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

Our ref : ICM:905094.1

20 July 2004

Ladies and Gentlemen:

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

Allen & Overy LLP welcomes the opportunity to comment on the proposed rules set out in Release Nos. 33-8419 and 34-49644 (the **proposed rules**), in which the Securities and Exchange Commission (the **Commission**) solicited comment on the proposed rules governing the registration, disclosure, and reporting requirements for asset-backed securities (**ABS**).

Allen & Overy frequently acts as counsel to originators, underwriters and other participants in registered United Kingdom (**UK**) residential mortgage-backed securities (**RMBS**) transactions. As you are aware, these UK transactions are among the largest registered ABS offerings by foreign private issuers. Although the views expressed in this letter are our own, our comments have been informed by discussions with various participants in these transactions.

In general, we support and applaud the Commission's efforts to clarify and streamline the existing requirements for filings involving ABS under the Securities Act of 1933, as amended (the **Securities Act**) and the Securities Exchange Act of 1934, as amended (the **Exchange Act**). Preparing such a broad and complex set of proposed regulations clearly required great effort and careful consideration, and we appreciate the thoughtful and detailed product that the Commission has released.

In this letter, we indicate – from the vantage point of foreign private issuers in general and UK RMBS transactions in particular – instances where the proposed rules may benefit from clarification or adaptation, or where the proposed rules may unnecessarily or excessively burden such issuers and transactions.

**Background**

It may be useful to describe here by way of background the typical UK RMBS master trust transaction, as several of our comments relate to the particular characteristics of this structure. In the typical UK RMBS master trust structure, a mortgage originator transfers an initial pool of mortgages to a trustee (the **mortgages trustee**), who in turn issues two interests in the resulting trust: an interest held by the originator and an interest held by a special purpose intermediate entity (the **funding entity**). In connection with each issuance of ABS after the initial one, further mortgages may be transferred by the originator to the mortgages trustee. For each issuance of ABS, a newly formed special purpose company (each, an **issuing entity**) sells ABS to investors and lends the proceeds to the funding entity by way of an intercompany loan. The funding entity in turn transfers the proceeds of the inter-company loan to the originator in consideration for an increase in the funding entity's share of the trust property. The cashflow from the pool of mortgages comprising the trust property is distributed by the mortgages trustee to the originator and the funding entity in accordance with their interests in the trust property. The funding entity uses the funds thus received to repay the various inter-company loans from various issuing entities, which in turn use these repayments to make payments to investors on their ABS.

Accordingly, each issuing entity is a different company, even though the ABS of each issuing entity are supported by the cashflow from a single pool of assets. As a matter of past practice, the Commission has required the particular issuing entity, the funding entity and the mortgages trustee to be the registrants in connection with each registration statement for a UK RMBS master trust issuance (registering, respectively, the ABS, the relevant inter-company loan and the interests in the mortgages trust).

## A. REGISTRATION

### 1. Availability of shelf registration on Form S-3

The proposed amendments to the General Instructions for Form S-3 would allow the use of Form S-3 by qualified issuers of ABS, making shelf registration available to foreign private issuers who meet the general requirements for use of that form. We support this change. However, it is not clear from the proposed rules that UK mortgage master trusts would be able to avail themselves of shelf registration because, as described above, in the typical UK mortgage master trust structure the issuing entity (and thus one of the registrants) will vary for each issuance.

We would suggest that shelf-registration under Form S-3 should be available in connection with master trust structures where the issuing entity is a special purpose vehicle that varies from deal to deal but the same (albeit growing) pool of assets supports the ABS of the various issuing entities. This should be confirmed in an explanatory note to the General Instructions for Form S-3.

In US-style master trusts, the trust comprised by the assets generally issues the various series of ABS, while in UK-style master trusts a new issuing entity (which is a special purpose vehicle) is used for each issuance. Otherwise, the fundamentals of the structure are similar: that the same (albeit growing) pool of assets supports various series of ABS. In UK-style master trusts, there is no material difference among the various issuing entities, as they are merely structural devices. Furthermore, two of the three registrants (namely the mortgages trustee and the funding entity) remain the same for each transaction, while the third is a special purpose vehicle. Hence, given that the Commission has taken the view that foreign and domestic registrants should have access to Form S-3 on an equal footing (a view which we endorse), there is no fundamental reason why Form S-3 should not be available in UK-style master trusts as it is with US-style master trusts.

### 2. Separate prospectus for each asset class and country of origin

The proposed General Instruction to Form S–3 would require that a separate base prospectus and prospectus supplement be used for each asset class and country of asset origin.

We would suggest that so long as all material information relating to any asset classes and/or countries of origin is included and clearly presented, a single prospectus and prospectus supplement should be sufficient, irrespective of the number of asset classes or countries of asset origin.

Offerings of ABS supported by European assets are often multi-jurisdictional in nature, comprising assets originated in different countries. This is anticipated to increase in the future. (Though these offerings are typically not registered, they may increasingly be in the future.) As currently proposed, however, the requirement for separate base prospectuses may act as a significant disincentive to registration. Furthermore, as ABS techniques evolve, it is certainly conceivable that a single structure may include different asset classes. As long as all material information relating to any asset classes and/or countries of origin is provided to investors in a coherent and clear manner, investors are not prejudiced by whether such information is presented in a single or multiple documents. Indeed, it may aid presentation and coherence to present all such information in a single prospectus and prospectus supplement. The Commission's approach to disclosure has long been to require that all information material to an investment decision is presented, leaving the manner of presentation to transaction parties. There is no particular reason to depart from this approach in this case. Indeed, requiring multiple prospectuses and prospectus supplements may hinder the development of more sophisticated, multi-jurisdictional and multi-asset structures, or at least deprive US investors of the opportunity to invest in such securities.

**3. Non-performing/delinquent assets in the original asset pool**

The proposed rules provide in items (iii) and (iv) of the definition of "asset-backed security" that no non-performing assets may be "*part of the original asset pool at the time of issuance of the asset-backed securities*" and that delinquent assets may not "*constitute 50% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities*". For shelf registrations, the maximum permissible percentage of delinquent assets is 20%.

We request clarification that in the context of a master trust structure, these requirements are measured as of the date of conveyance of each group of assets to the trust, and as a percentage of the assets being conveyed as of such conveyance date, as opposed to being measured for the entire trust as of the date of each conveyance.

In a master trust, assets are conveyed to the trust initially in connection with the first issuance of ABS supported by the trust assets, and generally again in connection with each additional issuance of such ABS. The originator of the assets will give representations and warranties as to the assets (such as a representation that they are performing or that not more than a given percentage are delinquent) as of their date of conveyance that require substitution of assets that are not in compliance with the warranties. Hence, before conveyance the risk of the assets lies with the originator but once assets are conveyed to the trust their credit risk lies with investors, and delinquencies and defaults on the assets affect the ABS issued. Inevitably, some assets will become delinquent or non-performing after conveyance, but this should not prevent further series from being issued from a master trust. Investors in a subsequent series of ABS backed by a master trust accept this structural aspect of master trusts.

It is also worth noting that a bank originator would not be able to "sanitize" a master trust by removing non-performing and delinquent assets after conveyance as under applicable regulations in various jurisdictions this would amount to impermissible credit support and affect the regulatory and accounting treatment of the transfer of assets.

## 4. Definitions of "depositor" and "sponsor"

The proposed rules provide definitions for "depositor" and "sponsor" as follows:

> *Depositor means the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity. For asset-backed securities transactions where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term depositor refers to the sponsor. For asset-backed securities transactions where the person transferring or selling the pool assets is itself a trust, the depositor of the issuing entity is the depositor of that trust.*
>
> *Sponsor means the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.*

Based on these definitions, the identity of the depositor and sponsor in a UK mortgage master trust is somewhat unclear, because the issuing entity does not hold the pool assets as both definitions seem to contemplate. As discussed earlier, the pool assets are held by the mortgages trustee, while the issuing entity's assets consist of loans extended to the funding entity. However, although the mortgages trustee holds the pool assets, the economic interest in the pool assets is vested in the funding entity and the originator in accordance with their respective shares in the mortgages trust.

We would suggest clarifying that the depositor in a master trust structure is the funding entity (who owns the main economic interest) or the mortgages trustee. In a UK RMBS master trust, the issuing entity does not hold the pool assets, but rather holds an inter-company loan to the funding entity, which in turn owns a beneficial interest in a mortgages trust. Therefore, the funding entity and the mortgages trustee create the instruments that generate the cashflow which supports the ABS, and hence one or the other should be considered the depositor. We would also suggest clarifying that the sponsor in a master trust structure is the originator.

## 5. Signatories of registration statement

Item 1105 of the proposed rules would require the registration statement to be signed by the depositor, the depositor's principal executive officer or officers, principal financial officer and controller or principal accounting officer, and by at least a majority of the depositor's board of directors or persons performing similar functions.

We have no comment on this item if the depositor in a master trust would be considered to be the funding entity or the mortgages trustee, as argued above. However, if the originator is deemed to be the depositor, then we would respectfully suggest that the originator should not be required to sign the registration statement.

The nature of ABS is different from corporate debt, where it makes sense for the debt issuer, as the credit behind the securities, to sign the registration statement. However, with ABS the originator's involvement is much narrower, and generally limited to having originated the asset pool in accordance with its underwriting criteria and servicing it on an ongoing basis under a contractual arrangement; the relevant credit is not the originator but the assets. Hence, the same logic does not apply in ABS transactions as in corporate debt. In addition, this requirement would represent a change in practice from what the Commission has heretofore required in ABS issuances, and would necessitate additional review of the registration statement by the originator (before the designated signatories were comfortable with signing it), while there is no reason to believe that such a change in practice would benefit investors. Other than those parts of the disclosure relating to underwriting and servicing, the balance of the registration statement in ABS issues tends not to relate to the originator but rather consists of descriptions of structure, statistics on the asset pool and other information not specific to the originator. It is not clear why the originator's principal executive officer, principal financial officer, controller or principal accounting officer and a majority of its board should need to review an ABS registration statement. This change would require originators of UK RMBS to alter fundamentally their risk analysis of registered transactions, and we are concerned that such originators would be dissuaded from participating in registered transactions in the future if the proposed rule is not clarified.

**6. Other definitional changes**

Various of the definitions in the proposed rules generally do not contemplate structures where the issuing entity does not hold the pool assets, but instead holds an instrument (e.g., a trust interest, a loan or a swap) representing an interest in the cashflow from the pool assets. For example, in a UK-style RMBS master trust, the pool assets (i.e., the mortgages) are not held by the issuer of the ABS, but rather by a mortgages trustee, which issues a beneficiary interest to a funding entity, which in turn takes an inter-company loan from the ABS issuer. Receipts on the asset pool are used by the mortgages trustee to make payments on the beneficiary interest, receipts on the beneficiary interest are used by the funding entity to make payments on the inter-company loan and receipts on the inter-company loan are used by the ABS issuer to make payments on the ABS.

There are various ways to broaden the relevant definitions, for example by adding the wording in bold or similar wording:

> In the definition of "issuing entity" in Item 1101(f): *Issuing entity means the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets* ***or an economic interest therein*** *and in whose name the asset-backed securities supported or serviced* ***directly or indirectly*** *by the pool assets are issued.*
>
> In the definition of "asset-backed security" in Item 1101(c)(2)(ii): *The activities of the issuing entity for the asset-backed securities are limited to passively owning or holding the pool of assets* ***or an economic interest therein****, issuing the asset-backed securities supported or serviced* ***directly or indirectly*** *by those assets, and other activities reasonably incidental thereto.*

We also note that in the definition of "non-performing" in Item 1101(g) the words "one payment past due" by themselves leave open the possibility of full or partial delinquency. Since we think the intent is to refer to delinquency by a full payment, we would suggest clarification by adding the words in bold: *A pool asset that is more than one* ***full periodic*** *payment past due* ***on a contractual basis*** *cannot be characterized as not non-performing if only partial payment on the total past due amount had been made unless the obligor had contractually agreed to restructure the obligation, such as part of a workout plan.*

Finally, we note that a definition of "pool assets" in the proposed rules would be helpful.

## B. DISCLOSURE

### 1. Local legal and regulatory regime

Item 1100(e) of the proposed rules requires that the registration statement describe "*any pertinent governmental legal or regulatory or administrative matters and any pertinent tax matters, exchange controls, currency restrictions or other economic, fiscal, monetary or potential factors that could materially affect payments on the performance of, or other matters relating to, the assets contained in the pool or the asset-backed securities*".

However, the proposing release at page 26665 states that, "*We would expect that at the time of filing, the registration statement would include fully developed disclosure clearly articulating the material differences and effects of the home country legal and regulatory regime*."

We request clarification that the additional statement in the proposing release relating to material differences does not expand the scope of what is proposed to be required under Item 1100(e), i.e., that there is no specific requirement for material differences to be discussed so long as Item 1100(e) is complied with.

Item 1100(e) is broadly enough drafted to cover all material legal and regulatory matters. If these are presented in a registration statement, there should be no need for a statement of "*material differences and effects of the home country legal and regulatory regime*" if the comparison itself does not add anything material to the disclosure beyond what Item 1100(e) requires.

### 2. Geographic factors

Item 1110(b)(14) of the proposed rules states:

"*If 10% or more of the pool assets are or will be located in any one state or other geographic region, provide the following information:*

*(i) Any economic or other factors specific to such state or region that may materially impact the pool assets or pool asset cash flows.*

*(ii) If material, statistical data referred to in this Item 1110(b) for each such geographic concentration.*"

We request clarification of the term "geographic region" both inside and outside the United States (for example, whether in a multi-jurisdictional European transaction, it relates to countries or regions within countries). We also respectfully request that the Commission delete any specified threshold for geographic concentration or at least raise the specified threshold from 10% to 30%. Finally, we respectfully request that the Commission delete item (ii) requiring separate statistical data for each geographic concentration, or raise the threshold for providing such information to 50%.

The term "geographic region" is somewhat malleable. For example, there are nine economic regions in the United Kingdom generally adopted by UK mortgage originators in their RMBS offering documents, but there are variances in each originator's definition. Because there are relatively few regions, it is not atypical to have five or more 10%+ concentrations. In the US, by contrast, asset pool statistical data are broken down by state, usually resulting in fewer geographic concentrations (say, California and New York). (Of course, even in the United States there is an interpretive issue because various smaller state concentrations, say in the South, could be aggregated to a 10%+ regional, rather than state, concentration.)

In light of this, specifying a percentage above which a geographic concentration exists is an overly broad and unnecessarily rigid approach which may result in additional, but not material, information being included in a registration statement. Specifying a threshold of 30% would limit the additional disclosure to at most three, but more likely one, geographic concentration.

Providing separate, extensive statistical data (of the sort set out in Item 1110(b)) for each 10%+ geographic concentration is potentially quite cumbersome, both in terms of assembling the data for review to decide on materiality, and in terms of preparing the data for inclusion in the registration statement and comforting by the accountants. We note that the general unavailability of such data in the past has apparently not prejudiced investors or caused concern that any material information was missing from registration statements (the Commission has not requested such data in previous UK RMBS registered transactions), so it is not clear that any real benefit would result from now providing it. Alternatively, by raising the threshold for providing such information to 50%, the disclosure requirement would be limited to at most one clearly material geographic concentration.

## 3. Obligor credit scores

Item 1110(b)(11) of the proposed rules requires registrants to report, if such information would be a material characteristic of the asset pool, "*ranges of standardized credit scores of obligors and other information regarding obligor credit quality*." Sections 229.1104(e) and 229.1110(c) require the same information, where material, for static pools of assets.

We would respectfully request that the requirement for credit score information be removed, or at least such information be required only in jurisdictions where there is a standardized, national credit scoring system.

In the United Kingdom as in many other jurisdictions, but unlike the United States, no standardized credit scoring system exists. Each mortgage lender uses its own system to analyze creditworthiness, and hence credit scores are not comparable between lenders. Of course, trends in credit scores may be useful information, but these can be disclosed in the narrative without producing statistical tables. In addition, such information is not published anywhere now (including for competitive reasons) and investors are not accustomed to evaluating it in making investment decisions. Furthermore, as a logistical matter, the underlying data may not be available as they are often not transferred to a servicer's electronic files (since they relate only to the initial underwriting decision and are not used thereafter) but are stored in paper form only (in the case of a master trust, possibly scattered in several hundred thousand files). Finally, some lenders re-score obligors from time to time, and may only have the most recent credit score (rather than the initial one) readily accessible, or may not have credit scores available for loans that have paid off (which would affect the ability to do a static pool analysis of credit scores).

## 4. Static pool data

Item 1104(e) of the proposed rules would require disclosure, to the extent material, of the sponsor's static pool data on delinquencies/losses and on the extensive factors listed in Item 1110(b) and (c), for the past three fiscal years and the most recent interim period. It would also require that, if material, such information be provided on a pool basis with respect to prior securitized pools established by the sponsor during this three-year period.

Item 1110(c) of the proposed rules would require disclosure, to the extent material, of the asset pool's static pool data on delinquencies/losses and on the extensive factors listed in Item 1110(b) and (c) (no time frame is specified for this static pool analysis).

We respectfully suggest that the requirements for presentation of static pool data be removed from the proposed rules, and the Commission and investors rely on an issuer's general, long-standing obligation to disclose all material facts in connection with the offered securities. Static pool data is not particularly more meaningful than dynamic pool data for master trusts and hence at the very least should not be required for master trusts.

Of all the issues raised by the proposed rules, the proposed requirement for static pool data has elicited the greatest and most vehement response in our discussions with market participants. In short, our view is that it is an unnecessary novelty and potentially so cumbersome as to dissuade originators from participating in registered transactions in the United States.

Thousands of ABS deals, using simple to complex assets, have been structured and sold to investors without static pool data. A new requirement for static pool data would represent a systematic response to a presumed systematic problem. However, the general breadth and health of the ABS market suggests that there are no systematic deficiencies in information available to investors in making their investment decisions.

In practical terms, we understand that not all originators currently have the information systems capabilities or captured data to produce static pool data. Static pool data for a sponsor's entire portfolio of assets (as opposed to its securitized assets) is particularly cumbersome. In addition, some pools include assets that were acquired by originators through whole loan purchases or acquisitions of third parties, in which case the relevant data may not be available or may have been prepared on a different platform. The proposed requirement is all the more a logistical challenge as the static pool data potentially required is not limited to delinquencies and losses, but may have to be presented, or at least considered, for a large number of other factors. Although such static pool data is to be presented "to the extent material", it may not be possible to assess materiality without actually producing the data. In light of the accepted definition of materiality (what a reasonable investor would consider important in making an investment decision) it is also difficult in this context to measure materiality, given that ABS investors have not to date required, or based their investment decisions on, static pool data. If produced and included in the registration statement, static pool data would have to be the subject of increased financial and legal due diligence (which of course has time and cost implications). Furthermore, if included in the registration statement, the data would have to be comforted by accountants based on appropriate procedures agreed with them. In the case of a master trust, since the static pool data would change with each issuance as the asset pool became seasoned, due diligence and comfort procedures for static pool data on the asset pool would need to be repeated for each transaction. In addition, originators have competitive concerns arising out of the fact that they have not previously made any static pool data public.

It must also be noted that static pool data would be less likely to be meaningful in the context of a master trust supporting various series of ABS (compared to a single pool supporting a single series of ABS), since a master trust includes both newly originated and seasoned assets. This mixture of assets tends to mute the effect of any statistical trends in, for example, delinquencies in groups of assets originated at different intervals. In addition, when the average term of the assets in a master trust is relatively brief, the difference between static pool data and dynamic pool data is reduced. (By way of example, some UK mortgage master trusts have average mortgage terms of under five years.)

Although as a theoretical matter greater information is always better, this must be balanced against the burdens of production of this information and the marginal value of the additional information. If ultimately the requirement for static pool data results in fewer originators seeking to participate in registered issuances, then the US ABS market as a whole will lose something of its robustness.

## 5. Credit enhancement provider disclosure

Item 1113(b)(2)(i) of the proposed rules requires financial data regarding "any entity or group of affiliated entities providing enhancement or other support for the asset-backed securities [which] is liable or contingently liable to provide payments representing 10% or more, but less than 20%, of the cash flow supporting any class of the asset-backed securities" and Item 1113(b)(2)(ii) requires more extensive financial information where any entity or group of affiliated entities is liable or contingently liable to provide payments representing 20% or more of the cash flow supporting any class of the asset-backed securities. The instructions state that these requirements extend very broadly to "counterparties to swap or hedging arrangements, interest rate exchange arrangements, interest rate cap or floor arrangements, currency exchange arrangements or similar arrangements".

We believe that Item 1113(b)(2) should not extend to entities such as ABS interest or currency swap providers providing a cashflow contribution at the specified levels, if the likelihood of a cashflow contribution at such levels is remote. We do not believe that it is appropriate for ABS issuers to be required to include in registration statements, and take liability for, financial information of third parties that fall within the very broad scope of entities providing enhancement under the proposed rules.

ABS interest or currency swaps are generally not intended or structured to provide credit support. Rather, they represent contractual obligations to exchange amounts of money (that are matched at the commencement of the transaction) in relation to pre-determined interest or exchange rates and on pre-determined dates, calibrated to expected receipts and outlays. Such swaps are not dependent on the exercise of any sort of option or other conditional right. In addition, such swaps are specifically structured to mitigate any risk to anticipated transaction cashflows by requiring a high credit rating of the swap provider at the outset and further requiring, upon a swap provider's subsequent downgrade, a transfer, guarantee or provision of collateral for its obligations.

Even assuming that such a swap did constitute credit support, we believe that a loss severity analysis should be performed to determine the putative level of support the swap would provide to the transaction, rather than applying the concept of "contingently liable", which would, under sufficiently extreme and remote circumstances, result in very many swaps having the specified levels of cashflow contribution. Indeed, in prior registered transactions for UK RMBS issuers, the staff of the Commission has agreed with such an approach where a loss severity analysis was performed based on the volatility of the relevant interest or exchange rates and the tenor of the swap stressed against historical default experience for swap counterparties with similar credit ratings.

An increased disclosure burden for swap providers may additionally have the effect of reducing the universe of ABS swap providers willing to provide this more extensive disclosure, a result arguably detrimental to investors.

## 6. Identity of the "trustee"

There is some ambiguity about who constitutes the "trustee" under the proposed rules for disclosure purposes in registration statements and Exchange Act reports. In the United States, the issuing entity is most often a trust with an independent trustee, which collects cashflows on the underlying assets from the servicer and makes payments on the ABS to investors. In UK RMBS master trust transactions, there are in fact a number of trustees: the "mortgages trustee," which we have described above; "security trustees" in respect of the security granted by the issuer and the funding entity; and the "note trustee," which acts as trustee on behalf of the security holders under the relevant trust deed. The proposed rules would require increased disclosure regarding the "trustee" and its roles and responsibilities, including previous experience, material legal proceedings and affiliations. The proposal also states that a prospectus may not disclaim or limit responsibility by the trustee for information regarding the underlying securities. The proposed rules do not define "trustee," so it is unclear which entities would be deemed "trustees" for purposes of the new requirements. The Commission in the proposed rules does contemplate that there may be more than one trustee, for instance a separate trustee for the issuing entity and for the ABS indenture. However, we believe that the roles of the various trustees, and therefore the disclosure regarding those entities, varies significantly, and that the responsibility those entities should take for the information in the prospectus should also vary. We would suggest that this should be reflected in the proposed rule.

## C. COMMUNICATIONS DURING THE OFFERING PROCESS

### 1. Ability of master trust issuers to use informational and computational materials

We believe that the Commission's proposal to codify and clarify existing no-action relief with regard to the use of informational and computational materials during the offering process represents a significant step forward in adapting the US securities laws and regulations to the needs and practices of the ABS market. As proposed, however, Rule 167 of the Securities Act would be available only in an offering of ABS meeting the requirements of General Instruction I.B.5 of Form S-3 and registered under the Securities Act on Form S-3. As noted above, it is our view that shelf registration should be available where multiple issuers issue ABS backed by a single master trust. As a consequence, such issuers should also be permitted to take advantage of the provisions of proposed Rule 167. Informational and computational materials are just as important in such transactions as they are in shelf registrations by a single issuer. If master trust issuers are not permitted to distribute such materials, investors in the United States will be denied access to materials that they may consider important in making an investment decision and will be disadvantaged vis-à-vis investors outside the United States in jurisdictions where such materials may be distributed.

### 2. Ability of registrants on Form S-1 to use informational and computational materials

It is our view that the logic set forth in the previous paragraph applies equally to issuers who are not eligible for registration on Form S-3, but instead register ABS on Form S-1. Again, in such situations it is often the case that distribution of informational and computational materials is not only permitted but is market practice outside the United States. Investors consider such information to be important in making an investment decision regardless of whether the issuer is a shelf registrant. We believe it would be a service to US investors to provide them with access to such materials during an offering. As drafted, proposed Rule 167 would only allow such materials to be used after a registration statement has been declared effective. While this makes sense for a shelf registration, it is clearly unworkable for a registration on Form S-1, where marketing of the securities generally precedes declaration of effectiveness. It would in our view be appropriate in such cases for the issuer to be permitted to distribute such materials after the registration statement has been publicly filed, provided that the materials are filed as set forth in the proposed rules. The materials could also be required in such cases to include a legend to the effect that a registration statement has been filed with respect to the ABS but has not yet been declared effective.

### 3. Ability of master trust issuers to rely on ABS research report safe harbor

Similarly, master trust issuers that are not eligible under the proposed rules to register securities on Form S-3 should be permitted to rely on the proposed ABS research report safe harbor, either by extending Form S-3 eligibility to such issuers or by making the safe harbor available to Form S-1 registrants under certain circumstances. As noted above, when multiple issuers issue ABS backed by the same master trust, it is the assets in the trust and not the SPV issuers on which investors make an investment decision, as the issuers are simply structural devices. In such cases, investors appreciate access to the analysis provided in research reports that may assist them in making an investment decision. It is appropriate for broker-dealers to be permitted to issue research reports in the United States in these circumstances. While we believe that this issue should be resolved for master trust issuers by making Form S-3 available to such issuers, we also believe that it would be appropriate for the proposed rules to enable any registrant on Form S-1 to take advantage of the research report safe harbor where the ABS is backed by the same pool of assets as previously registered ABS and issued by identical issuers under similar terms.

## D. REPORTING

We support the Commission's efforts to bring much-needed clarity to the ongoing reporting requirements of ABS registrants, particularly with regards to non-US ABS issuers, for whom the existing no action letters do not provide sufficient guidance without significant interpretation. We would suggest that the changes to the proposed rules described be implemented to make them more suitable for non-US issuers.

### 1. Who is the "issuer"?

The proposed rules release points out that existing no-action letters have generally allowed the Exchange Act reports of ABS registrants to be filed by either the depositor, the servicer or the trustee. Under the proposed rules, the depositor of the ABS (which may also be the sponsor), acting solely in its capacity as depositor, or an authorized representative of the servicer would be required to sign Exchange Act reports. As noted under paragraph A.4, there is currently some confusion as to which entity constitutes the "depositor" in structures, such as those found in UK RMBS master trust transactions, where there are two or more intermediaries between the sponsor and the issuer, none of whom clearly fits the definition of "depositor" set forth in the proposed rules. Existing practice in such transactions is for each intermediary and the issuer to sign the Exchange Act reports; in the case of UK master trust structures, the mortgages trustee, the funding entity and the issuing entity sign these reports. As with the registration statements, we believe that either the mortgages trustee or the funding entity could be deemed the "depositor" for purposes of the Exchange Act reports. In a master trust transaction, both the mortgages trustee and the funding entity, like the depositor in US transactions, remain the same for all ABS issued by different issuers backed by the same trust. Because the mortgages trustee acts as trustee of the pool of assets backing the ABS, that entity would be best placed to issue Exchange Act reports regarding those assets. We request clarification on this point.

### 2. Third-party disclosure in Form 10-K

As we have noted above in paragraph B.5, we do not believe that it is appropriate for ABS issuers to be required to include in registration statements, and take liability for, financial information of third parties that are deemed to be significant obligors or credit enhancement providers under the proposed rules. This same concern applies to Exchange Act reports. Although the proposed rules would allow registrants to incorporate such information by reference in some cases, this would only apply where the third party is an Exchange Act reporting entity, and registrants would take responsibility for such information. Alternatively, issuers would be able to refer to financial information – without incorporating by reference – in certain circumstances. However, this would only apply with regard to significant obligors that file Exchange Act reports. Providers of credit enhancement would not be covered by this latter provision, and entities that do not file Exchange

Act reports would not be covered by either provision. In the case of many registrants outside the United States, these third parties are not Exchange Act reporting companies, and such financial information may not be readily available. Providing such information on an ongoing basis in Exchange Act reports is even more burdensome. In any event, registrants would not be comfortable taking potential liability on financial information in the preparation of which they have had no involvement. At the very least, the rule should be revised to allow registrants to refer to financial information (without incorporating by reference) of both significant obligors and enhancement providers, and (as noted above in paragraph B.5) the definition of significant enhancement providers should be limited to exclude third parties such as swap providers that could potentially be required to provide payments of more than 20% of cash flows, even though the likelihood of such payments is remote.

**3. Who signs the Section 302 certification?**

As with registration statements and Exchange Act reports, we would request clarification regarding which entity would be required to sign the Sarbanes-Oxley Section 302 certification in the context of a master trust transaction where there is no US-style depositor, but other intermediaries. A clarification of the definition of "depositor" could resolve this problem. Alternatively, the trustee could be permitted to sign the certification, since (as noted above) in UK master trust structures the mortgages trustee, as trustee of the asset pool, is best placed to make this certification. Furthermore, the proposed rules require that the certification be signed by either the senior officer in charge of securitization of the depositor if the depositor is signing the filing, or the senior officer in charge of the servicing function of the servicer if the servicer is signing the filing. In the case of many intermediaries that are special purpose vehicles, there is no "senior officer in charge of securitization"; instead, there are directors. The proposed rules already reflect a variation for ABS issuers from the certification requirements of other registrants, because ABS issuers do not typically have a principal executive officer or principal financial officer. We would propose that this flexibility be extended to accommodate entities that do not have officers, perhaps by requiring that the certification be signed by the senior officer "or the equivalent".

**4. Report of compliance with servicing criteria and accountant's attestation**

Under the current requirements, the Sarbanes-Oxley Section 302 certification by an ABS issuer refers to a "report provided by an independent public accountant, after conducting a review in compliance with the Uniform Single Attestation Program for Mortgage Bankers or similar procedure." This formulation provides a degree of flexibility for issuers outside the United States that are not subject to USAP. However, it is uncertain what constitutes a "similar procedure," especially in other jurisdictions where there is no equivalent to USAP. The proposed rules, rather than referring to USAP, outline new servicing criteria in Item 1120 that expand the USAP criteria and make them more broadly applicable to US and non-US issuers as well as to different asset classes. These new criteria provide some welcome certainty in this area. However, this added certainty comes at the price of decreased flexibility and introduces some conflicts with the requirements and practices of other countries. Some of the proposed servicing standards do not apply to non-US issuers in that they do not have a corresponding concept in their home jurisdiction. For example, Item 1120 (d)(2)(v) requires that each custodial account is maintained at a federally insured depository institution as set forth in the transaction agreements. While the proposed rules provide that "federally insured" with respect to a foreign financial institution would mean that "the laws or regulations of the foreign financial institution's home jurisdiction require the institution to insure its deposits," in some jurisdictions, such as the United Kingdom, there is no equivalent requirement for a financial institution to insure its deposits. Similarly, there is no corresponding concept of an escrow account in the United Kingdom as referred to in Item 1120 (d)(4)(x). Therefore, issuers in the United Kingdom would be unable to comply with these criteria under the regulatory regime in their home country. The proposed rules do provide an exception where such standards do not apply to different asset classes, as long as the inapplicability of the criteria is disclosed in the responsible party's and the registered public accounting firm's reports. We would request clarification that a similar exception could be granted where the criteria do not apply in different jurisdictions, provided that disclosure is provided.

**5. Grandfathering**

The proposed Exchange Act reporting requirements represent a major change for existing transaction participants, and in some cases are not with consistent with their contractual obligations. For example, existing servicing agreements may not require the servicer to comply with the criteria set forth in Item 1120 or to provide an annual compliance statement. The depositor (or equivalent) may not be required to give a Sarbanes-Oxley Section 302 certification, or be in a position to do so. We therefore recommend that such existing entities and structures be "grandfathered" so that they do not need to comply with the new reporting requirements where they conflict with their existing obligations.

**E. OTHER**

**1. Effect on Rule 144A offerings**

Where the Commission has set out specific requirements for registered offerings of securities (e.g., the Securities Act Industry Guides), these requirements are often adopted as *de facto* disclosure standards for offerings exempt from registration pursuant to the resale exemption in Rule 144A under the Securities Act. Hence, we would suggest that the same effects noted above on the market for registered ABS may apply equally to the larger Rule 144A ABS market, and may result in some hesitation by securitizers to enter the Rule 144A market as well. This would be an unwelcome effect on what has become a very significant funding and investment market.

**2. Transition period and timing**

Depending on their final form, compliance with the new aspects of the proposed rules may take considerable time and effort. We respectfully suggest that registrants should accordingly be allowed ample time to digest the rules in final form before being expected to comply. We would suggest that due to the novelty and complexity of the proposed rules, the new burdens they would place on issuers and the importance of stability in the ABS market, the Commission allow a transition period of six to twelve months after promulgation of the final rules.

We would add our voice to those who have suggested that those parts of the proposed rules which add to or modify current practices in the ABS market may well have a substantial impact on what is a significant and essentially healthy market.

In light of the breadth and complexity of the proposal and the impact its implementation would have on the ABS market, we support the Commission's deliberative and measured process in formulating the proposed rules and soliciting comment on them. We would also encourage the Commission to strongly consider re-proposing the rules for further comment if the volume and substance of comments received on the initial proposed rules merit such a course.

We appreciate this opportunity to comment on the proposed rules, and would be happy to discuss any questions the Commission may have about these comments or provide further information the Commission may find helpful in evaluating them.

Please direct any correspondence regarding this comment letter to Christopher Bernard at Christopher.Bernard@AllenOvery.com or the address above.

Kind regards,

**Allen & Overy**