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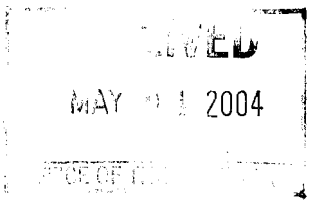
December 4, 2001



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THE BOND MARKET ASSOCIATION

Mr. David B.H. Martin, Director
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Proposals for Reform of Communications Practices under the Securities Act and Securitization Registration and Disclosure Rules

Dear David:

Please find enclosed the following documents:

1. A letter dated November 30, 2001 regarding the Association's proposal for reform of communications practices engaged in by issuers and underwriters of fixed income securities;

2. A proposal dated November 29, 2001 regarding reform of the financial disclosure requirements for statutory business trusts;

3. A proposal dated November 29, 2001 regarding reform of the disclosure requirements for swap counterparties;

4. A proposal dated November 29, 2001 regarding the legal characterization of loan participations when included in securitization offerings;

5. A proposal dated November 29, 2001 regarding "market-making" prospectus delivery requirements;

6. A proposal dated November 2001 regarding the eligibility of foreign securitization issuers to use shelf registration.

Items 2 through 6 above address various issues relevant to the securitization market. These items are submitted separately because each issue can and should be considered discretely.

We look forward to continuing our dialogue with the staff of the Commission on the issues addressed in the documents described above. We would very much appreciate the opportunity to meet with staff of the Commission to further develop the reform proposals that we have made.

We are particularly grateful to you for your willingness to discuss these issues with the Association and its member firms and your openness to our proposals for reform in the fixed income markets.

Very truly yours,

Michel de Konkoly Thege
Vice President and Associate General Counsel

cc: Alan L. Beller, *Cleary, Gottlieb, Steen & Hamilton*
The Association's Corporate Bond and MBS/ABS Securities Legal Advisory Committees
Micah Green, Paul Saltzman, George Miller, John Vogt, Laura Marcano -
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THE BOND MARKET ASSOCIATION

November 30, 2001

Mr. David B.H. Martin, Director
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: Securities Act Reform

Dear Mr. Martin:

The Bond Market Association (the "Association")[1] is pleased to submit this letter to the Securities and Exchange Commission (the "Commission" or "SEC"), outlining our proposal for regulatory reform under the Securities Act of 1933 (the "Securities Act") for a variety of communications practices engaged in by issuers and underwriters of securities. Our proposals relating to communications practices in connection with public offerings are limited to offerings of asset-backed securities ("ABS") and to investment grade fixed income securities of other issuers eligible to register on Form S-3 and F-3.

These proposals build on our prior discussions with you in October 2000, and in follow up discussions. We appreciate your interest in receiving our proposals regarding these issues, and in continuing a mutually beneficial dialogue about these issues with a view toward the goal of meaningful regulatory reform.

As you know, the Commission's efforts towards regulatory reform of the offering process in recent years have primarily focused on the general securities markets, setting aside the special concerns applicable to the ABS markets and, to a lesser extent, the market for fixed income securities of seasoned investment grade issuers. In this letter, our proposals are focused on proposed initiatives that are targeted to address the specific needs and concerns of participants in the capital markets for both ABS as well as investment grade fixed income securities of other issuers eligible to register on Forms S-3 and F-3.

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[1] The Association represents securities firms and banks that underwrite, distribute and trade debt securities, both domestically and internationally. The Association's member firms include underwriters that participate in the vast majority of initial distributions and secondary trading of corporate debt securities, asset-backed securities and other debt securities. More information about the Association is available on the Association's Internet home page at *http://www.bondmarkets.com*.

We believe that substantial changes in the rules governing offering period communications are particularly appropriate given the tremendous advancements and improvements in information technology that have occurred since these rules were first established. Continued growth in the volume, accessibility and sophistication of an ever widening range of communications media and technology have literally saturated the financial markets with information. In turn, these advancements have driven increased investor demand for information, and have fundamentally changed the investment decision-making process. Collectively, these trends suggest that substantial benefits and efficiencies can be achieved for investors and financial markets alike by reducing counterproductive and outdated regulatory restrictions on access to information.

The proposals in this letter are consistent with and build upon concepts and recommendations that the Association has made in a number of prior submissions to the SEC[2].

I. EXECUTIVE SUMMARY

The Association's proposals for reform included in this letter can be summarized as follows:

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[2] Our prior submissions include the following:

- Letter dated June 21, 2000 from the Association to Jonathan G. Katz, Secretary, SEC, responding to SEC release on the use of electronic media
- Letter dated April 28, 2000 from the Association to Jonathan G. Katz, Secretary, SEC, responding to SEC release on Regulation FD
- Letter dated June 30, 1999 from the Association to Jonathan G. Katz, Secretary, SEC, responding to SEC release on the regulation of securities offerings (the "Aircraft Carrier" proposals)
- Letter dated November 8, 1996 from the Association to Jonathan G. Katz, Secretary, SEC, responding to SEC concept release on securities act concepts and their effects on capital
- Letter dated November 5, 1996 from the Association to Brian Lane, Director, Division of Corporate Finance, SEC, responding to staff request for suggestions concerning possible reforms of disclosure and reporting rules for mortgage-backed and asset-backed securities.

Public Offerings. The essence of our proposals in this letter is that for public offerings of ABS and for investment grade fixed income securities of other issuers eligible to register on Forms S-3 and F-3, there is no longer any need to regulate the timing, content, format or manner of use of communications, other than the Section 10 prospectus[3]. We believe that the existing restrictions under the Securities Act unduly impair the free flow of information among market participants, and are no longer justified by concerns that such communications might condition the market for these types of securities. We also believe that the appropriate liability standard and set of remedies for such communications should be limited to Rule 10b-5 under the Securities Exchange Act of 1934 (the "Exchange Act"), and that subjecting such communications to the liability standards and remedies of Sections 11 and 12(a)(2) under the Securities Act would only serve to further inhibit the free flow of information.

- Our specific proposal is that, for public offerings of ABS and for investment grade fixed income securities of other issuers eligible to register on Form S-3 and Form F-3, all communications of any type, by any person, at any time and in any format, other than the Section 10 prospectus, shall be defined to not be a "prospectus" or an "offer" for all purposes under the Securities Act.

- We also propose revising the prospectus delivery requirement for ABS or investment grade fixed income securities of seasoned issuers to permit an "access equals delivery" approach. Access would be deemed to exist when the prospectus is delivered to the underwriter for use in the offering; provided that reasonable steps are taken to make the prospectus available to prospective investors, and the prospectus is filed as and when required under Rule 424.

- We believe that the securities industry's response to the Aircraft Carrier release clearly indicates that market participants do not consider Section 5 relief (that is, the expansion of materials that may be used as "free writing" without being treated as a prospectus under Section 5) to be workable or in any way helpful unless the materials permitted to be used are also exempted from filing requirements and from the remedies available under Section 12(a)(2).

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[3] The term "Section 10 prospectus" is used in this submission in its traditional "term of art" sense to refer to the formal prospectus, that is, the document which purports to be the definitive prospectus meeting all requirements of Section 10 (a) of the Securities Act.

- Non-prospectus communications, to the extent that they are now permitted without violating Section 5 (e.g., research reports under Rule 139 or "free- writing" materials used with a Section 10 prospectus) should be subject only to Rule 10b-5 liability. We believe the expanded category of communications that we propose should also be subject only to Rule 10b-5 liability.

Private Offerings. With respect to private offerings, we propose that the prohibition on general solicitations, and other limitations on the manner of offering, be eliminated. This would permit the unrestricted use or release of any materials (including offering materials), so long as actual sales are limited to eligible purchasers under the applicable exemption from registration.

We have compared our proposals to those included in the submission to the SEC by the ABA Committee on Federal Regulation of Securities, dated August 22, 2001, re Securities Act Reform (the "ABA Proposal"). On the whole, the ABA Proposal advocates an approach to communications issues that is substantially similar to our proposals. The ABA Proposal is effectively identical to our proposals with regard to communications practices for private offerings.[4]

II. PUBLIC OFFERINGS OF ABS AND SEASONED ISSUER FIXED INCOME SECURITIES

This section will discuss the Association's communications reform proposals relating to public offerings of ABS and other investment grade fixed income securities eligible for Form S-3 and F-3.

The application of the existing U.S. securities law regulatory regime to the ABS markets, and to the seasoned issuer fixed income markets, as well as other segments of the securities markets, historically has substantially impaired free flow of information among market participants. At the same time, investors continue to demand more and more information, and that the information be provided or made available in easily accessible formats, via multiple media, such as proprietary electronic systems and public websites.

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[4] The ABA Proposal is significantly more expansive in scope than our proposal, in that the ABA Proposal addresses all publicly offered securities, including first-time issuers, unseasoned issuers and seasoned issuers, except ABS, and also proposes fundamental changes in the registration process. Some of the most significant points of comparison will be highlighted throughout this letter.

The threat of a Section 5 violation resulting from the provision of non-prospectus information, which may or may not be deemed to constitute an "offer," creates a very substantial chilling effect on the availability of such information, as well as a lack of legal certainty as to the liability consequences of providing such information. Information outside of the Section 10 prospectus that an issuer or underwriter might want to release may include: 1) summary or term sheet type information about the offering, which would be superseded by the final Section 10 prospectus, 2) additional background information which the issuer and underwriter consider to be not material to the offering but which nevertheless may be of interest to particular investors, or 3) financial or other information about the issuer that may be released in a variety of contexts.

We propose that, for public offerings of ABS and for investment grade fixed income securities of issuers eligible to register on Form S-3 or F-3, all communications of any type, by any person, at any time and in any format, other than the Section 10 prospectus, shall be defined to not be a "prospectus" or an "offer" for all purposes under the Securities Act. This will provide a regulatory framework that will encourage the release of additional types of information desired by investors, while at the same time leaving investors with adequate protections under the securities laws.[5]

We also propose modifying the prospectus delivery requirement for ABS or investment grade fixed income securities of seasoned issuers, to permit an "access equals delivery" approach. All current liability standards and related remedies would continue to apply to the final Section 10 prospectus, thus preserving the central disclosure and investor protection role historically associated with this document.

The effect of our proposal would be to limit liability for all communications other than the Section 10 prospectus to Rule 10b-5 liability.[6]

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[5] Our proposals are in most respects consistent with the ABA Proposal. However, our proposal does not attempt to define non-prospectus offering materials or to treat such materials differently from other types of non-prospectus communications, unlike the ABA Proposal which would make such a distinction. Furthermore, the ABA Proposal would impose certain record-keeping requirements for non-prospectus offering materials, which our proposal does not include. We would submit that in practice it would be very difficult to distinguish between non-prospectus offering materials and other communications, as contemplated in the ABA Proposal.

[6] Our proposal differs in this regard from the ABA Proposal which would impose Section 12(a)(2) liability on non-prospectus offering materials.

In order to clarify our proposal, we have attached in Appendix 1 suggested language for the specific regulatory revisions that we advocate. The attachment is for illustrative purposes only, and does not reflect all of the conforming changes and other provisions that might be included in a formal proposed revision.

In the event that the SEC is not prepared to go forward with our proposal at this time, we advocate as an interim step a series of targeted proposals including 1) an expansion of Rule 134 to permit term sheet materials, 2) an expansion of and easing of restrictions in Rules 137, 138 and 139 relating to research reports[7], and 3) a new rule permitting release of background information (including the types of background information discussed below in connection with ABS) without filing requirements or being subject to Section 12(a)(2) liability.

A. ABS Markets: Communications Practices and Issues

1. Section 10 prospectus information vs. background information

The typical forms of Section 10 prospectus that are used in ABS transactions have been developed and refined by industry participants over a period spanning more than twenty years. Issuers, underwriters and their counsel are generally very confident that these documents provide a framework to include all material information about the offering, and about the transaction and the underlying assets, that is necessary in order to avoid liability for omissions and misstatements under Sections 11 and 12(a)(2) under the Securities Act.

There is substantial agreement among ABS market participants as to what information is required to be included in the Section 10 prospectus in order to meet the standards of Sections 11 and 12(a)(2) as well as the specific requirements of Regulation S-K. For the most part, this information relates only to the series of securities being offered and its underlying assets. The key elements include:

- summary
- risk factors related to the offering
- description of the underlying assets, including summary statistical information, and a description of the applicable underwriting guidelines
- description of all material terms of the securities offered, including the operative documents
- description of all material terms of any credit enhancement

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[7] For a discussion of specific proposals to modify these rules, see pp. 36-38 of our letter dated June 30, 1999 to Jonathan G. Katz, Secretary, SEC, regarding the Aircraft Carrier proposals.

- weighted average life and, for sensitive classes, yield disclosure under a limited range of scenarios
- portfolio loss and delinquency information for the servicer, where relevant
- tax, ERISA, and legal investment disclosure about the securities
- legal aspects of the underlying assets
- ratings
- method of distribution

However, there is a substantial body of additional information that is or may be of interest to specific types of prospective investors in an ABS transaction, while not rising to the level of materiality that would require inclusion in the prospectus. For example:

- background information such as:
  - a complete copy of the underwriting guidelines applicable to the underlying assets;
  - financial information about the originators and servicers, which is not considered material for the Section 10 prospectus;
  - portfolio loss and delinquency history of various originators and servicers, beyond what is considered material for the Section 10 prospectus;

- information on prior series of ABS issued by the same sponsor, including structure, pool composition and performance of the prior series;

- analytical information about how various classes of the series might perform under various scenarios;

- comparative information about other series of similar ABS issued by other sponsors, including comparative analytical information;

- loan level data about the underlying assets - investors can use the raw data to perform their own statistical analysis of the asset pool; and

- access to loan origination and underwriting files, and loan level servicing information - access to such information is of particular interest in transactions such as commercial mortgage-backed securities (CMBS) where individual assets may represent a large part of the pool.

These types of information may be of interest to some investors, but market participants generally believe that they may not considered to be material for one or more of following reasons: 1) the material elements of the information are summarized in the Section 10 prospectus; 2) financial information about originators and servicers is not material because the ABS are not interests in or obligations of such entities; however, material information that called into question the ability of such entities to perform their contractual obligations should be disclosed; 3) historical loss and delinquency information may not be material because the applicable portfolio does not share enough characteristics with the ABS asset pool; 4) prior series information is not considered material because each ABS asset pool is separate and distinct, and is not affected by the performance of other pools; 5) analytical information does not describe the ABS or the underlying assets, but rather addresses the projected performance of the security based on assumptions specified by the investor; or 6) in many cases, the information is of a type that is routinely available publicly or on request, or is prepared primarily for a purpose other than use in the offering, or constitutes ordinary course business communications.

The breadth of these types of information illustrates the point that what is of interest to a particular investor is not necessarily material for all investors. These types of information are generally provided only to investors that request it. Given the variety, scope and volume of such information that may be available for any given offering, it would be unreasonable to expect that all investors would want to review such information, or that all investors should be required to receive it.

Unfortunately, when an issuer or underwriter provides such information to a prospective investor during the period when an ABS offering is being conducted (or shortly before the offering commences), if the provision of the information can be viewed as being made to support the offering, then there is a risk that a Section 5 violation could be alleged in the future which could give rise to a recision right under Section 12. It is the threat of this draconian result that creates a chilling effect on providing such information.

Even if the risk of a Section 5 violation were removed, there would still be a chilling effect if there was a requirement to file all such information that is provided to prospective investors. Issuers and underwriters would prefer not to file such information, as doing so would potentially expose them to liability as part of the registration statement. Moreover, a filing requirement would be impractical. Information of the types described in this section in most cases are not available in formats that can be readily or cost effectively converted to electronic formats required by EDGAR. In many cases, the information is extremely voluminous, and it would impose a very heavy burden on the issuer and underwriter to assemble and file this material in physical form even if that were allowed. Filing in physical

form would be of no practical use to investors, as the material could not be retrieved electronically.

Many ABS transactions involve publicly offered, investment grade classes[8] as well as subordinated, below investment grade classes that are privately offered. In some cases, the assets are of a type that the prospective investors in the subordinated classes wish to review loan level background information (this is most typical with CMBS). In these cases, a prospective investor in the subordinated classes may be given access to that information, but only upon signing a confidentiality agreement that prohibits that investor from purchasing any of the publicly offered classes. This prohibition is deemed necessary under current law to avoid a Section 5 violation; however, it creates obvious market inefficiencies by restricting access to the public offering.

2. Timing of disclosure in an ABS offering

Another key element of the ABS issuance and offering process that is relevant in reviewing the impact of current securities laws is the iterative, give-and-take process that often takes place between the underwriter and prospective investors. The following illustrative timeline (which would vary from transaction to transaction) illustrates this process ("C" refers to the closing date, that is, the date on which the ABS are issued):

C - 45 days: Issuer provides loan level data for an asset pool to be securitized by one of several underwriters. Underwriters then provide bids for the asset pool to issuer.

C - 30 days: Underwriter selected by issuer based on bid for the asset pool.

C - 15 days: Underwriter prepares preliminary term sheets and preliminary structure relating to the securities. Term sheets and computational materials (analysis of yield and investment performance under various hypothetical scenarios) may be distributed to investors in accordance with the SEC no-action letters discussed below.

C - 10 days: Underwriter may revise structure as to specific classes, based on feedback from various investors. Revised term sheets and computational materials may be provided. This process may continue for several days.

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[8] Publicly offered ABS are in virtually all cases registered on Form S-3, which permits only investment grade classes of ABS.

C - 5 days: Structure finalized.

C - 3 days: Final pricing; prospectus printed (dated C-2).

C - 2 days: Confirmations sent to investors, with final prospectus.

C: Closing - securities initially issued. Settlements with investors.

Investors in ABS are uniquely involved in the issuance process. Their feedback during the iterative process may result in changes to the structure that affect factors such as the interest rate, payment priorities and weighted average lives of various classes.

The above timeline also illustrates the lack of reliance by ABS investors on a preliminary or final prospectus as a disclosure document.

In most ABS transactions, a preliminary prospectus is not used, for the following reasons: 1) because most transactions involve repeat issuers, as well as a transaction structure the fundamental elements of which have been previously used, and much of the content of the prospectus is already known to market participants; and 2) the most important elements of an ABS transaction that are unique to a specific transaction can be effectively communicated through structural term sheets, collateral term sheets and computational materials in accordance with SEC no-action letters. For these reasons, a preliminary prospectus is not necessary to market the securities, and would be an unnecessary expense.

As for the final prospectus, by the time it is available, the investor has already received the information that it needs to make its investment decision. In fact, production of the final prospectus is not possible until the iterative process, in which the investor's input is critical, is complete. Moreover, the existing requirement to deliver a final prospectus with or prior to the delivery of the confirmation can result in delays in sending the confirmation, which in turn can interfere with timely settlement. In this context, requiring delivery of the final prospectus with the confirmation does not appear to be necessary in order to provide the investor with information needed in order to make an investment decision, and therefore there is no reason to require actual delivery of the final prospectus with the delivery of the confirmation or of the security.

3. Methods of delivery of non-prospectus information

Non-prospectus information may be provided to ABS market participants through the following means:

- oral

- roadshows
- computational materials/ABS termsheets, in accordance with the no-action letters referred to below
- interactive databases and analytical tools
- research reports
- issuer periodic reporting

Oral. Section 5 of course permits oral offers to be made prior to the availability of the final prospectus, after the registration statement is filed. However, due to the highly technical nature of ABS structures, the utility of delivering information orally is extremely limited. This was recognized by the SEC in the Kidder/PSA no-action letters described below. It is simply not possible to convey orally meaningful information about an ABS structure, the underlying asset pool, yield or other economic performance information, or background information of the types described above, given its highly technical and quantitative character.

Roadshows. Roadshows are generally not used with ABS, except in the case of new issuers, or new programs or asset types of existing issuers. Where roadshows are used, the ability to transmit the presentation through electronic media in accordance with procedures such as those set forth in the applicable SEC no-action letters would be of significant interest to ABS market participants.[9] However, one significant impediment to the use of those letters is that they require the delivery of a preliminary prospectus prior to allowing the viewer access to the presentation. In the ABS markets, this requirement is highly problematic. As discussed above, in most ABS transactions, a preliminary prospectus is not used.

Computational materials/ABS termsheets. Because of the unique needs of ABS investors for detailed information about a new ABS issue prior to the availability of the final prospectus, the ABS market has been in the vanguard of developing new procedures designed to ease the restrictions of the Securities Act and respond to investors' information needs. One of the most important developments along these lines was the, issuance of the Kidder and PSA no-action letters in 1994 and 1995, which permit the distribution of written

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[9] A listing and discussion of the SEC no-action letters applicable to electronic roadshows appears on pp. 88-89 of the outline titled *Current Issues and Rulemaking Projects* published by the Division of Corporate Finance, dated November 14, 2000 and available on the Commission's website.

computational materials and ABS term sheets.[10] Under these letters, an underwriter may provide the following written materials prior to the availability of the final prospectus:

- computational materials: projections of yield, weighted average life and other economic parameters of an ABS class under various scenarios including assumptions as to prepayment speeds, loss rates, market interest rates and other parameters.

- structural term sheets[11]: summary descriptions of the proposed structure for an ABS issuance, including information such as class sizes and remittance rates, payment priorities, credit enhancement and other important terms.

- collateral term sheets: summary information as to the characteristics of the underlying asset pool.

These no-action letters have served the needs of the ABS community by permitting minimally necessary term sheet materials to be used when needed, without creating a Section 5 violation. However, there are some important drawbacks to the permitted procedures.

First, the no-action letters are narrowly drawn in terms of the materials that may be delivered. The letters do not permit the delivery to prospective investors in an upcoming ABS offering of background information, prior series data, loan level data and access to loan files. As discussed above, such information, while not material for purposes of the Section 10 prospectus, may nevertheless be of interest to prospective investors. The no-action letters leave open the threat of a Section 5 violation for the use of such information.

Secondly, the no-action letters require the filing of computational materials and ABS term sheets on Form 8-K, resulting in incorporation of that information by reference into the issuer's registration statement. This creates potential Section 11 and Section 12 (a)(2) liability for all persons subject thereto. For example, an issuer would have Section 11

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[10] No-action letter dated May 20, 1994 issued by the Commission to Kidder, Peabody Acceptance Corporation I, Kidder, Peabody & Co. Incorporated and Kidder Structured Asset Corporation, as made applicable to other issuers and underwriters by the Commission in response to the request of the Public Securities Association dated May 24, 1994, as well as the no-action letter dated February 17, 1995 issued by the Commission to the Public Securities Association.

[11] Structural term sheets and collateral term sheets are collectively referred to as "ABS term sheets."

liability for computational materials and structural term sheets prepared by the underwriter, even though the issuer typically has absolutely no involvement in making the related calculations or in determining the structure of the securities, and the assumptions used for the scenario analyses contained in these materials are generated by the underwriter or by the investors themselves. Moreover, as discussed in II.C.1. below, Rule 10b-5 liability is the appropriate standard for material other than the Section 10 prospectus, and we believe is adequate to protect the investors' interests.

Another drawback of the no-action letters is that the filing requirement does not appear to be necessary or helpful in light of how the ABS markets operate. Since current computational materials and ABS term sheets are available on request from the underwriter, and since the underwriter will provide investors with customized computational materials based on parameters that in many cases are specified by the investor, there is very little likelihood that an investor would ever wish to review computational materials and ABS term sheets as filed with the SEC. In fact, the SEC by longstanding practice has allowed these materials to be filed in physical form due to the recognized hardship that would be involved in converting them to electronic formats required by EDGAR. Because they are not filed electronically, it would be impracticable to obtain them from the SEC's files. It should be noted that investors apparently have not objected to this practice, and we are aware of virtually no investor demand for filed computational materials, which indicates that investors do not feel the need to be able to retrieve such materials from the SEC's files.

The Bond Market Association believes that the no-action letters do not serve as a good model for regulating the broader categories of information of interest to prospective ABS investors, such as background information, prior series data, loan level data and access to loan files. These materials for the most part represent ordinary business communications and records, and are not prepared with the intention of satisfying Section 11 and Section 12 (a)(2) disclosure standards relating to material misstatements and omissions. Moreover, the filing requirement does not appear to provide any practical benefit to investors. Finally, these materials generally cannot be readily or cost effectively converted to electronic formats required by EDGAR, and in many cases it would impose a very heavy burden on the issuer and underwriter to assemble and file this material in physical form even if that were allowed.

Interactive databases and analytical tools. ABS investors can obtain information about the projected economic performance of existing ABS, or in some cases ABS to be issued in the near future, from a variety of interactive databases.[12] These are facilities that are generally established and maintained independently of the underwriter, but contain sufficient information about the structure and underlying collateral to be able to model the transaction.

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[12] For example, these services are provided by Intex Solutions, Inc. See www.intex.com.

Through these facilities, the investor can obtain analysis and projections based on assumptions and parameters input by the investor. In addition, investors that have access to analytical software tools (which may be investor-developed, obtained under license, or available through a website or a subscription-based investor information service) can use information of the type included in ABS term sheets to generate data as to projected economic performance.

Since these interactive databases and analytical tools are not provided by or on behalf of the issuer or underwriter, they are not regulated under the Securities Act. However, as an aid to investors, it would be very helpful for issuers and underwriters to be able to offer such databases and tools directly, or to be able to provide software plug-ins or modules designed to be used with such facilities maintained by others, including during the pendency of a public offer, without raising any concern under Section 5.

Research reports. Some of the most difficult issues handled by securities lawyers in the ABS field relate to research reports. The rules in this area are very subjective, practices of broker-dealers vary widely, and there are certain characteristics of the ABS offering process that make it difficult to apply traditional research report concepts.

Some broker-dealers publish monthly or other periodic reports on the ABS markets or on specific sectors of the ABS markets. ABS research reports may also be styled as special reports that focus on new developments, such as new asset types, new structural features, new credit enhancements, current legal issues, or new analytical models or tools. ABS research reports that focus on a single topic may address several issuers to which that topic pertains, or may address a single issuer. Reports on new asset types, features or credit enhancements frequently focus on a single issuer.

In some cases, a broker-dealer that will or may participate in an upcoming offering of a specific series as an underwriter expresses an interest in publishing a research report that may be relevant to that offering, and may take the form of a report on a single issuer or on new asset types, features or credit enhancements. In some cases, it may be difficult to conclude that the report falls clearly within generally understood concepts of a permitted research report and does not have a substantial marketing element. Counsel may recommend that such reports be released sufficiently in advance of the commencement of the offering in order to mitigate the risk of a Section 5 violation. While this approach may appear to be excessively conservative to some, others believe that this conservatism is warranted given the lack of clarity of the rules and the potential consequences of a Section 5 violation.

Rules 137, 138 and 139 under the Securities Act were not drafted with ABS in mind and pose numerous interpretive difficulties. In recognition of this, the SEC attempted to set forth guidelines specifically designed for research reports in the ABS context, in its no-action letter

dated February 7, 1997 issued in response to the Association. However, there remain some issues that are frequently encountered under these guidelines. In particular, the requirements of "no greater prominence" for specific structural or collateral features may not be met in single topic reports. Moreover, the "previous publication with reasonable regularity" requirement can be difficult to apply in single topic reports about new developments. Another difficult issue is the requirement that "sufficient information is available from one or more public sources" to provide a reasonable basis for any views expressed. In many cases, ABS research reports are based in part on analysis of non-public performance data on prior series of ABS. Finally, even where the literal requirements of the letter are satisfied, there are some ABS securities lawyers that find it difficult to conclude that a research report that is clearly prepared and used with substantial marketing purposes in mind does not give rise to Section 5 compliance issues.

Another issue with research reports that is a particular problem with ABS arises from the fact that many ABS issuers are frequent issuers, sometimes issuing as often as monthly. To the extent that counsel advises that a research report with apparent marketing content should not be published within a certain period of time before the commencement of the offering for the next upcoming series, it may be extremely difficult to find a window of time when publication could be made.

Issuer periodic reporting. In the early days of ABS, periodic reporting by issuers (or by servicers or trustees on their behalf) consisted of little more than the monthly statements to investors containing the specific information required under the pooling and servicing agreement or other operative document. This information typically included data on a class by class basis as to interest and principal distributions, remaining principal balance, pool factor (the percent of the original pool balance outstanding), and delinquency status.

As analytical tools available to investors have become more sophisticated, investors have demanded more and more information from issuers about outstanding series. In addition, investor appetite for easy to use compilations of historic data continues to grow.

Today, issuers of ABS may provide ongoing reporting through the following means, in addition to the periodic statements required by the operative documents:

- posting of current and historic pool level information on outstanding series on a website
- posting of updated pool characteristics of outstanding series on a website

- posting of certain loan level information on a website, including data on defaulted loans
- providing current loan level data on the entire pool to broker-dealers, to persons maintaining interactive databases, or to investors upon request
- providing detailed loan level information to investors under a confidentiality agreement.

Of course, information about prior series may be of interest to prospective investors in new series. Issuers and underwriters may even direct prospective investors in a new series to such publicly available information, as part of the marketing efforts for the new series. Nevertheless, issuers need to know that the publication of such information without interruption during the offering of a new series will not give rise to any issues under Section 5. Most importantly, information of this type is increasingly demanded and expected by investors, who wish to use it to evaluate potential securities purchases or monitor the performance of their current holdings.

B. Seasoned Issuer Fixed Income Markets: Communications Practices and Issues

A number of parallel issues arise with seasoned issuers (ones that are eligible to use Form S-3 and F-3), in connection with non-ABS fixed income securities.

As used in this letter, "seasoned issuers" refers to domestic issuers (other than ABS issuers) that meet the registrant requirements for use of Form S-3, or foreign issuers that meet the registrant requirements for use of Form F-3. These requirements include: the registrant has a class of outstanding securities registered under Section 12 (b) or (g) of the Exchange Act or is subject to reporting requirements under Section 15(d) of the Exchange Act; has timely filed all reports required under the Exchange Act for the preceeding 12 months; and has not defaulted on certain material obligations.[13]

Investment grade fixed income securities of seasoned issuers are marketed, analyzed, priced and traded in a way that is fundamentally different from equity securities. Unlike equity securities, the vast majority of fixed income securities bear a fundamental pricing relationship to benchmark securities, or to other fixed income securities that have similar

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[13] The public float requirements of those forms are not relevant because our proposal is limited to investment grade fixed income securities, as to which the public float requirements do not apply.

credit, rating, yield and maturity characteristics. Quantitative information about the prices and yields of benchmark securities, and other comparable securities, is readily available. In other words, the price of an investment grade fixed income security of a seasoned issuer is primarily dependent on objective criteria such as the issuer rating and the financial terms of the security, and on market conditions, rather than on specific information about the issuer.

The Commission has long recognized these factors, and the fungibility of investment grade fixed income securities. The Commission's adoption of exception (xiii) to Rule 10b-6 in 1983 reflected its belief "that it is very difficult, if not impossible, to manipulate the price" of investment grade fixed income securities.[14] As the Commission observed in proposing the amendment:

> Investment grade debt securities are generally thought to trade in accordance with a concept of relative value, i.e., such securities are to a large degree fungible, so that investors generally evaluate new offerings by looking at comparably rated securities of other issuers. Debt securities that are not of investment grade may pose a greater potential manipulative threat, since those securities tend not to be fungible. Investors are therefore more likely to compare yields of new non-investment grade debt offerings with those of outstanding debt securities of the same issuer.

In a subsequent concept release, the Commission referred to exception (xiii) as being "premised on the fungibility of investment grade issues (i.e., that securities with similar terms will trade on rating and yield rather than issuer identification)."[15]

To the extent that investors in fixed income securities of seasoned issuers do wish to take into account specific information about the issuer in making their investment decisions, their needs will generally be fulfilled by information that is routinely supplied to the markets about the issuer on an ongoing basis, including information provided by the issuer's Exchange Act reports, information provided to the public by the issuer via its website and other media, and research reports and other analyst information.

Fixed income securities of seasoned issuers are generally considerably less complicated than ABS, and there is not as great a need to be able to distribute written materials prior to the prospectus. Nevertheless, seasoned issuers of investment grade fixed income securities should be able to use materials that are analogous to ABS term sheets and computational

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[14] Release No. 34-19565 (Mar. 4, 1983) (adopted), Release No. 34-18528 (Mar. 3, 1982) (proposed).

[15] Release No. 34-33924 (Apr. 19, 1994).

materials, as needed. In this regard, the negative aspects of these precedents (Section 11 and 12 (a)(2) liability and the filing requirement) should not be imported into this context.

Physical or in-person roadshows are generally not used with fixed income securities of seasoned issuers. Where roadshows are used, the presentation is often transmitted through electronic media in accordance with procedures such as those set forth in the SEC's no-action letters on electronic roadshows. However, as in the ABS markets, the fact that those letters require the delivery of a preliminary prospectus is a substantial barrier. A preliminary prospectus is generally not used with fixed income securities of seasoned issuers due to the additional costs involved, as well as the fact that, given the availability of Exchange Act reports and other information about the issuer and the manner in which such securities are marketed and priced (as discussed above), a preliminary prospectus is not needed for investors to obtain the information needed to make their investment decisions.

C. Arguments for Proposal

1. Only the Section 10 prospectus should be subject to Sections 11 and 12(a)(2) of the 1933 Act

The issuer and underwriter will remain obligated to use, make available to investors and to file with the SEC as and when required under our proposal, a Section 10 prospectus, which is subject to the remedies provided by Sections 11 and 12(a)(2) of the Securities Act.

Therefore, if the issuer or underwriter includes in non-prospectus communications any information that is not in the prospectus, and if the omission of this information from the prospectus makes the other statements in the prospectus misleading, investors who did not receive the information will have remedies under Sections 11 and 12(a)(2) with respect to the prospectus.

Because these remedies are available, the issuer and underwriter have adequate legal incentives to make sure that the Section 10 prospectus contains all information necessary to make the statements therein not misleading. As a result, there is no policy reason to require that non-prospectus communications be filed with the SEC or otherwise be made publicly available to all investors.

The Bond Market Association believes that Rule 10b-5 liability is the appropriate standard for non-prospectus communications during the course of an offering. This is because non-prospectus communications typically do

not purport to present the totality of information that the issuer believes is necessary to make an investment decision in the securities. Rule 10b-5 is appropriate for communications of this type because it encompasses material misstatements as well as omissions necessary to make the statements made not misleading. However, Rule 10b-5 does not include the more onerous elements of Section 12(a)(2) such as lack of scienter (that is, intent to deceive or defraud by the provider of the information), lack of reliance by the investor on the error or omission in question, and burden of proof on the defendant, which should be reserved for the Section 10 prospectus.

In this connection, we note that non-prospectus communications, to the extent that they are now permitted without violating Section 5 (e.g., research reports under Rule 139 or "free-writing" materials used with a Section 10 prospectus) are subject only to Rule 10b-5 liability. We believe the expanded category of communications that we propose should also be subject only to Rule 10b-5 liability.

With respect to term sheet type communications, as well as informal communications such as e-mail and electronic messages, it is generally understood that these materials are summary in nature, and are superseded in their entirety by the information in the final Section 10 prospectus. It is also understood that the investor may not receive, or may not review, the final prospectus until after its investment decision has been made. In this context, the use of a term sheet or other communication that purports to describe the transaction but that fails to disclose a material term or condition that would have altered the investor's decision could give rise to a Rule 10b-5 claim.

As to the broader categories of information of interest to prospective investors, such as current information about the issuer, or in the case of ABS background information, prior series data, loan level data and files, these materials for the most part represent ordinary business communications and records that are not prepared with the intention of satisfying Section 11 and Section 12 (a)(2) standards. Attempting to hold such communications to those standards will simply reduce (or in some cases eliminate) their availability. Nevertheless, if an issuer or underwriter uses such information that contains material errors or omissions in context in connection with a securities offering, where the issuer or underwriter is aware or should have been aware of the error or omission and an investor relies on the information to its detriment, that could give rise to a Rule 10b-5 claim.

2. **There is little risk of conditioning the market for the types of securities covered by the proposal.**

This proposal is limited to investment grade fixed income issuers using Form S-3 and F-3, which includes two kinds of issuers: seasoned issuers with a substantial reporting history, and issuers of ABS.

As to seasoned issuers, by definition these are companies that are already known to the U.S. capital markets and which are subject to reporting requirements under the Exchange Act, including the obligations to file periodic financial statements and to report material developments on a Form 8-K. Such issuers are tracked by fixed-income analysts that gather and verify information and report on their findings regularly. Analyst reports in the fixed-income context tend to be oriented towards comparing the securities with market benchmarks, as distinct from equity research which focuses more on issuer financial projections. Because there is already an established market for the securities of such issuers and a substantial volume of publicly available financial and other information about them, there is comparatively little risk of "conditioning the market" for a new securities offering through a non-prospectus communication.

As to ABS issuers, the securities that are offered under Form S-3 are limited to investment grade ABS which are fixed- income securities. The information used to market ABS is essentially empirical data and analysis about the structure of and collateral backing the securities. The prospects for conditioning the market for an ABS offering through the disclosure of incomplete or subjective information are extremely remote.

Both of these types of issuers are fundamentally different from other types of issuers for whom conditioning the market may be a legitimate concern, in particular operating companies making initial public offerings. For Form S-3 and F-3 investment grade fixed income security issuers, the risk of harm due to conditioning the market is not sufficient to warrant the various restrictions on supplying non-prospectus information under current law.

3. **An overly expansive view of what constitutes a "prospectus" is no longer appropriate.**

Existing securities law interpretations are based on the view that any written communication by an issuer or underwriter during an offering period, that has any offering or securities marketing content, should be viewed as a

prospectus thereby giving rise to a potential Section 5 violation. The SEC attempted to further codify this approach in the Aircraft Carrier release, by defining a broad range of communications that could be used without violating Section 5, but which were subjected to filing requirements and Section 11 and 12(2) liability.

This approach is no longer workable in the context of issuers of investment grade fixed income securities registered on Form S-3 and F-3, and therefore for such issuers and their underwriters non-prospectus communications should not be deemed to be prospectuses, due to:

- The development of information technologies which blur the distinction between written and oral information, including the use of interactive databases for which it is impracticable to track the information actually provided to any user for filing purposes

- The growing demand by investors in outstanding securities for current, ongoing information about Form S-3 and F-3 issuers and their previously issued securities

- The fact that many Form S-3 and F-3 issuers (both seasoned issuers and ABS issuers) are in an offering period for new issues on a frequent, and in some cases continuous basis

- The practical inability to distinguish, with respect to such issuers, between "normal business communications" and "offering materials", as the SEC attempted to do in the Aircraft Carrier release. For example, for an ABS issuer the publication of information or analytical reports on the performance of outstanding series is clearly a normal business communication; however, if made during an offering period such communication could be considered to be offering material.

Moreover, we believe that the securities industry's response to the Aircraft Carrier release clearly indicates that market participants do not consider Section 5 relief (that is, the expansion of materials that may be used as "free writing" without being treated as a prospectus under Section 5) to be workable or in any way helpful unless the

materials permitted to be used are also exempted from filing requirements and from liability under Section 12(a)(2).

Instead of the Aircraft Carrier approach, we propose that for Form S-3 and F-3 eligible issuers, the term "prospectus" should be limited to the Section 10 prospectus.

4. **Exchange Act reports provide current information about an issuer.**

For non-ABS Form S-3 and F-3 issuers, since such issuers are continuously subject to reporting requirements for material developments under the Exchange Act, the information in the Exchange Act reports should in most cases provide adequate disclosure about the issuer, so that delivery of a Section 10 prospectus can be considered redundant to the extent that it serves as a disclosure document for information on the issuer. Any information about the issuer that does not rise to the level of materiality requiring reporting under the Exchange Act should not be viewed as material enough to constitute a "prospectus" in the context of an upcoming offering.

Form S-3 and F-3 registrants (other than ABS issuers) must be required to file Exchange Act reports, and must have timely filed all reports required under the Exchange Act for the preceding 12 months.

For such issuers, particularly in the context of an offering of investment grade fixed income securities, we believe that the information required to be on file and publicly available in the issuer's Exchange Act reports would generally constitute all material information about the issuer that would be necessary to make an investment decision. Accordingly, to the extent that existing prospectus delivery requirements are designed to provide disclosure about the issuer to the investor, the provision of this information in a Section 10 prospectus does not appear necessary. Moreover, since the Exchange Act reports are already in the public record, it should be possible to use offering materials (in advance of the Section 10 prospectus) that describe the issuer without running the risk of a Section 5 violation. In the event that there was a material omission from the Exchange Act reports, due to the incorporation by reference of the Exchange Act reports into the prospectus that omission would also be a potentially actionable omission from the prospectus.

Within the context of investment grade fixed income securities of seasoned issuers, in the event that there were material developments about the issuer that are not yet reflected in the Exchange Act reports at the time the securities

are offered and sold and that would have a material impact on the value of the securities, the issuer and underwriter would have an obligation under Rule 10b-5 to effectively communicate that information to investors before they make their investment decisions. This could be achieved, for example, by filing a special report on Form 8-K, in advance of the time when the report would normally be required and in sufficient time to allow the information to be noted by market participants. The ABA Proposal follows this approach, and includes specific proposals regarding the timing of Exchange Act reports in order to address this issue.

5. **Existing guidelines on research reports and roadshows are unduly restrictive.**

As discussed above, the current rules relating to research reports present interpretative issues for ABS. There is a practical inability to clearly distinguish between research reports which are marketing pieces vs. bona fide research. Moreover, particularly with ABS involving new issuers, structures or asset types, it may be unclear whether a research report that is valid when initially published is still appropriate during a subsequent offering period if it can effectively be used for marketing purposes.

For fixed income securities of seasoned issuers, the existing research report rules are unduly restrictive, and more extensive publication should be permitted. Liberalization of these rules could be made without increasing risks to prospective investors.

The SEC's existing no-action letters on electronic roadshows require delivery of a preliminary prospectus. This requirement should be eliminated for ABS and investment grade fixed income securities of seasoned issuers because a preliminary prospectus is generally not needed in such offerings for the reasons discussed above.

The electronic roadshow no-action letters rely heavily on preserving the distinction between oral and written communication in the electronic context. For example, the letters require that the viewer of the presentation not be able to download or keep an electronic copy of the presentation, but be able to view it in real time only. As communications technologies continue to develop, it is likely that the preservation of the legal fiction that some electronic communications are more analogous to oral speech, or to writing, will become increasingly untenable, and that therefore rules that determine

how to regulate communications depending on whether they are "oral" or "written" will lose their legitimacy.

6. **Prospectus delivery requirement needs revision.**

Investors in ABS and investment grade fixed income securities of seasoned issuers generally make their investment decisions without having first received and reviewed the final Section 10 prospectus. Such investors are in most cases institutional investors, who increasingly have access to other information (to the extent permitted under current law) that they consider to be sufficient to make their investment decision. The final prospectus in practice serves primarily as a formal record of the offering, and as a liability document enabling potential future redress to the investor. In this context, the requirement that the final prospectus be delivered with the confirmation or with the security seems unnecessary and antiquated.

Our proposal would modify the prospectus delivery requirement for eligible Form S-3 and F-3 securities, to permit an "access equals delivery" approach. Access would be deemed to exist when the final prospectus has been provided by or on behalf of the issuer to the underwriter for use in connection with the offering, provided that reasonable steps are taken to make the prospectus available to prospective investors (including via electronic means), and the final prospectus has been or will be filed with the Commission in compliance with Rule 424 (b)(2) or (b)(5) which require filing within two business days of first use. Underwriters can of course continue to send physical prospectuses with or before the confirmation, or provide them electronically in accordance with existing SEC releases. Alternatively, the issuer could make the prospectus available through other means as it sees fit, such as posting it on a website when it has been approved for use.

The Bond Market Association believes that for eligible Form S-3 and F-3 securities, given their nature and their predominant institutional investor base, it is appropriate to allow the marketplace and its participants to determine the means by which prospectuses should be delivered or otherwise made available, and whether those means provide meaningful access to investors, and that these matters do not need to be further regulated.

III. PRIVATE OFFERINGS OF ABS AND SEASONED ISSUER FIXED INCOME SECURITIES

This section will discuss the Association's communications reform proposals relating to private offerings of ABS and other fixed income securities of seasoned issuers, including high yield securities.

Our proposals are as follows:

> Amend Rule 144A to eliminate the requirement that the securities be offered only to qualified institutional buyers.
>
> Amend Rule 502(c) by eliminating the prohibition on general solicitation.
>
> Amend Regulation S to eliminate all prohibitions on directed selling efforts in the United States.

These changes are intended to permit the unrestricted use or release of any materials, including offering materials, provided that actual sales are limited to eligible purchasers under the applicable exemption from registration.

These proposals are intended to address communications in any oral, written or electronic format, including live and electronic road shows, offering circulars and supporting documents, and information posted through any website or other media (such as third party information services).

Although these proposals are not limited to ABS and fixed income securities of seasoned issuers, we will discuss the proposals from the perspective of those segments of the capital markets.

A. ABS and seasoned fixed income issuer markets: communications practices and issues

ABS of U.S. based issuers are frequently sold in unregistered offerings of various types for a variety of reasons. Non-investment grade classes of ABS are almost always sold in unregistered offerings because they are not eligible for shelf registration on Form S-3. Other types of investment grade ABS may be offered privately because they are not eligible for Form S-3 for other reasons, such as asset concentration, the inclusion of non-financial assets, or the active management of assets. Investment grade ABS may also be sold privately to reach specific investors, to reduce issuance costs, or in cases where a broad market has not yet been established (for instance, where the assets are of a type that has not been securitized before, or where the issuer or originator has not previously been involved in a securitization).

Seasoned issuers (that is, issuers that meet the registrant requirements for registration on Form S-3) may also issue fixed income securities in unregistered offerings for a variety of reasons. Typical reasons would be to reach specific investors, to reduce issuance costs particularly where the dollar amount to be issued is relatively small, timing constraints or accounting reasons, or in limited circumstances to avoid constraints under Regulation M.

Transfer restrictions for unregistered offerings usually follow one of several typical formats. In one typical format, initial sales as well as all subsequent sales are restricted to QIBs[16] or IAIs[17], or to QIBs and accredited investors[18]. The transfer restrictions usually prevent the registration of any transfer unless both the transferor and the transferee make written certifications as to relevant facts. Opinions of counsel may be required, in transfers other than to QIBs.

In another typical format, initial sales as well as all subsequent sales are restricted to QIBs or IAIs, or to non-U.S. persons who purchase in accordance with Regulation S. These formats require that when non-U.S. persons resell into the United States, that the securities can be transferred only to QIBs and IAIs. Again, registration of any transfer is prohibited unless both the transferor and the transferee make written certifications as to relevant facts.

Unregistered investment grade ABS may be issued in book-entry form for sales to QIBs. In that case, the offering memorandum will typically include provisions that: 1) describe the transfer restrictions applicable to resales, 2) require investors to notify any transferees of the transfer restrictions, 3) require that any IAIs that purchase must take delivery in physical form, and 4) state that subsequent transferees are deemed to be aware of and to certify compliance with the transfer restrictions. These provisions are generally viewed by underwriters and their counsel as adequate to assure that the transfer restrictions will be complied with for securities of this type, and are appropriate for a limited investor base such as one consisting of QIBs (and may be appropriate for other limited groups of investors as well).

In the ABS markets in particular, limitations on publicity or unrestricted information about unregistered offerings is detrimental for the following reasons:

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16 "Qualified Institutional Buyers" as defined in Rule 144A under the Securities Act.

17 "Institutional Accredited Investors", or persons other than natural persons that are "accredited investors" as defined in Rule 501 under the Securities Act.

18 As defined in Rule 501 under the Securities Act.

In many cases, the issuers also issue publicly offered ABS and their securities are widely held and tracked by market participants. The inability to freely publish information about the issuers private transactions may prevent market participants from gaining a complete picture of the issuer's products.

For issuers that only issue privately, prohibitions on the publication or transmission of offering documents creates a "knowledge gap" whereby structuring elements and other transaction features are not widely understood by market participants, and the performance of the securities cannot be tracked. This is particularly a problem in market segments where most or all transactions are issued privately.

B. Arguments for Proposal

1. Transfer restrictions are adequate

Transfer restrictions commonly used by ABS issuers and seasoned issuers of fixed income securities provide reasonable assurance that the securities cannot be transferred to persons that do not meet the requirements for the applicable exemption from registration. Furthermore, such securities are for the most part of interest primarily to institutional investors only. Prohibitions on publicity, unrestricted information or general solicitation are not necessary to further safeguard against investment by non-eligible purchasers.

2. Likelihood of conditioning the market is remote

In the context of ABS issuers and seasoned issuers of investment grade fixed income securities, the likelihood of conditioning the market through premature disclosure, or through disclosure to persons that are not eligible investors, is remote.

Seasoned issuers are companies that are already known to the U.S. capital markets, and about which a substantial volume of publicly available information is available.

The market for privately placed ABS is not a broad market, but rather is essentially an institutional investor market. Participants in this market are highly sophisticated, and are not likely to be conditioned or in any way misled through the release of information about a transaction outside of the normal channels for distributing private placement offering materials.

For the same reasons, the risk that unrestricted disclosure in the U.S. about Regulation S offerings of ABS or investment grade fixed income securities of seasoned issuers would result in resales to U.S. persons in violation of Regulation S appears extremely remote.

3. **Suppression of information is harmful to the capital markets**

As stated above, existing restrictions on the publication or release of information on privately placed offerings creates a lack of knowledge in the markets about the assets, structure and performance of certain ABS. This may affect all or a portion of a specific issuer's securities, or entire segments of the ABS markets.

The effect of our proposals would also be to allow the liberal publication of research reports in the context of privately placed offerings. We believe that this result would also be of great benefit in spreading knowledge and making more transparent the markets for privately placed ABS or investment grade fixed income securities of seasoned issuers.

IV. CONCLUSION

As we have discussed in this letter, the existing securities law framework imposes restraints on communications that are incompatible with today's ABS and seasoned issuer investment grade fixed income markets. We believe that substantial regulatory relief is needed in order to permit the free flow of information in a manner that market participants need and demand, without giving rise to the substantial legal uncertainty and potential for disproportionate liability that exists under the current regulatory framework. As we have stated, an essential underpining of our proposals is the premise that the expansion of materials that may be used as "free writing" without being treated as a prospectus under Section 5, will not be workable or in any way helpful unless the materials permitted to be used are also exempted from filing requirements and from liability under Section 12(a)(2).

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The Association appreciates this opportunity to provide its views to the Commission on the matters discussed herein. We look forward to meeting with you and continuing our dialogue on the matters discussed in this letter. Please address any questions or requests for additional information to Michel de Konkoly Thege or Laura Gonzalez of the Association at 212-440-

9400, or to Stephen S. Kudenholdt of Thacher Proffitt & Wood, special outside counsel to the Association in this matter, at 212-789-1250.

Sincerely,

/s/ Elliot R. Levine

Elliot R. Levine
CIBC World Markets
2001 Chair, Corporate Bond
Legal Advisory Committee
of the Bond Market Association

/s/ Bianca A. Russo

Bianca A. Russo
J.P. Morgan Chase & Co.
2001 Chair, MBS/ABS
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cc: The Honorable Harvey Pitt, Chairman
Mark Radke, Securities and Exchange Commission

APPENDIX 1

SPECIFIC REGULATORY PROPOSALS

Public offerings. Our specific proposals relative to public offerings are as follows:

1. add new Rule 134x under the Securities Act as follows:

Rule 134x. Communications not Deemed a Prospectus for Eligible Form S-3 Securities.

(a) With respect to any eligible Form S-3 security, the term "prospectus" as defined in Section 2(10) of the Act shall not include any communication of any type, by any person, at any time and in any format, other than a written prospectus meeting substantially all of the requirements of Section 10 (a) of the Act.

(b) The publication, delivery or use of any communication of any type, by any person, at any time and in any format, other than a written prospectus meeting substantially all of the requirements of Section 10 (a) of the Act, shall not constitute an "offer to sell" or an "offer to buy" any eligible Form S-3 security for any purpose under the Act.

(c) The term *eligible Form S-3 security* means any security that meets all of the following requirements:

(1) The security is either (A) an asset-backed security as defined in General Instruction I.B.5. to Form S-3, or (B) an investment grade fixed income security of an issuer that meets the registrant requirements for registration on Form S-3 or Form F-3.

(2) The security has been or will be offered in an offering pursuant to a registration statement filed or to be filed on Form S-3.

For purposes of this Rule, *fixed income security* has the meaning defined in section (b)(2) of Rule 3a-7 under the Investment Company Act of 1940.

2. add new Rule 153x under the Securities Act as follows:

Rule 153x. Definition of "Preceded by a Prospectus" as Used in Section 5(b)(1) and 5(b)(2), for Eligible Form S-3 Securities.

With respect to any eligible Form S-3 security as defined in Rule 134x (c), the term "preceded by a prospectus" as used in Section 5(b)(1) and 5(b)(2) of the Act with respect to any requirement for the delivery of a prospectus shall be satisfied if a written prospectus meeting the requirements of Section 10 (a) of the Act has been provided by or on behalf of the issuer to the underwriter for use in connection with the offering after effectiveness of the related registration statement; provided that (a) reasonable steps are taken to make such prospectus available to prospective investors, and (b) such prospectus has been or will be filed with the Commission in compliance with Rule 424 (b)(2) or (b)(5).

Submission by
The Bond Market Association
to the Securities and Exchange Commission
regarding specific Securities Act reform proposals
November 29, 2001

Topic 1 - financials for business trusts

Statement of Issue

In recent years, the SEC staff has taken the position, in comment letters to asset backed securities shelf registrants, that where the issuing entity is a Delaware business trust, audited financial statements of the issuer should be included in the prospectus supplement.

Following is a typical comment from an SEC comment letter:

> "If the issuer of a series is a [Delaware] business trust, you must include audited financial statements, as well as additional S-1 level disclosure pertaining to the business trust, in the prospectus supplement."

Our Position

We believe that requiring audited financials or additional S-1 level disclosure in this context would not improve the quality of disclosure and would not provide any helpful additional information to investors. The SEC's position is in direct opposition to over twenty years of custom and practice in the ABS markets to the effect that special purpose entities (SPEs) that issue ABS are not required to prepare audited financials, either at initial issuance or on an ongoing basis. Varying from this practice would impose unnecessary expense on the issuer and could call into question the validity of industry practice.

Requested Relief

The Bond Market Association requests that the SEC:

1. Discontinue issuing the above comment requesting audited financial statements as well as additional S-1 level disclosure pertaining to ABS issuers that are business trusts, in comment letters for ABS registration statements.

2. Include in its publication "Current Issues and Rulemaking Projects" of the Division of Corporate Finance a section stating that ABS issuers, including business trusts, are not required to include in their prospectuses audited financial statements or additional S-1 level disclosure.

Discussion

Use of Delaware business trusts

Most securitization structures utilize a trust as the issuing vehicle, which is established either 1) as a common law trust, or 2) a Delaware business trust. Common law trusts are typically used in structures where the beneficial interests in the trust are treated by the investor as debt for tax purposes, even though not debt in form. These include grantor trusts (trusts where, because of the passive nature of the activities and the lack of non-pro rata allocations, the investor is treated as if it owned a share of the trust assets directly) and REMICs (real estate mortgage investment conduits) where the beneficial interests are treated by statute as debt instruments for tax purposes. For these structures, Delaware business trusts are not used because of their marginally higher administrative expense, as compared with common law trusts.

Delaware business trusts are generally used in ABS transactions where the securities are to be issued in legal form as debt securities. Except for the structures described in the preceding paragraph, investment grade asset backed securities are generally issued in legal form as debt, in order to support the conclusion that the securities should be treated by the investor as debt obligations for tax purposes rather than equity interests in the issuing vehicle.

In many respects, SPEs structured as Delaware business trusts are similar to those structured as common law trusts. In both cases, they will be structured with highly limited powers and activities, in order to preserve their bankruptcy-remote status. However, Delaware business trusts have a number of distinct advantages as issuing vehicles, as compared to common law trusts. First, they are authorized by statute to issue debt securities, unlike common law trusts which are not clearly authorized to issue debt. Second, they are subject to a clearly established statutory scheme. Third, they are also acknowledged as entities under the U.S. Bankruptcy Code, which facilitates the provision of legal opinions addressing their status. Delaware business trusts can also be used to create master trusts, and can therefore issue multiple series backed by separate asset pools.

Delaware business trusts also have a number of advantages as issuing SPEs, in comparison to corporations. First, Delaware business trusts may be treated as partnerships for federal income tax purposes, which facilitates the ability to have the equity in the SPE held by more than one entity. Second, banks and other regulated entities do not need to obtain regulatory approval to form Delaware business trusts, but such approval may be needed in forming a special purpose corporation. Finally, for securities issued by Delaware business trusts, the registrant is deemed to be the depositor[1], which is the special purpose corporation that transfers the assets to be securitized to each separate issuing trust. Thus, only the depositor, and not each separately formed issuing trust, is required to sign the registration statement.

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[1] Section 2(a)(4) of the Securities Act of 1933, as amended.

Business practice regarding financial disclosure

At the time ABS[2] structures were first developed in the late 1970s and early 1980s, it was established early on by market convention, and with the acquiescence of the SEC for registered transactions, that financial statements for the issuing SPEs were not necessary for any purpose. In fact, it was argued that financial statements for an ABS issuer might be misleading, by making it appear that the transaction is similar to corporate debt. The rationale for this approach is outlined below.

SPEs used to issue ABS are created with highly limited powers. Generally, their activities are limited to 1) acquiring the underlying assets, 2) issuing ABS and 3) through servicers, trustees and other entities arranging for the administration of the assets and the ABS. Each of these subjects is described in great detail in the prospectus for the ABS offering. The prospectus provides both quantitative and qualitative disclosure about the underlying assets in far greater detail than would be provided by audited financial statements. Similarly, the terms and conditions, as well as the investment characteristics, of the ABS (the "liabilities") of the SPE are described in the prospectus in far greater detail than would be provided by audited financial statements.

One essential purpose of financial statements is to disclose and evaluate various assets and liabilities of a traditional business enterprise, in a manner that allows for standardized comparison over different time periods as well as to other entities. This methodology of disclosure is not necessary or helpful for SPEs, inasmuch as all material assets and liabilities of the entity are already described in the prospectus in all material detail. For an SPE, its only material assets are those that back the ABS, and its only material liabilities are the ABS.

For similar reasons, financial statements would not be necessary or helpful to evaluate the performance of an ABS issuer over time. For an ABS issuer, the composition of the asset pool cannot change over time, except due to normal collections and liquidations of the underlying assets, information about which is provided to investors in periodic reports. Nor can the terms and conditions of the liabilities of the entity be changed, or new liabilities created, except as is consistent with the governing documents of the SPE which are described in the prospectus. For these reasons, the periodic reports that are required to be provided to investors under the operative documents should contain all relevant financial information about the assets and liabilities of the SPE.

Another essential purpose of financial statements is to provide a standardized format for evaluating the net worth or equity of a business enterprise under generally accepted accounting principles, or GAAP. With SPEs that issue ABS, the net worth of the entity under GAAP is completely irrelevant for any purpose. A key difference between ABS issuers and other issuers is that the ratings of ABS are supported not by the net worth or creditworthiness of the issuing SPE, but rather by the anticipated cash flows on the underlying assets together with any credit enhancements. Investors

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[2] As used herein, asset-backed securities, or ABS, includes mortgage-backed securities.

in ABS and rating agencies alike look solely to the cash flow characteristics of the underlying assets, and to the adequacy and creditworthiness of any credit enhancement.

Attached as Exhibit 1 is a sample financial statement for a Delaware business trust ABS issuer. The Exhibit was taken from a registration statement filed with the SEC in 1999. We believe that it is apparent that the financial statements add no useful information.

For the above reasons, The Bond Market Association believes that financial statements for ABS issuers including business trusts are not material, and therefore are not required under existing SEC regulations. Requiring such financial statements in comment letters imposes unnecessary expense on the issuer and does not provide any meaningful additional disclosure to investors.

In issuing comments requiring financial statements for ABS issuers that are business trusts, it may be that the SEC is concerned that the issuer might not otherwise disclose all of its material assets and liabilities, including any assets other than those backing the securities and any liabilities other than the ABS being offered. If that were the case, this concern could be remedied by creating an express regulatory requirement that an ABS issuer disclose all of its material assets and liabilities in the prospectus, and The Bond Market Association would support the adoption of such a regulatory requirement.

The Bond Market Association is concerned that the SEC's comments requiring financial statements for ABS issuers that are business trusts could set a very undesirable precedent, and could open the door to further requirements for financial statements for ABS issuers. For the reasons discussed above, financial statements for ABS issuers should be viewed as unnecessary and immaterial in all contexts.

EXHIBIT 1

Report of Independant Auditors

Wilmington Trust Company
As Owner Trustee of Ace Securities Corp.
Home Loan Trust 1999-A

We have audited the accompanying balance sheet of Ace Securities Corp. Home Loan Trust 1999-A, a Delaware business trust (the "Trust") as of August 6, 1999. This balance sheet is the responsibility of the Trust. Our responsibility is to express an opinion on this balance sheet based on our audit.

We conducted our audit in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the balance sheet is free of material misstatements. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the balance sheet. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall balance sheet presentation. We believe that our audit of the balance sheet provides a reasonable basis for our opinion.

In our opinion, the balance sheet referred to above presents fairly, in all material respects, the financial position of the Trust, at August 6, 1999, in conformity with generally accepted accounting principles.

/s/ Deloitte & Touche

Deloitte & Touche LLP
New York, New York

August 6, 1999

Ace Securities Corp.
Home Loan Trust 1999-A

Balance Sheet

August 6, 1999

Assets		
Total Assets		$0
Liabilities and Equity Interest		
Liabilities	$0	
Equity interest	$10	
Capital contribution due from Ace Securities Corp.	(10)	0
Total liabilities and equity interest		$0

See accompanying notes.

Ace Securities Corp.
Home Loan Trust 1999-A

Notes to Balance Sheet

August 6, 1999

1. Organization

Ace Securities Corp. Home Loan Trust 1999-A, a Delaware statutory business trust (the "Trust"), was organized in the state of Delaware on August 6, 1999 with Wilmington Trust Company, as its owner trustee.

The Trust was organized to engage exclusively in the following business and financial activities: To purchase or acquire from certain direct and indirect subsidiaries of ACE Securities Corp. certain home loans secured by, for the most part, junior liens on residential properties in which the related borrowers have little or no equity, and to pledge such loans or interests therein to First Union National Bank, as indenture trustee in connection with the planned issuance of up to $372 million of its Asset-Backed Notes, Series 1999-A. Ace Securities Corp. is a subsidiary of German American Capital Corp.

2. Capital Contribution

ACE Securities Corp. plans to make an initial capital contribution of $10 to the Trust on August 10, 1999.

Submission by
The Bond Market Association
to the Securities and Exchange Commission
regarding specific Securities Act reform proposals
November 29, 2001

Topic 2 - disclosure for swaps counterparties

Statement of Issue

In recent years, SEC staff has taken the position, in comment letters to asset backed securities shelf registrants, that where swaps or derivatives are used for structuring purposes in an ABS transaction, financial disclosure about the counterparty should be included in the prospectus supplement.

Following is a typical comment from an SEC comment letter:

> "We note that the collateral also may include interest rate exchange agreements, interest rate cap or floor agreements, currency exchange agreements or similar agreements....To the extent the credit exposure under a swap or similar agreement equals or exceeds 10% (but [is] less than 20%) of the cashflow to a series [or, "of the Trust's assets"], provide summarized financial statements of the counterparty. To the extent the credit exposure pursuant to a swap or similar agreement equals or exceeds 20% of the cashflow to a series [or, "of the Trust's assets"], provide audited financial statements of the counterparty."

In another example of a comment letter, the SEC continues:

> **"Furthermore, the Trust's credit exposure of [45%] or more pursuant to a swap or other agreement would raise co-registrant issues with respect to a counterparty."**

Our Position

The Bond Market Association believes that: (1) the method of evaluating the exposure to a swap for purposes of the foregoing triggers should be clarified, and should be based on the net market value of the swap at the time of issuance of the ABS as further described below; (2) where full financial disclosure is required, the ABS issuer should be able to refer the reader to where the financial statements can be found, and should not be required to incorporate the financial statements by reference or otherwise be liable for their content; and (3) in no event should the counterparty to a swap be required to be a co-registrant, if the swap is treated as not a security under the Securities Act of 1933, as amended.

Requested Relief

The Bond Market Association requests that the SEC:

1. Discontinue issuing the above comments in comment letters for ABS registration statements.

2. Include in its publication "Current Issues and Rulemaking Projects" of the Division of Corporate Finance a section based on the following:

   To the extent the net market value of a swap or similar agreement at the date of issuance of the ABS equals or exceeds 10% (but does not equal or exceed 20%) of the issuer's assets, provide summary financial information about the counterparty. To the extent the net market value of a swap or similar agreement at the date of issuance of the ABS equals or exceeds 20% of the issuer's assets, indicate where financial statements of the counterparty can be obtained.

   For unilateral swap contracts (that is, contracts where a single upfront payment is made by or on behalf of the SPE, and no ongoing payments are to be made to the counterparty by or on behalf of the SPE), the net market value of the swap contract at the date of issuance of the ABS is deemed to be the amount of that upfront payment.

   For bilateral swap contracts (that is, contracts where payments may be made over the term of the contract by both the SPE and the counterparty), the net market value of the swap contract is deemed to be its termination value on the date of issuance of the ABS.

Discussion

Issue 1 - The method for evaluating exposure to a swap contract should be based on the net market value of the swap at the time of issuance of the ABS

While the SEC's 10% and 20% thresholds serve as very appropriate benchmarks for measuring the materiality of a swap contract in the context of an ABS transaction, there has been significant difficulty in measuring the issuer's "credit exposure" to a swap against those thresholds as a percentage of the total value of the underlying assets. In order to make this calculation, it is necessary to make assumptions about market conditions and other factors that would affect future payments to the issuing SPE under the swap contract, and to make further assumptions in order to reach a valuation of the assumed future payments. Because the payments under a swap contract are difficult to project, and because the valuation assumptions are subjective, there is significant uncertainty in making these valuations for the purpose of complying with the SEC's guideline.

On the other hand, swap contracts are in fact routinely priced and traded by market participants. These activities involve an analysis similar to that described above, where payments made by both parties to the swap contract are projected and evaluated under various assumptions including future market conditions. Although valuations by market participants are of course subjective, they nevertheless result in a concrete and reliable valuation of the payments under a swap contract because these valuations are designed to be used by opposing parties in actual arms-length transactions.

The Bond Market Association believes that the best way to value swap contracts for purposes of complying with the SEC's 10% and 20% thresholds is to use valuations by market participants to determine the net market value of the swap to the SPE at the date of issuance of the ABS, relative to the size of the transaction. Specifically, we recommend that:

> For unilateral swap contracts (that is, contracts where a single upfront payment is made by or on behalf of the SPE, and no ongoing payments are to be made to the counterparty by or on behalf of the SPE), the net market value of the swap contract should be deemed to be the amount of that upfront payment.
>
> For bilateral swap contracts (that is, contracts where payments may be made over the term of the contract by both the SPE and the counterparty), the net market value of the swap contract should be deemed to be its termination value on the date of issuance of the ABS. The termination value would be determined in accordance with the termination provisions of the swap contract, which are designed to use market quotations and dealer quotes to determine the net present value of the contract on any given day. The termination value on any given day would represent the cost to the SPE to obtain a new swap contract on the same terms from a different counterparty, and thus represents the value to the SPE of the swap contract.
>
> The net market value of the swap contract should be tested as a percentage of the aggregate principal amount of all securities issued by the SPE at the date of initial issuance. This would include securities not publicly offered, including any classes retained by the depositor's affiliates.

The Bond Market Association believes focusing on the net market value of the swap contract to the SPE results in an "apples to apples" measurement of the materiality of the swap relative to an investment in the ABS. The net market value of the swap to the SPE approximates the cost that the investor would incur, if the swap were not included in the transaction and the investor were to obtain comparable risk coverage by purchasing a swap contract directly.

Further, the net market value of the swap contract as described above effectively measures the value of the credit exposure of the SPE to the swap counterparty. If, at any time, the swap counterparty were to give rise to a termination event (for example, if it defaults on its obligations, if it becomes insolvent or if its ratings decline below a level specified in the swap contract), the swap would be terminated and the counterparty's obligations to the SPE at that time would be limited to a lump sum payment equal to the termination value, determined as provided in the contract. *Thus, upon default by the counterparty, the maximum amount that the SPE could collect from the counterparty would be the termination value, and therefore the termination value represents the most appropriate measure of the credit exposure to the counterparty.* For unilateral swaps, the upfront payment effectively approximates the termination value of the contract at the date of issuance.

Issue 2 - Where full financial disclosure is required [use same language as on pg.1, "Our Position"]

For ABS transactions that include a swap contract, where the net market value of the swap contract (as described above) is 20% or more of the principal amount of the securities issued, the issuer should not be required to include audited financial statements of the counterparty, if such financial statements are otherwise publicly available. Rather, the issuer should be able to simply refer the reader to a publicly available location where such financial information can be found, which could include either (i) SEC filings, or (ii) an unrestricted website together with contact information for obtaining a paper version.

As long as audited financial statements of the swap counterparty are publicly available, and are reasonably accessible by an investor, there is no reason to compel the ABS issuer to include the financial statements in the prospectus or to incorporate them by reference. That requirement would only serve to penalize the ABS issuer by making it liable under the 1933 Act for the accuracy and completeness of the financial statements of the counterparty, without improving the quality or quantity of the information available to the investors.

Moreover, as discussed below, because most swap contracts are not "securities" for purposes of the 1933 Act, the registration statement of which the ABS prospectus is a part is not required to register the sale of the swap contract. For the same reason, the financial disclosure requirements for registered securities do not apply.

Issue 3 - co-registrant issue [use same language as on pg.1, "Our Position"]

The SEC's previously articulated policy, to the effect that co-registrant issues may arise if a swap contract used in an ABS transaction represents a credit exposure of 45% or more of the transaction size, would appear to no longer be supported by applicable law.

In December 2000, the Commodity Futures Modernization Act of 2000 became law. One effect of this legislation was to add new Section 2A to the 1933 Act, which provides that both security-based swap agreements and non-security-based swap agreements are excluded from the definition of "security" for purposes of the 1933 Act. This effectively excludes all "swap agreements" as defined under new section 206A of the Gramm-Leach-Bliley Act, which in turn covers virtually all types of swap agreements between eligible contract participants, with limited exceptions (for example, any swap that constitutes a put or call on a security). Generally, swap contracts used in connection with ABS transactions could be readily structured to qualify as "swap agreements" under section 206A.

As a result of these changes, with respect to swaps that constitute "swap agreements" as defined under new section 206A of the Gramm-Leach-Bliley Act, no co-registrant issue could arise because such a swap agreement would not be a "security" and thus could not be subject to the registration requirements under the 1933 Act.

Submission by
The Bond Market Association
to the Securities and Exchange Commission
regarding specific Securities Act reform proposals
November 29, 2001

Topic 3 - participations as securities

Statement of Issue

In recent years, SEC staff has taken the position, in comment letters to asset backed securities registrants, that where the assets underlying the securities include participation interests in financial assets, the participations themselves must in all cases be treated as separate securities that must be separately registered in connection with the offering.

Following are typical comments from an SEC letter:

> "We also note the disclosure about the participation interests. We believe that participations are securities."
>
> "We are of the view that a 'Participation', as defined in the prospectus, is a security. The staff believes that any Participations issued by the Depositor or its affiliates which are included in the Trust in respect of any series of Certificates must in all circumstances be registered concurrently with an offering of the Certificates. Moreover, if the Participations were issued by an entity other than the Depositor or its affiliates, such Participations must (i) either (a) have been previously registered under the Securities Act of 1933, or (b) be eligible for sale under Rule 144(k); and (ii) be acquired in bona fide secondary market transactions not from the issuer or an affiliate."

Our Position

We respectfully submit that the case law relating to the definition of "security" under the Securities Act of 1933, as amended, does not support the view that participations are in all cases securities. Nor does case law support a more narrow position that participations that are acquired by ABS issuers for the purpose of inclusion in an ABS transaction are in all cases securities.

Rather, this question should be determined on a case-by-case basis in light of the relevant facts and circumstances. Participations that are created with a view to inclusion in a securitization, as discussed below, typically have attributes, and are transferred in transactions, in a manner that does not support the view that they should be treated as separate securities under applicable case law.

The SEC's position that participations constitute securities does not serve to improve the quality of disclosure, but rather has the practical effect of limiting the ability to use participations as structuring tools.

Requested Relief

The Bond Market Association requests that the SEC:

1. Discontinue issuing comments in comment letters for ABS registration statements that all participations used as assets underlying ABS are themselves separate securities.

2. Include in its publication "Current Issues and Rulemaking Projects" of the Division of Corporate Finance a section stating that participations underlying ABS are not in all cases to be treated as separate securities, but rather are to be evaluated for this purpose under a facts and circumstances approach based on case law principles.

Discussion

1. *Uses of participations in ABS transactions*

Participations may be used for a variety of reasons in structuring ABS transactions. For example, in commercial mortgage-backed securities ("CMBS") transactions, participations may be used in order to transfer less than the entire mortgage loan to the structuring vehicle.

This may done for a variety of reasons: (i) to deposit less than the entire balance of the loan, in order to prevent the securitized pool from being concentrated in a particular property or credit to an extent greater than would be acceptable to the applicable rating agencies, credit enhancers or investors, (ii) to deposit less than the full amount of interest on the loan, if the full coupon is greater than necessary to cover the remittance rate to investors plus servicing fees, credit enhancement costs and other transaction expenses, (iii) to reserve from the transaction ancillary rights under the mortgage loan that are not needed for the securitization, such as "equity kicker" rights (additional interest or return on the loan that is contingent on income or gain from the property), or (iv) to avoid the application of transfer taxes or contractual transfer restrictions that might otherwise apply to a direct transfer of the loan and the supporting mortgage.

- *Example of a participation in a CMBS transaction*

In one example of a participation used in a CMBS transaction that was privately placed in 1997, a 50% participation interest in a particular loan was deposited into the securitization trust. The 50% participation interest represented approximately 19% of the total assets of the trust. In this case, the loan was participated solely in order to avoid undue concentration of the trust's assets in the related loan. The participation interest was created under a short form participation agreement, executed contemporaneously with the issuance of the CMBS, between the originator and the depositor for the securitization.

- In this transaction, the entire loan was first transferred to the depositor, and then under the participation agreement the depositor conveyed a 50% participation interest in the loan back to the originator.

- The participation agreement contemplates that the depositor's remaining 50% participating interest is to be immediately conveyed to the securitization vehicle.

- The participation interests are evidenced only by the participation agreement, and not by a certificate.

- The participation agreement provides that all payments and recoveries on the loan, excluding servicing compensation and reimbursements for servicing advances, are simply divided on a pro rata basis (50% each) between the two participation interests.

- The servicing of the entire loan is governed by the provisions of the pooling agreement for the CMBS. For example, the servicing standards and procedures for the loan are as set forth in the pooling agreement, and any successor servicer appointed under the pooling agreement will automatically become the servicer of the loan.

2. *Case Law.*

(a) Pre-Reves case law

The first federal appellate court to address the issue of whether a loan participation constitutes a "security" for purposes of the federal securities laws was *Lehigh Valley Trust Company v. Central National Bank of Jacksonville*, 409 F.2d 989 (5 Cir. 1969). The court in that case took a literal reading of the definition of "security" and held that the participation in that case, which was a typical interbank commercial loan participation made to comply with lending limits, was a security.

However, within five years of the *Lehigh Valley* decision, courts began to take a more liberal approach in reviewing cases involving the interpretation of federal and state security laws. In *United Housing Foundation v. Forman*, 421 U.S. 837 (1975), the Supreme Court was faced with deciding whether or not a transaction involving shares of "stock" fell under the auspices of federal security laws. In *Forman*, plaintiffs alleged that since federal securities laws include "stock" in the classification of securities which they aim to regulate, the transaction, *per se*, came under the auspices of the 1933 Act and the 1934 Act. The Court stated the principle that when "searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality."

In *United American Bank of Nashville v. Gunter*, 620 F.2d 1108 (5 Cir. 1980), a case involving a loan participation, the same court that decided *Lehigh Valley* rejected the literal

interpretation once utilized to interpret federal securities laws and instead focused "on the economic realities underlying a transaction." The court went further in saying that it had "also rejected the ritualistic application of the federal securities laws and ha[d] focused, in recent cases, on whether the transaction at issue is commercial or investment in nature."

Applying the *Forman* test, the Fifth Circuit found that the loan participation was not a security because the acquisition had been conducted in a manner consistent with a loan, the loan was fully collateralized, the participant was to receive fixed payments that would amount to the principal plus interest at a fixed rate, and that the participant was not relying on any entrepreneurial efforts of the lending bank.

Additional pre-*Reves* cases that held that loan participations are not securities include *American Fletcher Mortgage Company, Inc. v. U.S. Steel Credit Corporation*, 635 F.2d 1247 (7 Cir. 1980), *Union Planters National Bank of Memphis v. Commercial Credit Business Loans, Inc.*, 651 F.2d 1174 (6 Cir. 1981) and *Union National Bank of Little Rock v. Farmers Bank*, 786 F.2d 881 (8 Cir. 1986).

(b) Reves

The Supreme Court's decision in *Reves v. Young*, 494 U.S. 56 (1990) changed the way the judiciary decides whether a note is a security under the federal securities laws. In deciding *Reves*, the Court adopted a "family resemblance" test. In essence, a note is presumptively a security unless it bears a strong family resemblance to certain types of notes that clearly are not securities. *Reves* lists certain types of securities that clearly are not securities, including consumer loans, residential mortgage loans, and short term commercial loans.

The family resemblance test considers four factors: (1) the motivations of a reasonable buyer and seller to enter into the transaction; (2) the plan of distribution of the instrument; (3) the reasonable expectations of the investing public; and (4) whether some factor, such as the existence of an alternative regulatory scheme, significantly reduces the risk of the instrument, thereby circumventing the need of the protection offered by the federal securities laws.

(c) Banco Espanol

Since *Reves*, the Supreme Court has not directly addressed the issue of whether a loan participation is a security under federal securities laws. The most significant case since *Reves* to consider this issue is Second Circuit's decision in *Banco Espanol de Credito v. Security National Bank*, 973 F.2d 51 (2 Cir. 1992) ("*Banco Espanol II*").

In *Banco Espanol II*, Security Pacific National Bank and Security Pacific Merchant Bank (collectively "Security Pacific") had extended a line of credit to Integrated Resources, Inc. ("Integrated") allowing Integrated to obtain short-term unsecured loans from Security Pacific.

Security Pacific in turn sold these loans to various investors - a traditional short-term loan participation.

Security Pacific offered no assurances as to Integrated's ability to repay the loans and assumed no responsibility for default. Integrated subsequently found itself in financial trouble, and unable to obtain further lines of credit, declared bankruptcy. A group of investors brought an action against Security Pacific stating that since the loan participations were "securities," Security Pacific's withholding of material facts as to Integrated's financial condition amounted to a violation of applicable federal securities laws. Unswayed, the district court granted Security Pacific summary judgment and dismissed the claim. *See Banco Espanol de Credito v. Security Pacific National Bank*, 763 F. Supp. 36 (S.D.N.Y. 1991) ("*Banco Espanol I*").

On appeal, the plaintiffs conceded that traditional loan participations did not qualify as securities under the Acts. Rather, plaintiffs argued that the specific loan participations at issue in this case were securities because Security Pacific sought to sell "100% of its loans through high speed telephonic sales and often pre-paid transactions." *Banco Espanol II* at 55.

In deciding the issue, the district court applied the family resemblance test espoused in *Reves*. Under that test, the first factor to be considered is the parties' motivation. The district court found that the motivation of Security Pacific was to have access to enough short-term funds "to finance current operations or to cover a temporary cash shortage." *Banco Espanol I.* at 42. Likewise, the motivations of the participants were to use its excess cash to purchase a short-term vehicle that would give the participants a higher rate of return than other money market investments. *Id.* The court then concluded that the ultimate motivation of the parties was not to invest in a business enterprise but rather to promote commercial purposes. *Id.*

Addressing the second *Reves* factor - the plan of distribution of the instrument - the court noted that Security Pacific only sought to solicit the participation of institutional and corporate entities. Security Pacific specifically excluded individual investors. In fact, the minimum purchase amount was $1 million. Furthermore, the participations were evidenced by a signed Master Participation Agreement ("MPA"). *Id.*

The third factor of the test is the reasonable perception of the instrument by the investing public. The district court had trouble defining "investing public" and reasoned that the Supreme Court meant to define that term as those "institutions that would be targeted by Security Pacific sales personnel for inclusion in this program." *Id.* at 43. Since Security Pacific required a signed MPA for inclusion in the program, and since all the investors were "sophisticated financial or commercial institutions," they were put on notice that the instruments were loan participations and not an investment in a business enterprise. *Id.*

In regard to the fourth criterion - whether there are alternative safeguards or regulatory schemes in place that would duplicate the protective feature of the Acts - the court found that the Office of

the Comptroller of the Currency had issued guidelines to all national banks regulating loan participations. Being a national bank, Pacific Security was subject to such regulations. *Id.*

In affirming the district court's opinion, the Second Circuit believed that the loan participations most closely resembled a commercial loan and not a "note," *per se*, which is a security under the Acts. However, the Second Circuit also limited its holding to those loan participations at issue in the case at bar - other loan participations *could* be construed as securities.

Banco Espanol II clearly indicates that under existing case law loan participations are not *per se* securities under the federal securities laws. Rather, this case clearly indicates that this issue should be determined on a case-by-case basis, taking into account the facts and circumstances not only of the instrument in question but also the transaction in which it is involved.

3. *Application of Reves analysis to participations in an ABS transaction*

The assets underlying an ABS transaction are financial assets, principally consisting of various types of loans, which may be residential mortgage loans, commercial mortgage loans, auto loans, credit card accounts and other types of consumer receivables.

The following discussion will consider the hypothetical case of a participation used as an underlying asset in a publicly offered ABS transaction, where (i) the participation concurrently is created by an entity unaffiliated with the depositor with the transfer thereof to the depositor for inclusion in the securitization, (ii) the participation is created for a purpose similar to that described in Section 1 above, (iii) the participation represents an interest in one or more underlying assets as described above, which do not independently constitute "securities" under the federal securities laws, and (iv) the participation does not include any rights against the seller other than those that would be customary in the direct sale of the underlying asset. These assumptions would be typical of a situation where a participation is actually used in an ABS transaction.

In applying the *Reves* test, it is necessary to consider the instrument in question in the context of a specific transaction.

a. *Acquisition of the participation by the depositor*

First factor (parties' motivation): In this transaction, the motivations of the buyer (the depositor) are to acquire a partial or indirect interest in the underlying asset for the purpose of immediately reconveying the same to the special purpose entity (SPE) that will issue the ABS. The buyer is not purchasing the participation on its own behalf as an investment vehicle, but rather is acquiring it as part of its ordinary business activity of acting as a conduit in the pooling of assets for transfer to an SPE. This is a commercial purpose, not an investment purpose. The motivation of the seller (the entity that formed the participation and transferred it to the depositor) is to facilitate the disposition of an economic interest in the underlying asset in a manner that is essentially similar to the direct sale of the underlying asset. The seller is not raising debt or equity capital to finance its business

operations, but rather it simply is selling a financial asset for the purpose of recognizing gain and repaying indebtedness used to carry the asset.

Second factor (plan for distribution of the instrument): In this transaction, the plan of distribution is simply to sell the participation to the depositor for immediate resale by it to the SPE. This transaction in and of itself does not involve any elements of a securities offering. The participation is offered and sold only to the depositor (and subsequently to the SPE), and is not offered or made available to any other person as an independent investment vehicle.

Third factor (reasonable perception of the instrument by the investing public): In this transaction, there is no investing public.

Fourth factor (the existence of any alternative regulatory schemes or other safeguards): In this transaction, as in the subsequent sale of the participation by the depositor to the SPE, there is a regulatory scheme in place which adequately protects the interests of the investors. By virtue of the registration of the offering of the ABS to be issued in the subsequent securitization, investors can be assured that all material information about the participation (as well as the underlying asset) is required to be described in the prospectus, and that such disclosure is covered by the protections of Sections 11 and 12(2) of the Securities Act of 1933. In this context, treating the participation as a separate security would add absolutely no additional protection to the investors as against the depositor, the underwriter and their controlling persons.

For the reasons discussed above, we believe that in this transaction the participation would not be viewed as a security under the *Reves* analysis.

The only possible theoretical benefit from treating the participation in this transaction as a separate security would be if the entity that formed the participation was not an affiliate of the depositor and consented to become a co-registrant with respect to the participation, thereby giving the investors an additional potential defendant but not otherwise increasing the protection to the investors under the Act. However, in reality, this approach would simply result in issuers refraining from using participations in ABS transactions, as has been the experience in the ABS market since the SEC started taking this position. We respectfully submit that there is no policy reason or legal justification for this position, and that the SEC's position needlessly hampers the ABS market.

b. *Transfer of the participation by the depositor to the SPE*

First factor (parties' motivation): In this transaction, the motivations of the buyer (the SPE) are to acquire a partial or indirect interest in the underlying asset for the purpose of immediately using that interest as part of the asset pool backing the ABS to be issued. The SPE is not purchasing the participation on its own behalf as an investment vehicle, but rather is acquiring it as part of its business of acting as the issuer of the ABS. This is an essentially commercial purpose, not an investment purpose. The motivations of the seller (the depositor) are discussed above.

Second factor (plan for distribution of the instrument): In this transaction, the plan of distribution is simply to sell the participation to the SPE. Although the subsequently issued ABS are offered and sold to the public, the transfer of the participation by the depositor to the SPE in and of itself does not involve any elements of a securities offering. The participation itself is offered and sold only to the SPE, and is not offered or made available to any other person as an independent investment vehicle.

Third factor (reasonable perception of the instrument by the investing public): In this transaction, there is no investing public. In the immediately following issuance of the ABS, the expectations of the investing public are that the participation is merely one asset underlying the ABS that is described in the prospectus, that cannot be separately acquired or traded. In the context of the securitization, the participation is added to the other assets in the pool creating risk diversification, and is provided with credit enhancement sufficient to obtain the credit rating desired by investors. The investors do not perceive the participation as a separate security, nor would they be interested in acquiring the participation as a separate security as it would not be within the same investment parameters as the ABS. The investor's only expectation relative to the participation would be to understand the terms and conditions of the participation agreement as an indirect interest in the underlying loan.

Fourth factor (the existence of any alternative regulatory schemes or other safeguards): As discussed above, because the ABS will be sold in a registered offering, investors can be assured that all material information about the participation (as well as the underlying asset) is required to be described in the prospectus, and that such disclosure is covered by the protections of the Act. Again, treating the participation as a separate security would add absolutely no additional protection to the investors as against the depositor, the underwriter and their controlling persons.

For the reasons discussed above, we believe that in this transaction, the participation would not be viewed as a security under the *Reves* analysis.

In the context of the transfer of the participation by the depositor to the SPE, treating the participation as a separate security would have no practical significance, since the depositor has liability for the adequacy and accuracy of the disclosure about the participation regardless of whether it is registered as a separate security. However, by lumping participations that are acquired by a depositor from unaffiliated sellers together with other securities for purposes of the SEC's position on resecuritizations under a Form S-3 ABS shelf, as described in Section 1 above, the SEC effectively regulates the manner of acquisition of participations by depositors in a way that as a practical matter prohibits the use of such participations. Again, we respectfully submit that there is no policy reason or legal justification for this position, and that the SEC's position needlessly hampers the ABS market.

Submission by
The Bond Market Association
to the Securities and Exchange Commission
regarding specific Securities Act reform proposals
November 29, 2001

Topic 4 - market making prospectus delivery requirements

Statement of Issue

In recent years, SEC staff has taken the position, in comment letters to asset backed securities (ABS)[1] shelf registrants, that where the underwriter is or may be affiliated with both the issuer (that is, the depositor or registrant) and the servicer, then the underwriter must use a "market making" prospectus in executing secondary transactions in the ABS. A market making prospectus is one that contains or incorporates by reference current information about the ABS and the underlying assets.

A typical comment from an SEC letter is as follows:

> "We note that you will use this prospectus for market-making transactions. We also note that you are only incorporating information by reference prior to the termination of the offering. How do you intend to keep the prospectus "evergreen" after this time for market-making transactions?"

Generally, ABS issuers comply with this requirement by (i) incorporating by reference all periodic reports related to a specific series filed under the Securities Exchange Act of 1934 into the prospectus for that series, at least until the termination of the offering (which may be deemed to include any market making transactions), and (ii) filing Exchange Act reports for so long as any market making transactions may continue, including the periodic remittance reports to investors as well as any special reports covering material developments.

Our Position

The Bond Market Association believes that the SEC's position is inappropriate because it effectively imposes on certain issuers the obligation to continue to file Exchange Act reports beyond the time when they are otherwise required to do so, based solely on the affiliation of the underwriter with the issuer and the servicer, regardless of whether the underwriter actually has access to material nonpublic information as a result of that affiliation. The Bond Market Association believes that this is inappropriate and unnecessary because there are other safeguards in place to assure that underwriters will not have access to material nonpublic information in executing market making transactions.

Requested Relief

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[1] As used in this submission, "asset backed securities" or "ABS" includes mortgage backed securities.

The Bond Market Association requests that the SEC:

1. Discontinue issuing comments requiring the use of market making prospectuses in comment letters for ABS registration statements.

2. Include in its publication "Current Issues and Rulemaking Projects" of the Division of Corporate Finance a section stating that underwriters of ABS issuances are not required to use a market making prospectus in secondary transactions, regardless of any affiliation of the underwriter with the issuer or servicer.

Discussion

For the reasons outlined below, the affiliation of the underwriter in an ABS transaction with either the issuer or the servicer would not in and of itself result in any factors which would justify requiring the underwriter to maintain a market making prospectus. Accordingly, the affiliation of the underwriter with both the issuer and the servicer would not justify that requirement.

Underwriter affiliations with issuers would not justify requiring a market making prospectus.

Generally, in ABS transactions, because the underlying assets are deposited into a trust, the "issuer" as defined under Section 2(a)(4) of the Securities Act of 1933, and therefore the registrant, is the entity that acts as "depositor or manager" of the trust. In practice, this is the entity that acts as depositor of the assets into the trust, which is usually a special purpose corporation (SPC) created by the company that caused the shelf registration statement to be filed. Such SPC's may be subsidiaries of (i) broker dealers, (ii) companies affiliated with broker dealers that primarily engage in the trading of mortgage loans or other receivables, or (iii) financial institutions or other entities that originate or purchase mortgage loans or other receivables, which in turn may have an affiliated broker dealer. In any of these circumstances, the affiliated broker dealer may act as an underwriter for an ABS issuance, or may engage in secondary trading for such ABS.

However, such SPCs generally are formed and used solely for the purpose of acting as registrant, and for receiving and depositing the assets and depositing them into the trust on the date of issuance. They generally do not hold any unsold securities or residual interests issued in the transaction, and they generally have no other income or assets, no other operations, and no independent facilities or employees.

As a result, the issuer in an ABS transaction would in most cases **not** have any access on an ongoing basis to material nonpublic information about the transaction or the underlying assets. Moreover, the issuer's ongoing relationship with the transaction is usually limited to its obligations under any representations and warranties that it made when the securities were issued, and its ability to control amendments to any operative documents to which it is a party. For all practical purposes, control over the transaction on an ongoing basis is shared by the servicer, the trustee and

the investors. Thus, once the ABS have been issued, the issuer no longer has any material issuerlike functions that are comparable to the role of an issuer in a non-ABS transaction.

Underwriter affiliations with servicer would not justify requiring a market making prospectus.

In an ABS transaction, the servicer (sometimes referred to as the master servicer) is the entity that is primarily responsible to the trust for collecting payments on and otherwise administering the underlying assets, and remitting cash flows to the trustee or directly to the investors. Such entities may be affiliated with (i) broker dealers, or (ii) financial institutions or other entities that originate or purchase mortgage loans or other receivables, which in turn may have an affiliated broker dealer. The servicer may itself be the originator or purchaser of the assets, or may acquire the servicing rights at the time of the securitization.

Any servicer affiliated with a broker dealer would nevertheless be a separately capitalized entity with independent personnel and operations. The servicer and the broker dealer would most likely have separate facilities, which may be in different buildings or even in different cities. While the servicer may or may not be a regulated financial institution, it would in all cases be subject to independent licensing requirements under applicable state law for conducting its servicing activities.

In any case, the servicer will likely have access to material nonpublic information about the performance of the underlying assets. For example, for loans that have defaulted, the servicer may have access to information that is relevant to the amount of the loss that will ultimately be borne by the trust, such as workout negotiations with the borrower, or bids on or valuations of the collateral for the loan. Such information would be particularly significant if it involved loans representing a large concentration of the assets in the trust.

A broker dealer engaging in secondary trading of ABS, while in the possession of material nonpublic information that it obtained from an affiliated servicer, would be subject to potential liability under existing federal securities law. Liability could result under the "traditional" theory of insider trading, which arises when a corporate insider trades in the securities of his corporation on the basis of material nonpublic information. Liability could also result under the separate "misappropriation" theory of insider trading, which arises when any person trades in the securities of a corporation on the basis of material nonpublic information that was received in confidence, either under a confidentiality agreement or otherwise under circumstances involving "a duty of loyalty and confidentiality" to the source of the information. See *U.S. v. O'Hagan*, 521 U.S. 642 (1997). Potential liability would include damages to the parties with which the broker dealer transacted. Damage to reputation and regulatory action could also result.

For these reasons, broker dealers that are affiliated with servicers in ABS transactions maintain internal controls and procedures that are designed to make sure that broker dealer employees do not have access to material nonpublic information. Such "firewalls" would typically include restrictions on access to information at the servicer level, the avoidance of employee cross-over

between the servicer and the broker dealer, the avoidance of management interlocks, training and supervision at the broker dealer level, physical separation of broker-deals and servicing personnel and monitoring by the compliance department of the broker dealer.

The reliance on firewalls to avoid insider trading liability is of course not unique to ABS, but is an established concept under federal securities law that is essential to the operation of many aspects of a broker dealer's business, such as advising a merger candidate while at the same time trading in its securities.

It is our view that the threat of liability under well understood case law concepts, together with the maintaining of firewalls as part of the standard operating procedures of any broker dealer, make it extremely unlikely that an underwriter in an ABS transaction will have access to material nonpublic information in executing market making transactions, solely as a result of its affiliation with the servicer.

Submission by
The Bond Market Association
to the Securities and Exchange Commission
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November 29, 2001

Topic 5 - Form F-3 Eligibility for Non-U.S. ABS Issuers

Statement of Issue

The short form Securities Act registration form, Form S-3, is generally available to seasoned issuers which are timely in their SEC filings and which have large market capitalizations (a "free float" above $75 million). Form S-3 provides as one of its alternative criteria for eligibility for an issuer which does not have a sufficient capitalization to be eligible to register a transaction on such form, "Offerings of Investment Grade Asset-backed Securities". See Form S-3, General Instruction B.5.

The benefits that Form S-3 provides for a registrant in comparison to registration on more cumbersome and less permissive Securities Act registration forms such as Form S-1 or Form F-1 include its streamlined disclosure requirements, the ability to carry out delayed and continuous offerings (or "shelf offerings") and the ability to incorporate disclosure by reference from other SEC filings, including future SEC filings. These features provide considerable advantage to a registrant in terms of savings of time and expense and equally importantly provide flexibility to react quickly to market conditions by allowing a registrant using the form to schedule and structure offerings rapidly.

For domestic issuers of asset backed securities ("ABS"), the benefits of using Form S-3 are so substantial that the form is used in virtually all public ABS offerings. This practice is due in part to the dynamics of the ABS market, in which a pool of assets may be identified and securitized over a very brief period of time. In programs of regular, established ABS issuers, as little as three weeks may elapse from the selection of the underwriter to the closing. The ABS issuance market simply could not function in its current format were it necessary to file a new registration statement on Form S-1 and run the increased risk of the possibility of a full SEC review, for every such transaction.

Form F-3 is the counterpart form to Form S-3 which is used to register offers and sales of securities of issuers which meet the SEC's definition of a "foreign private issuer". (Securities Act Rule 405 contains the definition of this term, but "foreign private issuer" essentially encompasses an issuer organized in a jurisdiction outside the United States which also has the majority of its shareholders and its management located outside the United States.) For the most part, Form F-3 provides the same accommodations as Form S-3 but for foreign private issuers instead of for domestic issuers. Apart from the preliminary requirement that the registrant qualify as a "foreign private issuer" under Rule 405, virtually all of the eligibility requirements of Form F-3 mirror those of Form S- 3. One of the only significant differences in the eligibility requirements is that Form F-3, unlike Form S-3, does not provide for the eligibility of ABS issuers.

Our Position

Non-U.S. issuers of investment grade asset backed securities should benefit from the same accommodations as U.S. issuers in terms of their eligibility to use the short form registration form, Form F-3. Thus, foreign private issuers which seek to register ABS offerings, but are not otherwise eligible to use Form F-3, should be able to register such offerings on Form F-3 in the same way that a similarly situated U.S. issuer could register the offering on Form S-3.

Requested Relief

Incorporate General Instruction B.5. to Form S-3 into Form F-3, thereby permitting non-U.S. ABS issuers not otherwise eligible to use Form F-3 to use the form for ABS offerings.

Discussion

The SEC staff on occasion has permitted foreign private issuers to use short-form or shelf registration for investment grade asset-backed securities. As a policy matter, this treatment should be available on a general basis to foreign private issuers meeting specified criteria, rather than on a selective basis.

The SEC takes the view that the asset backed securities provisions of the Form S-3 instructions are not available unless both the depositor (that is, the registrant) and the special purpose entity ("SPE") used to issue the ABS are formed in the United States. Although a U.S.-based depositor could in some cases issue ABS outside of the United States, in many cases it would be impracticable for the SPE to be formed in the United States as opposed to the country of origin of the underlying assets, due to foreign tax issues or transfer impediments. For example, the home country may impose a withholding tax on the interest payments on the underlying assets if they are held by a foreign entity (such as a U.S.-based depositor), that would not apply if the assets were held by a domestic entity that issued debt obligations used to back an ABS issuance.

Although there is no comparable provision in Form F-3, the SEC has at times informally permitted foreign private issuers to use short-form or shelf registration for offers and sales of ABS on Form S-3. The SEC has granted only a few such waivers and on a case-by-case basis to selected issuers, based on the SEC's familiarity with the depositor and the asset class and based on the similarity of the law of the country where the assets are located to U.S. law. As an example, the staff permitted Westpac Securitisation Management Pty Limited, a foreign private issuer, to file a registration statement for an offering of investment grade asset backed securities on Form S-3 on March 21, 2000, file no. 333-32944. That filing states that it was filed with the "staff's permission based in part on the staff's experience with prior, similar WSM filings and WSM's various

undertakings and representations." There has been no apparent harm or detriment to investors or market participants as a result of the waiver granted to WSM or other similar registrants.

The Bond Market Association believes that this practice should be formalized by incorporating a specific instruction into Form F-3 allowing registration of ABS as an eligibility criteria for issuers that are not otherwise eligible to use Form F-3. In particular, we believe that Form F-3 should not be made available on a selective basis, but rather should be available to all non-U.S. ABS issuers, or to all such issuers that meet specified criteria. In addition, any undertakings or other conditions to the availability of Form F-3 for such issuers should be made public.

If this change were made, the SEC still could impose any additional safeguards it deems necessary such as requiring through the registration statement review process that all non-U.S. asset types be identified in the prospectus, and that all material aspects of local law in the relevant jurisdiction be described in the prospectus.

> *There does not appear to be a reason that ABS issuer eligibility should be explicitly provided for Form S-3 registrants but not for Form F-3 registrants.*

The SEC has made Form S-3 available to domestic issuers which are seasoned issuers with a large capitalization or "free float". The SEC also has made that form available to issuers which do not satisfy the basic market capitalization requirements for specified purposes. These purposes include secondary offerings, dividend and interest reinvestment plans, and investment grade ABS offerings.

The SEC has made the eligibility requirements for Form F-3 for registrants that meet the Rule 405 definition of "foreign private issuer" the same as for domestic registrants on Form S-3. The only distinction of any substance is that Form F-3 does not provide for eligibility for ABS issuances in the same way as does Form S-3. There appears to be no sound reason why there should be this particular difference in the eligibility requirements between the two forms.

As long as the applicable disclosure requirements are met, and these requirements can be met through adequate disclosure in the base prospectus prior to the effectiveness of the shelf registration statement, there is no reason to discriminate against non-U.S. ABS issuers.

> *There is no evidence that ABS offerings by "foreign private issuers" are inherently more suspect or risky than domestic offerings.*

There is no evidence that investment grade ABS offerings by "foreign private issuers" are inherently more suspect or risky than domestic offerings such that the eligibility requirements for the short form registration form for foreign private issuers should be made more strict than its domestic counterpart. Outside the ABS area, the Form F-3 eligibility requirements are substantially identical to those in Form S-3.

Since 1982, when the SEC first adopted Form F-3, the number of non-U.S. companies registered with the SEC has increased exponentially. Today, there are over 1,300 foreign private issuers from approximately 60 countries registered with and reporting to the SEC. Public securities offerings by non-U.S. issuers in fact have become somewhat commonplace in the U.S. capital markets, and there is no evidence available to indicate that the Securities Act registration forms generally available to foreign registrants warrant stricter eligibility requirements than the forms available to domestic registrants.

ABS issuance outside the United States also has grown markedly in recent years. Total ABS issuance in Europe totaled US$149 billion in 2000 (up 62% from the prior year). ABS issuance in 2000 totaled US$3.9 billion in Latin America, and US$1.64 billion in Asia. (Source: Moody's Investor's Service reports dated January 19 and 25, and February 16, 2001) While most of these transactions do not include classes sold in the United States, many do, and it is reasonable to assume that more non-U.S. ABS issuers would seek to access the U.S. capital markets if the registration statement process were streamlined.

Due to the evolution of the foreign ABS market and the potential volume of these transactions that could be sold in the United States, investment grade ABS issuance should be provided as a criteria for eligibility to use Form F-3, as it already is for Form S-3.