different series of ABS issued over time by the master trust, the asset pool for a master trust almost certainly will contain some amount of non-performing assets at the time of a new issuance of securities by the master trust. Because the proposed rules clearly permit master trusts as issuers of ABS, we do not believe that the Commission intended to exclude securities issued by master trusts from the definition of asset-backed security because of the existence of non-performing assets in the master trust.

(e) ***Definition of Delinquent***. We note that currently, sub-prime residential mortgage servicers and prime mortgage servicers use different day count conventions — the MBA method and the OTS method — to determine when a loan is delinquent. Also, depositary institutions are subject to regulatory guidelines on this subject issued by the applicable regulator. We request clarification that the new rules will not affect the method of counting delinquencies. We also note that a receivable is defined as delinquent if "any portion of a contractually required payment" is 30 days or more past due. Currently, many finance companies do not count a receivable as delinquent if a certain percentage or portion of the payment has been received (*e.g.*, at least 90% of the payment or all but $10 of the payment). This new definition would require such finance companies to alter their delinquency policies, which would change their investor reporting standards, their charge-off policies and their course of dealing with their customers. Banks should be allowed to disclose delinquencies consistent with regulatory requirements applicable to depositary institutions. Public companies that disclose portfolio delinquencies in their corporate filings should be allowed to provide consistent disclosure to asset-backed investors. Inconsistent reporting would be costly for sponsors and confusing for investors. In addition, some foreign issuers determine delinquencies differently (*e.g.*, for many UK issuers, a mortgage loan is not delinquent until at least a full single monthly payment is past due). In all of these cases, current market practice is that the prospectus disclose the methodology for determining a delinquency. We recommend that the Commission modify the definition of delinquency to permit common industry and country standards. Reference to industry or country standards will avoid creating artificial standards that may be at odds with accepted industry (or country) practices. Additionally, if the Commission is unwilling to so modify the definition, we request clarification from the Commission that for purposes of historical delinquency information for such servicers and sponsors, they may show information for periods prior to the effective date of the final rules on the basis of their prior method with footnote disclosure explaining the prior method.

(f) ***Delinquency Percentage Limitations***. We believe that the proposed delinquency limitations (50% for non-shelf use and 20% for shelf eligibility) should be eliminated or at a minimum increased. Appropriate disclosure would adequately convey the risk of a higher level of permissible delinquencies in an asset pool. The 20% limitation in the proposed rules is the level currently used by the Staff. To our knowledge, however, there is no mathematical analysis that leads to the conclusion that a 20% level, or any other specified level, of delinquencies at the start of a transaction will cause the transaction to rely disproportionately on recovery rates with respect to sales of the underlying assets rather than the payment stream on the underlying assets. Also, for many asset types, such as sub-prime credit card receivables, recoveries do not represent a significant portion of collections and yield on performing accounts is used to make required payments that cannot be made from non-performing accounts.

Delinquency levels are just one performance variable for an asset pool prior to the issuance of the ABS. With respect to corporate registrants that qualify to use Form S-3 for their non-convertible investment-grade debt offerings, the Commission does not impose financial tests with respect to debt coverage or any other matters, and the rating agency that granted the investment-grade rating and the market determine the acceptable level of risk with respect to all financial ratios and the like for corporate issuers. Similarly, the Commission should not here further test the quality of assets that by their terms convert to cash. Rather than addressing the risk from delinquencies through rules that may in some cases be arbitrary, we suggest that determination of the acceptable level of delinquencies be driven by the capital markets, the necessity of obtaining investment-grade ratings (at least for some of the ABS — see the proposal in Section I.C.3(a) below) and, in transactions with credit enhancement, the levels of delinquencies that the provider of the credit enhancement finds acceptable. Consequently, we are of the view that (i) where the ABS are being registered on a Form S-3 registration statement, in which case, subject to our proposal, at least some of the securities will be rated investment grade, there should be no limitation on the amount of delinquent assets in the asset pool and (ii) where the ABS are being issued under a Form S-1 registration statement, the percentage limitation on the amount of delinquent assets in an asset pool should be a relatively high percentage. We suggest 60%.

(g) ***Re-aging***. We note that under the current disclosure system, many transactions do not require that a receivable have been contractually altered in order to count the receivable as current. Frequently, consistent with the servicer's customary procedures, a receivable will be considered current if a borrower has made a minimum number of payments over a specified number of payment periods. The offering documents should describe this type of re-aging and the requirements of proposed Item 1100(b)(5) of Regulation AB appropriately make such disclosure mandatory when material. We request that the Commission reconsider its requirement that a re-aged receivable must have been contractually restructured in order to be re-aged.

With respect to the specific language, we also feel that the last sentence in the definition of "delinquent" is unclear. The proposed definition implies that a restructuring of a delinquent receivable pursuant to an agreement is a permissible re-aging and the related receivable is then viewed as current (absent delinquencies after the agreement) for purposes of the delinquency determination. We request clarification as to the meaning of the phrase "such as part of a workout plan" in the definition. If the Commission is unwilling to reconsider the requirement that a contract must be contractually restructured for it to no longer be considered delinquent, we suggest that the last sentence in the definition of "delinquent" should read as follows:

> Past due payments in respect of a pool asset that have not been paid in full will still be considered past due except to the extent that such pool asset has been contractually restructured such that those past due payments are no longer due on dates that are prior to the date of such contractual restructuring.

4. Lease-Backed Securitizations and Residual Values

Should ABS backed in part by cash flows from residual values be included in the definition of asset-backed security? Does the proposed proviso to the definition of asset-backed security capture the types of lease transactions that include residual values? Should there be any additional requirements for such securitizations apart from those proposed?

Cash flows from residual values should be permitted to back ABS. Investors view such structures as securitizations, and realization of the residual value is viewed as part of the ordinary course in the case of leased assets, as are sale proceeds in the case of balloon loans.

*We request comment on our proposed limits on the cash flows that are anticipated to come from residual values. Should there be such limits? What alternatives could be used in lieu of limits to address the concerns identified? Is there a disclosure-based solution that would preclude the need for such limits? Are there additional concerns we have not identified? Should there be different limits for automobile leases versus other leases? Should there be different limits for non-automobile leases for shelf registration eligibility? Should there be such limits for automobile leases? Should any of the proposed limits be higher or lower? Should the limits be based on a different amount (*e.g.*, percentage of offering proceeds instead of asset pool)? If possible, please provide supporting data in relation to current market practices.*

With respect to the proposed percentages limiting the cash flow from residual values, we believe that the market, and not the rules, should impose any percentage limitations on residual values for ABS registered under Form S-3. One example of why a specified limit may be inappropriate is shorter-term automobile leases. The percentage limitation of 60% for automobile leases will limit the amount of shorter-term automobile leases (*e.g.*, two-year leases) that can go into an asset pool. However, shorter-term leases probably pose less of a residual value risk because the vehicle has a shorter exposure to the used car market and is normally in better condition when it comes off the lease. In general, the longer the lease term, the harder it is to predict the residual value at the end of that lease term. As a result, we question the value of limiting the percentage from residual values. Additionally, the 20% limitation for shelf eligibility for leases other than automobile leases would appear to be too restrictive and therefore should be higher. Very few leased assets will satisfy this standard. To the extent that a transaction relies on the residual value of a lease, we suggest that the market determine the appropriate level.

Note also that bright-line tests may be inadvertently restrictive. The 60% limitation applies only to "automobile leases" while a 50% limitation for Form S-1 and 20% limitation for Form S-3 are imposed on all other leases. Sports utility vehicles (also referred to in some cases as "light duty trucks") may be subject to a different residual value limitation than automobiles in the same asset pool. Furthermore, it is likely that, over time, additional categories of motor vehicles may develop. See our comment above in Section I.B.1(a) regarding use of the term "motor vehicle lease" rather than "automobile lease."

We request that the final rules make clear that the calculation of residual value used in calculating the percentage limitations may be made at the beginning of each respective lease term. The use of the phrase "at the time of issuance of the asset-backed securities" in clauses (2)(v)(A) and (B) in the definition of "asset-backed security" might be construed to mean that the residual values must be calculated at that time. If the residual value of the assets is measured at the time of issuance of the ABS it would create a bias against the inclusion in an asset pool of older, more seasoned leases with better established payment records, because the inclusion of those leases would increase the portion of the total cash flows derived from the residual value of the leased assets. In many lease securitizations, for purposes of determining the pool balance, the residual value portion of the lease is calculated at the lower of the residual stated in the contract or the market price for that make of vehicle as set out in a third-party source (*e.g*., Automotive Lease Guide (ALG)). We believe application of any percentage test should give effect to the calculation of residual value in the transaction documents as a more appropriate measure of risk.

Under some leases the proceeds from the residual are guaranteed by a third party. We request that the Commission provide in the final rules that residual values, to the extent guaranteed under such third-party guarantee arrangements, be considered payments under the lease rather than payments from the realization of the residual value. Such guarantee payments are comparable to a payment from an obligor rather than cash received from the sale of the physical property.

Finally, we note that the proposed rule on residual values of leases does not make clear how to make the calculations called for in the rule. Are the residual values to be discounted to present value? Should the calculation give effect to historical losses? Should the calculation only relate to the registered securities (*i.e.*, exclude any class that is sold privately)? We respectfully submit that this bright-line test is not only unnecessary, but also unworkable without elaborate instructions.

We do not believe that there should be any additional requirements for securitizations that are supported by residual values.

5. Exceptions to the "Discrete" Requirement

*Should asset-backed securities transactions be allowed to have master trusts, prefunding periods and revolving periods? Are there some asset types where the inclusion of such features should disqualify any issued securities from being considered an "asset-backed security?" Should one or more of the features (*e.g.*, master trusts or revolving periods) not be included or expanded for all asset types? Are there any additional exceptions that should be made?*

We believe ABS transactions should be allowed to be issued from master trusts and have prefunding and revolving periods. These are common features of existing asset-backed structures. Again, we believe that the market, and not the rules, should determine when these features are used.

(a) ***Master Trusts***.

(i) Definition. We request clarification regarding the definition of master trust in subparagraph (3)(i) of the definition of "asset-backed security." As currently drafted, the provision could be read too narrowly to mean that additional assets are added to the master trust pool only in connection with future issuances by the master trust. In practice, assets may be added to master trusts to maintain the trust's assets at a level required by the transaction documents, to reduce funds deposited to an excess funding account or simply at the option of the depositor. Such additions would normally occur when existing assets in the master trust are paying down. We suggest the following definition:

> (i) Master trusts. The issuing entity has one or more asset pools that may allow for the addition and removal of assets and the terms of its transaction documents contemplate that each such asset pool may support multiple series of securities that may be issued from time to time.

The distinguishing feature of a master trust, in addition to assets being added from time to time, is that the asset pool supports multiple issuances of ABS over time. We see no reason to limit the type of assets that may be deposited into a master trust or to impose other limits on master trusts.

(ii) Revolving Versus Non-Revolving Assets. The proposed rules draw a distinction for purposes of asset addition limits between assets that "by their nature revolve" and those that do not revolve. We believe this distinction is unjustified. Today, ABS issuers add assets to master trusts in two ways: (i) through the creation of new assets in revolving accounts or relationships initially dedicated to an asset pool (*e.g.*, new credit card receivables) and (ii) through the addition of new assets, including the addition of new accounts (*e.g.*, premium finance loans or new credit card accounts). The proposed rules would permit the first type of addition by not restricting new assets arising in relationships that "by their nature revolve," but would limit the second type of addition to the substantial disadvantage of some issuers. Virtually all master trust structures permit and even require asset additions of both types. For sponsors that finance revolving credits (*e.g.*, credit card accounts), this flexibility is necessary because revolving credits can change over time due to customer habits and other factors, and the flexibility to add accounts is necessary to ensure that the related ABS are at times backed by a sufficient balance of receivables. For sponsors that finance short-term, closed-end credits, which in many cases are of a self-liquidating nature (*e.g.*, trade receivables or premium finance loans), this flexibility is necessary to permit the issuance of securities with maturities longer than the average maturity of the pool assets.

The fact that trade receivables and premium finance receivables do not arise from revolving relationships results from economic, legal and regulatory factors, and does not prevent them from being susceptible to the same types of disclosure and analysis that the market applies to other asset classes. Forcing sponsors of these asset classes to the private markets would increase their costs of funds, and these sponsors would likely pass some or all of these costs on their customers. We do not believe that these increased costs are justified by any benefit associated with the proposed rules' distinction between revolving and non-revolving assets.

(b) ***Prefunding and Revolving Periods***. We believe that the restrictions on prefunding and revolving periods, which significantly limit the addition of assets, should not apply to master trusts. With respect to other issuers, we believe that the percentage limitations and the one-year period should not apply to asset types that can be defined by uniform eligibility criteria. Residential mortgage loans, auto receivables and Federal Family Education Loan Program (FFELP) student loans would be examples of homogeneous asset types. We believe that the market will determine the appropriate percentage limitations and the length of the prefunding and revolving periods that are acceptable to investors.

With respect to revolving periods, the proposed rules would favor longer-term assets, like motor-vehicle receivables and mortgages, over shorter-term assets, like trade receivables. The shorter-term assets would have a higher turn-over rate, with the result that the percentage limitation would be more restrictive. Also, because the paydown period for a transaction with shorter-term assets is relatively quick, a longer revolving period would generally be desirable. We view this effect of the proposed rules as another reason not to impose pre-determined limits on prefunding and revolving structures, especially since the assets must meet eligibility criteria specified in the prospectus.

Should there be any pre-determined limits on master trust structures? Are the proposed limits appropriate for the use of prefunding or revolving periods? Should there be such limits? What alternatives could be used in lieu of limits? Should there be different limits for shelf registration eligibility? Should there be different limits based on the nature of the asset (fixed or revolving)? Should there be a limitation that the assets that may be acquired in a prefunding or revolving period are of the same character as the original pool? Should any of the proposed limits be higher or lower? Should the limits be based on a different amount? Should the length of prefunding or revolving periods be longer or shorter than one year? If possible, please provide supporting data in relation to current market practices. Please see Section III.B.4. for comment requested regarding disclosure related to these features.

We do not believe that the rules should determine how transactions are structured, but rather should focus on eliciting material disclosures with respect to transactions that are being brought to the public markets and fall within a principles-based definition of "asset-backed security." Our views on percentage limitations and restrictions on revolving or prefunding periods are set forth above.

6. Investment Company Act of 1940

The need to modify rules under the Investment Company Act, in light of changes to the definition of asset-backed security, is discussed under Section VI.C. of this letter.

C. <u>Securities Act Registration Statements</u>

1. Form Types/Only Forms S-1 and S-3

We request comment on our proposal to require ABS offerings to be registered on either Form S-1 or Form S-3. Is there a reason to continue to provide access to another form type? Would there be any reason to provide a separate form type specifically for ABS?

We request comment on the proposed general instructions to Forms S-1 and S-3. Is the proposed menu of disclosure items appropriate? Should any additional items be included or omitted? For example, should information required by Item 305 of Regulation S-K regarding quantitative and qualitative disclosures about market risk be included? Should disclosure be required of any changes in or disagreements with accountants used in prior transactions by the sponsor or depositor involving the same asset class regarding attestations of assessments of compliance with servicing criteria? If so, should the disclosure be similar to that required by existing Item 304 of Regulation S-K? Are there any additional instructions that should be included for ABS offerings?

(a) ***Additional Forms***. We agree with the Commission that there is no reason to require ABS offerings to be registered on a form other than Form S-1 or Form S-3. However, we recommend that the Commission make clear that, pursuant to Rule 415 (a)(vii), Form S-3 remains available for offerings on a delayed or continuous basis of "mortgage-related securities" (as defined in Section 3(a)(41) of the Exchange Act) which do not qualify to be registered as ABS on Form S-3 (because, for example, they are backed by non-performing assets or a higher than permitted percentage of delinquent assets).

Since 1983, Rule 415(a)(vii) has permitted mortgage-related securities to be registered for offering on a delayed or continuous basis regardless of whether the offering was registered on Form S-3 or on another form.[2] The Staff has made clear that:

> [a]lthough the Securities Act and the rules thereunder do not define mortgage-related securities, the Exchange Act was amended to provide such definition in Section 3(a)(41). Because the term in Rule 415 was intended to have the same meaning as ultimately decided upon by Congress, a security meeting the definition in 3(a)(41) will also be deemed to be a mortgage-related security for purposes of Rule 415 . . . Permitting subsection (vii) to be available only for mortgage-related securities as defined by Section 3(a)(41), but at the same time permitting other subsections of Rule 415 to be available for other filings involving mortgages, is consistent with the Congressional policy of facilitating the marketability of mortgages.[3]

Section 3(a)(41) was added to the Exchange Act by the Secondary Mortgage Market Enhancement Act of 1984[4] ("SMMEA"). We believe that SMMEA, and its underlying Congressional policy of facilitating the marketability of mortgages, continues to support permitting mortgage-related securities to be offered on a delayed or continuous basis, and that this result should not be altered by the fact that such securities do not also qualify as ABS eligible for registration on Form S-3. Accordingly, if the Commission decides to eliminate the availability of Form S-11 for ABS, the Commission should clarify that Form S-3 remains available for registration of mortgage-related securities to be offered on a delayed or continuous basis, even if such securities do not also qualify as ABS eligible for registration on Form S-3. We would also suggest that the Commission make clear that, in such case, the Form S-3 registration statement may be prepared in accordance with instructions in the proposal pertaining to ABS (to the extent applicable), notwithstanding that the mortgage-related security will not qualify as an asset-backed security.

(b) ***Additional Disclosure Requirements***. In response to the Commission's inquiry regarding required disclosure items, we agree that paragraph (j) of Item 11 of Form S-1 should be in the "may be omitted category." The market risk disclosure required by paragraph (j) of Item 11 is generally not applicable to ABS, because the assets in an ABS are generally held to maturity and are normally sold prior to maturity only upon an event of default in respect of the ABS. The market risk in that case is generally fully disclosed. If an ABS has a swap, the risks of the swap are also generally disclosed. Other than in these instances, paragraph (j) of Form S-1 is not relevant.

We also believe that paragraph (m) of Item 11 of Form S-1 should be in the "may be omitted category" regardless of whether the issuing entity has executive officers or directors. The beneficial owners of the issuing entity are irrelevant since there is no management of the issuing entity by the beneficial owners.

Further, we believe that Item 304 disclosure is overly broad for ABS. Under current Commission rules, financial statements are not required for ABS issuers. Independent accountant involvement is therefore limited to an annual report as to compliance by the servicer with particular servicing standards.[5] Disclosure about changes in or disagreements with accountants should therefore be required only to the extent related to such a report.

In our opinion, no additional instructions, other than those set forth in the proposed rule, are needed.

2. Presentation of Disclosure in Base Prospectuses and Prospectus Supplements

Is any additional guidance or clarification necessary regarding the presentation of base prospectus and prospectus supplement disclosure? Should we be more specific, including by rule if necessary, on what information must be in the base prospectus as opposed to the prospectus supplement? If so, how should disclosures be delineated? Are there additional ways to cut down on unnecessary volume or detail in base prospectuses?

Is the proposed specification that a separate base prospectus and form of prospectus supplement must be presented for each asset class and country of origin appropriate? If not, how would the staff ensure the base prospectus provides clear disclosure that did not confuse investors?

Does the process of a base prospectus and a later prospectus supplement ensure that investors have adequate information at the time of their investment decision? Do the provisions permitting additional written communications in shelf ABS offerings, discussed in III.C., permit adequate information to be provided to investors in that time?

(a) ***Convenience Shelf***. Footnote 83 of the Release states that if a registrant plans to conduct a prompt takedown of ABS, the registration statement at effectiveness must include all information regarding the offering. We read this requirement as a restatement of the Commission's position that "immediate offerings from an effective shelf registration statement are currently permitted. At the time of effectiveness, information in the shelf registration statement is required to the extent it is known or reasonably available to the registrant."[6]

We question the application of this principle to registrations of ABS. At the time of effectiveness, what is material to investors generally is the fact that a takedown within the parameters of the base prospectus may occur at any time. Any shelf clearly states that fact. The particular structure of a takedown and its method of distribution are relevant only to the purchasers of that takedown. At the time of effectiveness, the Staff has had the opportunity to comment on each base prospectus and each form of prospectus supplement. In this regard, we note the Commission's comments in Section III.A.3.b of the Release. Unless the entire amount registered is taken down immediately after effectiveness, we see no reason why the takedown that is fully prepared prior to effectiveness and is done immediately upon effectiveness should be treated any differently from a takedown done at some later time. We respectfully ask the Commission to reconsider its position on this issue.

If the Commission continues to apply the convenience shelf theory to shelf registrations of ABS, we would ask the Commission to clarify that application. In our experience, at the time of effectiveness of an ABS shelf registration statement, a registrant may be considering any number of possible transactions, although no one transaction has solidified to the point that it is likely to result in an immediate takedown from the shelf or that a Rule 430A prospectus supplement could be prepared describing it. For this reason, and to avoid second-guessing which may result from "20/20 hindsight," we urge the Commission to establish a safe harbor provision that an offering will not be viewed as an "immediate takedown," unless the registrant knew prior to effectiveness that such offering was more likely than not to occur immediately after effectiveness, and the terms of such offering were so clearly established at such time as to be susceptible to disclosure in a Rule 430A prospectus supplement.

(b) ***Opinions***. Footnote 85 of the Release effectively requires that opinions of counsel be filed for each takedown off a shelf, either by post-effective amendment or under cover of a Form 8-K and incorporated by reference into the registration statement. While it appears that the Staff may have recently begun to impose such a requirement on some ABS transactions, this requirement is contrary to past practice and is administratively cumbersome. In addition, it is unnecessary because any issues as to enforceability of ABS or their tax treatment are required to be addressed in the disclosure document itself. Accordingly, we would urge the Commission not to adopt this requirement.

(c) ***Base Disclosure***. With respect to the proposed provisions on base prospectus disclosure, we make the following comments.

(i) <u>Features to be included</u>. The requirement in the proposal that registrants limit the base prospectus to only the asset types and structural features reasonably contemplated diverges from current practice and would significantly reduce the flexibility of shelf registration. Accordingly, we recommend against adopting such requirement.

(ii) <u>Separate base for each asset class and each country</u>. Under current practice, the Staff allows related asset types — *e.g.*, first lien residential mortgage loans and revolving home equity loans — to be covered in one base prospectus. Depending upon how "asset class" is interpreted — *e.g.*, whether first lien residential mortgage loans are a separate class from home equity loans — there could be a substantial expansion in the number of base prospectuses needed for a shelf, resulting in duplication of descriptions of common elements and additional costs. We believe that a separate base prospectus for each asset class would not be unduly burdensome and costly to a sponsor if the term "asset class" were reasonably interpreted to include similar assets (*e.g.*, first and second lien mortgage loans and revolving home equity loans would be considered one asset class — residential mortgage loans).

We also oppose the proposed requirement for separate base prospectuses for each country of origin. With respect to a single asset class originated in different countries, the main differences will relate to the legal aspects of the asset class and to taxation, all of which can be addressed through disclosure similar to that currently provided when domestic (U.S.) assets of a single class are originated in different states. The proposed requirement also runs counter to the trend, evidenced by developments in the European Union and elsewhere, of encouraging cross-border integration of capital markets and of eliminating unnecessary regulatory obstacles to such integration, and by the Commission's policy of encouraging foreign issuers to issue their securities in registered offerings.

(iii) Prospectus supplement cannot conflict with the base prospectus. The Commission's statement that "disclosure in prospectus supplements regarding the transaction may enhance disclosure in the base prospectus regarding contemplated transactions, but should not contradict it" appears to us to endorse current practice. We would, however, recommend that the Commission make clear that use of the formulation "except as otherwise permitted in the prospectus supplement" is acceptable because it is used to clarify that the supplement may refine, supplement or modify general concepts set forth in the base prospectus without adding new asset types or structural features. We believe that the last sentence before the questions in Section III.A.3.b. of the Release confirms this usage.

(d) ***Market-Making Prospectuses — Footnote 86***. As further discussed under Section IV.J. below, we urge the Commission to eliminate the requirement to deliver market-making prospectuses in connection with secondary market sales of ABS. Alternatively, we request that market-making prospectuses not be required to be delivered if the transaction documents provide for, and the prospectus for the ABS discloses that, distribution statements containing the information required in Item 1119 of Regulation AB are available to investors upon request and without charge from a designated transaction party.

3. Form S-3 Eligibility Requirements for ABS

(a) ***S-3 Eligibility/Investment Grade***.

Should we continue to require an investment grade requirement for Form S-3 eligibility? Are any modifications to that requirement necessary? Should alternatives be *considered, such as investor sophistication, minimum denomination or experience criteria? If so, what criteria should be considered?*

The Commission has favorably noted the beneficial effect that the adoption of Form S-3 for ABS has had on precipitating movement of ABS from the private to the public markets where investors are able to receive the benefit (not available to purchasers of privately placed securities) of the protections accorded to purchasers of securities registered under the Securities Act.[7] Such movement has also had the effect of increasing the liquidity of such securities, which has benefited both issuers and investors. One consequence of the "investment grade" requirement for Form S-3 eligibility is that non-investment-grade classes of ABS offered in the same transaction must, as a practical matter, be offered on a private placement basis. This is because it is not practical to simultaneously register such non-investment-grade securities on Form S-1, given the need for the effectiveness of the Form S-1 to coincide with the simultaneous offering off the Form S-3 registration statement. This is true, even though, like the investment-grade ABS being offered off the Form S-3 shelf, such non-investment-grade ABS are being offered to sophisticated institutional investors who are capable of undertaking their own analysis of such securities.

We do not believe that any regulatory purpose is served by driving non-investment-grade ABS offered to institutional investors to the private placement market and thereby depriving such institutional investors of the benefits and the protections accorded to purchasers of registered ABS. Accordingly, we recommend making Form S-3 available for registration of otherwise eligible non-investment-grade rated or unrated classes of ABS, provided that:

(i) initial sales of such classes of ABS are limited to qualified institutional buyers (within the meaning of Rule 144A under the Securities Act) and to "institutional" accredited investors (within the meaning of Rule 501(a)(1), (2), (3) and (7) of Regulation D under the Securities Act); and

(ii) initial sales and subsequent resales of such classes of securities are required by the terms of such securities to be in minimum denominations of $250,000.

Such restrictions should ensure that securities are sold and subsequently resold only to investors who are capable of undertaking their own analysis of the merits and risks of their investment. At the same time, such investors will gain the benefits accorded by the registration of such securities, including increased investor protection and liquidity. If the Commission adopts this approach (which we strongly urge it to do), it should make concomitant changes to Rule 3a-7 under the Investment Company Act so that the public sale of such securities will not affect the status of the issuing entity under such Act.

(b) ***S-3 Eligibility/Reporting History***.

Are there any additional conditions that should be required to qualify for Form S-3 eligibility? Are the proposed conditions appropriate?

We do not believe that there should be any additional conditions required to qualify for Form S-3 eligibility.

Should our proposed clarification of the impact of prior reporting obligations be limited to prior transactions by the same sponsor and depositor involving the same asset class? If so, why?

Unlike non-ABS issuers who generally file on a quarterly basis, during the period of applicability of Exchange Act filing requirements ABS issuers are generally required to file Exchange Act reports monthly, a tripling of the number of opportunities for late filings of such reports. In addition, as the Commission has recognized, timely compliance with Exchange Act reporting by ABS issuers is uniquely dependent upon the cooperation of servicers, trustees and other third parties not under the control of the sponsor/depositor.[8] Reliance by ABS issuers on third parties for the preparation and timely filing of Exchange Act reports would significantly increase if the Commission's proposed disclosure requirements for Form 10-D are adopted, as described in Section IV.D. below. Further, it is our experience that, in accordance with Section 15(d) of the Exchange Act, the duty of most issuers to file with respect to a particular issuance of ABS will normally be suspended in a year or less from the date of issuance. Thus, investors in ABS do not usually rely upon Exchange Act reports for information regarding an issuance of ABS. However, we note that in the case of some ABS, such as the repackaging of corporate debt, the duty to file Exchange Act reports is not likely to be suspended in accordance with Section 15(d) of the Exchange Act, and under current practice such duty can be expected to continue throughout the term of the securities. See the discussion under Section VI.D.

Despite these unique features of the ABS Exchange Act filing process, the Commission has proposed that Form S-3 eligibility be forfeited when a report required to be filed under the Exchange Act is not filed when required. Significantly, the Commission is proposing to impose such a forfeiture even when the failure results from the action or inaction of a third party not controlled by the registrant or there is other good cause for such failure.

In addition, loss of Form S-3 eligibility would also be extended, for the first time, to non-registrant sponsors, thus affecting all ABS transactions that could be undertaken by such sponsor. Such an extension would be analogous to linking the Form S-3 eligibility of a corporate non-ABS issuer to the reporting history of a sister company — a step the Commission has never taken. In addition, the Commission does not adequately explain how such a forfeiture would be determined in many common ABS transactions, such as those involving rent-a-shelf transactions (described in more detail in Section II.C.2(a) below).

Further, it appears from the language of the proposal that it is intended that no new transactions could be done under an existing Form S-3 shelf from and after the date of the failure to comply with Exchange Act reporting requirements. This is a much more severe penalty than applies to Exchange Act reporting non-compliance by non-ABS corporate issuers, since a non-ABS corporate issuer may generally continue to issue under an existing effective Form S-3 shelf — even after such non-compliance — until the earlier of the date the capacity on the Form S-3 shelf is exhausted or a post-effective amendment is effected in order to update for purposes of Section 10(a)(3) of the Securities Act.[9] We see no reason why this approach should not apply to ABS shelf registration statements.

Although the duty to file Exchange Act reports with respect to an issuance of ABS often exists for an extremely limited period of time, we agree with the Commission that during such period, ABS issuers should file in a timely fashion. However, we strongly believe that a failure to have timely filed should not result in a loss of Form S-3 eligibility in cases where such failure is the result of third-party action or inaction or other good cause can be shown for such failure. The severity of these proposed rules is magnified in respect of those issuers whose duty to file Exchange Act reports exists, as noted above, for an extended period of time. In addition, we strongly believe that it is unduly harsh to extend loss of Form S-3 eligibility to non-registrant sponsors and that any such extension would be inconsistent with the forfeiture scheme applicable to non-ABS corporate issuers. The possible breadth of the definition of "sponsor" could lead to unfair and, we think, unintended results. For example, in the case of a rent-a-shelf, would a seller into the rent-a-shelf be considered a sponsor of that rent-a-shelf, with the result that the seller's ability to use Form S-3 would be dependent on whether the depositor and other sellers into the rent-a-shelf perform their obligations in a timely manner? Further, we believe that, as in the case of non-ABS corporate issuers, an ABS registrant should be able to continue to issue under an effective Form S-3 shelf until the date the shelf is exhausted.

We also request that the Commission clarify that, if a sponsor acquires a depositor which was not in compliance with Exchange Act reporting prior to the acquisition and such acquisition is not part of a transaction designed to avoid the reporting requirements of the Exchange Act, then only the acquired depositor, and not the acquiror's pre-existing depositors, would be ineligible to use Form S-3.

One way our suggestions above could be effectuated would be through modification of Rule 12b-25 under the Exchange Act (which does not, as currently written, address the unique features of the ABS Exchange Act filing process). In this regard, Rule 12b-25 could be modified to provide that:

> (i) If any Exchange Act report with respect to an ABS required to be filed pursuant to Section 13 or 15(d) of the Exchange Act or the rules thereunder is not filed within the required time period, the registrant must file a Form 12b-25 within five business days after such report is due disclosing its failure to file and the reason therefor in reasonable detail.
>
> (ii) If the registrant asserts in the Form 12b-25 that the reason for such failure relates to the action or inaction of a person other than the registrant, the registrant would not lose its eligibility to use Form S-3. Given the likely difficulty of obtaining a signed statement of such third party in such situation for inclusion in the Form 12b-25 in such a situation, we do not believe that such a signed statement should be required.
>
> (iii) If the Form 12b-25 discloses a reason for failure to timely file other than that stated in the previous subparagraph, the registrant (but not a non-registrant sponsor or any other entity affiliated or otherwise related to the registrant) would lose its ability to file a <u>new</u> Form S-3, but only until after the required report is actually filed. As is the case with non-ABS corporate issuers, the registrant would not lose the ability to issue additional securities under the existing Form S-3 shelf until the capacity of such shelf is exhausted. If some period of non-eligibility must be applied, we suggest three months after the required report is actually filed.

(iv) The Staff should be required to waive Form S-3 ineligibility pursuant to subparagraph (iii) above for other good cause shown. A registrant should be deemed to have shown good cause if it asserts a cause as a good cause in its Form 12b-25 and the Commission does not notify the registrant within ten business days that it does not accept such cause as a good cause.

We believe our proposal represents a balanced approach in light of the limited period most ABS issuers must file reports with respect to an issuer, the required frequency of ABS Exchange Act filings during such period and the necessary involvement of third parties not controlled by the registrant in the preparation of such filings, and strongly urge the Commission to consider its adoption. If the Commission decides not to adopt such an approach, we recommend that the Commission defer implementing a requirement tying Form S-3 eligibility to Exchange Act reporting compliance until it can separately consider how Rule 12b-25 can be modified to accommodate better the unique features of the ABS Exchange Act filing process.

If the Commission does not follow the suggestions made above, the final rule should, at the very least, recognize that within an affiliated corporate group, there may be multiple sponsors — *e.g.*, one affiliate may be the sponsor for mortgage loan securitizations and another affiliate may be the sponsor for credit card securitizations. The failure by one such sponsor or its depositors to make a timely filing should not affect the other sponsors or their depositors. This would be analogous to the rule as applied to corporate filers — the failure by one corporate affiliate to file in a timely manner does not affect the ability of another corporate affiliate to use Form S-3.

4. Determining the "Issuer" and Required Signatures

(a) ***Determining the Issuer***.

We request comment on our proposed rule clarifying the "issuer" for an asset-backed security. In 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? What would be the bases for designating such entity or entities as the "issuer?"

Consistent with Section 2(a)(4) of the Securities Act, the proposal clarifies that the depositor is the "issuer" of an asset-backed security. We believe that the designation of any other or additional entity (such as the sponsor, the servicer or the trustee) as an "issuer" would be inconsistent with the Securities Act scheme, and we would strongly oppose any such designation. We note, however, that certain foreign structures, such as Australian or United Kingdom residential mortgage loan transactions, may not have directly parallel concepts of issuers and depositors and therefore request that the Commission include some flexibility with respect to these definitions. One alternative would be to specify that the definition of "issuer" could be modified in particular circumstances subject to Staff confirmation through pre-filing conferences.

(b) ***Required Signatures***.

Is there still a reason to require the issuing entity to sign the registration statement if formed prior to effectiveness? If so, who should sign on behalf of the issuing entity? Should any other party to the transaction be required to sign the registration statement?

Our proposal regarding which individuals of the depositor must sign is consistent with requirements for all registration statements. Should they be modified for ABS? If so, how?

Because ABS issuers are without management and their assets are dedicated to paying their investors, we do not believe that there is any reason to require the issuing entity, if formed, to sign the registration statement prior to effectiveness. A requirement that any party other than the depositor sign the registration statement would be inconsistent with the definition of "issuer" in Section 2(a)(4) of the Securities Act. We do not believe there is any reason to change the individuals who are required to sign the registration statement for the depositor.

D. Foreign ABS

We request comment on the application of our proposals to foreign ABS. Is there a need to create different regulatory requirements for foreign ABS? If so, what accommodations should be made and why? In particular, is there any reason why foreign ABS should be subject to differing ongoing Exchange Act reporting obligations than domestic ABS? We request comment particularly from the point of views of potential issuers of foreign ABS who would prepare this information as well as potential investors in foreign ABS regarding what information would be material to their investing decisions.

Should our proposed general instruction regarding foreign ABS disclosure be more specific? Are there any particular categories of disclosure that should be delineated?

*Are there any investor protection concerns raised by the approach of the proposals to foreign ABS? Should there be any additional conditions for Form S-3 eligibility for foreign ABS? For example, should there be a requirement of one or more previous registered offerings on a non-shelf basis? Should certain representations or undertakings be required, such as that subsequent offerings will be substantially similar to prior transactions? Should there be any minimum denomination requirements, investor sophistication or other suitability requirements regarding the types of investors that may invest? Should we have different standards regarding the type of pool assets (*e.g.*, level of delinquencies) that may be securitized? Should any of these conditions also be imposed with respect to Form S-1, such as an investment grade requirement?*

Are there structures commonly used in foreign ABS transactions that would be restricted from the definition of "asset-backed security" under our proposals? Would this limit the ability of these transactions to register public offerings in the U.S.? Are there any foreign structures that would be contemplated by our proposals but should not be considered appropriate for an "asset-backed security?"

We see no need to create different regulatory requirements for foreign ABS or to impose differing ongoing Exchange Act reporting obligations on foreign ABS. Similarly, we see no need for the general instructions regarding foreign ABS to be more specific. We do not believe that foreign ABS raise special concerns that cannot be handled through disclosure. We are unaware of any structures used in foreign ABS transactions that would be excluded from the definition of "asset-backed security" under the proposal or any foreign structures that would be included as ABS under the proposal that should not be included. We have mentioned the need for flexibility (i) in determining the issuer and depositor in the context of foreign ABS in Section I.C.4(a) above and (ii) in the definition of "delinquent" in Section I.B.3(e) above.

E. <u>Proposed Exclusion From Exchange Act Rule 15c2-8(b); Requested Clarification</u>

Should we codify an exclusion from the preliminary prospectus delivery requirements of Rule 15c2-8(b) for Form S-3 ABS? Do investors have enough time and information before the offering to make fully informed investment decisions? What alternatives might exist to Rule 15c2-8(b) to address this concern?

*What would be the costs and benefits of not codifying the staff position? Should there be any additional conditions to the exclusion? Should the proposed exclusion not apply to ABS targeted to non-institutional investors? For example, should preliminary prospectus delivery be required if the ABS is expected to have low minimum investment denominations (*e.g.*, less than $1,000) or for ABS that are to be listed? Should the exclusion be available for foreign ABS?*

Is the proposed limitation to Form S-3 ABS still appropriate? If not, under what circumstances should the proposal be extended to Form S-1 ABS? In particular, are there any additional conditions that should be required for extending the exclusion to Form S-1 ABS?

The proposed rules would exempt from Exchange Act Rule 15c2-8(b) ABS that meet the requirements of General Instructions I.B.5. of Form S-3. Existing relief from the requirements of the 48-hour rule with respect to ABS transactions has been predicated, in part, on the practical difficulties of preparing a preliminary prospectus in an ABS transaction within the required time frame because the structure of the transaction is frequently not finalized until immediately prior to closing. While the proposed exemption would exempt ABS that are eligible for registration on Form S-3, the exemption does not apply to ABS registered on Form S-1. Similar to ABS issued under a Form S-3, ABS issued under a Form S-1 evolve in response to investor demand and their terms and structure may not be finalized until shortly before closing. As a result, we recommend that the exemption apply to ABS that meet the general definition of ABS, rather than restricting the exemption to ABS eligible for Form S-3. If the Commission is unwilling to expand the exemption to all ABS, a possible middle ground would be those ABS registered on Form S-1 that are not new asset types or new issuers, or, alternatively, transactions that are substantially similar to previous Form S-1 transactions — *e.g.*, transactions with the same sponsor, asset class and depositor, and with a substantially similar structure, which cannot be registered on Form S-3, but would otherwise be known to investors and would therefore not be viewed as "new or speculative."

Although the proposed exemption would codify the exemption from the 48-hour rule with respect to the delivery of preliminary prospectuses, it does not address specifically the application of the 48-hour rule to transactions in which no preliminary prospectus is delivered.

The Commission has interpreted Rule 15c2-8(b) to require delivery of a final prospectus supplement at least 48 hours prior to sending the confirmation in cases where no preliminary prospectus is circulated and the offering is sold solely on the basis of the final prospectus.[10] We recommend that the Commission adopt as a formal exclusion the position taken in the *Public Securities Association* line of no-action letters dated November 20, 1995, November 13, 1997, November 20, 1998, December 15, 1999 and December 15, 2000, which granted relief from the 48-hour delivery requirement of a final prospectus in transactions where no preliminary prospectus was circulated, and the offering was sold solely on the basis of the final prospectus; provided that a final prospectus is sent or given to a purchaser prior to, or at the same time as, the sending of the confirmation.

In response to the Commission's inquiry as to whether the proposed rules would provide investors with sufficient time and information to make informed investment decisions, as noted in the Release, most investors in ABS are institutional investors that have previously invested in ABS. Such investors will frequently have had significant experience with the details of ABS transactions. Additionally, with respect to ABS registered on Form S-3, the availability of the base prospectus, as well as prospectus supplements from prior offerings, allows an investor to become familiar with the common structural features and asset types of a particular issuer. Similarly, with respect to ABS registered on Form S-1, the availability of prospectuses of an issuer or similar asset type allows an investor to become familiar with structures and asset types. Also, the availability of computational materials with respect to Form S-3 offerings, and as we have proposed, Form S-1 offerings, provides investors with more specific information as to the particular ABS. Finally, institutional investors, or any investor, can refrain from investing if there is insufficient time to evaluate an investment. In light of the fact that most investors continue to purchase ABS under the current no-action letter relief, it would appear that most investors believe that they do have sufficient time to consider the investment.

F. Registration of Underlying Pool Assets

1. Proposal for When Registration Is Required

We request comment on the list of conditions that clarify when the distribution of underlying securities in the asset pool needs to be separately registered. Are any modifications or clarifications necessary? Should we address further examples?

We also request comment on the proposed conditions codifying the manner of registration of the underlying securities distribution. Are any modifications or clarifications necessary? Should any of these conditions no longer be required? Should any additional conditions be added?

In instances where the underlying securities must be registered because they are part of an unsold allotment and are being offered as part of a primary offering by the same issuer, we suggest the following:

(a) with respect to proposed Rule 190(b), specifically provide that the issuing entity may combine into one prospectus the necessary disclosure with respect to the ABS to be offered and the underlying securities; and

(b) clarify that, consistent with current practice, the subsequent registration of the underlying securities would not require payment of another registration fee with respect to such underlying securities and therefore would not count against the capacity of the shelf on which the underlying securities were registered.

2. Proposed Exceptions from Disclosure and Delivery Conditions

Should transactions that involve features such as issuance trusts or SUBIs be excluded from the proposed disclosure and delivery conditions? Should we specify more particularly the manner in which they should be registered? Does our proposed list of conditions adequately identify the relevant structures while excluding the resecuritization of other underlying securities? Are any other exceptions necessary?

(a) ***Eligibility Requirements***. We request that it be made clear in the final rule that financial assets that are eligible for the proposed exceptions from disclosure and delivery conditions under proposed Rule 190(c) ("Eligible Underlying Assets") also be exempt from the additional Form S-3 eligibility requirements, as well as additional registration requirements. The Commission's examples of Eligible Underlying Assets include SUBIs issued in lease transactions by titling trusts. Footnote 117 of the Release states that registration of Eligible Underlying Assets must be on a form eligible for such distribution. Consequently, if the ABS are registered on Form S-3, the Eligible Underlying Assets would need to meet requirements for registration on Form S-3 (or be separately registered), including the requirement that the financial assets constitute investment-grade ABS. However, in footnote 63 of the Release, the Commission states that securities issued by a series trust would not constitute "asset-backed securities" because a series trust does not meet the requirement that the issuing entity must be passive and its activities restricted to the ABS transaction.[11] Also, SUBIs are usually not rated because they are not offered to investors (and ABS backed by SUBIs are currently only registrable on Form S-1). As a result, SUBI interests would not be eligible for registration on a Form S-3, as they are neither ABS nor rated investment grade.[12] As noted by the Commission and stated in proposed Rule 190(c), Eligible Underlying Assets are predominately look-through securities structured to address legal and administrative issues. Given the nature of these Eligible Underlying Assets, there would appear to be little or no benefit to the investors in primary ABS registered on Form S-3 in obtaining a rating on such Eligible Underlying Assets.

The preceding discussion applies equally to collateral certificates that are used to facilitate the issuance of securities backed by the ownership interest in credit card or dealer floorplan portfolios. These collateral certificates are often rated, but solely for purposes of Form S-3 qualification. Given that the proposed rules specifically contemplate the use of Form S-3 for lease offerings and offerings by issuance trusts, we request that the Commission re-evaluate its position that Eligible Underlying Assets must be eligible for distribution on the related form, in light of the fact that the rule would foreclose the use of Form S-3 by issuers where the underlying securities are issued by a series trust or are unrated.

(b) ***Underwriter Classification***. Footnote 117 of the Release states that any intervening transferors of the Eligible Underlying Asset to the ABS issuing entity would need to be named as underwriters. In transactions involving SUBIs, the SUBI may be issued by the series trust (a registrant) to an affiliate that is also a registrant, which subsequently transfers the SUBI to the issuing entity in exchange for the proceeds of the sale of the ABS. We request clarification regarding the treatment of the transferor registrant in such circumstances. We also request clarification of the treatment of a transferor that is an affiliate of the registrant, but not itself a registrant. Finally, we request that the Commission state for what purposes the transferor would be considered an underwriter. We request that the Commission make clear that such a transferor is not required to register as a dealer solely on the basis of such transfers.

(c) ***Registration Fee***. We request that the Commission specifically state that, in instances where Eligible Underlying Assets are registered together with the related ABS, no separate registration fee is payable with respect to the Eligible Underlying Asset. This is consistent with the Commission's current policy with respect to the registration of such Eligible Underlying Assets.

(d) ***Issuance Trusts and SUBIs***. In response to the Commission's inquiry regarding the treatment of SUBIs, we consider the proposed exceptions to the disclosure and delivery conditions for issuance trusts and SUBI transactions to be appropriate. However, certain revisions regarding the ability to register these assets on Form S-3 and the required disclosure regime, as well as clarification regarding fees and the classification of transferors as underwriters, are discussed above. Clarifications in the final rules and adopting release on the items noted above with respect to the registration of such assets would be helpful. We believe that the conditions for meeting the exceptions are adequately described. We do not believe that additional exceptions are necessary.

II. DISCLOSURE

A. <u>Executive Summary</u>

This portion of the letter addresses issues in the Disclosure section of the Release.

One overriding concept in this letter is that the roles of various parties should be clarified. Accordingly, we are suggesting a revised definition of "servicer," "master servicer," "administrator," "trustee," "originator" and "sponsor." We note that the Release takes a very expansive view of the term "servicer."

The most important single area covered in this section of the letter is static pool data. We propose clarification of the prior pools for which static pool data would be required, with a preference for prior securitized pools over vintage pools. We also believe that the prior pools should not be stratified, but rather that their summary characteristics should be included in the disclosure. We also recommend that all possible steps be taken to permit disclosure of static pool data via Web sites. Finally, we propose a safe harbor for the selection of the prior pools on which static pool data are provided.

In summary, our principal additional proposals are as follows:

- We propose a substantial reduction in the number of servicers for which disclosure would be required.

- Item 1102(b), (e) and (f) require that limited information about each class of securities be shown on the outside front cover page of the prospectus. We propose that this provision permit any class-specific information to be included in the summary instead of on the outside front cover page.

- We propose that additional disclosure regarding personnel or management of the various transaction parties should not be required and we recommend that additional corresponding financial disclosure also not be required.

- We propose that the Item 1106 requirements for disclosure of the amount paid or to be paid for the pool assets be eliminated.

- We propose that opinions of counsel regarding any bankruptcy separation or bankruptcy remoteness, true sale of assets and non-consolidation of the issuing entity in the event of bankruptcy not be required to be filed.

- We believe that the Item 1107 servicer disclosure should not also be required of subservicers, and we also believe that such disclosure requirements are generally too extensive for entities servicing less than 30% of pool assets.

- We believe that the Item 1109 originator disclosure requirements generally are too extensive for entities originating less than 30% of pool assets.

- We propose that Item 1115 legal proceedings disclosure generally be limited to disclosure of only publicly available information about legal proceedings.

- We propose that the Item 1117 affiliate and related party transaction disclosure be limited to transactions that could materially affect the rights of security holders or are necessary to understand the securities.

- We propose that the Commission clarify (as appears intended) that, where the issuer refers to the financial statements of another party, as opposed to incorporating them by reference, the issuer is not liable for any errors or omissions in those financial statements.

- We propose that the Commission clarify that it is not necessary to have the permission of the third party to incorporate financial statements of a third party by reference or to refer to financial statements of a third party. Moreover, we request that the Commission clarify that it is not necessary to obtain the consent of the third party's accountants in such situations, and that the protections in Section 11 of the Securities Act for audited financial statements still will be available without such consent.

- We propose that registrants be permitted to rely reasonably on information that non-affiliates provide for inclusion in a prospectus, and that the Commission relax its policy against indemnification for securities law liability in this regard.

B. Role of Various Parties

Many of our comments relate to the need for clarification of the roles of various parties. We note that the Release takes a very expansive view of the term "servicer." As proposed, "servicer" would include entities that perform bond administration only (that is, that do not handle collections on pool assets). As discussed in more detail below, we feel that there should be a separate item requiring disclosure for administrators, and that the required disclosure would be different from that for servicers and trustees. Moreover, as drafted, "servicer" could include subservicers that are several steps removed from the issuing entity, for whom servicer level disclosure as proposed may not be appropriate. Finally, for reasons described in more detail below, we also believe that definitions of "trustee" and "originator" should be provided.

Following are suggested new definitions, including a replacement for the proposed definition of "servicer":

Servicer	means any person 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 responsible 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	means any person that does not itself perform servicing functions, but as to the issuing entity is either: 1) contractually responsible for the activities of servicers or subservicers in servicing the pool assets, or 2) contractually responsible for monitoring the activities of servicers or subservicers and replacing them if needed. The term "master servicer" also includes any person otherwise meeting the foregoing tests but that is also responsible for direct servicing of a portion of a pool or for making and/or calculating the amount of allocations or distributions to holders of the asset-backed securities and that also performs master servicing functions.
Trustee	means the person with fiduciary obligations 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	means any person responsible for making and/or calculating the amount of 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	means, 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. The term originator does not include an entity that funds financial assets in accordance with underwriting criteria established by another person.

C. <u>Proposed Regulation AB</u>

We request comment on our proposed principles-based approach for Regulation AB. Should we provide detailed disclosure guides by asset type instead? In evaluating the proposed items in Regulation AB, do the items provide sufficient clarity in identifying the disclosure concept? Should we be more specific (or less specific) regarding any particular items?

We support a principles-based approach for disclosure. We agree that asset type guides should not be used. We comment below in the specific areas where disclosure should be different from the proposed disclosure.

We also request comment on methods to improve the usefulness of disclosure documents. What additional actions can we take to encourage focus on clear and understandable material disclosures?

We anticipate that the Staff will comment heavily on ABS registration statements filed after the new regulations become effective. The Staff should in the future publish lists of standard or typical comments that it makes. This would be of enormous practical help to securitization attorneys who want to "get it right the first time" during the period immediately after the regulations become effective, and thereafter. We also appreciate the recently announced decision to publish on the Commission's Web site comment letters on registration statements.

Is additional disclosure regarding the background, experience, performance and role of transaction parties needed? In evaluating the proposed disclosure items relating to these parties, should we be more specific on particular aspects that should be disclosed?

We believe that the proposed principles-based approach does not need to be more specific in this regard.

*Should audited financial statements be required to be filed for issuing entities? If so, for what periods? What would be the costs and benefits of such a requirement? Should they be required in some filings (*e.g.*, ongoing Exchange Act reports) but not others (*e.g.*, Securities Act registration statements)? Are there alternative methods to reach the same objectives that would be achieved by requiring financial statements?*

Are one or more of the basic audited financial statements (balance sheet, statement of income, retained earnings, or cash flows) more relevant for issuing entities than the others? If so, which one(s) and should it (they) be required to be filed?

Should a statement of cash flows using the direct method be required?

*What additional disclosures would be relevant if only one or more basic financial statements, rather than full audited financial statements, are provided (*e.g.*, disclosures about the fair value of financial instruments pursuant to FASB Statement 107)?*

Instead of GAAP financial statements, should financial statements be required that are prepared on another basis, such as on the basis of cash receipts and cash disbursements?

Audited financials should not be required as to securitization-issuing entities. Financial statements are useful for operating entities because they provide a standardized format for valuing the assets and liabilities of an entity and determining the value of the equity. Securitization-issuing entities are completely different. They are designed so that the cash flows from the fixed pool of assets are sufficient to pay off the securities issued. For similar reasons, financial statements would not be useful for ongoing reporting.

Consequently, none of the basic audited financial statements would have any particular relevance to a securitization-issuing entity.

Disclosures about the fair value of the underlying financial assets would not be helpful. The issue is not the value of the assets; the issue is whether the cash flows from the assets are continuing to support the securities issued.

There is no need to develop a non-GAAP system of financial statements for securitization-issuing entities or to use financial statements to value a securitization-issuing entity. The principal issues with respect to ongoing monitoring of a securitization-issuing entity are whether: (1) the assets are being serviced in accordance with the agreement, (2) the cash flows are being distributed in accordance with the agreement, and (3) the assets are performing in a manner that continues to support the ratings of the securities. Issues 1 and 2 are appropriately addressed through the system of periodic reporting compliance certification that is in place today, with whatever improvements result from the reporting portion of the Release. Issue 3 can best be addressed only by the rating agencies.

1. General

Proposed Item 1100(b)(1) would require disclosure of delinquency experience in 30-day increments through the point at which the assets are "written off or charged off as uncollectible." This approach may be appropriate for certain types of unsecured consumer loan assets that are typically charged off after a specific period of time (*e.g.*, 180 days). However, this approach would be burdensome for residential and commercial mortgage loans and other secured loans where the amount of time needed to liquidate the collateral may vary. Moreover, the "charge-off" concept is not used with these types of loans; they are carried as assets until the time that the collateral is finally liquidated. In the mortgage industry, it is standard practice to report delinquencies under the following categories only: 30–59 days, 60–89 days, 90 days or more, in foreclosure, and in bankruptcy. Requiring disclosure of delinquency in 30-day increments after 90 days would be out of keeping with industry practice, and would be unduly burdensome relative to the value of the additional information provided.

We recommend that Item 1100(b)(1) be modified to permit presentation of historical delinquency information in a manner consistent with industry norms, so long as at least the categories of 30–59 days, 60–89 days, and 90 days or more are shown.

2. Definitions

(a) ***Sponsor***. The definition of "sponsor" in proposed Item 1101(l) properly focuses on the entity that "organizes and initiates" an ABS transaction. In most cases, that would appear to be the entity that owned the pool assets immediately prior to the time when they were transferred (directly or indirectly) to the issuing entity, provided that the entity owned the pool assets and had the ability to decide whether to hold the assets, securitize them, or sell them as whole loans.

It should be understood that the sponsor will not always be an affiliate of the depositor. In some cases, a loan seller that wishes to sell loans in a securitization transaction, but does not have its own effective registration statement, will sell the loans to an unaffiliated depositor for immediate resale to an issuing entity for a securitization. In such a transaction (typically called a "rent-a-shelf" transaction), the loan seller would appropriately be viewed as the sponsor for purposes of the required sponsor disclosure (including static pool data).

However, in some cases the definition, as drafted, could have anomalous results. For example, assume that a loan seller that is a regular issuer of ABS, sells a pool of whole loans to a loan purchaser. At some future time, the loan purchaser decides that it wants to sell the loans in a securitization. The loan purchaser may or may not have its own shelf registration statement. However, the parties may desire to use the loan seller's registration statement to effect the securitization because the loans are identified with the loan seller. In such a case, it appears that the loan purchaser would be the sponsor under the proposed definition, but it would be more appropriate to treat the loan seller as the sponsor for purposes of the required sponsor disclosure (including static pool data).

In some transactions, particularly with commercial mortgage-backed securities, two or more unaffiliated loan sellers may simultaneously sell loans through a depositor into a single issuing entity that issues a combined securitization. In such a case, it may be appropriate to treat each loan seller as a sponsor solely for purposes of the disclosure requirements (and not for purposes of Form S-3 eligibility).

Although we view the proposed definition of "sponsor" as generally workable, we recommend that the Commission consider adding some flexibility, as follows. For disclosure purposes, if the static pool data and other required information pertaining to the sponsor of an entity, other than the person defined as the sponsor, would clearly be more meaningful to investors, and if static pool data and other information of that entity can be obtained, then there should be an ability to provide the static pool data and other information of that other entity in place of that for the entity defined as sponsor.

(b) ***Other Parties***. Please refer to the discussion in Section II.B. above regarding additional proposed definitions.

D. Forepart of Registration Statement and Prospectus

Are any modifications needed to the proposed list of items? Should we be more specific (or less specific) regarding any items?

Proposed Item 1102(b), (e) and (f) would require certain limited information specific to each class of securities to be shown on the outside front cover page of the prospectus. For series with more than a half dozen or so classes, it would be impossible to include all the information requested on the outside front cover, while still maintaining the clean, uncluttered look that became the norm following the plain English reforms in 1998. Therefore, this provision should be revised to permit any class-specific information to be included in the summary instead of on the outside front cover page.

Should we provide a list of representative risk factors? How could we address our concern that any such list would become boilerplate disclosure in all filings?

This would not be necessary or helpful. Any representative list would be non-comprehensive and would become dated quickly. However, publication of comment letters and model comments would be helpful.

E. Transaction Parties

We request comment on the proposed disclosure regarding transaction parties. We also request comment on our proposed definitions. Are there additional parties not mentioned that should be specifically referenced? For each particular disclosure item, are there any modifications that should be made to the list of items to be disclosed? For example, should information regarding personnel or management of the sponsor, servicer or other party, *including any recent turnover in personnel or management, be listed as an additional item for disclosure, if material? Should any of the examples of disclosure be added explicitly to the proposed items? Would information about the depositor's securitization program ever materially differ from the sponsor's? Several rating agencies provide ratings for servicers. Should these be required to be disclosed?*

*Should specific financial information be required regarding any of the transaction parties? If so, for which parties should information be required? What information should be required (*e.g.*, audited financial statements) and for what periods? Under what circumstances should such information be required? Should audited financial statements be required for the servicer? Would this place too much emphasis on the servicer?*

Please refer to the discussion in Section II.B. above regarding proposed additional transaction party definitions. We would not recommend additional disclosure regarding personnel or management of the various entities, nor do we recommend requiring additional financial disclosure. We believe that the proposal as drafted, with the modifications we suggest, generally focuses on the right types of disclosure for the various entities. We do favor disclosure of servicer rankings, if any, by the rating agencies. We note, however, that, as with credit ratings, there should be no need for the servicer rankings to be treated as statements or reports made by an expert. We request that the Commission provide clarification to that effect by revising Rule 436 to permit inclusion of a servicer ranking in a prospectus in the same manner as a security credit rating.

1. Sponsor Disclosure

We note that in some cases noted in the discussion in Section II.C.2(a) above, the sponsor may be a non-affiliate of the depositor. Obtaining internal, non-public information about the sponsor, including the occurrence of trigger events and events of default in prior securitizations would impose a substantial burden on the depositor. Please refer to the discussion in Section II.L.1 below.

2. Static Pool Disclosure

We request comment on the proposed requirement to include static pool data for the sponsor's portfolio and for prior securitized pools by the sponsor. Is such data material? Is such data available? Is additional clarity needed regarding the scope of the requirement? For what period should such data be presented? How should variations in what may be relevant for each asset type or asset pool be considered? Are there particular statistics that should be specifically identified for presentation on a static pool basis?

The proposed requirements to include material static pool data in the prospectus are among the most important elements of the Release. We believe that there is a lack of uniform standards and practices within the securitization industry in making static pool data available. Consequently, we appreciate the need for some measure of reform in order to foster improved access to this information for investors. However, we believe that the new requirements as proposed would have an unduly burdensome effect on issuers, and would create an environment of legal uncertainty as to whether all material information has been disclosed.

(a) ***Static Pool Data Are Currently Not Material***. We note that Item 1104(e) in the Release would require the disclosure of static pool data, "to the extent material." Our overriding concern in this regard is that the prevailing market practice to date has been to not disclose static pool data in the prospectus, which reflects a perception held by most market participants that this information is not material to the asset pool being offered. If, as market practice to date indicates, static pool data truly are not material to the offering but are nevertheless of interest to investors, a fundamentally better approach to the issue would simply be to require by rule that issuers publish static pool data on a regular basis. There is no reason why the Commission could not simply require, for example, as a new condition to the filing of any ABS registration statement, an undertaking by the issuer to publish static pool data for the last three years on reasonably comparable pools, or on all pools of the same asset type. Such publication would preferably be made on an unrestricted Web site. Under this approach, the standard of liability for this data would be Exchange Act Rule 10b-5 (and not Section 11 of the Securities Act), which we believe to be appropriate for this information inasmuch as it constitutes ordinary business communications, the content of which is not prepared for use as offering material. Notwithstanding the further discussion below in this section, our primary recommendation is that static pool data should not be required in the prospectus, but, rather, that issuers should be required to publish static pool data outside of the prospectus on a regular basis.

(b) ***Safe Harbor for Selection of Required Static Pool Data***. We note the long history in the ABS market of not including static pool data in prospectuses, the wide variety of purposes for which an investor may request and use static pool data, the arbitrariness of cutting off static pool data at a particular date, and the extremely subjective nature of a determination whether a particular prior pool is comparable to the pool being offered. In light of these considerations, we believe that suddenly imposing on issuers a duty to include static pool data in the prospectus, "to the extent material," with the remedies available for alleged violations of Sections 11 and 12(a)(2) of the Securities Act, exposes well-intentioned issuers to unreasonable legal risks.

The definition of "materiality" under the securities laws may be well settled in the abstract. A fact is considered material if there is "a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[13]

However, the plain and simple truth is that after trillions of dollars of ABS issuance in thousands of transactions over 20 years, there is absolutely no market standard definition of "static pool data" or prevailing practice for what static pool data would be considered material and therefore required to be disclosed. With no custom and practice to point to, there is a legitimate concern that issuers and other transaction participants could be exposed to litigation based on claims of omission of material static pool data. The case law test would lead to no clear answer on materiality in this instance.

In light of the above, if the final rule requires disclosure of static pool data in the prospectus or registration statement, we recommend that there be a safe harbor for the inclusion of static pool data under which persons with potential liability under Sections 11 and 12(a)(2) of the Securities Act would have liability under Section 10(b)(5) of the Exchange Act for the accuracy of any static pool data that were provided in the prospectus or registration statement, but would not be liable for omitting static pool data unless such omission was knowingly misleading. The safe harbor would apply to statistical information, and also to explanatory, interpretive or summary statements. This approach as to omissions would be crafted in a manner comparable to the relief provided for forward-looking statements.

(c) ***Static Pool Data Not a Prospectus***. As discussed in more detail below, many issuers routinely publish static pool data on Web sites and through other media. We believe that this practice should not be discouraged in any way. However, we note that under proposed Rule 426, any static pool data that are communicated "in connection with" an offering of ABS would be defined as a prospectus and would have to be filed. We are concerned that issuers that post static pool data continuously on their Web sites, while at the same time providing required static pool data through any medium in order to meet the disclosure requirements in connection with an offering of ABS, would naturally have to be concerned about whether the publication on the Web site (which would likely include data in excess of that deemed required for disclosure purposes) constituted a prospectus subject to filing requirements.

We request that the final rules contain a specific provision to the effect that the routine publication of static pool data through any medium does not constitute a prospectus (unless the issue is dealt with by permitting incorporation by reference of the required static pool data posted on the Web site).

(d) ***Relevant Pools — Hierarchical Approach***. We believe that the requirements as proposed create unnecessary duplication of effort by requiring disclosure both as to vintages and prior securitized pools. Proposed Item 1104 refers to "static pools of periodic originations or purchases" for the three-fiscal-year (plus stub) period, while the Release text refers to "static pool data for the sponsor's overall portfolio." We request clarification of these phrases to refer to all loans of the relevant asset type originated or purchased by the sponsor in a given fiscal year. To avoid confusion, we will refer in this letter to these portions of the sponsor's portfolio as "vintages."

It is our view that static pool data as to prior securitized pools, if available, are preferable to vintage information for a variety of reasons. First, vintages are substantially less static than securitized pools, as new loans are added to vintages over a full 12-month period. Second, prior securitized pools include only loans that were selected for inclusion in a securitization, and thus would normally be more representative of loans included in a securitization, as compared to a vintage which could include loans not eligible for a securitization. Third, many of the loans included in a vintage that are not securitized by the sponsor may be sold on a whole loan basis to other institutions, and the sponsor may no longer track the performance of the loans following that sale. Finally, by showing, for example, static pool data about all prior pools securitized in a given fiscal year, as opposed to static pool data about the vintage for that fiscal year, variations in performance as between the different securitized pools will be apparent.

The latter point is even more relevant for sponsors that are aggregators or frequent purchasers of bulk assets. Such sponsors purchase loans of a given asset type from a variety of originators, who may use different underwriting criteria. Also, these loans may be serviced by a variety of servicers. Thus, aggregators or bulk purchasers' vintages may not be as homogeneous as those of sponsors who are originators. Vintage static pool data would therefore include loans with a variety of originators and servicers. In contrast, if static pool data were shown for prior securitized pools, with disclosure showing relevant parameters for each pool, the effect (if any) of variances in those parameters would be apparent.

Given the above considerations and the massive amount of disclosure that could result from just including static pool data on prior securitized pools (see Section II.E.2(f) below), we propose a hierarchical approach to static pool data disclosure, as follows:

- First, if the sponsor had at least three full fiscal years of experience in securitizing pools of the same asset type, the required static pool data disclosure could be limited to prior securitized pools for the three-fiscal-year (plus stub) period.

- Second, if the sponsor did not have at least three full fiscal years of experience in securitizing pools of the same asset type, the required static pool data would include a combination of vintage and (if applicable) prior securitized pool data for the three-fiscal-year (plus stub) period.

- Third, if the sponsor did not have at least three full fiscal years of experience in originating or purchasing loans of the same asset type, the required static pool data would include a combination of vintage and (if applicable) prior securitized pool data for whatever period such data were available, plus additional disclosure, as warranted, relating to the sponsor's lack of experience.

Moreover, the sponsor should be able to exclude from the static pool data information on prior securitized pools that were privately offered. Furthermore, the sponsor should be able to exclude any information about prior securitized pools that are not reasonably comparable to the pool being securitized. For example, pools of large balance commercial mortgage loans may be different enough from the pool being securitized to warrant exclusion from static pool data.

Finally, we request that the final regulations acknowledge that the sponsor is not required to provide any static pool data that cannot be obtained without unreasonable effort or expense, or that cannot be obtained because it is under the control of a non-affiliated entity that will not provide it. This would appear to be in accordance with existing Commission policy as reflected in Rule 409. For example, if one of the prior securitized pools of the sponsor was backed by loans that the sponsor had sold on a servicing released basis in a rent-a-shelf transaction through a non-affiliated depositor, the sponsor might not have access to the static pool data for that pool.

(e) ***Caveat Regarding Certain Asset Types***. We note that the discussion in the preceding section is primarily geared towards securitizations involving fixed pools of relatively fungible assets. For certain asset types and structures, a different approach may be preferable. For example, with securitizations of motor vehicle loans or credit card accounts using a master trust structure, the static pool approach may be inappropriate regardless of whether prior securitized pools or vintages are shown. If the pool being securitized has a revolving period, so that new assets are continuously being transferred to the pool in which the investor has an interest, then that pool is not static. Even if the sponsor had a static pool to refer to, that pool's experience would not necessarily be reasonably comparable to the revolving pool backing the securitization. For such asset types, disclosure about the overall portfolio may be more appropriate. The final rules should allow enough flexibility to provide the most appropriate type of historical experience, depending on the asset type and the securitization structure.

(f) ***Content of Required Static Pool Data***. Item 1104(e), as proposed, includes a requirement to present static pool data separately according to pool characteristics, such as maturity, coupon, geographic location, credit score, *etc*. It appears that it is intended that a static pool (vintage or prior securitization) should be stratified according to a number of pool characteristics, with the static pool data shown for each stratification within each characteristic.

We believe that this requirement, if complied with in more than token fashion, would impose an astonishing burden on the sponsor. For example, if the pool characteristics included coupon bands, geographic concentrations, FICO bands, LTV bands, and loan size bands, and if there were only four stratifications for each pool characteristic, the result could be separate static pool data reporting each month for up to three years (plus the stub period) on 20 different subpools, multiplied by the number of prior securitizations or vintages for which static pool data are being disclosed. For a seasoned issuer disclosing static pool data on each prior securitized pool, this approach could easily result in over 100,000 numbers.

Moreover, we believe that the concept underlying the stratification requirement is misguided. The only apparent rationale would be that the investor could see how loans of the sponsor with different characteristics had performed in the past, and could interpolate from the different pool stratifications a hypothetical pool that mimics the characteristics of the pool being offered. In reality, an investor wanting to perform that type of analysis would do so using actual historical loan level data run through sophisticated software. Stratifications as contemplated in the Release for each static pool would be useless.

If the point is to show that for any given static pool different segments of the pool will perform differently, we believe that point should be made on a sample pool basis only, not as to each static pool. We question why the point has to be made in the prospectus at all; it seems more appropriate for a research report.

In lieu of such stratifications, we would propose that, for each prior securitized pool or vintage for which static pool data are required to be provided, limited relevant pool characteristics at inception only should be disclosed. For example, in the case of residential mortgage static pools, the parameters could include weighted average coupon, weighted average maturity, weighted average FICO, weighted average LTV and state concentrations. The specific characteristics would vary depending on the asset type. This would give the reader basic information as to whether the pool being securitized is comparable to the static pools.

The Release indicates that for each prior securitized pool or vintage for which static pool data are provided, for each payment period, static pool data would include loss and delinquency experience. We would recommend that static pool data would also include information regarding prepayment rate.

(g) ***Delivery Method***. We believe that the volume of the required static pool disclosure is potentially enormous. Provision should be made for delivery of the data outside of the prospectus.

Even if the changes that we recommend above are made to the proposal, we estimate that for a seasoned issuer that issues one securitization a month for a given asset type, the resulting disclosure would add over 30 pages to the prospectus. We believe this would be inappropriate for information that is voluminous and that is not specific to the series being offered.

In addition, the static pool data for a repeat issuer over time will be repetitive. Even if the static pool data are required to be either in the prospectus or filed on Form 8-K, for a seasoned issuer that issues one securitization a month for a given asset type, in order to update the disclosure in a single document, it would have to refile all static pool data for the three-fiscal-year (plus stub) period each month, even though only the most recent month's data would be new. Given the costs and limitations of the current EDGAR system, this seems extremely inefficient. (In the event that filing on Form 8-K is deemed necessary by the Staff for liability reasons, see the discussion in Section II.E.2(i) below for a way to mitigate the filing burden.)

Accordingly, we believe that an Internet-based disclosure option should be made available for all (not just required) static pool disclosure. An Internet-based option would have many advantages, including:

- Many issuers already use Internet-based systems to provide static pool disclosure, and it can be expected they will continue to do so. Issuers that have taken the lead in voluntarily providing static pool data to investors should not be penalized by having to file duplicative disclosure on EDGAR.

- Investors can be expected to prefer to obtain static pool data from issuers' Web sites rather than from EDGAR.

- Issuers that post required static pool data on their Web sites may very well use the same Web sites to post additional static pool data over and above what is required.

Web sites can also provide functionality and utility far beyond what EDGAR can provide. For example:

- Web sites can be used today to post loan level data in spreadsheet form that can be downloaded and used by investors for various applications; and

- Web sites have already been modified by some issuers to contain interactive facilities that allow investors to graph loss and prepayment performance of selected pools or groups of pools against each other.

In short, Web sites can be much more effective than EDGAR in providing ABS investors what they really want, which is easy access to vast amounts of raw data that can be manipulated by the investor or downloaded for use with their own analytical tools. We believe that investors would prefer this to non-interactive presentations of static pool data, limited to that which the issuer considers to be material, provided in paper form with the prospectus or through the current EDGAR system.

Accordingly, we propose that the issuer would have the option to deliver required static pool data in any of the following formats:

- A Web site meeting the criteria described in Section II.E.2(i) below (including possible filing requirements);

- By filing it on Form 8-K pursuant to proposed Rule 426 (thereby incorporating it by reference in the registration statement);

- By providing it in electronic form along with the prospectus (*e.g.*, as a CD-ROM attached to the prospectus); or

- By including it in text form in the prospectus.

(h) ***Summary Static Pool Information***. The above discussion is intended to demonstrate that the required static pool data for some issuers may be so voluminous that disclosure in the prospectus or by an exhibit to the registration statement would be impractical, and that the data can be better provided through Web sites capable of delivering data beyond the minimum amount required to meet the new regulatory requirements.

We are not opposed, however, to the inclusion of some summary static pool information in the prospectus. In particular, the prospectus would be well suited for the provision of, for example:

- Narrative discussion of trends in static pool performance; and

- Graphs that show the prior loss or prepayment experience of a limited number of comparable pools.

The point remains that the provision of all material static pool data, as opposed to a limited amount of summary static pool information, in the prospectus or registration statement exhibit would be impractical and burdensome for many issuers. Furthermore, the types of data that could be material to a particular investor can vary so widely that encompassing all potentially material data in the prospectus or registration statement is particularly ineffective.

(i) ***Legal Issues Related to Web Site Delivery***. We would propose that any Web site used to deliver required static pool data would have to meet these criteria:

- Access must be unrestricted, provided that a user may be required to register in order to use the site, so long as all persons requesting access are given prompt access.

- A permanent record must be kept of the data displayed on the Web site at any given time.

- The prospectus must refer to the availability of the static pool data on the Web site and provide the Web site address.

We understand that the Commission may have concerns about the option to provide required static pool data through a Web site, including (1) the issue of liability for the information provided on the Web site and (2) the Commission's apparent desire to require the issuer to identify the static pool information that it considers material. We believe that these issues should not drive the decision about how best to provide static pool data. Rather, we believe that static pool data should be provided through means that best suit the abilities of issuers and the needs of investors, and that creative approaches be used to address the legal issues.

For the reasons discussed in Section II.E.2(a) above, we believe that it would be appropriate for static pool data posted on a Web site to be subject only to Rule 10b-5 liability, and not to be included or incorporated by reference in the prospectus.

If, nevertheless, the Commission insists that the required static pool data be subject to Section 11 liability, then we request that the Commission allow ABS issuers using Form S-3 to provide required static pool data through a Web site meeting the requirements above, instead of in the prospectus or in a filing on Form 8-K, provided that the prospectus states that the required static pool data are incorporated by reference into the prospectus. If necessary, the Commission could impose a requirement that, as a condition to posting required static pool data on a Web site, the issuer would provide an undertaking to the effect that it acknowledges and agrees that the required static pool data are incorporated by reference into the prospectus and would be deemed to be part of the registration statement for all purposes. In addition, if necessary from the Commission's perspective, there could be a requirement to provide the information in paper form to an investor upon request. We believe that these measures would serve the goals of investor access to static pool data, and investor protection for that data, as well or better than delivering the data through the prospectus.

If the Commission is not able at this time to permit the incorporation by reference of information posted on Web sites into a prospectus, then we would recommend the following approach as a condition to posting required static pool data on a Web site.

For each offering, the issuer would file written information on Form 8-K, in accordance with proposed Rule 426, that: (1) identifies the prior securitized pools or vintages and the relevant time periods for which static pool data are required to be disclosed in connection with that offering, and (2) either (a) discloses the required static pool data for the required periods and/or (b) to the extent that any of the required data are contained in static pool data previously filed on a Form 8-K that was incorporated by reference either to the same registration statement or a prior registration statement of the same depositor, identifies the prior Form 8-K in which that static pool data appear.

If data on a static pool basis are required, should any updates to the data be required on an ongoing basis? If so, what data should be updated, how often, and where should they appear? Should we require explanatory information about static pool data?

There should be no updating requirement for static pool data. The concept behind requiring its disclosure is to assist in the offering process. Updating would appear to overlap with Exchange Act reporting. In practice, however, it should be anticipated that regular ABS issuers would, in effect, be updating their static pool information on an ongoing basis in connection with successive offerings. Posting this data on a Web site seems to be the preferable way to do this.

Explanatory or interpretive statements about the static pool information should be encouraged, but not required.

3. Depositor Disclosure

Would information about the depositor's securitization program ever materially differ from the sponsor's?

As discussed in Section II.C.2(a) above, the sponsor may be a non-affiliate of the depositor in some cases; in which case the securitization program disclosure would obviously differ. In situations in which they differ, we request that information regarding the depositor's securitization program only be required if material to the investor's understanding of the ABS. Even where the sponsor and depositor are affiliated, the depositor's securitization program description would be a subset of the sponsor's securitization program description if the sponsor had multiple depositors.

4. Issuing Entity and Transfer of Asset Pool

Is additional specificity required for disclosure of the transfer of the pool assets? For example, should there be any modifications to the disclosure regarding bankruptcy separation, bankruptcy remoteness and the creation of security interests? In the case of sponsors that acquire pool assets for securitization from other originators or issuers, should there be disclosure of the difference between the acquisition price and the price paid by the issuing entity?

Proposed Item 1106(i) would require disclosure in the prospectus of the amount paid or to be paid for the pool assets. We respectfully submit that this information is not relevant to investors, and in many cases this would require disclosure of sensitive, proprietary business information that could cause competitive harm to the buyer, the seller, or both. The amount of proceeds and use of proceeds received by the issuing entity provides sufficient disclosure.

Proposed Item 1106(k) would require disclosure of "provisions or arrangements included to address" issues relating to perfection of security interests, bankruptcy remoteness of the issuing entity, true sale of the assets, and non-consolidation of the issuing entity in the event of bankruptcy. We believe that disclosure of these "provisions or arrangements" in a meaningful way would not be appropriate or helpful, particularly with respect to the issues of bankruptcy remoteness of the issuing entity, true sale of the assets and non-consolidation of the issuing entity in the event of bankruptcy. Structuring an ABS transaction to achieve a level of legal isolation of the assets that is consistent with industry and rating agency standards requires a number of complex steps, including creation of limited purpose entities, review of restrictions, representations, covenants and undertakings of various parties, review of the economic substance of the transaction, delivery of legal opinions as required by the transaction participants and the rating agencies, and ultimately a review of the structural features of the transaction by the rating agencies which is a cornerstone of the rating. We believe that walking investors through all of the elements of this process would be both cumbersome and unnecessary.

Should any statement or opinion, such as an opinion of counsel, regarding any bankruptcy separation or bankruptcy remoteness issues be required to be filed? Should they only be required if they are required by the underlying transaction documents? Should there be disclosure if such opinions are not provided?

Opinions of counsel covering these matters should not be required to be filed. Opinions with respect to the issues of bankruptcy remoteness of the issuing entity, true sale of the assets and non-consolidation of the issuing entity in the event of bankruptcy, generally include complex, reasoned analysis. The conclusions reached are frequently not straightforward applications of black letter law. There is substantial concern about potential Section 11 liability for the contents of these opinions, if they were filed with the registration statement. We believe that Section 11 of the Securities Act would impose too high a standard of liability on the correctness of these opinions given the reasoned and fact-sensitive analysis on which they are based. Moreover, we think that if these opinions were filed, it might convey to investors the misimpression that the conclusions reached were more definitive than they actually are.

5. Servicer Disclosure

We request comment on requiring more disclosure regarding sub-servicers. What are the ramifications of including additional disclosure regarding sub-servicers, including the material terms of the agreements with such sub-servicers? Is such disclosure important to investors? Are there instances where this information should not be required?

*Is a 10% breakpoint appropriate for triggering disclosure regarding unaffiliated servicers and significant originators? Should the percentage be higher (*e.g.*, 20%) or lower (*e.g.*, 5%)? Should a specific percentage not be used for determining when disclosure is appropriate? Is disclosure regarding other servicers that account for a material portion or aspect of the servicing of the pool assets appropriate?*

As discussed in Section II.B. above, we have proposed a revised definition of "servicer" and a new definition of "master servicer." We suggest that the proposed Item 1107 disclosure should be applicable to any master servicer and to certain servicers as described below.

We further suggest that Item 1107 disclosure should not be required of any subservicer. Our proposed definitions are intended to capture the point that if a servicer or master servicer is contractually responsible to the issuing entity for the servicing of the pool assets, then that is the relevant party on whom investors are relying and about whom disclosure should be made. As to subservicers that merely subcontract under a servicer or master servicer that is contractually responsible to the issuing entity, we believe that their relationship to the transaction is too remote to justify the level of disclosure required under Item 1107. This would include entities acting as special servicers, if they are acting in a subcontracting role.

We also recommend that administrators not be subject to Item 1107 disclosure, but, rather, be included under Item 1108 as discussed below. As proposed in the Release, entities whose activities are limited to allocations and distributions to holders would be treated as "servicers" for whom Item 1107 disclosure is required. However, Item 1107 as drafted includes numerous requirements that are not applicable or relevant to entities that are acting only as administrators (*e.g.*, subsections (a)(3) and (4), and subsections (b)(2)–(8)). Administrators are not generally referred to in the ABS market as "servicers" and to call them such may be misleading to investors and market participants.

Furthermore, even with the revision to the definition of "servicer" as we propose, we believe that the volume of disclosure in Item 1107 is simply too extensive for an entity servicing only 10% of the pool assets. If disclosure as required under Item 1107 were required for as many as ten different servicing entities, we believe this could result in disclosure in the prospectus beyond what is material to investors. Moreover, we believe that it is inappropriate to treat affiliated servicers differently from non-affiliates. We believe that if the pool concentration is not material enough to warrant Item 1107 disclosure for a non-affiliated servicer, then the disclosure would still be immaterial even if the servicer is affiliated.

We propose a tiered approach to Item 1107 disclosure, as follows:

- For servicers that initially will be servicing <u>at least 10%</u>, <u>but less than 25%</u>, of the pool assets, the only disclosure required would be: 1) the identity of the servicer and 2) all servicing rankings issued for the servicer by any nationally recognized statistical rating organizations' ("NRSRO") rating agency, or, if no servicing rankings have been issued, a statement to that effect.

- For servicers that initially will be servicing <u>at least 25%</u> of the pool assets, as well as any master servicer, the disclosure required would be as proposed in Item 1107 with the suggested changes discussed below. Servicing rankings issued by any NRSRO rating agency should also be disclosed.

As noted above, Rule 436 should be revised so that servicer rankings can be included in a prospectus in the same manner as securities credit ratings, without being deemed to be a statement made by an expert or requiring consent. We believe that this revision is essential in order for issuers to be able to include this important information in the prospectus.

Item 1107(a)(2) should be modified by deleting reference to computer systems and backup systems. Detailed descriptions of these systems are not relevant to ABS investors.

Item 1107(a)(3) should be deleted. We are concerned that this section will lead to extensive, detailed descriptions of changes in the servicer's policies and procedures, which in many cases are constantly being refined based on experience. Sometimes changes are rolled out on a limited, test basis and assessing materiality will be very difficult.

Item 1107(a)(4) should be modified to provide examples of (not requirements as to) the types of financial condition disclosure that could be material. We are concerned that without some clarification, this section will be interpreted in an overly broad manner that would be burdensome to comply with. Disclosure should be required only if material to investors.

Item 1107(b)(4) should be modified by deleting the second sentence. Prior advances on the pool assets are not relevant, given that disclosure about delinquency status of the pool assets will be provided. Advancing on the overall servicing portfolio is not relevant to investors.

We also note that in many cases the servicer may be a non-affiliate of the depositor. Obtaining internal, non-public information about the servicer, including internal information about collection processes and computer systems, would impose a substantial burden on the depositor. Please refer to the discussion in Section II.L.1 below.

6. Trustee and Administrator Disclosure

Should the proposed disclosure regarding the trustee include more explicit examples of activities that the trustee does and does not do? Should there be disclosure of any other entity that would perform such activities if the trustee does not? Is the same disclosure needed for both the trustee for the issuing entity and the trustee for the ABS indenture?

We believe that the proposed disclosure in Item 1108 regarding trustees is appropriate.

Our proposed definition of "trustee" is intended to avoid requiring Item 1108 disclosure for entities that do not have fiduciary duties to the investors. For example, in many transactions the issuing entity is a Delaware statutory trust created using an "owner trustee" under a trust agreement, while the ABS are issued under an indenture. In such a transaction, only the indenture trustee has fiduciary obligations to the investors. The owner trustee in such a structure would typically have no responsibility or obligation to protect the interests of the investors, and also would typically not perform any servicing or administrative functions.

We recommend that Item 1108 be expanded to cover required disclosure for administrators. Subsections (a), (b) and the first sentence of subsection (c) would be relevant to administrators.

7. Originator Disclosure

Should any information regarding third party originators be required other than what is provided today? If so, is it practical to obtain such information?

We believe that the volume of disclosure in Item 1109 is too extensive for an entity originating only 10% of the pool assets. If disclosure as required under Item 1109 were required for as many as ten different originating entities, we believe this could result in disclosure in the prospectus beyond what is material to investors.

We propose a tiered approach to Item 1109 disclosure, as follows:

- For originators that originated at least 10%, but not more than 25%, of the pool assets, the only disclosure required would be the identity of the originator, together with a brief description of its business.

- For originators that originated at least 25% of the pool assets, the disclosure required would be as proposed in Item 1109.

Moreover, if the pool assets were re-underwritten by the sponsor at the time of acquisition by the sponsor, then disclosure of the originator's underwriting criteria would not be material, provided that the sponsor's underwriting criteria are disclosed.

Should material static pool data regarding originators be required?

We believe such disclosure should not be required. As explained above, the static pool data disclosure requirements on sponsors are extremely burdensome. We do not believe it would be reasonable to impose such burdens on non-participants in the ABS issuance. Moreover, the sponsor's static pool information is more relevant, because the sponsor (not the originator) selects the pool assets to be included in any securitization.

Should specific financial information be required regarding any of the transaction parties?

Summary financial information and financial statements should not be required for any transaction parties. The overall approach in the Release regarding disclosure about the transaction parties is a good one. It seeks to highlight information about those parties that is relevant to investors, without overburdening the disclosure.

We request comment on the clarification regarding the application of our proposals to the asset pool underlying a financial asset that represents an interest in or the right to the payments or cash flows of that asset pool. Does our proposed list of conditions adequately identify the relevant structures?

We believe proposed Item 1100(d) adequately identifies the structures intended to be covered by this provision.

F. <u>Pool Assets</u>

We request comment on the proposed disclosure regarding the asset pool. Are there any modifications that should be made to the list of representative items to be disclosed? For example, is additional specificity needed regarding when and how the asset pool may change? Is the disclosure regarding rights and claims regarding the pool assets appropriate?

Is the proposed disclosure regarding lease-backed ABS appropriate? Is additional specificity needed regarding residual value disclosures or how residual values are to be realized?

Should additional guidance be provided on the methods to present statistical disclosure so that it is presented in a clear and understandable format?

Similar to our proposals for the sponsor, we request comment on the proposed requirement to include static pool data for the asset pool. Is such data material to an investment decision? Is it readily available for presentation? Is additional clarity needed regarding the scope of the requirement? Should any updates to the data be required on an ongoing basis? If so, what data should be updated, how often should they be updated, and where should they appear?

The pool asset disclosure requirements of Item 1110 are in most respects comparable to prevailing industry practice. Our specific comments are set forth below.

Subsection (a)(6) and instructions imply that the existence of a material concentration of assets in a jurisdiction requires the disclosure of the details of local laws, such as those relating to foreclosure. We recommend that in all cases required disclosure regarding state and local laws and regulations be limited to material potential effects, without detailed discussion.

Under subsection (b)(3), annual percentage rate should not have to be disclosed as it is not relevant to investors. Cash flow available to the transaction is based on the interest rate on the assets. Annual percentage rate takes into account up-front fees and costs that are not available for the securitization.

Under subsection (b)(7)(v), points and charges paid on the pool assets are not material to investors, as these cash flows are not available to the securitization. Also, as is the case with the annual percentage rate, in many, if not most, cases today, this information is not captured in the loan level data available to the sponsor and other securitization transaction participants.

The proposed disclosure for receivables or other financial assets with revolving balances under subsection (b)(8) is generally in line with current industry practices, although credit lines are usually presented in dollar buckets without reference to a maximum credit line. For most revolving asset transactions the credit line for any single account would not be material. Also, it is unclear what information is being requested under subsections (b)(8)(v), (vii) and (viii). We suggest the following clarifications:

(v) Type of asset.
(vii) Balance reductions granted for refunds, returns, fraudulent charges or other reasons.
(viii) Minimum payment requirements.

The proposed required commercial mortgage loan disclosure under subsection (b)(9) is generally in line with current industry practices, at least with respect to the largest loans in the asset pool. We request clarification that these specific items can be omitted for any individual loan that represents less than 10% of the total pool assets.

Under subsection (b)(11), the proposed disclosure regarding standardized credit scores should be required only to the extent material. As to certain asset types, current market standards are that this information may not be considered to be material.

Under subsection (b)(14), regarding geographic concentrations, we believe that imposing a duty on the issuer to evaluate and be liable for disclosure about local and regional economic conditions is excessively onerous. We believe that any meaningful analysis of local and regional economic conditions is far beyond the scope of an ABS prospectus. Also, the proposed requirement to break out and restate pool disclosure for the parts of the pool with geographic concentrations would impose a major burden on the issuer and substantially increase the length of a prospectus without a corresponding benefit to investors.

Under subsection (c), static pool information for the pool being offered should only be required if material. In most cases, it will not be material for the following reasons:

- For pools consisting of assets that were recently originated, performance to date would not be indicative of future performance. Generally, receivables do not begin to experience a meaningful level of defaults until some time after origination. Also, prepayment rate trends do not become apparent for some time. Instead of static pool information, the prospectus should disclose the delinquency criteria applicable to the selection of the loans included in the pool assets and should quantify any loans that are delinquent as of the cut-off date for the pool.

- For pools consisting of seasoned assets (generally, loans originated more than 12 months previously), static pool data would also in most cases not be informative. The key is that pools of seasoned assets are not really static pools. Loans that might otherwise be included in such a pool obviously would be excluded if they previously had been prepaid, or if they had defaulted and been liquidated. Moreover, there would typically be selection criteria for a seasoned loan pool, under which loans that do not meet the required delinquency history criteria would be excluded. Thus, static pool data about the loans that remained outstanding and satisfied the selection criteria would actually be a misleading indication of the future performance of that pool.

Under subsection (d)(2)(vi), we request a clarification as to whether estimated residual value refers to the estimated residual value used to structure the transaction, as in subsection (d)(2)(i), and what statistical information is required.

Under subsection (f), we request clarification that required disclosure of claims on pool assets does not include possible borrower defenses, including set-off rights of borrowers against originators that are also depository institutions. Such possible claims would be virtually impossible to detect. Disclosure under this provision should be limited to claims of third parties.

Under subsection (g), the required disclosure in subsection (g)(3) regarding "the maximum amount of additional assets that may be acquired during the revolving period" should be deleted because it will not be possible for an issuer to make that determination in many circumstances, such as a credit card master trust issuance with a seven-year revolving period. Also, regarding subsection (g)(7), in many circumstances, it will be possible to describe only in very general terms the acquisition or underwriting criteria for additional pool assets added to a revolving pool master trust during its revolving period because the underwriting criteria for accounts originated, for example, five years after closing and added to a revolving pool within a seven-year revolving period cannot be known at the time of issuance of the securities. Accordingly, the disclosure required under subsection (g)(7) should be qualified by "to the extent known." We note that material future changes to the criteria would have to be disclosed under Item 1119(n)(1).

G. <u>Transaction Structure</u>

We request comment on the above proposed disclosure regarding transaction structure. Are there any modifications that should be made to the list of items? For example, is additional specificity needed regarding the information that should be provided regarding prepayment, maturity and yield considerations?

Is a separate itemized fee and expense table useful, or would disclosure of fees and expenses as part of a flow of funds discussion be sufficient?

If the proposal regarding an assessment of compliance with servicing criteria is modified, should additional disclosure be required regarding controls and procedures over collections and cash balances?

Is the proposed disclosure about additional series or classes of securities in master trust structures sufficient? Should disclosure of additional information be required?

The transaction structure disclosure requirements under proposed Item 1112 in general are in line with industry norms. We have a few specific comments on the requirements.

Subsection (a)(1) references disclosure regarding "residual or subordinated interests." The issuer may issue series or classes of securities (*e.g.*, strips of the seller interest in a credit card trust, rights to receive excess cash flow or funds released from spread or reserve accounts) that are not relevant to the investors and are to be used to support other non-public transactions. Disclosure of such securities should not be required if not material to the holders of the ABS.

Subsection (c) would require itemized disclosure of all fees and expenses payable out of the cash flows. We would request that the Commission consider modifying this requirement in respect of credit enhancement fees. Credit enhancement fees are considered in some cases to be proprietary, and the parties may wish to avoid disclosure of the credit enhancement fees negotiated for a specific transaction in order to foster competition among credit enhancers, which at least indirectly benefits investors by reducing the expense burden on available cash flows.

Subsection (d)(1) would require disclosure of the owners of residual or retained interests, and the disposition of excess cash flow, without regard to materiality. We note this would require disclosure of the identity of investors in non-publicly offered subordinate and residual classes. This information is not material to investors, and is also considered proprietary by transaction parties. If for any reason the identity of such owners creates a risk factor relating to true sale or bankruptcy remoteness issues, then that should be subject to a separate disclosure requirement (see our discussion in Section II.E.4 above regarding proposed Item 1106(k)). Disclosure regarding the precise application of cash flows greater than that needed to pay the offered securities also is not material to investors, and could require disclosure of non-public transactions or proprietary information.

Subsection (d)(3) would require disclosure of features to facilitate a securitization of excess cash flows. We do not believe this information is material to investors, so long as such features cannot affect the rights of holders of the ABS.

In subsection (f)(1)(ii), instead of requiring disclosure of the source of funds for a mandatory or optional redemption or termination provision, disclosure should be required of the entity or the class that holds that option or obligation. The source of funds would generally not be known at the time of issuance.

In subsection (f)(2), the Commission should clarify that securities backed by revolving assets are not required to be titled callable if they are subject to early amortization as a result of the occurrence of events outside the sponsor's control.

H. Significant Obligors

We request comment on the proposed definition of significant obligor. Are any modifications necessary? Is the test of whether the pool asset represents 10% or more of the asset pool the appropriate test? Should it instead be based on cash flows supporting the offered ABS, the principal amount of the offered asset-backed securities or a combination of any of these tests? Is the application to lessees appropriate? Should any other particular entities be included or excluded?

Are the 10% and 20% breakpoints still appropriate for triggering when different levels of financial disclosure should be required? Should they be changed?

We also request comment on the level of disclosure to be required, both descriptive and financial, regarding significant obligors. Are there alternative disclosures that should be required or permitted? For example, in the case of an insurance company or other regulated entity that is not subject to Exchange Act reporting requirements and does not *otherwise provide GAAP financial statements, should financial statements prepared under the entities' regulatory accounting principles be acceptable as a substitute?*

Should there be any additional exclusions to when financial information would be required? Are the proposed instructions regarding governments and asset-backed securities appropriate?

The Release would permit incorporation by reference of financial information filed under the Exchange Act, including that of a parent guarantor. Note that for a commercial loan, if the loan is non-recourse to a special purpose entity borrower, then the 10% and 20% concentration tests would require financial information only as to the real property and not to the borrower, which we believe to be appropriate.

I. <u>Credit Enhancement and Other Support</u>

We request comment on our proposals for disclosure regarding credit enhancement and other forms of support for an ABS transaction. Are any modifications necessary? Are there any additional examples we should provide?

Is the test of whether the enhancement provider is liable or contingently liable for payments representing 10% or more of the cash flows to any class of the asset-backed securities the appropriate test? If not, why? What alternatives should be used? Should different tests be used for different forms of enhancement? What would be the rationale for different tests?

Are the 10% and 20% breakpoints still appropriate for triggering when different levels of financial disclosure should be required? Should they be changed?

Should there be any additional exclusions as to when financial information would be required? Are the proposed instructions regarding U.S. and foreign government-backed obligations appropriate?

Proposed Item 1113(a) requires that as to all external credit enhancements (including financial guaranty insurance policies), liquidity mechanisms and derivatives, in addition to disclosure "to the extent material" of its contents, "any agreement" (without regard to materiality) must be filed as an exhibit. We note that the material terms of all material enhancements would have to be disclosed under this provision. We respectfully request that filing of agreements be required only for instruments for whose issuers' financial statements are required. We believe that requiring the filing of all such agreements would in some cases result in unnecessarily voluminous filings. We believe that investors should be able to rely on the prospectus disclosure to point out any material terms, limitations and conditions of these enhancements, and that investors do not generally wish to review the applicable agreements.

We further request that 1113(a) be revised to indicate clearly that disclosure is required only as to pool-level or ABS-level enhancements, and not enhancements that pertain solely to individual pool assets that are not obtained as part of the securitization transaction. For example, loan-level primary mortgage insurance policies and hazard insurance policies should not be subject to the requirements of Item 1113 (in particular, subsection (b)).

Subsection (b) requires additional information depending on whether the entity providing the enhancement is contingently liable to provide payments representing more than specified percentages of the total cash flow supporting the ABS. We believe that these tests are administratively difficult and would result in disclosure of immaterial information. Credit enhancements and liquidity mechanisms as described in subsections (a)(1) and (2) are appropriately measured by reference to their maximum amount or maximum coverage as a percentage of the total amount of the pool assets (not the total cash flow). However, derivatives are not appropriate for testing in this manner. By custom and practice, derivatives are frequently uncapped. Very often, the reasonably likely exposure under, and the value of, the derivative is far less than the maximum possible exposure. Failure to provide an appropriate test for the materiality of derivatives will likely result in changes in market practices.

In the credit derivatives markets, the exposure to a counterparty is typically evaluated for purposes of making a credit decision by calculating the maximum probable exposure using a statistical analysis. We strongly recommend that derivatives be tested for purposes of the disclosure thresholds by reference to the maximum probable exposure to the counterparty at the time of transfer to the issuing entity, determined under reasonable and customary procedures for making credit decisions in the derivatives markets.

Subsection (b)(2) would require disclosure, for enhancement providers, of full financial statements if they are contingently liable for 20% or more of the cash flows. Incorporation by reference is allowed to financial statements filed in reports of the provider, or of the entity that consolidates the provider, under the Exchange Act. However, we note that in many cases derivatives are provided by special purpose structured financial product companies that may be controlled by, but are not consolidated into, an Exchange Act reporting company. These entities are structured so that they are subject to specially calculated capital requirements based on their overall derivatives exposure, with the intention that they be isolated from the bankruptcy risk of the controlling entity. We believe that imposing a financial statement disclosure requirement for such entities would be very burdensome, and would result in fewer counterparties with appropriate ratings being willing to participate in ABS transactions, reducing competition and increasing prices. Increased costs of effecting securitization of consumer assets will inevitably be passed on to consumers in higher financing costs. Accordingly, we recommend that, for derivatives with counterparties that are special purpose structured financial product companies, in lieu of financial statement disclosure, and in addition to the information in subsection (b)(1), only disclosure regarding the ratings of the counterparty be disclosed.

We believe that the requirements of subsection (b) for financial and other disclosures regarding significant enhancement providers presumes that in all structures the issuing entity and investors will have continuing exposure to the credit risk of the enhancement provider after the issuance of the ABS. In some circumstances, however, such as where a credit enhancement account is funded at the commencement of the transaction through a loan by the enhancement provider, there is no such ongoing exposure and therefore such disclosures would not provide meaningful information to investors. We request that subsection (b) be clarified so that financial and other disclosures about enhancement providers need not be provided if the enhancement provider does not have any future funding obligations with respect to the transaction.

We also request comment on the level of disclosure to be required, both descriptive and financial. Are there alternative disclosures that should be required or permitted? For example, in the case of an insurance company or other regulated entity that is not subject to Exchange Act reporting requirements and does not otherwise provide GAAP financial statements, should financial statements prepared under the entities' regulatory accounting principles be acceptable as a substitute?

We recommend that for insurers that do not prepare GAAP financial statements, financial statements based on regulatory accounting principles should be permitted.

J. <u>Other Basic Disclosure Items</u>

We request comment on these other basic disclosure items. Are there any modifications that should be made to these items? For example, is additional specificity needed regarding the tax consequences that should be described?

What should be the proper scope for disclosure of affiliations and relationships between transaction parties? Should any modifications be made to the proposed disclosure item? Are all of the proposed related party transaction disclosures useful, or should the disclosure be limited from what is proposed? Should disclosure be required regarding any relationships at an individual level, such as with an executive officer or director of the sponsor, depositor or issuing entity, if applicable, that exists in connection with or apart from the asset-backed securities transaction?

Should additional disclosure regarding ratings or the rating process be required? For example, should disclosure of fees paid to rating agencies be required? Should we require an explanation of what an NRSRO rating addresses and the characteristics the rating does not address?

With regard to the content of reports that will be provided to investors, should a copy of the form of the report to be used be included with the registration statement or filed as an exhibit?

We request comment on the proposed disclosure regarding Web site access to reports. Should disclosure also be required on an ongoing basis in the Form 10-K or in distribution reports? Is additional guidance necessary in how to comply with the proposal? Should alternative methods be considered in promoting the availability of transaction reporting to investors and market participants?

Are there additional areas of disclosure that should be separately identified? For example, should there be a separate disclosure item for legal investment considerations, such as ERISA qualifications?

1. Tax Matters

We recommend a clarification to Item 1114(b) to the effect that the federal income tax consequences disclosed should be the consequences that would pertain to the principal categories of United States taxpayers that may purchase the securities for investment as capital assets.

2. Legal Proceedings

Proposed Item 1115 would require disclosure, if material to investors, as to any legal proceedings, or "proceedings known to be contemplated by governmental authorities," against the sponsor, depositor, trustee, issuing entity, or any servicer, enhancement provider, or originator identified in the prospectus. Although arguably implicit in existing law, this new explicit requirement would impose an enormous diligence burden on both issuers and underwriters.

In particular, the disclosure requirement regarding proceedings known to be contemplated by governmental authorities would require disclosure of non-public information and in some cases may violate the regulations and policies of such authorities. Similarly it may be impossible to obtain information regarding litigation with respect to third parties that is non-public. We recommend that the disclosure requirement be limited to public information only.

3. Affiliations and Certain Relationships and Related Transactions

Proposed Item 1117(b) would require disclosure, if material, as to the existence and "general character" of any transactions between (a) the sponsor, depositor or issuing entity, and (b) any underwriter, trustee, or any servicer, originator, credit enhancement provider or significant obligor identified in the prospectus, or any of their affiliates; but only if outside the ordinary course of business or on non-arm's length negotiated terms. However, the instruction gives as an example a warehouse line provided to the sponsor by the underwriter, and indicates it would have to be disclosed because it is outside the normal course of the issuer-underwriter relationship. The instruction should be revised to eliminate this example, as these financing arrangements are common transactions entered into in the ordinary course of business. Required disclosure should be limited to transactions that could materially affect the rights of holders of the ABS, or that are necessary to understand the ABS.

Should disclosure be required regarding any relationships at the individual level?

We believe it is not necessary for there to be an express disclosure requirement in this regard.

4. Rating

We have no comments to the proposal for ratings disclosure as drafted.

5. Reports and Additional Information

Generally, the disclosure requirements in proposed Item 1116 regarding the availability of ongoing reports and additional information is consistent with current industry practice.

We agree that there should be an express statement as to whether Exchange Act reports filed by the issuing entity will be made available on a transaction participant Web site. We note that current practice is generally to post only the distribution reports as required under the operative documents, and not to post the other required Exchange Act reports.

K. <u>Alternatives to Present Third Party Financial Information</u>

We request comment on the alternative that permits incorporation by reference of required third party financial information. Should any of the conditions to the proposal be modified? Should the proposal be allowed for all significant obligors and enhancement providers that meet the proposed conditions?

Is it appropriate to extend incorporation by reference for third parties to registered ABS offerings on Form S-1? Would it be appropriate to extend it to all parties?

We also request comment on our proposed amendments to the incorporation by reference and updating rules to accommodate the proposal. In particular, we request comment on the proposed undertaking for incorporation by reference of third party information. Is additional guidance necessary regarding updating requirements?

We request comment on the alternative that permits reference to a third party's Exchange Act reports on file with the Commission in lieu of providing that information. Should any of the conditions to the proposal be modified? Should a termination option be recognized? We also request comment on the limitation of the proposal to only unaffiliated and uninvolved significant obligors. What are the reasons that would justify reference to reports by affiliated obligors, others involved in the transaction or an enhancement provider even though that entity is involved with the ABS transaction?

We request comment on the proposed codification of the eligible categories of significant obligors for which reference information would be permitted. Given the size of most ABS transactions, would a $75 million requirement for outstanding securities add value for the ABS category?

We generally appreciate the additional flexibility provided under the Release with regard to the ability to incorporate financial statements by reference, or to refer to financial statements of a third party. (*See* Section II.E.2.)

We request that in the adopting release the Commission make it clear that, as apparently intended, where the issuer refers to the financial statements of another party as opposed to incorporating them by reference in the issuer's registration statement, then the issuer is not liable for any errors or omissions in those financial statements.

We further request a clarification that to incorporate financial statements of a third party by reference, or to refer to financial statements of a third party, it is not necessary to have the permission of the third party. Moreover, we respectfully request that the Commission clarify in the final rules that it is not necessary to seek or obtain the consent of the third party's accountants in this situation, and that the protections in Section 11 for audited financial statements will still be available without such consent. We believe that the current system of requiring a consent imposes a needless administrative burden and expense on the issuer.

L. Additional Topics

1. Disclosure Burden and Indemnification Policy

We note that many of the new disclosure requirements call for substantial amounts of material non-public information about non-affiliated parties. We believe that in this regard, the disclosure requirements for ABS issuers would be fundamentally different from and more burdensome than disclosure requirements imposed on other types of issuers.

The reporting section of the Release references the ability to reasonably rely on information provided by third parties in connection with the assessment of compliance. We request that the final rules also contain a provision allowing an issuer to reasonably rely on information provided by a third party in order to satisfy a disclosure requirement.

We further respectfully request that in view of these disclosure requirements, the Commission clarify that its policy in opposition to indemnification for securities law liability does not extend to an indemnification provided by an unaffiliated third party regarding information that it provides for use in an ABS prospectus.

III. COMMUNICATIONS DURING THE OFFERING PROCESS

A. Executive Summary

We believe that the Commission's proposed rules related to communications during the offering process come very close to establishing a framework providing investors with necessary transaction information in a cost-efficient and timely manner. Several of our comments and our responses to specific Commission questions and requests for comment identify those aspects of the proposed rules which, in our opinion, do not permit the continuance of current accepted market practice. In addition, we also suggest alternatives both to current practice and to the Commission's proposed rules. These proposed alternatives are intended to further improve the flow of information in the ABS market, and thus the efficiency of such market without having a negative effect on investors. We also seek clarification from the Commission that certain current ABS market practices do not and will not violate existing and proposed securities laws.

Our principal proposals are as follows:

- The exemptions for ABS informational and computational materials and ABS research reports should be expanded to offerings on Form S-1 in addition to those on Form S-3.

- The Commission should clarify its concerns as to how ABS informational and computational materials can be used inappropriately.

- The scope of the proposed definition of ABS informational and computational materials should be expanded to conform to existing market practice.

- The exemption for tombstones in Securities Act Rule 134 should be expanded to accommodate ABS offerings, recognizing that this issue is the subject of a broader rule-making project being considered by the Commission.

- The Commission should develop a scheme to allocate liability and filing responsibility across different types of ABS informational and computational materials.

- The Commission should clarify that the use of ABS informational and computational materials and rating agency pre-sale reports does not violate Section 5 of the Securities Act and other securities laws if conducted in the manner described below.

B. <u>ABS Informational and Computational Materials</u>

1. Proposed Exemptive Rule

We request comment on the proposed exemptive rule. What is the use of these materials in today's market? Is the proposed exemption consistent with the use of these materials? Does the use of these materials provide investors with enough time and information to make informed investment decisions?

(a) ***General***. Our belief is that the primary purpose of ABS informational and computational materials in today's ABS market is to provide a substitute for and/or supplement to preliminary prospectuses that include only the information most relevant to gauge investor interest in a proposed ABS offering. Computational materials (as defined in the existing no-action letters) also provide quantitative information to investors, in many cases tailored to individual investors' needs but not otherwise material to other investors. ABS informational and computational materials can be delivered to investors in a timely, cost-efficient and flexible manner and promote efficiency in the ABS market by allowing issuers and investors to reduce the time required to execute a transaction. Except as described below with respect to the definition of ABS informational and computational materials, we believe that the proposed exemption is consistent with their use and that these materials provide investors with enough time and information to make informed investment decisions.

(b) ***Exceptions Noted in Preliminary Note to Proposed Rule 167***. The Preliminary Note to proposed Securities Act Rule 167 states that this exemption does not apply to communications that "have the primary purpose or effect of conditioning the market for another transaction or are part of a plan or scheme to evade the requirements of Section 5 of the [Securities] Act." We request that this exception be either excluded or clarified to indicate one or more examples of the types of materials or uses of such materials that the Commission was contemplating. We also request clarification that the use of ABS informational and computational materials to market ABS securities offered on Form S-3 will not be considered to "have the purpose or effect of conditioning the market for another transaction" when securities of the same series as those referred to in such materials are also being offered privately (*e.g.*, non-investment-grade classes).

We do not propose to limit eligibility for the exemption on any variables such as transaction size or asset type. However, under the existing no-action letters we see few filings related to the use of term sheets or computational material outside of [Mortgage-Backed Securities ("MBS")]. Should we limit eligibility by size, asset type or other variable? Is the use of these materials not necessary for other asset classes? Is there a reason why more of these materials are not filed?

Although the use of these materials originated with the marketing of MBS and tend to lend themselves more to the quantitative analysis done by MBS investors, they are being used more and more frequently with other types of ABS, particularly as the structural complexity of all asset-backed transactions increases.

*Should the exemption not be available to ABS targeted to non-institutional investors? For example, should the exemption not be available to ABS expected to have low minimum investment denominations (*e.g.*, less than $1,000) or ABS that are to be listed?*

As described in Section I.E. above, as a practical matter most ABS investors are institutional investors that have previously invested in ABS. In addition, ABS informational and computational materials were developed for distribution to institutional investors, both for purposes of structural development and simplified disclosure. That being said, we believe proposed Securities Act Rule 167 should also be available to transactions targeted to institutional investors. We would also not endorse any proposed rules that differentiate the types of offering materials that can be sent to certain investors. As a practical matter, any proposed definition of such a non-institutional targeted transaction is likely to be imperfect, and even if a transaction were targeted to non-institutional investors, there still could be institutional investor participation in the transaction that could benefit from the use of ABS informational and computational materials. In the event ABS informational and computational materials were to be delivered to a non-institutional investor, that investor would still have the benefit of the preliminary prospectus and/or final prospectus required to be delivered pursuant Exchange Act Rule 15c2-8(b) as described in Section I.E. above. Therefore, the substantial benefits from use of ABS informational and computational materials in all transactions would outweigh any potential detriments from use in an ABS offering having attributes typical of issuances targeted to non-institutional investors.

*Is the proposed limitation to registered offerings on Form S-3 still appropriate? If not, under what circumstances should the proposal be extended to offerings on Form S-1? The existing letters and our proposals require filing of material on Form 8-K that is incorporated by reference into the registration statement. They also only apply to the use of materials after the effective date of the registration statement (*e.g.*, before a takedown off of an effective shelf registration statement). How would this procedure work with respect to non-shelf registered offerings on Form S-1?*

We strongly believe that the scope of ABS informational and computational materials must include all ABS, including those registered on Form S-1. ABS of a single issuer may be offered under registration statements filed under both forms because under current requirements only investment-grade securities may be offered under Form S-3. The proposed rules should focus, as they do, on the kind of securities being marketed with ABS informational and computational materials. As a suggestion to ensure filing of ABS informational and computational materials used for Form S-1 offerings, such materials may be filed as an exhibit to the related registration statement pursuant to the same terms as applicable to Form S-3 offerings as set forth in proposed Securities Act Rule 167, except that in the case of materials used prior to effectiveness of the related registration statement on Form S-1, filing as an exhibit prior to use could be required.

If the Commission is unwilling to broaden applicability of proposed Securities Act Rule 167 to offerings on Form S-1, we request clarification that the joint offering of non-investment-grade securities that are registered on Form S-1 or privately offered will not impact the use of ABS informational and computational materials for the securities registered on Form S-3 that are part of the same series.

*Are any clarifying amendments necessary for ABS with respect to Securities Act Rule 134? This rule deems certain limited communications announcing an offering (often called a "tombstone" announcement) not a prospectus so long as the communication is limited to the items specified in that rule. What items would be appropriate for ABS (*e.g.*, announcing the asset type being securitized, asset concentrations, sponsor, servicer or weighed average life, maturity or coupon), and why should they be included?*

The information permitted to be included in a Securities Act Rule 134 "tombstone" has never been broad enough to cover the information applicable to an offering of ABS by analogy to the basic information included on a tombstone for a traditional corporate debt offering. We request that Securities Act Rule 134 be expanded to cover ABS-specific information such as the following (some of which is already permitted by the current Rule but is included here to provide a complete listing):

- Name of the issuer;
- Name of the seller and/or servicer;
- With respect to each class of securities of the issuer, its securities designation, amount, maturity, relative priority, ratings, coupon/initial coupon/floating rate spread and benchmark, assumed weighted average life, CUSIPs, first and last payment date, accrual periods, price and method for determining price;
- With respect to asset pool, asset types and ranges of underlying asset type sizes, weighted average coupons, weighted average FICO and seasoning;
- General transaction information, such as nature of credit enhancement, tax and ERISA treatment;

- Basic factual information, such as road show dates and pricing dates; and
- Whether a particular class of securities has been sold or retained.

2. Proposed Definition of ABS Informational and Computational Materials

We request comment on the proposed definition of ABS informational and computational material, including the proposed addition of static pool data to the types of materials that may be used. Does the definition reflect the scope of materials that are used under the existing no-action letters?

The proposed definition of ABS informational and computational material is actually narrower than that provided in the relevant no-action letters, such as *Public Securities Association.*[14] Item 1101(a) states that the communication must consist solely of the identified items. The identified items do not include such transaction aspects as credit enhancement, servicer portfolio delinquency, loss and prepayment information, legal matters disclosure (*e.g.*, tax, ERISA and money market eligibility), transaction participants (*e.g.*, servicers, administrators, insurers and trustees), other deal terms (*e.g.*, revolving periods, prefunding periods and clean-up calls), ratings, minimum denominations and asset selection criteria. This information is typically included in structural term sheets and other computational materials for assets other than mortgage transactions and is essential to understanding the transactions. Given the securities law liability assumed for delivery of these materials, the fact that market participants understand (and will be told) that these materials are by their definition incomplete and the dynamic nature of the ABS market, we believe that ABS informational and computational materials should be defined using a principles-based approach that would permit inclusion of any information deemed material by the issuer or the underwriter, as applicable.

Consistent with the no-action letters, we do not propose content restrictions for the material so long as it meets the definition of ABS informational and computational material. Is this still an appropriate approach? Of course, even without content restrictions, the antifraud rules and other liability provisions applicable to the material would continue to apply.

This approach is appropriate if the definition of ABS informational and computational materials is principles-based, as discussed in the preceding paragraph. As discussed in Section III.B.4. below, we agree that, at a minimum, the antifraud provisions of the securities laws should apply to all ABS informational and computational materials.

Are additional interpretive clarifications necessary regarding loan level detail or third party analytics providers? Is any additional clarification needed regarding other uses of ABS informational and computational material?

No additional clarifications should be needed if the definition of ABS informational and computational materials reflects a principles-based approach. We know of no uses of these materials other than those identified in the proposal.

3. Proposed Conditions for Use

We request comment on our proposed conditions to the exemption, including whether any additional conditions would be appropriate. For example, we request comment on the basic information and legend we propose to require for the materials. Should any additional information be required? Is any of the proposed information not necessary? Is any additional clarification about inappropriate disclaimers or legends necessary?

The proposed conditions for use are generally appropriate, but it would be helpful if the Commission could clarify that ABS informational and computational materials can be delivered after the distribution of a preliminary prospectus (and would otherwise be required to be filed in accordance with proposed Securities Act Rule 426).

In addition, because ABS informational and computational materials are inherently incomplete by their nature, it seems logical to allow the use of legends that make this point clear to investors. There also seems to be a lack of recognition that the information presented in these materials can change both in subsequent iterations as well in the final prospectus to the extent such information is covered therein. Consequently, it is our view that disclaimers to this effect on all ABS informational and computational materials are appropriate.

Is the proposed clarification that the exemption also is applicable to any other party to the asset-backed securities transaction and any persons authorized to act on their behalf appropriate? Is any additional clarification needed?

Our feeling is that the proposed clarification is appropriate and that no additional clarification is needed.

While the ABS market has operated under the no-action letters for nearly a decade without it, should the rule include an exception for a good faith immaterial or unintentional failure to file or delay in meeting the filing requirements? Has the absence of this exception chilled communications? Why would such an exception be appropriate now?

We would welcome the provision of a limited exception that recognizes that late filings will occur in a market that is as large as, and that moves as quickly as, the ABS market. Some ABS issuers prohibit the use of such materials because of the liability that attaches to them and the logistical complexities of filing such materials. Permitting a limited exemption going forward seems fair and may have the effect of increasing pre-sale communication through ABS informational and computational materials; it is also consistent with the position the Commission has taken with respect to other required filings, such as with required filings under Form 8-K.

4. Proposed Filing Requirements

We believe our proposed unified filing rule will result in better administration and compliance with the filing requirements. However, it is possible that under the proposal some collateral term sheets that are required to be filed today under the no-action letters would no longer be filed. For example, the current no-action letters require all collateral term sheets to be filed. However, the existing letters use overlapping definitions and it is thus difficult to distinguish what truly is a "collateral term sheet" versus what is acceptable "background *information" that can be included in computational material, which is not always required to be filed. We also understand that current practice is to call such materials "computational material." We are thus proposing to codify current practice and treat all ABS informational and computational material the same. However, is it common practice to prepare multiple collateral term sheets separate from computational materials? Would the lack of filing each collateral term sheet result in substantial harm due to a reduction in materials filed?*

Our belief is that it is very uncommon for an issuer or an underwriter to prepare multiple collateral term sheets apart from computational materials, and we support the decision to include all of these pre-sale materials into a single definition. Our view is that the failure to file each collateral term sheet would not result in substantial harm to investors due to a reduction in materials filed. To the contrary, we believe that it would avoid investor confusion by ensuring that only the collateral information relating to the collateral that is actually in the transaction is filed.

Under the no-action letters and our proposals, not all materials need be filed. Should all material related to the offering be filed? Are the conditions for the material that is to be filed appropriate? Should filing requirements distinguish between material provided or containing information provided by the issuer, on the one hand, and materials provided by underwriters or dealers not containing such issuer information, on the other? If so, why, and how should the two be differentiated?

Our view is that the no-action letters and the Commission's proposal strike the right balance with respect to the information relating to an ABS offering that is required to be filed. As discussed below and in our comments above, filings should be distinguished on the basis of which transaction party provided the information to the investors.

The filing requirement does not require filing until the later of the filing of the final prospectus or two business days of first use. Should there be an earlier filing requirement, such as always two business days of first use, even if the deadline is before filing of the final prospectus? Conversely, while the proposed deadlines are consistent with the no-action letters, is there any reason to shorten or extend the deadlines, and if so, to what period?

The proposed filing timeline is appropriate and is consistent with the general approach of treating all ABS informational and computational materials in the same manner.

Are any additional clarifications or modifications needed on when or how such materials need to be filed?

Both the Release and the relevant no-action letters acknowledge that parties other than the issuer or registrant may be filing ABS informational and computational materials. In addition, in footnote 193 of the Release, the Commission suggests that underwriters who comply with proposed Securities Act Rule 167 would not be liable for noncompliance by other underwriters. We propose that this principle apply to all transaction parties, and we request that the final rules provide an express compliance scheme for transaction parties other than the issuer or registrant (*e.g.*, how can an underwriter file ABS computational and informational materials when it is not the registrant?). Although the application of proposed Securities Act Rule 167 to cover data provided by third-party service providers will bring the law into step with market practice, we request additional clarity on what must actually be filed and the mechanics required for doing so. In addition, such a compliance scheme will facilitate our suggested liability allocation scheme as discussed in the following three paragraphs.

We request comment on liability requirements for ABS informational and computational material. While the existing liability framework does not appear to have chilled the use of such materials, is there any reason to re-evaluate the liability framework for them? If so, how and why?

We recommend development of a scheme that defines and allocates liability for ABS informational and computational materials based on its type and who produces and distributes it. Liability for traditional computational materials prepared by broker-dealers (often at the direct request of investors) without participation from the ABS issuer should be limited to the antifraud provisions of Section 10(b) of the Exchange Act, and such materials should not be required to be filed. These materials would be expected to be of the type described in Item 1104(a)(4) of proposed Regulation AB. Other ABS informational and computational materials would be subject to strict liability under Sections 11 and 12(a)(2) of the Securities Act, as well as Section 10(b) of the Exchange Act, and would be filed in accordance with proposed Securities Act Rule 426. These materials would be expected to be of the type described in Items 1104(a)(1) through (3) of proposed Regulation AB. Notwithstanding the foregoing, ABS informational and computational materials are by definition incomplete and may contain material omissions; it should be acknowledged that ABS informational and computational materials are not complete prospectuses and strict liability for omissions should therefore not attach to them. In addition, we respectfully request that the Commission except from its general position that indemnification provisions are unenforceable agreements by underwriters to indemnify issuers and others for liability relating to ABS informational and computational materials which would not otherwise be required to be filed with the Commission as proposed above.

We also respectfully disagree in part with the Commission's assumption that the existing liability framework has not chilled the use of these materials. Some ABS issuers prohibit their use entirely because of concern for assuming strict liability for materials that they neither prepare nor are able to adequately review in advance of use. Most often the materials causing these concerns are those of the type described in Item 1104(a)(4) of proposed Regulation AB. Concern about the enforceability of the related indemnification arrangements has also discouraged use of these materials. Thus, investors are sometimes deprived of helpful information during the offering process, and the ABS market has been made less efficient, due to liability concerns of issuers or registrants. This is despite the fact that the underwriters are often willing to assume liability for the materials that they prepare in order to facilitate transactions. The proposals outlined in the immediately preceding paragraph would, collectively, encourage the unique dialogue between ABS underwriters and investors necessary to structure transactions most efficiently for the benefit of all parties concerned, including issuers.

Should we not remove the EDGAR filing exemption for ABS informational and computational material? Are there particular difficulties or unreasonable expenses that would be associated with electronic filing of such material that would still exist under EDGAR? If so, please explain and quantify any such expenses in relation to other electronic filings.

Other constituents may be better positioned to address this question, but our impression is that, although advances in EDGAR and other technologies have largely obviated the need for a hardship exemption permitting ABS informational and computational materials to be filed in paper form, there are still issues with respect to filing materials in Excel or PDF formats because it is often difficult to convert financial information in spreadsheets into ASCII or HTML formats.

C. Research Reports

1. Proposed ABS Research Report Safe Harbor

We request comment on the proposed safe harbor. We have reorganized and reordered the conditions from the staff no-action letter and altered the wording slightly to make them easier to read and consistent with terms used in our other proposals. We otherwise did not mean to change the intent or scope of the original no-action letter. Are any additional revisions necessary or would any additional clarifications be appropriate?

The existing no-action letter advice provides a workable compromise between providing ABS investors with helpful investment research and giving ABS issuers the flexibility to time their issuances based on market conditions and not their broker-dealer's research activity. Although proposed Securities Act Rule 139a is a helpful codification of the no-action letter, we request that the sufficient public information requirement in clause (d) thereof be deleted. This requirement was included in the existing no-action letter as a result of concerns regarding selective disclosure. In the years since the issuance of the no-action letter, the Commission and the self-regulatory organizations have adopted various regulations that have addressed these concerns, such as Regulation FD and most recently certain provisions in the Sarbanes-Oxley Act of 2002. We respectfully request that the Commission rely on broker-dealer compliance with these other regulations to ensure fair disclosure in ABS research, particularly since proposed Rule 139a in its current form necessitates that broker-dealers conduct a qualitative assessment of unaffiliated issuer public disclosures to determine whether they would be in compliance; this requirement can potentially have the effect of discouraging valuable research from being published.

However, we respectfully request clarification that pre-sale reports produced by an NRSRO do not violate Section 5 of the Securities Act, so long as they are not distributed by an issuer or underwriter. In the alternative, we request that the Commission confirm that the indirect involvement of issuers or underwriters in these reports prior to their publication solely for purposes of correcting factual errors does not violate Section 5.

We also request comment on the continued applicability of any of the conditions or whether any additional conditions are necessary. For example, should the condition regarding disclosures of additional relationships be retained?

Our view is that additional conditions are not needed and are appropriately addressed by other regulations.

Our proposal, like the 1997 no-action letter, does not contain any instructions. Are any instructions or clarifications necessary for a codification of the ABS research report safe harbor?

Our view is that the proposal is sufficiently clear without instructions.

Is the limitation to offerings on Form S-3 still appropriate? If not, under what circumstances should the proposal be extended to offerings on Form S-1? In particular, are there any additional conditions that should be required for extending the safe harbor to Form S-1 offerings?

As noted above, we suggest that proposed Securities Act Rule 139a apply to offerings on Form S-1, as well as to offerings on Form S-3, so long as the other requirements of the rule are satisfied. Any distinctions should be made on the basis of the nature of the ABS being marketed.

D. Additional Topics

1. Electronic Roadshows

While we understand that the Commission may not wish to act on this subject in the Release before its more general release concerning electronic roadshows and distribution of offering materials, we nevertheless recommend that the regulations issued pursuant to the Release modify the rules for electronic roadshows when used in connection with ABS informational and computational materials to conform with the proposed Securities Act Rules as adopted.

IV. ONGOING REPORTING UNDER THE EXCHANGE ACT

A. Executive Summary

We believe that codification of the current modified reporting system is a laudable goal, and commend the Commission on its proposals to make Exchange Act reporting more accessible and more useful to investors and prospective investors in ABS. We also commend the Commission on its stated willingness to examine its own practices and systems — in particular, the EDGAR system — insofar as they contribute to less than optimal transparency in the ABS market. Because the proposed rules (i) expand the scope of the required reports substantially beyond current market practice and (ii) require disclosures about, and review of the performance and processes of, third parties who may not be controlled by the depositor, and because the Commission has indicated in the Release that the failure to file timely Exchange Act reports by the depositor or any issuing entity established by the sponsor would cause the depositor to become ineligible to use Form S-3, we believe that each new element of Exchange Act reporting must be evaluated to determine whether the perceived benefits to investors intended thereby outweigh the additional burdens imposed by the proposed rules, and whether the benefits sought to be conferred can be achieved in a less intrusive manner. The comments that follow and our responses to specific Commission questions and requests for comment identify those aspects of the proposed rules which, in our opinion, do not add materially to the mix of information available to investors and prospective investors in the public ABS market, but which, because of the difficulty or functional impossibility of timely compliance, create significant risk that the issuer of the ABS would be barred from efficient access to that market. We also suggest an alternative to the proposed responsible party assessment of servicing scheme, which we believe will yield equally effective investor protection in a more compliance-friendly manner, and invite the Commission to reexamine the merits of continuing to require delivery of market-making prospectuses with respect to ABS by certain broker-dealers, in light of the relative benefits and burdens of that requirement.

In summary, our principal proposals are as follows:

- Notwithstanding that the depositor is the issuer for purposes of the Exchange Act, the parties to a securitization should be permitted to decide among themselves who should sign Exchange Act reports, based on their respective duties and access to information.

- Due to the extreme difficulty or even impossibility of obtaining required information controlled by unaffiliated third parties, the enhanced reporting obligations of Form 10-D and Form 10-K, with the specific modifications requested below, should be instituted only for transactions effected after the publication date of the final rules.

- In lieu of monthly filing, Web site posting of distribution information, with a cumulative annual filing, should be permitted.

- Reporting of sales of securities and use of proceeds should generally be eliminated.

- Periodic updating of the financial information of highly rated significant enhancement providers should not be required. Updating which is required should be permitted through more simplified mechanisms, such as incorporating by reference, regardless of a third party's contractual relationship to the transaction.

- The proposed assessment of servicing compliance by a responsible party should be replaced by a fairer and more easily administered system of individual assessments by the parties actually responsible for the servicing function. These individual assessments could be implemented through an expansion of the proposed servicer compliance statements under Item 1121 of Regulation AB.

- In addition, we take issue with a few of the provisions of the proposed rules that, through disclosure requirements or undertakings, seem to impose through indirect means substantive regulatory standards that are best left to the marketplace to develop.

- The technical requirement that broker-dealers who are affiliated with an issuer and servicer of ABS deliver a market-making prospectus when effecting secondary market trades in those securities imposes an enormous compliance burden and competitive disadvantage on those broker-dealers, while affording no additional investor protection benefits, and should be eliminated.

B. Determination of "Issuer" and Operation of Section 15(d) Reporting Obligation

We request comment on our proposed rule clarifying the "issuer" of asset-backed securities for purposes of the Exchange Act. In 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? What would be the bases for requiring the servicer to be the reporting entity?

We believe that the proposed definition of "issuer" is appropriate. While practitioners in the securitization field have understood the Commission to view each issuing entity as a separate reporting person for purposes of the Exchange Act, clarification that the ultimate responsibility for reporting remains with the depositor is helpful. However, while we acknowledge the appropriateness of placing the responsibility for Exchange Act reporting on the depositor, driven in part by the convenient enforcement mechanism of restricting the depositor's access to shelf registration if it fails to meet its obligations in a timely manner, we nonetheless believe that it is appropriate to permit other parties to the transaction to contractually agree to sign relevant Exchange Act reports where those parties play a more central role than the depositor in the conduct of the transaction after issuance. For example, although it appears that (i) a trustee that acts both as fiduciary and bond administrator (*i.e.*, that calculates distributions to investors based on asset-level collections received from and reported by the servicer or from the trustee of an underlying trust, if the pool assets are themselves ABS) and (ii) a bond administrator that performs such calculation functions in a transaction as to which the trustee serves solely as fiduciary, are each captured within the definition of "servicer" contained in Item 1101 of Regulation AB, we request clarification that under such circumstances Exchange Act reports, as well as the related Sarbanes-Oxley certification, may be appropriately signed by the trustee or an administrator. (*See also*, Sections II.B. and IV.F.)

Should the ability to suspend reporting under Section 15(d) be revisited? For example, should it be a condition or required undertaking for registration statement form eligibility or for any of our other proposals that Exchange Act reporting will continue for the life of the asset-backed security? What would be the relative costs and benefits of such a requirement?

We see no basis for distinguishing between asset-backed and other securities for purposes of suspension of reporting under the Exchange Act and would strongly object to such an unorthodox approach to interpreting Section 15(d). Further, we request clarification with respect to the continuing reporting obligations of an issuer following the termination of the securitization after receipt of the final payment on the pool assets or following a cleanup call in accordance with the terms of the transaction documents. Specifically, (i) is the issuer required to file a Form 15 to terminate its reporting obligations under the Exchange Act with respect to a transaction which is terminated in accordance with its terms, (ii) must the issuer file a Form 10-D with respect to the final distribution date, and (iii) must the issuer file a Form 10-K for the fiscal year in which the securitization terminated? Insofar as there are no investors or potential investors following the termination of the securitization, we suggest that the issuer's reporting obligations be deemed to be automatically suspended effective on the final distribution date, without further action.

We request comment on our proposed interpretive rules regarding the operation of the Section 15(d) reporting obligation. Should any of these positions be revised? Are additional interpretations or accommodations necessary?

We believe that the interpretive rules are appropriate and consistent with current market practice.

Should there be an accommodation for separate Section 15(d) reporting obligations that may exist as a result of the registration of an intermediate financial asset, such as in an issuance trust/SUBI structure? Does our proposed list of conditions adequately identify the relevant structures?

We believe that it is appropriate to except intermediate financial assets from the reporting system. We believe that the list of conditions is appropriate, other than the condition that the intermediate financial asset "is not part of a scheme to avoid the registration or reporting requirements of the [Exchange] Act" because, in our opinion, that condition only injects uncertainty into the determination. If that condition is retained, we request an illustrative example of a circumstance in which the Commission would view an intermediate financial asset to be "part of a scheme to avoid the registration or reporting requirements of the [Exchange] Act" when the other four conditions are satisfied.

C. <u>Reporting Under EDGAR</u>

We request comment on any additional ways to make reporting on EDGAR less time-consuming or costly for ABS issuers while still providing an efficient and usable retrieval system for investors and the marketplace. For example, under the current system a filer must affirmatively indicate through a serial tag that a new issuing entity is being created when a prospectus is filed pursuant to Rule 424(b) to generate the new issuing entity's separate CIK code. Would it be more effective to require a mandatory serial tag for such filings or establish an "opt-out" system for the serial tag (in lieu of the current "opt-in" system)?

The EDGAR system currently is administratively burdensome for ABS issuers to use. This burden will only be increased by the proposed expansion to the contents of prospectuses and Exchange Act reports and the requirement that all ABS informational and computational materials be filed through the EDGAR system. The current system requires extensive and time-consuming document conversion by skilled operators to either ASCII or HTML, which both raises the costs of conducting transactions and the likelihood that filings will be delayed notwithstanding the good faith efforts of the transaction parties.

We also believe that the existing EDGAR system should be modified or supplemented to permit:

- Filing of documents in a variety of commonly used word processing and spreadsheet file formats (including Excel and XML, in read-only form);

- Filing of documents in PDF;

- Posting documents to EDGAR using a Web-based, fully automated process;

- Obtaining CIK serial tags using a fully automated process; and

- Obtaining separate CIK serial tags on pre-existing transactions, using a fully automated process that does not require re-filing of the prospectus or any similar document.

With greater reliance on the EDGAR system in the ABS market, the need for these modernizations will become increasingly more apparent.

D. <u>Distribution Reports on Proposed Form 10-D</u>

We request comment on proposed Form 10-D. Would a separate form type for distribution reports be beneficial? Should additional parties be permitted to sign the report? Is there any additional identifying information that should be provided on the cover page?

We believe that the creation of a separate form for reporting distributions is a useful enhancement to the reporting system. However, we note that, while the Commission states in the Release that the disclosures proposed for Form 10-D are consistent with the current modified reporting system, various reporting requirements go well beyond current market norms. In addition, the new required reporting with respect to master trusts and transactions involving prefunding or revolving periods, and in respect of significant obligors and credit enhancement providers, further increases the reporting burden on the issuer beyond current market practice. This raises a serious concern about the ability of existing issuers to comply with the reporting requirements of the Exchange Act after the effectiveness of final rules. Under the proposed rules, an issuer may have a reporting obligation with respect to matters involving third parties that are not contractually obligated to cooperate with the issuer or provide the information required in order for the issuer to comply with its expanded reporting obligations, and there may be no way for the issuer to compel such cooperation. For example, the proposed six-month transition period (or any other transition period) is inadequate to ensure that credit enhancement providers who are not now contractually bound to release their financial statements will agree to do so. Accordingly, consistent with the discussion in Section V.C. below, we strongly request that the Form 10-D reporting regime be instituted solely with respect to transactions effected after the effective date of the final rules. Notwithstanding this request, in recognition of the fact that the new Form 10-D is intended to differentiate ordinary periodic reporting from the reporting of material events on Form 8-K, we have no objection to requiring pre-existing issuers to file distribution date statements under cover of Form 10-D after the effective date of the final rules. As stated in Section IV.B. above, we believe that trustees and administrators should be permitted to sign Form 10-D under circumstances where they have better access to information than the depositor.

*What should be the appropriate deadline for Form 10-D reports? Given that the Form 10-D will in most cases consist only of the distribution report and also given advancements in technology, should the proposed 15-day deadline be shorter (*e.g.*, two business days, five days, ten days)? Should the deadline be tied to the delivery of the distribution report to the trustee? If so, what would be the effect of such a deadline if there was a failure to send a report to the trustee? Should the deadline be tied to the end of the distribution period?*

We believe that the 15-day deadline is appropriate, although given the depositor's lack of control over third parties, such as obligors and credit enhancement providers who may have sole access to the required information, late filing should not automatically affect Form S-3 eligibility if the failure to timely file is due to the action or inaction of a third party. See discussion in Section I.C.3(b) above.

*As an alternative to the current system, should it be required (*e.g.*, through a condition to an exemption to filing with the Commission or for continued Form S-3 eligibility) that distribution reports are posted on a specified party's Web site within a certain time period (*e.g.*, same day or two business days after the distribution date) and not filed with the Commission until the Form 10-K (*e.g.*, so that it is filed and subject to the Section 302 certification)? What would be the advantages and disadvantages of such a system? Under such a system, should non-financial disclosures, such as those incorporated from Part II of Form 10-Q, still be required to be filed during the distribution period in which the events occurred?*

We endorse making distribution reports available on a designated Web site identified in the prospectus as a permissive alternative to monthly filings, with a cumulative annual filing on Form 10-K. The advantage would be quicker reporting of material information on issuer or trustee Web sites, which many investors are more accustomed to routinely accessing than the EDGAR system, in part because of the ease of access issues noted by the Commission. Subject to our comments below as to those items which we believe should be modified, we believe that annual reporting of non-financial items (*i.e.*, matters addressed other than by Item 1 of Form 10-D) would be sufficient and could be supplemented in the case of legal proceedings, significant obligors and credit enhancement providers with Form 8-K reporting of material developments as they occur. With respect to significant obligors and significant credit enhancement providers, we suggest that such Form 8-K reporting would be for the purpose of disclosing material changes in financial condition, but that ordinary course updating would take place solely in Form 10-K.

Should the frequency of the Form 10-D report be based on the payment or collection frequency of the underlying pool assets, regardless of the distribution frequency of the asset-backed securities, so that updated pool performance information is included? How often do payments on the asset-backed securities not match payments on the underlying pool assets?

We believe that Form 10-D reporting is appropriately tied to distributions on the ABS. Except for revolving periods, we believe the distribution frequency of the securities and the related pool assets to generally be the same.

*The modified reporting system did not clearly contemplate any filing extensions for distribution information, such as those available under Exchange Act Rule 12b-25. Under that rule, registrants that face extenuating circumstances have the ability to gain a one-time filing extension for five calendar days for quarterly reports and 15 calendar days for annual reports, if certain conditions are met. Is there a reason to provide a comparable filing extension for proposed Form 10-D? If so, what would be the length of such an extension (*e.g.*, two, five or ten days)? Under what circumstances or conditions should such an extension be available?*

We believe that an extension mechanism would be appropriate, and that a minimum of five days would be fair, given the unavoidable reliance on third parties. As discussed under Section I.C.3(b) above, we believe that an extension mechanism alone is inadequate to guaranty timely compliance by unaffiliated third parties, and that relief from Form S-3 disqualification should be available where the issuer is unable to effect timely filing due to the action or inaction of a person other than the depositor.

We request comment on the manner of presenting distribution and pool performance information. Should the distribution report required by the transaction agreements still serve as the primary method for presentation of this information? Are there better alternatives to our proposal regarding the interaction between Form 10-D and that report? Should the presentation of any information be standardized?

We believe that the proposed satisfaction of the Form 10-D requirement, in whole or in part, through the attached distribution report is an appropriate approach. We do not believe that standardization of reporting across asset classes or issuers is practical at this time.

Are there any modifications that should be made to the list of representative items that should be disclosed regarding the distribution or asset performance? In particular, are there additional items that should be added or should any proposed items be deleted? For example, what amount of detail regarding updated pool composition information should be specified? Should there be a requirement to update all or some part of the information required by proposed Item 1110 of Regulation AB? Should any of the representative items be specifically mandated for disclosure and not just as examples of representative material disclosure?

See our comment below with respect to the specific "representative items" in Item 1119. We strongly believe that wholesale updating of Item 1110 disclosure would be unduly burdensome and unnecessary, particularly given the updated loan level information currently made available by many issuers through their Web sites or third party services, such as Bloomberg. We further believe that the determination of materiality should be left, in most instances, to the judgment of the transaction participants, rather than be mandated by the Commission. With respect to the specific list of "representative items" in Item 1119, we have the following comments:

- Item 1119(g): With respect to credit enhancement draws, we believe that it should be sufficient to show the amount of any draw on outside enhancement and the amount of outside credit enhancement remaining after the draw. The method of calculation is prescribed by the transaction documents and the purpose is self-evident (*i.e.*, to effect payments on the securities).

- Item 1119(h): We believe that once the amount of prepayments is reported, converting it to a prepayment rate is unnecessary, as various models for expressing prepayment rates exist and an investor can easily convert the amount of prepayments into a rate using the particular model selected by it. In addition, we find reference to "other prepayment or interest rate sensitivity information" too vague and request that such language be deleted. The language suggests the need to provide updated sensitivity tables which, as discussed below, we believe to be unnecessary. We believe that it should be sufficient to show the amount of prepayments received on pool assets and the current value of the index upon which the interest rate of any classes of securities is based.

- Item 1119(i): Monthly update of delinquency and loss information on a static pool basis and by asset characteristics, as contemplated in Item 1110(c), would, in our opinion, be no more enlightening than delinquency and loss information on the pool as a whole.

- Item 1119(j): We believe that little useful information is added by detailed disclosure of individual advances, particularly in transactions involving large numbers of pool assets. We believe that disclosure of the amount and purpose of advances by category (*i.e.*, principal and interest advances and servicing advances, such as those to pay taxes and insurance) should be sufficient. The source of reimbursement should not need to be stated in the report, since this will always be specified in the applicable transaction documents.

- Item 1119(k): Because modifications of loan terms, and the granting of extensions and waivers of payments, terms, fees and penalties, are all loss mitigation tactics commonly employed by servicers in the ordinary course of servicing financial assets, we believe that it would be appropriate in this instance for the Commission to specify a materiality threshold for disclosure in any distribution period. By analogy to other sections of the proposed rules, we suggest 30% of the aggregate principal balance of the pool assets, measured as of the beginning of the reporting period.

- Item 1119(l): Neither the depositor who signs the Form 10-D nor the servicer who prepares the distribution date statement may be in a position to know about breaches of transaction representations, warranties or covenants by other transaction parties. This is not a matter customarily addressed in reports today. With respect to breaches regarding pool assets, we believe that this disclosure requirement should be limited to breaches (i) of which the reporting person has actual knowledge or has received notice under the transaction documents and (ii) which exceed in the aggregate, during the reporting period, either 10% of the aggregate principal balance of the pool assets or, if applicable, any threshold specified in the transaction documents that creates a right by any transaction party to terminate another transaction party as a result of such breaches.

- Item 1119(n): The requirement to include full prospectus level disclosure on a portfolio subsequent to an addition, removal or substitution of assets is a significant expansion of required disclosure and, as discussed below, generally should not be necessary where the action is taken in compliance with the provisions of the transaction documents as disclosed in the original prospectus.

*Our proposed disclosure regarding changes to the asset pool, such as those that involve a master trust or a prefunding or revolving period, could result in additional disclosures from those that are currently provided today, particularly regarding material changes to the composition of the asset pool. Are these disclosures desirable? Are there alternatives to provide this information to investors? Should some or all of this information instead be filed on a more current basis on Form 8-K? Is the exception for providing this information if it is provided in a Rule 424 prospectus filed under the same CIK code appropriate? Should disclosures only be required if the pool differs materially by a certain percentage from the original pool? Should there instead be an express limitation in the definition of asset-backed security that pool changes may not materially alter the characteristics of the asset pool or alter the characteristics by some set percentage (*e.g.*, 2%, 5%)? How should such changes be measured?*

We believe that the Commission should confine its proposed disclosure regarding changes to the asset pool to situations involving the addition of pool assets. Removal or substitution of pool assets, which normally occur as the result of breaches of transaction representations and warranties, are generally limited in scope and, in the case of substitution, the assets to be substituted are generally required by the transaction documents to have economic characteristics substantially similar to those removed. With respect to the addition of assets to a pool, we believe that the standard should be whether the composition of the asset pool taken as a whole, at the time the asset pool becomes fixed (*i.e.*, at the end of the prefunding or revolving period or upon the addition of assets to a master trust), deviates materially from the contemplated composition of the pool described in the prospectus for the ABS. The requirement otherwise imposed on the depositor, who may not have direct access to such information, to monitor the composition of the asset pool on a monthly basis rather than at a fixed determination date, and to repeatedly update the extensive disclosures required by Items 1104, 1107, 1109, 1110 and 1111 of Regulation AB, would impose unreasonable administrative expense. In addition, for the avoidance of doubt, we recommend that a change to the composition of the asset pool by less than 10% of the principal balance as of the date of the issuance of the ABS (excluding changes resulting from payments and repayments on the pool assets made on behalf of obligors or as a result of realization by a servicer on defaulted pool assets in the ordinary course of servicing, if notwithstanding our comments the final rules encompass asset removals), be deemed not to constitute a material change to the composition of the asset pool taken as a whole.

If a previous filing, including the registration statement or ABS informational and computational material, included the results of any payment or sensitivity analyses, models or *estimates or projections regarding items such as expected yield, maturity or pool performance, should there be a requirement to disclose any material changes between the previously disclosed information and the actual performance of the pool assets or the asset-backed securities? Should any such information appear in the annual report on Form 10-K as well as, or in lieu of, Form 10-D?*

Because many ABS are sensitive to the rate of prepayment or loss on the underlying assets and/or changes in interest rate indices, sensitivity analyses are included in prospectuses to illustrate the degree of sensitivity of yield or weighted average life to different assumed rates of prepayment or default on the pool assets and/or levels of interest rates. Those analyses are expressly stated and understood not to be projections of the performance of the related pool assets or securities, but merely illustrative of the sensitivity of yield or average life to different assumptions. Investors are advised to, and generally will, employ their own assumptions, which reflect their individual views on movements in interest rates or relative prepayment or default rates, in deciding to purchase the ABS. Accordingly, we believe there is no value in mandating periodic re-performance of these analyses or in using them as a measure of comparison against actual pool performance at any point in time. Further, analytical tools are readily available in the marketplace, such as those offered by Bloomberg and Intex, to allow investors to prepare new sensitivity analyses if they wish to examine them under different assumptions than those presented in the prospectus.

*We also request comment regarding the proposed other disclosure items for Form 10-D. Should any additional disclosures be required (*e.g.*, quantitative and qualitative disclosures about market risk required by Item 305 of Regulation S-K)? Should any of the proposed disclosures codifying the principles of the existing modified reporting system now be omitted?*

We do not believe that any additional non-financial disclosure is warranted beyond that currently contained in Form 10-D. With respect to the specific non-financial disclosure items currently contemplated, we do not believe that the fact that such items are non-financial in nature, by itself, should lead to the conclusion that they should be carried over from Form 10-Q to Form 10-D. We point out that the disclosures contemplated by Item 3 are not typically reported today by issuers under the modified reporting system. With respect to Items 2 through 7 of proposed Form 10-D we have the following specific comments:

- Item 2 (Legal Proceedings): We believe that the obligation to disclose pending litigation against the sponsor, depositor, trustee, issuing entity, servicer, enhancement provider or a 10% originator, or to which any of their property is subject, should be limited, as is the obligation to disclose threatened litigation, to the actual knowledge of the reporting person, to the extent that the reporting person is unaffiliated with the enumerated entity. Although Item 1115 of Regulation AB appears intended to mirror the standard in Item 103 of Regulation S-K applicable to corporate issuers, the requirement in Regulation S-K relates only to the reporting person and its subsidiaries. In order for the depositor to report all material pending litigation affecting the enumerated persons, the depositor would have to engage in a docket search in every conceivable jurisdiction with respect to each of the enumerated parties on a monthly basis. That would be both impractical and cost-prohibitive.

- Item 3 (Sales of Securities and Use of Proceeds): We believe that the current practice under the modified reporting system of reporting neither the sale of securities nor the use of proceeds reflects the appropriate market judgment that such information is generally irrelevant. Because the use of proceeds in a securitization is almost always limited to the purchase of the pool assets, we request that the requirement to report use of proceeds be deleted, or alternatively that such reporting be limited solely to uses that are either (i) other than as described in the prospectus for the ABS or (ii) for purposes other than to acquire the pool assets, including additional pool assets acquired during a prefunding or revolving period. With respect to reports on sales of securities, we request that such reporting not be required. Information on sales of unregistered securities in non-master trust transactions is generally immaterial, since the expected issuance and terms of those securities are contemplated and disclosed, to the extent material to the registered securities, in the prospectus for the registered securities, and the unregistered and registered securities are issued simultaneously. Sales of unregistered securities by master trusts are similarly immaterial to holders of the registered securities because the parameters of those securities (including the waterfall priority and allocation of cash flow among classes and series) are disclosed in the prospectus for the registered securities. In addition, the full range of disclosure required by Item 701(a)–(e) of Regulation S-K, such as consideration received for and the identity of purchasers of unregistered securities, would publicly reveal proprietary competitive information of the issuer and the underwriter with no apparent benefits to investors.

- Items 6 and 7 (Significant Obligors of Pool Assets and Significant Enhancement Providers): We request clarification as to when the 10% and 20% tests contained in Item 1111 of Regulation AB are measured for purposes of Exchange Act reporting. We propose that, for purposes of Exchange Act reporting, the tests be measured as of the date on which the asset to which the obligor's obligation relates or on which the credit enhancement was added to the asset pool. We believe that an additional reporting obligation should not be triggered with respect to an obligor or enhancement provider that was initially below the respective threshold if it subsequently exceeds the threshold due to the pattern of amortization or prepayment of the pool assets. We anticipate that the obligation of an obligor or enhancement provider to provide continuing financial information for so long as the issuer has an Exchange Act reporting requirement will affect the costs to the sponsor of including various transaction participants. Those costs need to be fixed at the date of the securitization. For instance, an enhancement provider's fee, which is generally payable from pool asset cash flows, cannot be subject to renegotiation if the provider's obligation increases above 10% of the transaction as a result of payments on the pool assets because there will be no source of funds for the payment. By contrast, the depositor would incur no comparable practical difficulty or expense in the event that, due to payments on the pool assets, any significant obligor or significant enhancement provider's obligation fell below the 10% threshold, measured on a current basis, and we recommend that, in such event, the obligation to update financial information of the obligor or enhancement provider be terminated until such time as it again exceeds the 10% threshold.

We request that the Commission resolve an apparent conflict between Items 1111(b) and 1113(b)(2), on the one hand, which contemplate incorporation of financial statements of a significant obligor or credit enhancement provider and its subsidiaries, and Item 1100(c), which contemplates incorporation of financial statements of the obligor or enhancement provider or the entity that consolidates the obligor or enhancement provider. We believe that the condition to incorporation by reference in Item 1100(c)(1)(ii), namely that a third party whose financial statements the issuer desires to incorporate by reference must be current in all Exchange Act reporting for 12 months, is impractical and should be deleted. A depositor is not in the position to know whether events have occurred which would be required to be reported by unaffiliated third parties on Form 8-K. Further, because the depositor must rely completely on the third party for updating of information which is incorporated by reference, we believe that the requirement in Item 1100(c)(1)(iv) to describe material changes to the incorporated information be modified, in the case of unaffiliated third parties, to refer to changes known to the issuer.

We believe that the provision in Item 1100(c)(2) allowing for the reference to third party periodic reports of significant obligors, subject to certain conditions, is appropriate, albeit too limited in scope. The presumption of Item 1100(c)(2) appears to be that where there is privity of contract, the depositor can contractually compel the cooperation of a third party whose financial statement disclosure is required. That does not, however, ensure that an unaffiliated third party will in fact cooperate with the depositor or cause its accountants to cooperate on a timely basis. This strikes us as fundamentally unfair, as it could result in the inability of a depositor to use Form S-3 due to the actions of recalcitrant third parties whose information is otherwise readily accessible to investors on the EDGAR system. Therefore, we request that the reference mechanism of Item 1100(c)(2) also be made available with respect to unaffiliated third party obligors who have a relationship to the ABS transaction and to credit enhancers. We believe that the guiding principle with respect to continuing disclosure of information about significant obligors and significant enhancement providers should be enabling timely access by investors to information about such third parties, to the extent material, and that any mechanisms or conditions which unduly impair an investor's access to such information should be abandoned.

We wish to propose a ratings-based alternative with respect to financial disclosure regarding certain third party credit enhancement providers. It is common in ABS transactions for swaps or other derivatives to be provided by counterparties that are highly rated subsidiaries of diversified financial institutions and that do not have or file financial statements on a stand alone basis. Those counterparties generally have AA or AAA ratings assigned to them based not on their financial strength, but on the rating agencies' evaluation of the efficacy of their hedged positions and the collateralization of their unhedged exposures under various stress scenarios. Those counterparties historically have been reluctant to provide their financial statements, and may be expected to continue to be in the future. It is our understanding that, with respect to such over-the-counter derivative providers, investors and rating agencies alike rely primarily on the rating assigned to the counterparty in assessing its ability to fulfill its obligations, rather than on its balance sheet. Further, rating agencies typically require any such derivative in an ABS transaction to be replaced if the counterparty's rating drops below single-A, minimizing the possibility that the transaction will be exposed to counterparty credit risk. In light of (i) the additional burden placed on highly rated enhancement providers that are not presently reporting companies, (ii) the additional transaction costs likely to be incurred by sponsors as a result of fees imposed by credit enhancement providers for furnishing their financial information and by accountants for providing consents to incorporation by reference on an ongoing basis, (iii) the material adverse consequences to a depositor and sponsor's securitization program, in the form of loss of eligibility to use Form S-3, in the event that a third party enhancement provider or its accountants do not provide required information or consent on a timely basis and (iv) any lack of compelling investor interest in, or enhanced investor protection resulting from, additional disclosure about highly rated enhancement providers, we request that Item 7 of Form 10-D be made expressly inapplicable to enhancement providers who, as of the date of the required report, are rated in the top three rating categories by an NRSRO. We also request that a corresponding change be made to the correlative provision of Form 10-K.

E. Annual Reports on Form 10-K

We request comment on the proposed general instruction to Form 10-K. Should additional or different parties be permitted to sign the report? Should the designated person to sign be someone else, such as the entity's principal executive officer?

We refer to our comments in Sections IV.B. and IV.D. above regarding the execution of Exchange Act reports by persons other than the depositor or the servicer.

Is the proposed menu of disclosure items appropriate? Should any additional items be included or omitted? Is the proposed presentation of this menu clear? Are there any additional instructions that should be included for ABS offerings?

We refer to our comments in Section IV.D. above with respect to non-financial disclosures required by Form 10-D. We restate our comments with respect to the requirements of Items 1111(b), 1113(b)(2) and 1115 of Regulation AB, which apply to annual reports on Form 10-K with equal force here, since those requirements also apply to periodic distribution reports on Form 10-D.

Because Item 1117 (Affiliations and Certain Relationships and Related Transactions) has a two-year "look-back" provision, we request that the Commission clarify that disclosure of matters previously reported in a prospectus for the ABS or in a prior annual report on Form 10-K need not be disclosed.

Should updated pool composition information be required for the Form 10-K? For example, several modified reporting no-action letters require aggregate distribution and pool performance information for the reporting period. Should such disclosure be required for the Form 10-K? Should there be a requirement to update and restate all or some part of the information required by proposed Item 1110 of Regulation AB, such as static pool information?

We believe that distribution reports on Form 10-D will be filed with sufficient frequency that further updating of pool information would be redundant and would simply add additional administrative burden and expense to the transaction during the March reporting period with no corresponding benefit. We do not believe that any value is added for investors by requiring aggregated distribution information in Form 10-K, since this is merely repetitive of the information which would be reported on Form 10-D. Typical transaction requirements to provide aggregate year-end information exist for the purpose of providing investors with tax reporting information and are sufficient for that purpose. For the reasons described above with respect to Form 10-D, we also believe that a requirement to update or restate information required by proposed Item 1110 of Regulation AB would be unduly burdensome to depositors. We further believe that such additional information would be unlikely to result in improved pricing of the securities, particularly for more generic asset classes, to offset the attendant expense.

*Should specific financial information be required regarding any transaction parties, such as the sponsor, servicer or issuing entity? If so, for which parties should information be required? What information should be required (*e.g.*, audited financial statements)? Under what circumstances should such information be required? Should any such information also be provided in distribution reports on Form 10-D?*

We believe that the financial information regarding the transaction parties is generally irrelevant to an ABS transaction unless, in the case of a servicer, it involves a material adverse change required to be reported on Form 8-K. We believe that the Form 8-K reporting scheme is more suited to disclosing such information on a timely basis than the annual report on Form 10-K.

We request comment on the proposed servicer compliance statement. Would such a statement still be beneficial? In particular, would this compliance statement still be necessary given the Sarbanes-Oxley Section 302 certification and the proposed assessment of compliance with servicing criteria?

As discussed in our comments in Section IV.G. below, we believe that the servicer compliance statement should be expanded to provide an alternative to the responsible party assessment mechanism currently proposed.

If multiple servicers are involved, should additional statements be required by servicers other than the master servicer? Is the proposal to require each Item 1107(a) servicer to submit a compliance statement appropriate? Should compliance statements be limited to only the master servicer? Should servicer compliance statements be required for Form 10-Ds as well?

In our view, servicer compliance statements with respect to Form 10-D would be redundant and would only interject the possibility of delay into the process of filing critical periodic distribution information. Consistent with our comments in Sections II.B. and II.E.5. above, we believe that servicer compliance statements are appropriate only if the servicer has direct contractual responsibility for servicing. For example, we believe that compliance statements are appropriate for primary servicers who are in contractual privity with the trustee, even though supervised by a master servicer, but we do not believe that compliance statements are appropriate with respect to subservicers hired by a primary servicer to assist it with its servicing responsibilities where the primary servicer remains liable to the transaction.

F. Certification Under Section 302 of the Sarbanes-Oxley Act

We request comment on the certification requirements for ABS filings. Are any modifications needed to the form of certification? For example, is paragraph 5 necessary if the proposed assessment of compliance with servicing criteria is adopted? Are any modifications necessary for particular types of ABS transactions?

We believe that paragraph 5 is redundant if either the proposed assessment and attestation regime or an expanded compliance statement alternative of the type proposed in our comments in Section IV.G. below is adopted, and that paragraph 5 should therefore be deleted from the certification.

Should additional or different persons be permitted to sign the proposed certification? For example, should we permit the trustee to sign the certification? Should both the depositor and the servicer sign a certification? Should the designated person to sign for an entity be someone else, such as the entity's principal executive officer?

As discussed in Section IV.B. above, we believe that transaction participants should have the flexibility to allocate and divide the certification among themselves in accordance with their actual transaction responsibilities. In either event, we believe that trustees and administrators should be permitted to sign under circumstances where they have better access to information than the depositor and if the transaction parties so agree by contract.

Because they would be filing Form 10-D distribution reports, ABS issuers would be exempt from filing Form 10-Q quarterly reports. Should each Form 10-D be certified directly rather than at the end of the fiscal period?

We believe that the current annual certification requirement is most appropriate.

Is the reasonable reliance instruction necessary?

We believe that the reasonable reliance instruction provides useful clarity and should be retained.

G. Report of Compliance With Servicing Criteria and Accountant's Attestation

We respect the Commission's attempt to articulate a consistent and transparent set of servicing criteria for ABS. We believe, however, that compliance with the criteria in Item

1120(d) is better assured by a certification regime involving the respective parties actually responsible for performing material servicing functions, subject to Exchange Act liability, rather than by the proposed scheme involving assessment of compliance by a responsible party who may have neither the skills nor the access to information to effectively perform such an assessment. In our view, the new assessment requirement, which covers multiple transaction parties, some of which are likely to be unaffiliated with each other and with the depositor, creates a fundamental problem by allowing the role of responsible party generally to fall by default to the depositor, who will be penalized through loss of eligibility to use Form S-3 if the assessment is not timely completed. This appears to us to be an inappropriate allocation of responsibility and an unfair result, as the depositor is frequently in the worst position of all transaction parties to make such an assessment. The depositor is generally a bankruptcy remote special purpose vehicle which plays no role in any servicing function and lacks the requisite expertise to properly assess a servicer's performance.[15]

In our view, if the goal of the proposed assessment of servicing is to provide investors with assurance that the entire servicing function is performed in accordance with consistent and transparent standards, a simpler and more effective approach would be through the mechanism of the various servicers' compliance statements required under Item 1121. Although those compliance statements relate to servicing in accordance with the requirements of the particular transaction documents, we see no reason why they could not be expanded to include a separate certification that the servicer has performed an assessment of its servicing platform in accordance with the criteria of Item 1120(d), insofar as those criteria apply to the portion of the servicing function performed by it in the transaction, including an identification of any material non-compliance. We believe that this would meet the Commission's requirement of a review of the entirety of servicing on a consistent basis while placing Exchange Act liability for the efficacy of the review and the adequacy of the disclosure of any material non-compliance on the appropriate party. To the extent that bond administrators and trustees performing bond administration functions are excluded from the definition of "servicer" in Item 1101 in accordance with our comments in Sections II.B. and II.E.5 and 6 above, they could be added to the Item 1121 regime solely for the purpose of certifying as to compliance with the Item 1120(d) criteria. The depositor's role and risk would be limited to the more appropriate task of collecting the individual compliance statements for filing with Form 10-K, as it is now required to do in order to satisfy the requirements of Item 1121. We believe that direct Exchange Act recourse to servicers for the adequacy of their assessment of servicing compliance is a more powerful incentive to compel disclosure by such servicers and better serves the protection of investors than merely permitting them to provide information for reliance on by the depositor as the "responsible party" and limiting recourse under the Exchange Act to the depositor.

With respect to the proposed accountant's attestation requirement, we believe that a separate accountant's report on, and attestation to, the assessment of compliance should be made with respect to each individual servicer that under our proposal would be required to certify its compliance with the Item 1120(d) criteria in an expanded servicer compliance statement. We believe that accountant review of what are essentially internal controls is most appropriately made by the servicer's auditor, rather than an accountant selected by the depositor. This would also allow servicers the flexibility of having their platform evaluated by a single accounting firm and making a single attestation report available for use in connection with each securitization in which it participates, rather than involving a variety of different accounting firms in the process of attesting to a plethora of responsible party assessments. We further request that the Commission consider eliminating the attestation requirement with respect to asset classes in which servicing is relatively generic, such as prime mortgage, prime auto and prime credit card loans. Increased investor focus on the adequacy of servicing and trustee capability, to which the proposed assessment and attestation regime appears to be a response, has arisen primarily in the context of troubled transactions featuring unique assets such as medical and insurance receivables, as to which there are fewer capable servicers and in which the possibility of fraudulent or inadequate servicing is presumably greater. We also suggest that accountant's attestation, and perhaps even assessments of compliance, not be required with respect to servicers that have received the highest servicer ratings issued by an NRSRO, as such ratings are arrived at through a rating agency's comprehensive review, not only of the servicer's financial condition, but also its servicing platform.

In the event that the Commission is unwilling to permit the assessment of servicing to be effected on an individual basis or through the expanded Item 1121 compliance statement mechanism suggested above, we request that, at a minimum, the Commission permit a servicer or master servicer to be contractually designated as the responsible party, irrespective of who signs Form 10-K, if the transaction parties so desire.

Some of the attestation standards (and the underlying record-keeping standards) appear to be inconsistent with servicing standards and contractual requirements currently accepted in the market, and these standards and requirements should therefore not be changed to comply with what otherwise purport to be disclosure standards. While the attestation standards are not mandatory (and if they were they would go beyond the Commission's authority under the Securities Act and the Exchange Act), and issuers are free to have arrangements that result in "no" responses to certain disclosure items in each attestation report, the setting of disclosure standards that result in disclosure that the issuer is not in compliance with the mandated standard is the functional equivalent of setting substantive standards rather than disclosure standards and should be avoided.

The proposed attestation requirement (Item 1120(d)(2)(i)) to the effect that payments on assets underlying an ABS transaction have been deposited in appropriate custodial bank accounts within two business days of receipt is one example of this problem. Under some transactions, with which neither the market nor the rating agencies seem to have a problem, the servicer may be permitted to hold these funds until the distribution date or just prior thereto. The attestation standards should not force issuers to say that they are not in compliance with an arbitrary standard when they are in fact in compliance with contractual arrangements that are clearly accepted in the marketplace.

As described below, there are numerous other deadlines for taking of action set forth in the proposed rules' attestation standards for which disclosure is required if the deadline is not met. While these deadlines may reflect the Commission's (and also the market's) current views as to best practices, they should not be effectively codified by the Commission, which will be the result if they are adopted as proposed, since an issuer will be extremely reluctant to deliver an attestation report saying it does not meet the standards. The level of detail in these deadlines in some cases may even go beyond what is specified in the agreements that govern the transactions.

We would propose, as an alternative to the hard and fast deadlines that the Commission has proposed, that the required attestation simply state that the responsible parties have performed their duties as to the specified items in accordance with the applicable agreement(s) (setting forth the contractually specified deadlines when applicable). In cases where the agreement is silent on an issue the attesting party should be permitted to state that there is no applicable requirement and that the specified action has been taken within whatever number of days are stated in the attestation, rather than stating that a specified action has not been taken within an arbitrarily mandated time period.

With respect to the specific criteria of Section 1120(d), we have the following detailed comments:

- Item 1120(d)(2)(i): This criterion, as discussed above, will require a response with potentially negative inferences if the transaction documents do not require posting of deposits within two business days of receipt. The time period for deposit is more appropriately left to the transaction parties and this item should be modified to read “no more than two business days, or such other number of days specified in the transaction documents, of receipt.”

- Item 1120(d)(2)(ii): The reference to disbursements, “on behalf of,” to the extent it is intended to refer to remittances to investors, should be moved to Item 1120(d)(3). To the extent it is not so intended, the reference should be deleted since this sort of wire transfer would not be part of a publicly-offered ABS transaction.

- Item 1120(d)(2)(iv): The word “separately” should be removed. The standard to which accounts are maintained should be governed by the transaction agreements. To the extent that, consistent with rating agency requirements, such agreements permit commingling, that should not be given negative connotations by the 1120(d) criteria.

- Item 1120(d)(3)(i)(D): The words “investors’ and/or” should be deleted, as servicers are unable to determine whether their records agree with those of investors. Except with respect to sending remittances and, to the extent not posted on a Web site, remittance reports, servicers generally have no direct contact with investors. If this reference is intended to refer to a sampling, in accordance with generally-accepted auditing standards, of confirmations of whether investors have received the distributions shown on the records of the entity that makes the distributions, this intent should be clarified.

- Item 1120(d)(3)(iii): We believe this criterion should be modified to refer to recordholders of securities, rather than investors, because in the vast majority of cases registered ABS are held in book-entry form, and remittances will be made by the trustee or a paying agent to The Depository Trust Company, which in turn will make remittances in accordance with its rules to beneficial holders of the securities. The paying agent for the securitization transaction will not maintain payment records with respect to beneficial owners of book-entry securities.

- Item 1120(d)(iv)(x)(C): This item should be modified to state that "such funds are returned to the obligor within the time period required by the terms of the pool asset, the transaction documents or applicable law, following full repayment of the related pool asset."

- Item 1120(d)(iv)(xiii): The item should be modified to contemplate that disbursements made on behalf of an obligor may be posted to the obligor's records maintained by the servicer more than two days after the disbursement is made if permitted by the pool asset documents and the transaction documents.

Would audited financial statements of the ABS issuer or servicer be more useful to an ABS investor than a report on servicing compliance and related attestation report by a registered public accounting firm?

It is our view, as discussed in Sections II.C. and II.E. above, that the financial statements of the issuer are immaterial and that the focus with respect to servicers should more appropriately be on their competence rather than their financial condition. We would, however, support disclosure of any servicer ratings, as they are indicative of both servicer capability as well as condition.

Is the period to be covered by the report appropriate? Should disclosure be required of material instances of noncompliance during the period, even if subsequently cured? Should there be a requirement to make an assessment and report on compliance regarding any interim periods?

In response to the questions regarding servicer review, we firmly believe that the current practice of reviewing servicer compliance on an annual basis remains an appropriate standard and that a disclosure based system is the most appropriate approach. However, we believe that, given the inherent complexity of servicing financial assets, materiality of non-compliance should be measured for the reporting period as a whole, and that curative measures taken by the servicer should be given effect in determining whether the servicer is in material compliance with the servicing criteria. Accordingly, we propose that the report speak as of the end of the reporting period.

Should material instances of noncompliance have regulatory ramifications, such as on Securities Act form eligibility?

Disqualification of the depositor from eligibility to use Form S-3 as a result of a servicer's performance appears to us to serve no useful purpose.

H. Current Reporting on Form 8-K

We have the following comments with respect to specific items required by the proposed rules to be reported on Form 8-K:

- Item 1.02 (Termination of a Material Definitive Agreement): We request that the Commission clarify that, in the context of an ABS transaction, this item does not require reporting of the termination of transaction agreements in connection with a cleanup call. Such terminations are in the ordinary course of business and as contemplated by the transaction documents. Existing security holders will receive notice of the call and final distribution information from the trustee. By definition, the call is irrelevant to prospective investors.

- Item 2.02 (Results of Operations and Financial Condition): This item suggests that the routine publication of performance information on ABS on the issuer's or the trustee's Web site triggers an 8-K filing. We request that the Commission clarify that a report would not be required if the availability of the information is discussed in the prospectus or Form 10-D.

- Item 5.03 (Amendment to Articles of Incorporation or Bylaws): We request that the requirement to file amendments to the governing documents of the issuing entity, whether or not relating to a reporting class, be qualified by materiality. For example, a change to the minimum denomination or book-entry status of an unregistered class which is subordinate to the registered securities is irrelevant to the registered classes and should not trigger the expense of filing or the severe consequences to the depositor of late filing. At a minimum, we request that the four business day filing deadline not apply to amendments other than material amendments.

- Item 6.02 (Change of Servicer or Trustee): The information required by this item should not be subject to the four business day filing requirement or, alternatively, should be added to the list in the General Instructions to Form S-3 of Form 8-K items which need not be timely filed for Form S-3 eligibility. This item mandates significant factual disclosures to be made about successor servicers or trustees, which requires the depositor to obtain and process information solely within the control of a third party. If that information cannot be rapidly obtained and the required disclosure assembled within four business days, it will have the unintended consequence of delaying the critical appointment of a successor in order to permit timely Exchange Act reporting. This clearly is the wrong result.

- Item 6.05 (Sales of Additional Securities): We restate our comments in Section IV.D. above with respect to Item 3 of Form 10-D, and request that the reporting requirement, as modified, be confined solely to Form 10-D.

- Item 6.06 (Securities Act Updating Disclosures): We request clarification of how the 5% difference between the actual asset pool at the time of issuance and the description of the asset pool in the prospectus, which triggers the disclosure requirement, is to be determined. We suggest that the standard be revised to expressly provide that the asset pool on the date of issuance has an aggregate principal balance, as of the applicable cut-off date, which is at least 5% more or less than the cut off date balance specified in the prospectus, rather than requiring a separate evaluation of each characteristic of the asset pool. In addition, we request that the Commission clarify that the servicer information called for under this Item would not be required under this item if it is provided under Item 6.02 (and vice versa).

I. <u>Other Exchange Act Reporting Proposals</u>

Should we codify the exclusion from quarterly reporting on Form 10-Q for asset-backed issuers? Should we exempt asset-backed securities from Section 16? Should the non-reporting provisions of Section 16 remain applicable with respect to asset-backed issuers or other participants in an ABS transaction? Should the result be different if the issuing entity has officers or directors?

The exclusion from quarterly reporting on Form 10-Q has long been a feature of the modified reporting system for ABS. Because there has been no change in the basis for the exclusion (*i.e.*, the irrelevance of quarterly financial statements of the issuer) we agree that the exclusion should be formally codified in order to avoid any interpretive issues as to its applicability. To the extent that any non-financial disclosures in Form 10-Q have any applicability to ABS, we believe they are more appropriately addressed in Form 10-D and Form 10-K, as the Commission has suggested in the proposed rules.

The prophylactic purpose of Section 16, which is designed to deter insider trading by requiring disclosure of purchases and sales of equity securities by certain presumed insiders and disgorgement of short-swing trading profits, is irrelevant to ABS, which by their nature involve self-liquidating asset pools, the status of which are subject to frequent, generally monthly, reporting to security holders. This is true whether or not the issuing entity has officers or directors, because such officers and directors do not own equity securities of the issuer and do not receive incentive compensation in the form of securities or options of the issuer, as is common in operating companies. Accordingly, we concur with the Commission's proposal to formally exempt ABS from all provisions of Section 16.

Should all of the applicable Form 10-K items be required for a transition report? For example, are there any item requirements under proposed General Instruction J. of Form 10-K that would not be important to investors with respect to the transition period? Should we require a separate report even if the transition period is one month or less?

We request that the proposed transition rules in Exchange Act Rules 13a-10 and 15d-10 be modified to make clear that they refer to changes in the fiscal year of the "issuing entity." As proposed, those rules refer to the "asset-backed issuer," which in this context might be construed to mean the depositor, rather than the issuing entity. While we believe that it is appropriate for the depositor to be considered the issuer of a given ABS for purposes of establishing responsibility for Exchange Act reporting, such reporting relates to the activities of the related issuing entity, not the depositor, and a change in the fiscal year of the issuing entity is the only relevant subject of the transition rules.

J. Additional Topics

1. Request for Elimination of Market-Making Prospectuses for ABS.

We note that the burden of complying with the enhanced reporting obligations under the Exchange Act contained in the proposed rules, and the attendant risk of disqualification for 12 months from eligibility for shelf registration on Form S-3 for failure to comply in a timely fashion, fall most heavily on issuers of ABS that are affiliated with a servicer and an underwriter of the transaction. This results from the view of the Commission that a dealer who effects secondary market resales of securities of an affiliated issuer is ineligible for the transactional exemption from registration contained in Section 4(3) of the Securities Act because it does not satisfy the definition of "dealer" in Section 2(a)(12) of the Securities Act, which contemplates "dealing or trading in securities issued by another person." In the context of ABS, the Commission has regarded the dealer exemption as inapplicable where affiliation exists among a broker-dealer, an issuer and a servicer in the same transaction. Presumably, this reflects an assumption that the servicer is akin to a corporate issuer in that it is likely to have material information regarding the securities and that the broker-dealer, by virtue of the affiliation with both the servicer and the issuer, could cause the issuer to prepare and deliver to it an updated prospectus. Accordingly, the Commission has required broker-dealers who are affiliated with both the depositor and the servicer in an ABS transaction to deliver a current market-making prospectus in connection with resales of the ABS.

Historically, depositors in respect of which an affiliated broker-dealer had a market-making prospectus delivery obligation would update prospectuses under Form S-3 registration statements through the incorporation by reference of subsequent Exchange Act reports, notwithstanding that the issuer otherwise became entitled to suspend reporting under Section 15(d). Until the Commission suggested in footnote 86 of the Release that the prospectus must update the disclosure regarding the asset pool in total, market participants generally believed that the market-making prospectus sufficiently complied with the requirements of the Securities Act if it contained all material information about the current status of the asset pool, by virtue of the incorporated distribution date statements, even if the asset stratifications contained in the original prospectus were not updated. By virtue of the contrary position espoused by the Commission in footnote 86 of the Release, and the greater definition given to the required content of a Section 10 prospectus, issuers with respect to which a broker-dealer has a market-making prospectus delivery obligation will be required not only to file the new and more extensive Exchange Act reports required by the proposed rules, but also voluminous additional asset-level disclosure for the sake of keeping the original prospectus current, for the life of the transaction. By contrast, because registered ABS are generally held of record by fewer than 300 persons, most issuers will be able to avail themselves of the provisions of Section 15(d) in the fiscal year after which the transaction is issued and terminate their reporting obligations.

We submit that this is an appropriate occasion for the Commission to revisit its position with respect to the availability of the dealer exemption in Section 4(3) of the Securities Act, and the concomitant market-making prospectus delivery obligation, in the context of ABS. Although the Commission has previously indicated a willingness to re-examine the need for market-making prospectuses generally, we believe that, because of the unique nature of the ABS market and the disproportionate compliance burden placed on issuers whose affiliated broker-dealers have a market-making prospectus delivery obligation, relief should be granted now and should not await a broader Securities Act reform project.

We believe that the Commission's insistence on applying the market-making prospectus paradigm to ABS transactions is unwarranted. The distinction between corporate and ABS for purposes of market-making prospectuses is as valid as that drawn in creating the exception to the prospectus delivery requirements of Section 5 of the Securities Act with respect to ABS informational and computational materials. Unlike the case when corporate equity and debt securities are involved, virtually all material information relating to the ABS issuer is confined to the performance of the asset pool, and that information is freely available to secondary market purchasers through the distribution date statements required in each ABS transaction. The proposed rules further broaden the scope and content of distribution reports. Indeed, even with respect to transactions as to which Exchange Act reporting has ceased, enhanced periodic reporting will no doubt be available with respect to ABS, because transaction participants will inevitably require distribution date statements to contain all of the information required by Form 10-D in contemplation of a single reporting scheme commencing in the period during which Exchange Act reporting applies. Those periodic distribution date statements are substantial additional loan level asset information also available with respect to most asset-backed securities transactions through issuer or trustee Web sites and third party services, such as Bloomberg. We have been advised that these are the sources of information to which investors routinely look in connection with secondary market trades in ABS, and we believe that the receipt of a market-making prospectus is generally not viewed by investors as significant. The end result of the market-making prospectus delivery requirement is merely additional expense for certain issuers with affiliated servicers and broker-dealers and competitive disadvantage in the execution of secondary market trades in those securities by the broker-dealer affiliates. If nothing else, the additional compliance layer of producing a market-making prospectus for secondary market investors who are indifferent to receiving one inevitably must result in some decrease in liquidity of the related securities without offsetting protection to investors. In the unlikely event that a broker-dealer, by virtue of its affiliation with a servicer, should in fact come into possession of material non-public information about the asset pool, we believe that the antifraud provisions of Exchange Act Rule 10b-5 provide adequate protection for prospective investors.

In view of the foregoing, we respectfully request that the Commission provide in the final rules that broker-dealers affiliated with the issuer or the servicer of an ABS transaction need not deliver a market-making prospectus in connection with secondary market sales of the ABS or, in the alternative, that a market-making prospectus need not be delivered if the transaction documents provide, and the prospectus for the ABS discloses, that distribution date statements containing the information required in Item 1119 of Regulation AB are available to investors upon request and without charge from a designated transaction party (which may include such party's Web site).

While we believe that a balancing of the benefits and burdens of compliance and a realistic examination of investor expectation both support elimination of the market-making prospectus requirement, in the event that the Commission chooses not to do so, we urge that the requirement not be expanded, as contemplated by footnote 86, beyond current market practice, and that the Commission formally acknowledge that a prospectus satisfies the requirements for a market-making prospectus as to pool asset disclosure if the issuer is filing Exchange Act reports with respect to the asset pool that are incorporated by reference into the prospectus.

V. TRANSITION PERIODS

A. Executive Summary

The following is a summary of the key points we raise with respect to transition periods for implementation of the proposals in the Release:

- Compliance with the proposed rules will require substantial changes in agreements governing existing transactions and the cooperation of unaffiliated third parties. We therefore strongly recommend grandfathering transactions that commenced prior to 12 months after the publication date of the final rules.

- Even for takedowns off existing shelf registration statements and new shelf registration statements, the proposed changes are so substantial that we propose that the appropriate transition period be one year after the publication date of the final rules.

B. General

In the Release, the Commission posed the following questions regarding implementation and transition periods:

*Should we provide a transition period with respect to the implementation of all or some portion of our proposals? If so, what proposals should be subject to any transition period and would be an appropriate length for any transition period (*e.g.*, 3 months, 6 months)?*

Should there be different transition periods for different proposals? In particular, should there be an extended transition period for the proposed assessment and attestation of compliance with servicing criteria?

Are there special considerations we should take into account in providing a transition period with respect to certain issuers, such as foreign ABS, certain asset classes or existing transactions? Should transactions before a certain point be "grandfathered" from the proposals? How should any remaining capacity under existing shelf registration statements be treated?

Because so many of the proposed changes go beyond mere codification of existing practices, we strongly believe that transition periods are needed with respect to all of the proposals and that the length of time suggested by the Commission in its questions is in most cases far too short. The proposed rules will change many of the ways in which issuers are required to meet their disclosure obligations under the Securities Act and the Exchange Act and, more importantly, require them to obtain significant amounts of information from parties that have not necessarily provided such information in the past and are currently under no obligation to do so.

While compliance with the final version of the rules in new transactions will obviously be necessary for parties that wish to continue to be participants in, or derive benefits from, the ABS market, we believe that negotiating the terms and conditions under which these parties will provide the newly required information (and the cost thereof) for new transactions could take a significant amount of time until market standards and pricing become settled.

The problems faced under existing transactions, where the only bargaining power an issuer has is its threat not to do any future business with a recalcitrant service provider from whom it must now seek to obtain information that the service provider is not currently obligated to give, are even more severe. While the large players on the issuer side may well have sufficient market power to be able to fend for themselves and deal with these problems, the smaller issuer that has to deal with a larger service provider for whom it is but a tiny portion of that service provider's business may have little ability to negotiate required changes on fair terms or at a fair price.

Nowhere in the Release nor in the proposed rules does the Commission address the allocation of the additional costs of complying with the proposed rules. For transactions governed or to be governed by agreements currently in place, this is a serious concern since no one is currently obligated to pay these costs under the terms of the applicable agreements. In most transactions, there would be no funds available to pay these costs that are not already promised to investors, except in those transactions in which a residual class of interests exists. While the residual investors agreed to take on a high degree of risk (such as prepayment and interest rate risks), they did not agree to absorb additional expenses involved in meeting expanded reporting requirements. Nor did servicers and trustees agree to take on these additional duties or expenses for the fees that were negotiated for their limited and well-defined duties. While originators and depositors will need to deal with these costs prospectively, they will typically have no liability for these costs under the documentation governing existing transactions, leaving unresolved the question of who will pay the cost of any new reporting requirements.

Indeed, the concept of going back to originators or depositors of transactions seeking funds to pay additional costs generated by the proposed rules would be anathema to the rating agencies that gave these transactions ratings based on the notion that the financial integrity of the transactions was completely independent from the financial condition of the originator or depositor.

Because the ability to use Rule 415 is so critical to market access for most ABS issuers, any change that might jeopardize such access (even temporarily) for an issuer that is making every effort in good faith to comply with the requirements for use of Rule 415 should be made only with the most careful consideration of its consequences. Unless, as we urge it to do in

Section I.C.1(a) above, the Commission retains the existing right of issuers offering "mortgage-related securities" to use Rule 415, ability to use Rule 415 will depend in all cases upon meeting all of the Form S-3 eligibility requirements, including being current in all Exchange Act reporting requirements.

C. Grandfathering Existing Transactions

Although existing transactions would not be subject to the proposed disclosure requirements, the Exchange Act proposals would apply commencing with fiscal years ending six months after the effective date of the final rules. As further discussed in Section IV.D. above, this could lead to issuers having expanded reporting obligations with respect to matters for which they are dependent upon third parties that are not contractually obligated to cooperate with them or to provide the required information. Without this information, which it has no way to compel others to provide, an issuer will have a difficult time complying with its expanded reporting obligations.

We note that many issuers will be eligible to cease reporting under the Exchange Act at the earliest possible date permitted by their undertaking to report under Section 15(d), since the typical ABS issuer will have far fewer than 300 record holders of its securities, and there are virtually no ABS issuers subject to reporting requirements under Section 12(b) or 12(g). However, many issuers may continue to have market making prospectus obligations. As further discussed in Section IV.J.1. above (where we recommend eliminating this market making prospectus obligation), it would be particularly burdensome and unfair to impose these requirements on these issuers without, in our view, any meaningful investor protection benefit. Therefore, we propose grandfathering transactions that close within 12 months after publication of the final rules. Issuers that continue to be required to file Exchange Act reports on grandfathered transactions should report under existing standards, rather than under the proposed expanded requirements.

D. Existing Registration Statements

We believe strongly that a three-month transition period is not sufficiently long to effect the amendments to existing registration statements necessary to permit continued takedowns. Depending on whether grandfathering provisions are adopted, registrants may have to amend their existing registration statements to bring them into compliance with the proposed rules, as well as in many cases having to amend their underlying agreements with service providers to require the service providers to deliver the information necessary to enable such registrants to comply with the new rules both under the Securities Act and on an ongoing basis under the Exchange Act.

Amending existing contractual relationships to bring them into compliance with the new rules could, in some cases, take longer than creating new contractual relationships with new counterparties.

A registrant that had an existing effective registration statement could suddenly find itself shut out of the market if the transition period were not sufficiently long to enable it to get into compliance with the new rules, an even worse case than that of the registrant under a new filing whose access to the market is merely delayed. For this reason, we also urge the Commission to grant a sufficiently long transition period for use of remaining capacity under existing registration statements. We suggest one year from the date the rules are finalized as an appropriate period for effective registration statements.

An additional transitional issue is raised by the elimination of Form S-11 for ABS backed by real estate assets. Will issuers having an effective Form S-11 registration statement meeting the requirements for continuous or delayed offerings under Rule 415(a)(vii) be required to amend their registration statements to convert to Form S-3? We believe that these issuers should be permitted to continue using existing capacity under their registration statements for as long as two years from the publication date of the proposed rules if they are forced to switch their filings from Form S-11 to Form S-3, a period consistent with that applicable to certain shelf registration statements under Rule 415(a)(2).

The treatment under the transition rules of master trust transactions, such as ABS backed by credit card receivables, raises some difficult issues. The typical master trust issues multiple series of ABS under the same documentation and backed by the same pool of assets, unlike other issuers that typically issue only one series of ABS backed by a discrete pool of assets and governed by documentation that applies to that transaction only. Because of the master trust's unique structure, the master trust issuer's prior transactions are intertwined with its new transactions, and many changes that apply to new transactions will of necessity have to apply to the prior transactions backed by the same pool of assets and governed by the same documentation.

For this reason, a master trust issuer that files a new registration statement will likely be required to comply with the current rules for new filings with respect to its prior transactions as soon as the rules become effective for new transactions. This is a result that may impose hardship on master trust issuers without any corresponding increase in investor protection.

Investors in prior ABS transactions benefit from the continued ability of the issuer to renew its receivables pools under master trust structures by adding receivables to the transactions. On the other hand, investors in new transactions benefit from the seasoning of the assets backing prior transactions that are included as part of the assets backing new transactions.

In order to accommodate the particular needs of issuers under master trust transactions, we recommend that they also be allowed to postpone compliance with those portions of the disclosure requirements that require cooperation of third parties until 12 months after the publication date of the proposed rules.

E. <u>New Registration Statements</u>

We believe that the scope of the changes to existing market practices that would be made by the proposed rules, all of which have been discussed in detail in the preceding sections of this letter, are so significant that it is unreasonable to expect market participants to adjust (in a manner that in some cases will be seen as radical) existing practices (some of which have developed over a period in excess of 20 years) in a very compressed time period, such as the three-month transition period suggested in the Commission's question.

In the traditional corporate securities markets, the only entities whose cooperation is required in order to enable an issuer to comply with any changes to virtually all of the Securities Act and Exchange Act disclosure requirements are the issuer, its independent registered public accounting firm and its legal counsel.

By contrast, in virtually every transaction in the ABS market a large number of entities are linked together through complex contractual arrangements (which may include asset originators, master servicers, servicers, special servicers, administrators, credit enhancers, liquidity providers, derivative counterparties, trustees, legal counsel for each of these parties and registered public accounting firms) both to enable the transaction to occur at all and to provide ongoing reporting to investors as required under the transaction documents and under the Exchange Act. To effect changes in these relationships in order to comply with a new disclosure regime will take much longer than what would reasonably be required for comparable changes to reporting obligations in the traditional corporate securities markets.

Clearly, the changes under the Securities Act as to form of the registration statement and disclosure about the issuing entity and the terms of the transaction fall into the category of items as to which the transition period can be relatively short. In these cases and other cases where the ability to comply is not dependent upon obtaining cooperation of third parties, a shorter compliance period for new registration statements would be perfectly appropriate, and we would concur with the Commission's suggestion of a three-month transition period.

The proposed changes in disclosure requirements as to underlying assets, the origination process, static pool information and transaction participants will require significantly longer than six months to implement, in particular because so much of this information must be obtained from third parties. For this reason, and because of the need in certain cases to re-negotiate existing and long-standing contractual relationships and to develop new market standards for these relationships, we propose that issuers offering ABS under new registration statements be given a minimum of 12 months before being required to be in compliance with the portions of the proposed rules under which agreements with or obtaining information from third parties is needed to permit compliance. This 12-month transition period would begin on the date on which the new rules are finalized, so that an issuer on the date the rules are published in final form would have the full 12-month period in which to comply, while, for example, an issuer whose registration statement became effective nine months after that date would need to be in compliance within three months after effectiveness. We believe that the magnitude of the task facing issuers justifies the long transition period.

VI. GENERAL REQUEST FOR COMMENT

A. <u>Executive Summary</u>

Since the Commission has decided to undertake comprehensive reform of the laws applicable to ABS, we propose the following changes:

- We propose changes to Rule 3a-7 under the Investment Company Act that correspond to proposed changes to the definition of "asset-backed security" as well as to the ratings of ABS that could be registered on Form S-3.
- We propose that the Commission adopt a provision in the final rules defining the term "earning statement" for ABS issuers for purposes of Section 11(a) of the Securities Act.
- We propose that the final rules contain provisions relaxing certain requirements under the Trust Indenture Act not relevant to ABS issuers.

B. <u>General</u>

In the Release, the Commission requested and encouraged additional comments regarding:

The proposals that are the subject of th[e] release;

Specific interpretive guidance under the Investment Company Act concerning issues that may arise in connection with asset-backed issuers' compliance with the proposals set forth in th[e] release;

Additional or different changes regarding asset-backed securities; or

Other matters that may have an effect on the proposals contained in th[e] release.

C. <u>Investment Company Act Issues</u>

The proposed rules do not appear to contemplate (other than through inclusion of this topic in the list of general requests for comment) any coordination between the requirements of the proposed rules and those under the Investment Company Act, including in particular Rule 3a-7 thereunder. We believe that harmonization of requirements under the Securities Act and under the Investment Company Act is important to the maintenance of efficient markets, and therefore suggest certain changes to Rule 3a-7. We note that the proposed rules require that, as a condition to being considered an "asset-backed security," neither the depositor nor issuer with respect thereto be an investment company nor become one as a result of the ABS transaction. If the changes we propose to Rule 3a-7 are not made, certain issuers otherwise eligible to take advantage of the more favorable treatment given qualifying ABS transactions will be denied those benefits.

First, if the Commission accepts our recommendation discussed in Section I.C.3. above to allow for the registration on Form S-3 of securities rated below investment grade or not rated, both in initial sales and, even more importantly, in secondary market sales, we believe that corresponding changes should be made to Rule 3a-7 to permit secondary market resales of ABS rated below investment grade to any class of investor, provided that our proposed minimum denomination requirement is observed. We do not believe that the investor protection goals under the Investment Company Act are in any way compromised by adoption of the changes proposed in Section I.C.3.

Second, we propose harmonizing the definition of the term "eligible assets" in Rule 3a-7 with the definition in the proposed rule of the term "asset-backed securities," as modified by the changes suggested in Section I.B. above.

Finally, an additional area of concern for many issuers and underwriters of ABS is the prohibition in Rule 3a-7 of any affiliation between the trustee for an issue of ABS and "the issuer or any person involved in the organization or operation of the issuer . . .". This restriction, to the extent that it prohibits affiliation between an underwriter involved in the formation of an issuer, a typical scenario, and the trustee for an issue of ABS by that issuer, is unduly restrictive. Since enactment of the Trust Indenture Reform Act of 1990 (the "TIRA"), which occurred shortly before adoption of Rule 3a-7 but was not reflected in that Rule, affiliation between the trustee and an underwriter has not been *per se* prohibited in the case of a corporate debt security, where the potential for conflicts of interest is much greater than in the case of ABS.

Since enactment of the TIRA, affiliation between the underwriter and the trustee would result in the trustee's being required to resign in accordance with Section 310(b) of the Trust Indenture Act only if there were a default on the securities and the underwriter affiliated with the trustee for the indenture securities had been an underwriter within one year (reduced from the three-year period in effect prior to adoption of the TIRA) before the date of the default.

Because the duties of a trustee under an ABS issue are much more limited than those of a trustee under a corporate debt issue, we question the utility of continuing the Rule 3a-7 conflict provisions. The trustee's duties are principally to hold title to or a security interest in the underlying assets and to verify that required deposits of collections on the assets are made. We suggest that the trustee conflict provisions in Rule 3a-7 be eliminated entirely. We do not recommend adding a provision for the trustee's resignation similar to that in the Trust Indenture Act because of the substantial cost involved in most cases of transferring title to or security interests in the assets backing the ABS transaction. If, however, the Commission feels that some form of the current Rule 3a-7 restrictions must be retained outside of the area of debt transactions where the Trust Indenture Act would otherwise be applicable, we suggest that these restrictions be loosened to conform to the current provisions of the Trust Indenture Act.

D. Additional or Different Changes

1. Securities Act Section 11 Earning Statements

Under Section 11(a) of the Securities Act, any person attempting to recover under Section 11 for an untrue statement in or omission from a registration statement that acquired a security "after the issuer has made generally available to its security holders an earning statement covering a period of at least 12 months beginning after the effective date of the registration statement" must prove reliance on an untrue statement in the registration statement or reliance on the registration statement without knowledge of an omission. Prior to that time, no such reliance must be shown.

In an effort to take advantage of this burden-shifting provision, underwriters will typically include in their ABS underwriting agreements a requirement that the issuer provide such an earning statement. In the ABS context, however, it is not clear what would in fact meet the requirements of this provision, since ABS issuers do not have the ability to provide a traditional "earning statement."

Accordingly, we urge the Commission to include in the proposed rules a provision defining the term "earning statement" for ABS issuers for purposes of Section 11(a) of the Securities Act. We would propose that the definition provide that an issuer that has met all of its Exchange Act reporting requirements for the 12 months following the effective date of a stand-alone (non-shelf) registration statement or for the 12 months following the date of filing of a prospectus supplement under Rule 424(b)(2) or (5) for an offering under Rule 415 be deemed to have made generally available to its security holders the required earning statement.

2. Trust Indenture Act Issues

If the Commission wants to engage in a comprehensive review of all laws under its jurisdiction that are applicable to ABS, which we believe is entirely appropriate in connection with the major effort involved in codification of ABS disclosure standards as contemplated by the proposed rules, there are some issues arising under the Trust Indenture Act that should be addressed. While many ABS are not issued under indentures required to be qualified under the Trust Indenture Act, for those issuers that are required to comply with the Trust Indenture Act the issues set forth below raise concerns.

Read strictly, Section 314(d)(2) of the Trust Indenture Act requires delivery of fair value certificates as to the value of the assets backing the issue from an independent person in connection with issuance of ABS under an indenture qualified under the Trust Indenture Act. Indentures for securities offered under Rule 144A, even though not initially qualified, will typically contain provisions making them eligible to be qualified under the Trust Indenture Act to facilitate registration of the securities offered under Rule 144A pursuant to the holders' registration rights. The Section 314(d)(2) requirement makes no sense in the context of an issue of securities on which the payments depend primarily upon the cash flow from (as opposed to the value of) the underlying assets, such as securities meeting the current and proposed Form S-3 eligibility requirements and the requirements under Rule 3a-7 under the Investment Company Act. Accordingly, under Section 304(d) of the Trust Indenture Act the Commission should exempt these transactions from the requirements of Section 314(d)(2).

Similarly, Sections 314(c) and (d) of the Trust Indenture Act require a number of certificates to be delivered in connection with the release of property from the lien of an indenture qualified, or containing provisions making it eligible to be qualified, under the Trust Indenture Act. Existing practice in the ABS market is that these certificates are not required under Section 314 in connection with monthly distributions, although one could make an argument based upon a strict reading of the Trust Indenture Act that they are. Again, we urge the Commission to address this issue through the Section 304(d) exemptive process.

Section 314(b)(2) of the Trust Indenture Act requires that no less frequently than annually an issuer under an indenture qualified under the Trust Indenture Act deliver to the indenture trustee an opinion of counsel as to the continued perfection of the lien of the indenture on the assets pledged to secure the securities issued under the indenture. Under the Uniform Commercial Code as adopted in all 50 states and the District of Columbia ("UCC") liens that are perfected with respect to financial assets by filing of a UCC financing statement will last for five years absent changes in an obligor's state of organization or name. Lien perfection will not be affected at all by such events if perfection is by possession of tangible evidence of the underlying assets, such as mortgage notes, leases or "chattel paper" (*e.g.*, a combined note and security agreement covering an automobile) or by control of securities held in accounts with securities firms or banks or cash held in deposit accounts with banks. Therefore, we would propose that this requirement be relaxed so that delivery of an opinion with respect to assets backing ABS having an investment-grade rating is mandated only when required by the terms of the indenture, irrespective of what Section 314(b)(2) would require. The rating agencies will require opinions to be delivered when needed, more frequently than annually when events require the taking of action under the UCC and less frequently when action under the UCC is not necessary.

3. Repackaging Transactions

Some ABS involve the "repackaging" of securities of other issuers through deposit of those securities into a trust that then issues securities representing interests in the underlying assets of the trust. In most cases the issuers of the underlying securities will be "significant obligors" under the proposed rules. The requirement under current Commission practice and the requirement under the proposed rules is that the registrant include an undertaking in its registration statement that if Exchange Act disclosure is no longer available for the issuer of an underlying security the registrant will either provide the disclosure itself (not a realistic option in most cases) or terminate the transaction or the portion thereof related to the issuer for which Exchange Act disclosure is no longer available. We believe that this requirement actually works against the interests of investors.

There have been several issuers in the past six months who have elected to stop reporting (generally subsidiaries of reporting companies) as permitted under the Commission's rules, with the result that repackaging trusts holding their securities have been forced to sell the underlying securities and terminate the related transaction — often forcing the investors in their securities to take a loss. By contrast, other investors who held the underlying securities directly had the option of continuing to hold, even though they would no longer receive Exchange Act reports. We suggest that investors in the repackaging transaction should not effectively be forced to sell at a time when they may wish to continue to hold the economic equivalent of a position in the underlying securities. If an underlying issuer ceases to be a reporting company, the investors can always elect to sell based upon their own assessment of the impact of the termination of Exchange Act reporting. If this is not a serious concern, investors should have the ability to continue to hold their investment.

We believe that if an issuer of underlying securities no longer has an Exchange Act reporting obligation, the repackaging trust also should not have any further reporting obligation with respect to such issuer's securities — not that the trust has to terminate. Also, the repackaging trust's failure to provide required information should not disqualify the depositor or the sponsor from ability to use Form S-3 if the information about the underlying securities is not delivered by the issuer(s) on a timely basis.

We suggest that the issuer in a repackaging transaction be required to verify that the underlying securities are those of reporting companies that have satisfied their reporting obligations for the immediately preceding 12-month period (subject to a "known to the issuer" standard in the case of any failures to file Form 8-Ks or make any disclosures required to be made on that Form, since the requirement to file a Form 8-K is event-driven rather than calendar-driven). The repackaging trust should then have to report all distributions it receives and any other material information it receives from the underlying issuers. But beyond that, if an underlying security issuer fails to meet its reporting obligations (or is legally relieved from meeting them), that event should have no effect on the repackaging trust or its sponsor or the depositor.

* * *

We applaud the Commission and its Staff for the massive effort put into the Release, but respectfully reiterate our concern that this project would benefit from ample opportunity for additional discussion of modifications to the proposals in the Release. We feel strongly that this process will result both in the production by the Commission of a better final product and more immediate acceptance of the final rules in the ABS market. Failure to achieve this result could have the unfortunate effect of driving issuers to the private markets, which would harm all of the participants in the ABS market.

* * *

We hope these comments are helpful to the Commission and the Staff. Members of the Committee would be happy to engage in further dialogue and bring additional market participants to any discussion of these issues.

Respectfully submitted,

/s/ Dixie Johnson
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Committee on Federal Regulation of Securities

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[1] References to "we," "our" and "us" refer to the Committee.

[2] *See* Shelf Registration, Securities Act Release No. 33-6499; 34-20384; 35-23122 (Nov. 17, 1983).

[3] SEC, Division of Corporation Finance, Manual of Publicly Available Telephone Interpretations, Interpretation D.9 (July 1997).

[4] Pub. L. 98-440.

[5] *See* SEC, Division of Corporation Finance, Revised Statement: Compliance by Asset-Backed Issuers with Exchange Act Rules 13a-14 and 15d-14 (Feb. 21, 2003).

[6] Prospectus Delivery; Securities Transactions Settlement, Securities Act Release No. 33-7168; 34-35705; IC-210161 (May 11, 1995).

[7] *See* SEC, Division of Corporation Finance, Current Issues and Rulemaking Projects (Nov. 14, 2000).

[8] *See* Revised Statement, note 5 above.

[9] *See* Manual of Publicly Available Telephone Interpretations, note 3 above, Interpretation H.72.

[10] *See* Prospectus Delivery; Securities Transactions Settlement, Securities Act Release No. 33-7168; 34-35705; IC-210161 (May 11, 1995).

[11] As discussed above in I.B.2., we have requested clarification from the Commission on the statement in footnote 63 that series trusts would not constitute passive issuing entities.

[12] If SUBI interests are not asset-backed securities, it raises the question of the disclosure regime applicable to such securities if they were registered along with the primary ABS on a Form S-1.

[13] *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[14] SEC No-Action Letter (Feb. 17, 1995). *Public Securities Association* provides for Series Term Sheets that include "similar information relating to the proposed structure of the offering" and "similar descriptive information relating to the structure of the offering," which have been construed to date to permit inclusion in a Series Term Sheet of information of the type typically included in a final ABS prospectus.

[15] In some, but not all, transactions the servicer may be an affiliate of the depositor.