40 Broad Street
New York, NY 10004-2373
Telephone 212.440.9400
Fax 212.440.5260
www.bondmarkets.com

1399 New York Avenue, NW
Washington, DC 20005-4711
Telephone 202.434.8400
Fax 202.434.8456

St. Michael's House
1 George Yard
London EC3V 9DH
Telephone 44.20.77 43 93 00
Fax 44.20.77 43 93 01

S7-21-04

THE BOND MARKET ASSOCIATION

VIA FEDERAL EXPRESS

6

April 23, 2002

Mr. Alan L. Beller
Director, Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Prior Correspondence Regarding Asset-Backed Securities Reforms

Dear Alan,

It was a pleasure speaking with you today, and again please accept my belated congratulations on your appointment as Director of the Division of Corporation Finance.

As we discussed, enclosed please find prior correspondence submitted by The Bond Market Association to the SEC in connection with the Staff's previous consideration of possible reforms of registration, disclosure and reporting rules applicable to mortgage-backed and other asset-backed securities.

The letter dated November 6, 1996 was submitted in response to the staff's informal request for suggestions concerning possible reforms in this area. The letter dated November 8, 1996 was written in response to the SEC's concept release on "Securities Act Concepts and Their Effects on Capital Formation." Pages 1-12 of that letter respond generally to this concept release; issues relating specifically to asset-backed securities are addressed beginning on page 13. Finally, the letter dated June 30, 1999 was written in response to the so-called "aircraft carrier" proposals. The bulk of this letter responds to these proposals generally from a fixed-income market perspective (specifically in the context of corporate bond offerings), with a section addressing the application of the proposals to asset-backed securities beginning on page 41.

I have also taken the liberty of including another copy of the proposals we submitted to the Division of Corporation Finance in December of last year. These include our recommendations for reforms of rules governing communications by issuers and underwriters in connection with offerings of fixed-income securities, as well as five separate requests dealing with registration and disclosure issues specifically in the context of securitization transactions.

We welcome your and the Staff's interest in addressing these matters, which remain a high priority for our members. Should you have any questions or need additional information, please do not hesitate to contact either Michel de Konkoly Thege or me directly.

Sincerely,

George

George P. Miller
Senior Vice President and Deputy General Counsel

cc: Paul Saltzman, Michel de Konkoly Thege--The Bond Market Association

enclosures

PSA THE BOND MARKET TRADE ASSOCIATION

40 Broad Street • New York, NY 10004-2373 USA • 212-440-9400 • Fax: 212-440-5260 • http://www.psa.com

Doc. I. A. 5.

November 5, 1996

Mr. Brian Lane
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

RE: Response to Staff Request for Suggestions Concerning Possible Reforms of Disclosure and Reporting Rules for Mortgage and Asset-Backed Securities

Dear Mr. Lane:

In several previous meetings and discussions between Staff officials and representatives of PSA The Bond Market Trade Association (PSA)[1], members of the Staff solicited suggestions concerning potential improvements to the existing system of disclosure and reporting for public offerings of mortgage-backed securities (MBS) and asset-backed securities (ABS). This letter constitutes PSA's initial response to this request and deals specifically with possible reforms of the disclosure and reporting system for MBS/ABS, addressed in the hypothetical context (as suggested by the Staff) of a complete overhaul of the system for dealing with MBS/ABS. Some of the matters addressed in this letter are also being addressed in a separate letter that is being sent by PSA in response to the Commission's Concept Release: Securities Act Concepts and Their Effect on Capital Formation (Release No. 33-7314 (July 25, 1996)).

INTRODUCTION

PSA welcomes the initiative of the Staff in seeking suggestions on possible ways to improve the existing rules relating to disclosure and reporting[2] in connection with registered public offerings of MBS and ABS. PSA's members are extensively involved in the process of bringing new MBS and ABS issues to market, usually working in the role of capital markets intermediary between issuers and investors of mortgage-backed and asset-backed securities, as well as in the secondary market trading of those instruments. PSA's formal involvement in the MBS and ABS market is coordinated through a network of standing committees. This letter was prepared by an ad hoc "MBS/ABS Regulatory Task Force," comprised of senior business and legal professionals from a representative cross-section of PSA's membership that is particularly active in these markets.

[1] PSA The Bond Market Trade Association represents approximately 275 securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. Among PSA's members are many of the underwriters that participate in the initial distribution and secondary market trading of mortgage-backed and asset-backed securities.

[2] Throughout this letter, the term "disclosure" shall refer generally to disclosure documents that are prepared in connection with the initial distribution of public offerings of MBS and ABS, while the term "reporting" shall refer generally to post-distribution disclosure with respect to such offerings.

The MBS and ABS markets are large and growing. PSA estimates that there are currently in excess of $1.9 trillion MBS and over $330 billion ABS outstanding. Collectively, this volume rivals or exceeds the outstanding volumes of other major categories of debt securities, including traditional corporate debt obligations. In short, and as the Staff is well aware, the MBS and ABS markets have become central vehicles for capital formation in the United States, and increasingly, abroad. Several recent statistical reports published by PSA that demonstrate the size, growth and increasing importance of these markets are attached.

Broad consultation among PSA's members who are involved in the issuance and trading of these types of securities reveals a consensus that the existing rules under the Securities Act of 1933 and the Securities Exchange Act of 1934, which were developed in the context of traditional corporate debt and equity securities offerings and which generally were adopted before securities such as MBS/ABS existed, are not well adapted to MBS/ABS. Primary differences between the MBS/ABS market and other financial markets include: (i) a principal focus in the MBS/ABS market on the structure of a class of securities and the nature of the underlying assets rather than on the financial prospects of an issuer with an ongoing business; (ii) the importance of evaluating the impact of alternative potential future cash flows in making a meaningful assessment of a security's yield; and (iii) the interaction between broker-dealers and investors in tailoring underlying pools of assets and offering structures to meet investor needs and changing market conditions.

The existing rules under the 1933 and 1934 Acts impose undue burdens on the parties involved in the structuring and issuance of such securities and lead to unnecessary costs and delays in consummating such issuance. Moreover, such costs and delays do not result in better disclosure for investors. Instead, it is widely felt that the disclosure documents typically associated with these categories of transactions are overly-long and opaque, and that existing legal rules at times actually stand in the way of disseminating useful information to investors, both at the time of initial issuance and in the secondary market.

PSA thus entirely supports the Staff's recognition that there are significant problems with the existing system and the Staff's willingness to consider substantial changes, possibly including an entirely new set of disclosure rules specifically adopted for MBS/ABS. This initiative is particularly timely, in that the Commission's new exemptive authority under the National Securities Markets Improvement Act of 1996 should facilitate the implementation of appropriate changes to the present rules. This letter sets forth, in preliminary form, PSA's views as to the inadequacies of the current regulatory framework and the broad outlines of a proposed approach to deal with the issues.

I. SCOPE AND CONTENT OF REFORM

A new regulation specifically designed to meet the unique requirements of the MBS/ABS market is needed.

PSA has considered whether the existing disclosure system for MBS/ABS could adequately be improved simply by modifying the instructions to Forms S-3 and S-11 and the related provisions of Regulation S-K in a manner that would eliminate inapplicable provisions and otherwise more appropriately adapt these forms and rules to the realities of the MBS/ABS market. PSA's view is that such incremental modifications would be difficult to implement, would be confusing to apply and would not sufficiently resolve existing problems. Instead, PSA would urge that the SEC consider promulgating a new regulation specifically designed to create a disclosure system that meets the unique requirements of the MBS/ABS market and better serves the needs of investors, issuers and underwriters. Approaching the matter de novo, with full participation of all market participants, is most likely to achieve a reform that will serve the interests of investors, while enabling the market to operate in a more efficient fashion. Should the Commission adopt the approach of creating de novo a disclosure system specifically adapted to MBS/ABS, PSA looks forward to participating in the rulemaking process with specific suggestions as to the content of such a system. In broad outline, PSA's preliminary views are that the disclosure documents under such a system should incorporate the following principles:

A. Improvement of clarity and elimination of repetition. The disclosure documents typically used today in registered public offerings of MBS/ABS are not "user-friendly". They tend to be extremely lengthy, highly repetitious and replete with formulaic disclosure that varies little, if at all, from transaction to transaction and from issuer to issuer. As a result, it is believed that few, if any investors, actually read the vast majority of these disclosure materials and that, if changes do occur in the portions that are largely invariable, investors are likely to overlook such changes entirely. Much of the bulk and complexity of the existing disclosure documentation is a product of several factors. One is the attempt to comply with the instructions to current Forms S-3 and S-11, neither of which was formulated with MBS/ABS in mind, and the cross-references to Regulation S-K, which also was not created to deal with MBS/ABS. The attempt to apply these instructions and provisions of Regulation S-K has led to the elaboration of descriptive material that is unlikely to be of substantial use to investors. A second factor is the SEC review process. Over the course of time different reviewers have imposed various disclosure requirements in their own attempt to fit MBS/ABS better into a framework created for traditional corporate debt and equity offerings. Each new requirement has tended not only to become incorporated into the disclosure documents for the issuer in question but, over the course of time, to spread to other issuances and eventually to have an industry-wide impact. Thus, MBS/ABS disclosure documents have grown longer and longer over the years.

In PSA's view, a disclosure system created de novo to deal with MBS/ABS would produce shorter and more readable documents that would be more useful to investors. Several specific ways in which this could be accomplished include:

(i) *Eliminate duplicative summaries.*

The summary section of the prospectus (and prospectus supplement for shelf offerings) should be reduced to something along the lines of the typical terms sheet used in private placements -- i.e., a summary of the significant structural and economic terms of the transaction, with cross-references to the significant portions of the prospectus and/or supplement that investors should be cautioned to read with care, such as the "risk factors" section. Currently, it has become practice for the summary section to repeat a very large proportion of the substantive material found in the body. As a result, the summary tends to confuse investors and no longer serves the purpose of providing an accessible overview of the economic characteristics of the transaction. To encourage the use of more concise, readable summaries, the Commission should consider adopting a safe harbor provision similar to that found in current Rule 175. Such a safe harbor provision would allow summaries to present the major features of an offering, without requiring a full discussion of all details concerning the transaction, which would appear elsewhere in the document.

In a shelf registration, it is difficult to see that there is any purpose served by the summary portion of the base prospectus. The transaction-specific summary presented in the prospectus supplement invariably overrides the summary that appears in the base. Consideration should therefore be given to eliminating the summary entirely in the base prospectus, and replacing it with a short description of the classes of assets and securities covered by the registration statement and a series of references to portions of the base prospectus that are especially important for investors.

(ii) *Provide guidance on generic MBS/ABS risk factor disclosure.*

Disclosure of risks is one of the most important aspects of a disclosure system. In typical issuances of corporate securities, risk factors tend to be specific to the issuer's business. MBS/ABS transactions relate primarily to pools of assets and not to business operations, and hence much of the disclosure of risk factors relating to MBS/ABS relates to issues that are common to all such transactions, such as the ways in which prepayments can affect yields or the ways in which geographic concentration may increase risks of loss. A great deal of the disclosure on these factors is virtually identical in all prospectuses, thus obscuring the deal-specific risks disclosed in the same section. Consideration could be given to developing a guide to required risk-related disclosure (or even a series of standard disclosure statements) that would set a minimum standard to be met in the base prospectus, leaving the issuer responsible in each prospectus supplement for identifying only such deal-specific or additional risk factors as are material to investors in that particular transaction. Among the risk factors of general application would be prepayment, yield and maturity risks; limited liquidity and lack of assurance of a secondary market; the limited effectiveness of credit support; limited obligations of depositor/trustee/servicer and others; ERISA; tax treatment of residuals; sensitivity of loss and default experience to general economic conditions; impact of concentration of geographic or other relevant factors in enhancing the risk of loss; and others.

(iii) *Eliminate inappropriate disclosure.*

Certain currently required disclosure that is not appropriate to MBS/ABS could be eliminated. For example, the "use of proceeds" adds little where the securities represent a pool of assets rather than interests in a going business concern.

(iv) *Focus on non-standard and non-customary terms in disclosure of operative documents.*

A substantial portion of the volume of current MBS/ABS disclosure documents consists of lengthy descriptions of the contents of the transactional documents, such as pooling and servicing agreements and trust indentures, and of the procedures that will be used in servicing the underlying pools of assets. These descriptions vary little, if at all, from transaction to transaction, because these transactional documents tend to become standardized (or at least highly similar) within the industry. It also is believed that few potential investors in MBS/ABS actually read these descriptions or add appreciably to their understanding of the proposed investment by doing so. Disclosure could be improved and streamlined if it were not required to include discussion of customary or standard language, permitting a focus on non-standard provisions of indentures, pooling documents and the like. Such a distinction could foster development of a standard set of industry-developed guidelines for the typical contents of various MBS/ABS transactional documents insofar as they relate to such matters as the duties of the trustee and servicer, events of default and remedies on default, investor reporting and the like. An even more efficient approach would be to set this material forth in a separate document that could be incorporated by reference into the disclosure documents and made available to investors. However the standard, customary provisions are addressed, the objective should be to focus disclosure on the deal-specific payment terms and any deal-specific divergence from standard provisions.

(v) *Simplify generic disclosure on categories of assets.*

A significant portion of current MBS/ABS disclosure consists of information about specific asset classes (such as first or second-lien mortgages, automobile loans, credit card receivables and the like) which is general in nature, not transaction-specific and tends to be substantially identical across the entire industry. These descriptions are lengthy and complex and, in part because of their unvarying nature, are probably ignored by most investors, especially the institutional investors who make up the vast majority of all purchasers of publicly-offered MBS/ABS. A more efficient disclosure system would reduce the need to repeat in every disclosure document the well-known (and boilerplate) characteristics of established assets such as mortgages, auto loans, credit card receivables and others. Although at one time it may have been appropriate to describe how a car works in connection with an offering of debt by an auto maker, this is no longer the case, and we would submit that the market is not aided by reading repetitive summaries of standard mortgage foreclosure procedures, the procedures for perfecting a security interest in automobile or credit card receivables, general environmental law issues, drug proceeding forfeitures or the like.

In recognition of this maturing of the market and the need to focus disclosure on differences and the particular rather than the generic, the disclosure system could permit some categories of generic disclosure to be treated as unnecessary or permit incorporation by reference of standardized disclosures about such assets, their economic and legal characteristics and other general matters. Such disclosure could be included in a separate publication that would be incorporated by reference (in material part) in each prospectus and would be made available to investors. Issuers would, of course, still be responsible for disclosing in transaction-specific prospectuses or prospectus supplements any material characteristics of the assets relating to the specific transaction that differ from, or are not covered in, the material included in such publication. Development of such a standardized disclosure publication should permit the shelf process to deal more effectively with the use of a single shelf registration statement for multiple classes of assets.

B. Circulation of term sheet. *Permit early circulation of term sheets and other structuring information.*

The demands of the institutional investor market require that underwriters of MBS/ABS be able to circulate a brief description of the economic structure of a specific transaction to institutional investors before the final prospectus supplement is distributed. The

Commission (even if a more extensive reform of the MBS/ABS disclosure system is not undertaken) should consider promulgating a rule that makes circulation of such a term sheet possible without violating the prospectus rules, as long a complete prospectus is delivered to the investor in connection with the consummation of any sale. In this regard, it should be recognized that preparation of a "red herring" preliminary prospectus addressing in detail all aspects of a possible transaction is not a feasible or desirable means in every case to provide important information to investors or to bring securities to market.

Indeed, as noted above, in the MBS/ABS market broker-dealers and issuers attempt to structure their offerings to meet particular investor needs and constantly changing market conditions. MBS/ABS offerings are typically divided into a number of separate classes of securities, with cash flows of principal and interest in the underlying assets allocated among the classes according to specified payment risks. Unlike a going concern that issues debt or equity, the key characteristics of each MBS/ABS transaction essentially are invented in response to investors and the market.

PSA believes that the market and the interests of all participants would best be served by adoption of a rule that replaced the current burdensome and untargetted system of filing certain computational materials and term sheets by a system that greatly liberalizes the ability to send to potential investors a wide range of information without a requirement that it be filed, so long as the prospectus (or prospectus supplement) includes indicative materials covering, with respect to the final structure of the transaction, the topics and types of data addressed in those preliminary materials. If only on the basis of practicality and cost, the formal disclosure document can not and should not include every item sent to every potential investor about every possible structure. Ready distribution of term sheets and other information would respond most directly to the expressed need of potential investors to obtain an early and meaningful understanding of proposed transactions. The market can do a better job of informing investors (and getting reactions from investors to possible structures) on a timely basis without the procedural burdens of the existing system - and the formal offering documents can be better focused on providing useful information.

C. <u>Resecuritizations</u>. *Eliminate barriers to inclusion of securitized assets in public offerings.*

The state of the law currently is unclear as to the ability of an issuer of MBS/ABS to include, as part of a pool of collateral, assets that are indirectly held through a securitization vehicle that has been the subject of a private placement or an earlier public offering. A variety of views expressed by members of the Staff to different issuers at different times has left market participants in a state of uncertainty. Any reform of the existing rules should address this issue and should eliminate artificial distinctions between securitized and unsecuritized assets. As long as there is full disclosure in the prospectus of relevant information about the assets underlying an issue of MBS/ABS (including any material disclosure about the effects that prior securitization may have on servicing, cash flows or other relevant matters), there seems no reason to raise obstacles to including assets that have already been securitized or to require registration or reregistration of the earlier transaction in which such assets were securitized.

D. Codification of SEC Staff positions. *Codify informal staff positions on disclosure requirements established during the review process.*

As discussed above, one reason for the bulk and complexity of current MBS/ABS disclosure documents is the cumulative effect of disclosure requirements that have been imposed over time through the SEC review process. Many of these requirements, established in connection with individual issuances of securities, have evolved into informal disclosure standards that are observed throughout the entire MBS/ABS industry.

As part of its overall disclosure reform efforts, PSA encourages the Commission to undertake a deliberative process to publish for comment and, where warranted, formally codify informal Staff views and positions in disclosure rules of specific applicability to MBS and ABS offerings. We believe that such a process will be helpful in limiting or eliminating unnecessary and inapplicable disclosure practices, and would result in clearer and more specific guidance to market participants concerning those disclosures that are required in particular circumstances.

II. EXPANDING AVAILABILITY OF INFORMATION TO INVESTORS

Reform the rules to permit greater access to information by investors and to facilitate the use of electronic communications.

In many respects, existing rules relating to the offering of MBS/ABS have the effect of constricting the flow of relevant information to investors, especially to the sophisticated institutional investors who make up the vast bulk of the market for these securities. A number of pending problems in this area could be addressed as part of the Commission's broader consideration of reforms to the capital formation process. One of these is determining when a distribution has terminated for purposes of prospectus delivery and other requirements. In MBS/ABS transactions, PSA believes that such termination should be determined separately for each class of securities offered in the transaction structure. Other issues include general Section 5 prohibitions on the distribution of written non-prospectus communications, including research reports; the applicability of Rule 15c2-8 to the MBS/ABS markets; and similar issues that PSA expects to address in greater detail in its response to the Commission's above-cited Concept Release.

A. Information Relating to Underlying Assets. *Permit broader investor access to information relating to underlying assets without triggering filing requirements or Securities Act liability.*

A particular problem under the current disclosure system arises in connection with certain MBS/ABS transactions in which some (but not necessarily all) investors seek access to voluminous information about the underlying assets. This is particularly characteristic of securitized offerings of commercial mortgage loans, in which some institutional investors, even though the securities are being publicly offered, wish to perform their own due diligence on the underlying loans and real properties as if they were purchasing an interest in those assets directly. Such investors often seek access to third-party documentation held by the issuer and underwriters, such as appraisals, environmental reports, property managers' reports and engineering reports. Existing law makes unclear the ability of issuers and underwriters to furnish such materials or their liability for doing so. It would seem appropriate, if individual investors wish to have access to underlying information that the issuer has not deemed requires disclosure in the prospectus (or has covered by summarizing in the prospectus), for such investors to have that option, so long as any prospective investor is given the same access upon request. However, there should be no requirement for the issuer to include such material in the prospectus or file it with the Commission, or for either the issuer or the underwriters to be required to assume liability under the Securities Act.

B. Electronic Access to Information. *Permit electronic posting of transaction information as soon as a prospectus is available.*

Another issue under current rules is the desire of investors to have electronic access to information about the pools of assets underlying a proposed issue of MBS/ABS at the earliest possible moment. For example, both investors and underwriters would like underwriters to be able to post information about the characteristics of underlying pools on electronic bulletin boards, such as Bloomberg, no later than when the prospectus is delivered to the underwriters, or in some cases even earlier. This information is contained in the prospectus (and currently is also furnished by some issuers to investors in an electronic medium together with the prospectus). It is generally not practicable to post the entire prospectus on such a bulletin board or to establish a hyper-text link to another site containing the prospectus. The current rules should be reformed to make clear that such a posting is permissible, as long as investors can obtain the entire prospectus upon request. It would also be desirable to make it possible for issuers to post on the same bulletin boards the computer models they have used to produce information in the prospectus, such as the effect of various interest rate and prepayment scenarios on yields. This would make it easier for prospective investors to model other scenarios that better fit the investor's own assumptions or needs.

III. REFORM OF REPORTING REQUIREMENTS

Replace exemptive orders, no-action letters and deregistration with a system under which servicer/trustee information is made readily available for the life of the deal.

Closely related to the disclosure system are the reporting requirements under the Securities Exchange Act of 1934 as they apply to MBS/ABS. In connection with any reform of the MBS/ABS disclosure system, PSA suggests that the Commission also consider a parallel reform of the 1934 Act reporting system as applied to MBS/ABS. The inapplicability of many of the requirements of the 1934 Act reporting rules to MBS/ABS is evidenced by the fact that virtually every registrant seeks either an exemptive order or a no-action letter to relieve it of inappropriate reporting requirements. This process alone is a significant waste of time for both the Staff and registrants and should be replaced with a rule of general applicability.

A more fundamental issue with the reporting system is demonstrated by the fact that most registrants "deregister" at the earliest possible opportunity, not because they wish to stop supplying information to investors but because they wish to avoid liability for information over which they have no control. An issuance of MBS/ABS by its nature is a stand-alone structure. Once the securities have been sold, information about the registrant (which often is itself a special purpose entity that exists only to bring together pools of assets and securitize them) is immaterial to investors. What investors and the secondary market need is information about the performance of the pool of assets. This typically is supplied by filing copies of the periodic reports that the trustee is required to send to investors. These reports in turn incorporate information provided by the servicer. All of the relevant information is internal to the pool of assets and is generated by entities, such as the trustee and servicer, whose function in the transaction is to provide services to the investors.

The current system does not adequately serve the interests of participants in the secondary market, who need as much current information as possible about the performance of the pools of assets underlying MBS/ABS. This concern is shared broadly by such participants, including investors and broker/dealers. Accordingly, PSA would propose that the Commission consider adopting rules to replace, for MBS/ABS, the reporting requirements currently applied under the 1934 Act with a requirement (a) that all transaction documents require the trustee or servicer to report to investors at least a prescribed minimum set of information no less often than or shortly following each payment date on the securities and (b) that all such information provided to investors be made available by the trustee or servicer on request to any requester (which requirement could be met by making such information generally available to the public, either directly or through third-party data providers). Compliance with these requirements should obviate the need for filing such information under the 1934 Act, although PSA would urge that registrants (including issuers whose securities are already outstanding) that satisfy these requirements should still be considered reporting companies for technical reasons (e.g., eligibility to use Form S-3.)

IV. REVISION OF SHELF REGISTRATION

Eliminate or incorporate by reference generic and standard disclosure.

Most MBS/ABS offerings are completed on shelf registrations under Rule 415. Under current rules and SEC policies, extensive disclosure is required in the base prospectus, even though the nature of the transactional structure and often even the characteristics of the assets that will underlie the transaction, are unknown until a specific take-down occurs. An improved disclosure system for MBS/ABS would recognize that these transactions are highly variable in transactional structure and would adapt the shelf registration process (which is indispensable to most issuances in the MBS/ABS market) accordingly. The application of Rule 415 to MBS/ABS should be reformed to provide for a significantly reduced body of material in the base prospectus. Much of this could be accomplished by eliminating the need to include certain generic and standard matters or by the technique of allowing the industry, subject to the Commission's review, to develop standard disclosure about broad ranges of matters that do not vary significantly from prospectus to prospectus and to provide that such material may be incorporated by reference in base prospectuses, as well as transaction-specific prospectuses or prospectus supplements.

CONCLUSION

PSA welcomes the opportunity to provide its preliminary, conceptual views on appropriate disclosure and reporting reforms. We encourage the Commission to seek opportunities for joint discussion by all affected market participants of the most desirable and appropriate means by which to achieve these goals. In addition, we look forward to the opportunity to offer detailed comments in response to any specific, proposed rules that the Commission may issue in the future. Should you desire further information or any clarification of the matters discussed in this letter, please contact either of the undersigned, or Paul Saltzman, PSA General Counsel, at (212) 440-9459, or George Miller, PSA Associate General Counsel, at (212) 440-9403.

Sincerely,

Lawrence E. Thomas/gm

Lawrence E. Thomas
Vice-Chairman, PSA Mortgage and
Asset-Backed Securities Division

Thomas K. Guba/gm

Thomas K. Guba
Chairman, PSA Mortgage and
Asset-Backed Securities Division

Attachment

cc: Michael Mitchell, Esq.—SEC Division of Corporation Finance
Selected PSA Committees and Staff

gm/Blanefnl.doc/11/5/96

PSA THE BOND MARKET TRADE ASSOCIATION

Doc. I. A. 1.

40 Broad Street • New York, NY 10004-2373 USA • 212-440-9400 • Fax: 212-440-5260 • http://www.psa.com

November 8, 1996

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

Re: Securities Act Concepts and Their Effects on Capital Formation (Release No. 33-7314) (File No. S7-19-96)

Dear Mr. Katz:

PSA The Bond Market Trade Association ("PSA")[1] appreciates this opportunity to comment to the Securities and Exchange Commission (the "Commission" or "SEC") on the Commission's Concept Release: Securities Act Concepts and Their Effects on Capital Formation (Release No. 33-7314 (July 25, 1996)) (the "Concept Release"). PSA wishes to praise the Commission and its Staff on the comprehensive review they have undertaken of the U.S. capital formation methods and markets. We believe that the work of the Commission and Staff in connection with the Concept Release, as well as the efforts of the Task Force on Disclosure Simplification (the "Task Force") and the Advisory Committee on the Capital Formation and Regulatory Processes (the "Advisory Committee"), will help to preserve the integrity of the U.S. capital markets and keep them the strongest, as well as most transparent and liquid, in the world.

This comment letter is organized in two sections, corresponding to the markets represented by PSA that are significantly impacted by the proposals contained in the Concept Release. The first section responds broadly to the Concept Release from the perspective of the

[1] PSA represents approximately 250 securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. PSA's member firms include underwriters which participate in approximately ninety to ninety-five percent of the initial distribution and secondary market trading of corporate debt securities, including investment grade and non-investment grade corporate debt securities as well as mortgage and other asset-backed securities. More information about PSA is available on PSA's Internet home page at http://www.psa.com.

membership of PSA's Corporate Bond Division, which includes bulge bracket firms, brokers' brokers and regional fixed income securities dealers. The activities of the Corporate Bond Division are governed by an Executive Committee, the members of which are listed on an attachment to this comment letter.[2]

The second section of the letter responds to the Concept Release from the perspective of PSA's Mortgage and Asset-Backed Securities Division. This portion of the letter is based upon input provided by an ad hoc Mortgage- and Asset-Backed Securities Regulatory Task Force, comprised of senior business and legal professionals from a representative group of PSA member firms that actively participate in the mortgage-backed and asset-backed securities ("MBS" and "ABS", respectively) markets. PSA organized this Task Force both for the purpose of responding to the issues raised in the Concept Release, as well as to respond to the Staff's invitation to provide PSA's suggestions on possible reforms to current disclosure rules and practices applicable to MBS and ABS. These latter views were recently communicated to the Staff in a separate letter,[3] which overlaps somewhat with the subject matter addressed by the second section of this letter. However, PSA's members that are active in the mortgage- and asset-backed securities markets believe that it is vital to respond specifically to certain issues addressed in the Concept Release, for two principal reasons.

First, although there is a significant degree of convergence between the views of PSA's Corporate Bond and Mortgage- and Asset-Backed Securities membership on many of the issues raised by the Concept Release, in several key areas this is not the case, and PSA's different views (and the reasons underlying those different views) need to be explained. Second, and perhaps of greater significance, mortgage- and asset-backed securities are fundamentally different from corporate debt and equity securities in a number of important respects. As a result, many of the traditional views underlying the existing federal securities law regime regarding the nature of the offering process and the information relevant to investors do not apply equally to both markets. Any reform as fundamental as that suggested by the ideas contained in the Concept Release must properly account for basic differences between the different securities and securities markets that would be impacted by such reform. Accordingly, the second section of this letter highlights those areas of the Concept Release in which a different regulatory approach for MBS and ABS may be

---

[2] In order to gain a better and more detailed view of members' reactions to the Concept Release and the issues raised, PSA distributed a Questionnaire to 56 PSA member firms represented on the Corporate Bond Division Executive, Investment Grade Debt, High Yield Debt and Fixed Rate Capital Securities Committees. Comments in the first section of this letter are based upon Questionnaire responses received from a segment of these member firms, representing a broad spectrum of participants in the traditional corporate debt markets, as well as the input of a special Task Force established to respond to the Concept Release. The Questionnaire enabled PSA member firms to focus on the essential issues raised by the Concept Release and, thereby, formulate what PSA believes are innovative opportunities to change salient elements of the current regulatory framework under the Securities Act of 1933.

[3] PSA letter dated November 5, 1996 to Brian Lane, Director, SEC Division of Corporation Finance, regarding response to Staff request for suggestions concerning possible reforms of disclosure and reporting rules for mortgage- and asset-backed securities.

warranted. As such, this portion of PSA's comment letter does not attempt to address comprehensively all of the issues implicated by the Concept Release, but instead focuses on issues that may raise different regulatory considerations when applied to the MBS and ABS markets.

I. CORPORATE BONDS

Advisory Committee Report

Under the current regulatory system, the U.S. capital markets have become the strongest in the world. The transparency, depth and liquidity of our markets have provided U.S. and foreign issuers access to capital and have fostered financial instrument innovation unparalleled in other markets. To maintain this leadership in international capital markets, PSA believes that the current regulatory system should be modified and amended in accordance with the suggestions described below and that a more lengthy and exhaustive study of the ramifications of alternative regulatory systems, including Company Registration, should be undertaken.

With respect to certain changes discussed in the Concept Release, as well as certain aspects of Company Registration, PSA believes that Company Registration should be the subject of further evaluation and debate. Although admirable as an attempt to address important issues facing the capital markets, the Company Registration concept needs to be studied and defined in more detail before the present system is abandoned in order to receive the analysis necessary to be certain that Company Registration will not have a negative impact upon the capital formation process and the trading markets. Without this study and analysis, PSA questions whether Company Registration will attract widespread issuer participation. Furthermore, it is our view that Company Registration might be somewhat controversial and will require compromises on many important issues. *In that regard, PSA does not favor the adoption of a voluntary pilot program.* It is our view that such a program will create confusion in the bond marketplace by creating a dual regulatory system. Company Registration should only be instituted after further analysis and presentation to the marketplace of all applicable rules and regulations.

While supportive of the goals of Company Registration postulated by the Advisory Committee, including increased market access, PSA strongly believes that many of the practical benefits of Company Registration can nevertheless be attained by implementing certain of the proposals and improvements suggested by the Concept Release without the fundamental changes represented by Company Registration. The adoption of a Company Registration system will require a completely new regulatory system that will (and should) undoubtedly take a significant amount of time as the Commission seeks to incorporate the differing views of a number of constituencies. *PSA is not in favor of delaying implementation of the more specific and targeted changes discussed below while the concept of Company Registration and the rules and regulations instituting such a system are discussed and debated.* In this regard, we note that, in our view, certain changes discussed in the

Concept Release might require legislative action[4]; recent experience has shown that this can be a lengthy and at times unpredictable process. Therefore, as discussed in more detail below, PSA suggests that the Commission act promptly to adopt certain enhancements to the current regulatory system through changes in (i) current rules that are within the scope of the Commission's rulemaking or exemptive power and (ii) Staff procedures that can be effected without rule changes, *while continuing to study* the necessity for more fundamental changes such as Company Registration or other alternatives that may be suggested by commenters in response to the Commission's request for comments.

As set forth in more detail below, PSA is of the view that:

- the quality of ongoing disclosure in registration statements is generally better than the disclosure in periodic reports. Except for the adoption of mandatory SAS 71 interim reviews, PSA does not believe that the adoption of the other disclosure enhancements will have a dramatic impact on disclosure in periodic reports;

- investors should be permitted to receive transaction-specific information of the type that would be included in a term sheet through physical or electronic delivery prior to delivery of a final prospectus;

- any requirement to impose a transaction-specific filing requirement prior to sale would significantly reduce the benefits of shelf registration;

- additional liberalization of "free writing" without adequate controls is neither necessary or desirable;

- the confirmation and prospectus delivery requirements should be decoupled, thus permitting a confirmation (and, if desired by an underwriter, an optional "term sheet") to be sent to customers prior to delivery of a final prospectus;

- the role of underwriters in today's capital markets should be reassessed and that the liability of underwriters should be correlated with their ability to impact the content of prospectuses;

- changes in Staff review procedures would significantly improve the efficiency of the U.S. capital markets, improve the quality of filings and reduce Staff review time;

---

[4] While the Commission may have been granted broad exemptive power by the National Securities Markets Improvements Act of 1996, certain of the changes that might result from Company Registration may not fall within this new exemptive authority. For example, it is unclear whether the Commission could eviscerate the private placement exemption provided by Section 4(2) of the Securities Act with the adoption of rules implementing Company Registration.

- the adoption of many of the recommendations of the Task Force Report would result in significant improvements to the present regulatory system;
- the expansion of Rule 144A to reduce the investment security threshold as well as several other modifications will increase the efficiency of the rule; and
- the general solicitation prohibition on Regulation D and Rule 144A offerings hampers the utility of these rules, results in unnecessary uncertainty and raises costs to issuers.

Securities Act Concepts

PSA fully appreciates the continuing challenge for the Commission to adapt the disclosure framework of the Securities Act of 1933 (the "Securities Act") to developments and innovation in the *primary* capital markets, while ensuring that investors receive full and fair disclosure in a manner and at a time that allows for informed decision-making. We suggest that equally important is the timely receipt of disclosure by the marketplace in order to ensure that an informed and orderly *secondary* market can be maintained to assure continued transparency and liquidity that are so vital to our capital markets.

Quality of Ongoing Disclosure. We believe that the quality of disclosure in Securities Act offering documents is generally better than the disclosure documents required by the Securities Exchange Act of 1934 (the "Exchange Act"). In addition, we believe the quality of ongoing disclosure under the Exchange Act differs significantly among issuers. However, investment grade debt issuers and *frequent* non-investment grade debt issuers generally provide better on-going disclosure in their periodic reports. It is our view that ongoing disclosure documents are generally adequate but nevertheless could be enhanced.

PSA believes that Securities Act offering documents benefit from the attention that the event of capital raising is given by issuers, which is assisted by the objective focus and involvement of underwriters and their counsel and the issuers' accountants. However, underwriters and their counsel often have little impact upon disclosure that already exists in Exchange Act disclosure documents that have been filed with the Commission without their prior involvement and review.[5]

As discussed below, the adoption of Form S-3, the prominent use of incorporation by reference and the evolution of Securities Act offerings since the 1930's have transformed the traditional role of the underwriter with respect to Exchange Act disclosure documents. As a result, the quality of disclosure included in Exchange Act disclosure documents is not always consistent. We believe that the quality of such disclosure is highly dependent on the issuer's internal controls, the extent to which

[5] Underwriters, however, are much more likely to have an impact upon Exchange Act disclosure relating to (i) events not previously addressed in Exchange Act filings, but required in the registration statement, (ii) elaboration of prior disclosure and (iii) certain extraordinary situations.

the issuer involves outside lawyers and accountants in the preparation process, the significance placed by the issuer on Exchange Act disclosure documents and the frequency of securities offerings. It is not clear to PSA that the application of additional liability provisions or the adoption of the Advisory Committee's disclosure recommendations will dramatically improve the disclosure in Exchange Act documents. For example, certification by senior management or a senior management report submitted to the audit committee of the board of directors would not, in our opinion, necessarily improve disclosure. Since certain senior members of management are already required to sign periodic reports, a certification or senior management report is not likely to significantly enhance these disclosure documents. Also, while we believe that a "disclosure committee" of the board of directors could improve the accuracy of disclosure, we seriously doubt that directors would agree to serve on such a committee unless they were provided some relief from liability. On the other hand, *we believe that more timely reports on Form 8-K (i.e., accelerating the filing requirement from 15 calendar days to 5 business days) would improve disclosure.* We also would support expansion of current reporting obligations on Form 8-K to include material modifications to the rights of security holders, resignation or removal of any of the top five executive officers, defaults of senior securities, sales of significant amounts of securities and events affecting audit reports that are currently required to be filed on Form 10-Q. We believe that Form 10-K risk factor disclosure may be helpful, but in itself should not be expected to significantly enhance disclosure.

PSA also believes that the quality of disclosure in Exchange Act disclosure documents would be enhanced by the participation of independent accountants through the use of mandatory SAS 71 interim reviews. These third-party review procedures would not only assist the underwriters in their due diligence efforts in connection with primary offerings, but would improve the quality of an issuer's interim financial statements.

Informing Investors. PSA believes that at a minimum all investors should be allowed to receive physical or electronic delivery of transaction-specific information ("Term Sheets").[6] While the amount of information that an investor may possess prior to an offering may vary, every investor has the same need for transaction-specific information. In fact, given the larger average purchase by institutional investors, they may have a greater need for timely transaction-specific information. Such information is also vital for the formation of an informed secondary market. We also believe that the method of information delivery or access should be a matter of investor choice rather than differing by regulation based on the investor's level of sophistication.

On the other hand, it is our view that there are some classes of investors who do not require the protection afforded by actual delivery of a prospectus disclosure beyond a term sheet. For sophisticated investors in offerings made by issuers of investment grade debt and frequent issuers of

---

[6] See PSA's comment letter, dated October 16, 1996, in response to the Commission's release regarding Use of Electronic Media by Broker-Dealers, Transfer Agents and Investment Advisors for Delivery of Information (Release No. 33-7288).

non-investment grade debt[7], constructive delivery of disclosure other than term sheet information should be sufficient to satisfy the requirements of the Securities Act. As to general company information relating to such issuers, we believe that the assumptions of the "efficient market hypothesis" are realistic for the debt market and we support notions of constructive delivery.

Finally, we also believe that the Commission should not impose special registration requirements for types of securities never before sold or never before sold by the issuer.

Timing of Delivery of Transaction-Specific Information. PSA is of the view that details of the securities being offered and any recent *developments or changes* with respect to company-specific information contained in prior disclosures should be made available as soon as possible after pricing. At least with respect to primary offerings of investment grade debt securities, we believe that the information needed by an investor to make an informed decision is relatively limited and can be given orally or through the use of a Term Sheet. Therefore, we believe that any requirement that transaction-specific information be filed prior to sale would significantly reduce the flexibility and instantaneous access shelf registration has brought to the U.S. capital markets. The imposition of such a requirement, we believe, would place the U.S. capital markets at a significant disadvantage to the European and other global markets which do not have any such impediments. We believe that the pre-filing of transaction-specific information would delay absorption of that information by investors in the primary offering.

Limitations on Written Communications. While we believe that expansion of research and the use of term sheets is desirable, it is our view that additional liberalization of "free writing" outside the statutory prospectus is not necessary or desirable without adequately addressing issues relating to liability, indemnification and discrepancies among each of the underwriters' documents.[8] However, we do believe that the current rules regarding research coverage of investment grade debt issuers and frequent non-investment grade issuers should be clarified and expanded. The benefits obtained from continuous research coverage of most segments of issuers should more than outweigh any regulatory issues presented by such coverage.

As stated above, we believe that the benefits of any requirement mandating pre-offering filings of transaction-specific Term Sheets would be more than offset by the burdens such a requirement

---

[7] For this purpose, PSA would consider a frequent issuer to be one that accesses the markets at least twice a year or maintains an active medium-term note program.

[8] In this regard, PSA recognizes that the Staff of the Commission has granted no-action advice permitting underwriters of mortgage-backed and asset-backed securities to distribute written "computational materials" to prospective investors prior to the availability of a final prospectus (see Kidder, Peabody Acceptance Corporation I (May 20, 1994) and Public Securities Association (May 27, 1994)). Section II of this letter, reflecting the views of PSA's Mortgage and Asset-Backed Securities Division, in fact advocates an expansion of the circumstances in which written non-prospectus communications may be circulated. It is our view, however, that the unique and largely quantitative characteristics of mortgage and asset-backed securities, described at greater length in Section II, may be readily distinguished from investment grade debt and non-investment grade debt.

would place on instantaneous market access that has become the hallmark of shelf registration in the U.S. capital markets. We do believe, however, that the Commission should consider authorizing the optional use of a Term Sheet containing transaction-specific information regarding the offering, which could be made available promptly after pricing, could be more quickly provided to investors than the current prospectus and prospectus supplement requirement and could assist investors in the secondary market by delivering the Term Sheet to such investors. PSA would not favor any requirement to pre-file the Term Sheet with the Commission as such a requirement would defeat the purpose and intent of the Term Sheet.

The Term Sheet would summarize the transaction-specific information associated with the offering, incorporate the prospectus or prospectus supplement by reference and disclose that the prospectus or prospectus supplement is available upon request. The contents of such a term sheet would not and should not be mandated by rule other than to require that the information be derived from and consistent with the prospectus or prospectus supplement.

PSA believes that the current requirement that a prospectus or prospectus supplement accompany or precede the confirmation of the transaction should be amended by decoupling the confirmation and prospectus delivery requirements. As noted by the Advisory Committee, delivery of the final prospectus does not occur until after an investor has already made his or her investment decision. The reality of the marketplace is such that investment decisions are generally based on the "Subject to Completion" prospectus or prospectus supplement or, more likely with respect to issuers of investment grade debt or *frequent* issuers of non-investment grade debt, upon oral information delivered at or prior to the pricing of the securities. The adoption of Rule 15c6-1 ("T+3") has placed significant pressure on issuers and underwriters not only to perform their traditional roles but also to finalize the prospectus or prospectus supplement in time to be delivered with the confirmation. Any further reduction in the settlement cycle will further exacerbate the timing issue associated with the confirmation and prospectus delivery requirements. We urge the Commission to consider permitting broker-dealers to incorporate the prospectus into the confirmation and undertake to deliver such prospectus to anyone who requests a copy. Accordingly, the confirmation and prospectus would be decoupled for prospectus delivery requirements, and the confirmation and any optional term sheet would not be an illegal prospectus if delivered in the manner suggested herein.

The Role of "Gatekeepers". The capital formation process has changed significantly since the enactment of the Securities Act. At that time, investment banks essentially controlled access to the capital markets. From the enactment of the Securities Act until prior to the adoption of the shelf registration process investors relied upon the "sponsorship" of the investment bank for a specific offering, Moreover, investment banks played a more substantial role in the drafting of the disclosure included in the prospectus. Therefore, the liability scheme of Section 11 of the Securities Act placed responsibilities, with a "due diligence" defense, upon underwriters which were consistent with their then existing role and their ability to affect the disclosure contained in the prospectus. Developments since that time have significantly changed the role of underwriters. Integrated disclosure (where underwriters are seldom involved in non-transaction specific disclosure), significant developments in communications (where information about reporting companies is available instantaneously from numerous sources), shelf registration (where issuers can instantaneously effect transactions with any underwriter), T+3 settlement (where little time is available to deliver a confirmation and prospectus and receive payment), and the globalization and institutionalization of the securities markets (where institutions are willing to purchase securities from any major underwriter) have made the responsibilities of underwriters under Section 11 inappropriate and less realistic. "Relationship" investment banking has become "transactional" investment banking, with underwriters providing advice and distribution services; investment grade debt issuers and frequent non-investment grade issuers have, in effect, become their own "gatekeepers," accessing the capital markets at will. Underwriters have little control over the content of the prospectus, which has become a multi-document "offering package" consisting of documents that have been filed by the issuer at varying times for varying purposes (e.g., periodic reporting and proxy solicitation) and in the case of continuous offerings is subject to automatic change whenever the issuer files an Exchange Act report. An underwriter today cannot realistically be expected to exercise the same degree of control over the disclosure document that it could at the time the Securities Act was enacted.

Except for certain transaction-specific disclosure, the prospectus and periodic reports are, for all significant purposes, the documents of the issuer. Therefore, we believe that the role of an underwriter in today's capital markets should be addressed directly and that the liability of an underwriter should be correlated with its ability to impact the content of the prospectus. Unless the Commission elects to exercise its newly granted exemptive authority,[9] it would appear that legislative action would be required to change an underwriter's liability. Because this could be a lengthy process, we suggest that if the Commission agrees with our position, it would be appropriate to consider amending Rule 176 to recast the Rule in the form of a safe harbor and to add factors such as:

- The time available to the underwriter for investigation in connection with a transaction and the use made by the underwriter of the available time;
- The degree to which the procedures followed by the underwriter in connection with a transaction are consistent with procedures generally followed by underwriters in connection with offerings of comparable securities of comparable issuers in comparable transactions;
- The degree to which investors rely upon a rating assigned to the underwritten securities by an independent rating agency; and

[9] As discussed above, we note that the National Securities Markets Improvements Act of 1996 granted the Commission broad and general exemptive authority under both the Securities Act and the Exchange Act to conditionally or unconditionally exempt any person, security or transaction, or any class of the same, from any provision of the Securities Act or Exchange Act (except Section 15C of the Exchange Act) or any rule or regulation thereunder.

- The degree to which investors have independent access to information and credit judgments about the issuer that are of a comparable degree of reliability to those available to the underwriter.

Staff Review. While the Commission considers the full ramifications of the adoption of Company Registration, we suggest it take immediate action to increase the certainty of Staff review of pre-transaction filings. PSA believes that increased certainty of Staff review will significantly improve the efficiency of the U.S. capital markets. PSA also strongly suggests that the Commission make public the criteria used by the Staff in determining whether to review registration statements. We do not believe that anything is gained by withholding this information from the public. We favor enhanced reviews of Exchange Act filings, limiting reviews of transaction filings to such transactions as initial public offerings and "novel and unique" securities. We also suggest that the Staff permit an issuer to submit a transaction to the Staff a short period of time, such as 60 days, in advance of filing. If a review were indicated, the issuer should be able at that time to request a review of its Exchange Act documents in advance of the filing of the registration statement. We also suggest that the Staff permit U.S. issuers to be able to take advantage of the confidential filing procedures that have been made available to non-U.S. issuers.

PSA also believes that the Staff should periodically make public frequent legal and accounting comments, as well as legal interpretations that affect public offerings. It should also make public its reviews of "novel and unique" securities to eliminate redundant Staff reviews of new financial instruments. This would be of great benefit to issuers and underwriters, would improve the quality of filings and reduce Staff review time.

We also suggest that the Staff consider the automatic effectiveness of pricing amendments or Rule 430A amendments that effect no substantive changes other than the size of the offering. This would afford issuers and underwriters greater certainty in scheduling and sizing offerings in volatile markets.

Task Force Report Recommendations

Consistent with our suggestion above that the Commission focus on improving the current regulatory system while continuing to develop and study Company Registration and other alternative regulatory systems, PSA supports many of the Task Force Report recommendations. In particular, PSA supports the following recommendations:

- Eliminate restrictions for "at the market" offerings;

- Permit companies engaged in shelf offerings to include secondary offerings without identifying the selling security holders until the time of the actual offering;

- Allow multiple undesignated issuers on a shelf registration;

- Permit an issuer to reallocate securities, or register a new class of securities, on a shelf registration statement by post-effective amendment;

- Allow seasoned issuers to pay registration fees at the time securities are taken down from the shelf;

- Permit seasoned issuers to register a dollar amount of securities without specifying the classes of securities being registered;

- Eliminate the Form D filing requirement under Regulation D;

- Expand the safe harbor of Rule 152 as recommended by the Task Force Report;

- Permit the submission of a registration statement on a "quiet" basis (*i.e.*, without any issuer or underwriter generated publicity) without being deemed to have commenced a public offering;

- Streamline and modernize the safe harbors provided for by Securities Act Rules 137, 138 and 139 relating to the use of broker-dealer research reports;

- Eliminate a broker-dealer's prospectus "market-making" delivery obligations in connection with "regular way" market making transactions in securities of its affiliates;

- Permit a shelf registrant to qualify an indenture by post-effective amendment rather than be required to file a new registration statement;

- Eliminate Forms T-1 and T-3 and instead require an issuer to make an "eligible trustee" representation in the registration statement;

- Broaden the circumstances in which the guaranteed convertible securities of a wholly-owned subsidiary can be exchanged for securities of its parent under Section 3(a)(9) without registration; and

- Streamline the rules requiring separate audited financial statements of affiliates whose stock collateralizes a registrant's securities and of persons who guarantee a registrant's securities.

Rule 144A

PSA supports the expansion of Rule 144A under the Securities Act. Rule 144A has resulted in a significant expansion of the private institutional market for unregistered securities, giving issuers a real alternative to the registered market without a significant pricing penalty. It has also clarified the resale of unregistered securities and provided additional liquidity to the marketplace. PSA believes that the success of the Rule indicates that it should be expanded and revised as follows:

- The definition of qualified institutional buyers ("QIBs") should be modified to (i) reduce the investment security threshold to $25 to 50 million[10]; and (ii) allow any investor meeting the investment level to be a QIB, even if an individual — experience has indicated that any investor of this size either possesses or has advisors that possess the necessary level of investment sophistication. These changes would significantly reduce the necessity for parallel QIB/Institutional Accredited Investor offerings;

- The rule should be available for *sales* to QIBs only; *offers*, on the other hand, should not be subject to any restriction; and

- The Rule should be revised to delete the certification requirement of Rule 144A(d)(iv) as unnecessary and burdensome on QIBs who are inundated with requests even when such requests are unnecessary because of the public status of the purchaser.

We do not believe that the above expansion of Rule 144A would lessen investor protection in any way or harm the public interest. In this regard, we suggest that the Staff expand the availability of the registered exchange offer to apply to all securities sold in reliance upon Rule 144A. The current limitations do not appear to serve any useful function. We further suggest that the Staff consider issuing a "staff legal bulletin" to clarify the application of the integration doctrine to concurrent and subsequent private placements and registered offerings.

We also suggest that the Staff expressly sanction the use of the Depository Trust Company's book entry system in the case of non-PORTAL offerings to non-QIB Institutional Accredited Investors. The current situation has been interpreted to require physical delivery of certificates to non-QIBs, thereby denying such investors the efficiencies of the book entry system.

We request that the Commission specifically exempt Rule 144A from the application of Section 11(d)(1) of the Exchange Act. We note that in the Release adopting Rule 144A, the Commission stated that the Staff was prepared to provide interpretive relief under Section 11(d)(1) in "appropriate circumstances."[11] We believe, however, that there is no legal or policy reason for Section 11(d)(1) to be applicable to Rule 144A offerings of investment grade debt securities as there is no distribution for purposes of the rule. In this context, we would also suggest that separate underwritten takedowns of corporate debt securities from a typical Rule 415 "shelf" registration statement should be exempt from

---

[10] We note that the National Securities Markets Improvements Act of 1996, adding the definition of "qualified purchaser" to the Investment Company Act of 1940, used investment thresholds of $5 million for natural persons and $25 million for other persons.

[11] See Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities under Rules 144 and 145 (Release No. 33-6862 (April 23, 1990)).

the prohibitions of Section 11(d)(1).[12] Similar to Rule 144A offerings, where the financial terms of the securities are tailored to the individual needs of investors and each tranche is "bought" prior to the pricing of the transaction, there is no legal or policy justification for requiring broker-dealers to wait thirty days before they may extend credit on the securities.

General Solicitation

We believe that the general solicitation prohibition on offerings made under Regulation D, as well as in the context of Rule 144A discussed above, hampers the utility of Regulation D and Rule 144A, unnecessarily creates uncertainty and raises costs to issuers. This change by the Commission would shift the focus to purchasers of securities rather than offerees and would avoid current problems relating to the offering of securities such as publicity, research coverage, publication of quotations and similar "general solicitation" issues, without, in our view, any decrease in investor protection.

II. MORTGAGE-BACKED AND ASSET-BACKED SECURITIES

Advisory Committee Report

As noted in the introductory portion of this letter, the basic framework of securities laws and regulations was established substantially before the broad emergence of the MBS and ABS markets. In a number of areas, this framework does not adequately address and accommodate the distinctive characteristics of MBS and ABS, inhibiting the growth and efficiency of these markets. In both general and specific contexts, PSA believes that a rethinking and rationalization of the SEC's regulation of these markets is needed to remove, or at least reduce, these impediments to growth and greater efficiency.

At the outset, it is important to recognize that MBS and ABS possess a number of features that readily distinguish them from more traditional corporate debt and equity securities. Principally, these differences relate to the importance of (1) the nature and quality of the underlying collateral, and (2) the structure and timing of cash flows supported by that collateral, as the primary determinants of value of an ABS offering. These features contrast sharply with corporate debt and equity obligations, where the current financial condition and future earnings prospects of an issuer—generally, an ongoing business enterprise with active management oversight—are the most important considerations and are publicly available to investors.

These fundamental differences between traditional corporate debt and equity securities on the one hand, and MBS and ABS, on the other, are perhaps nowhere brought more sharply into

---

[12] *See* Kidder, Peabody & Co., SEC No-Action Letter [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶79,626 (Aug. 16, 1990) where the Staff reversed a prior position and permitted a broker-dealer acting as agent for an issuer in a medium-term note program to extend credit on notes of a particular tranche after the expiration of thirty days, even if sales of other medium-term notes by the broker-dealer continued.

focus than by certain portions of the Advisory Committee Report, and specifically, by the discussion of the Company Registration concept. While PSA's members that are active in the MBS and ABS markets generally agree that a more lengthy and exhaustive study of alternative regulatory systems, including Company Registration, should be undertaken, the basic relevance and applicability of such systems to MBS and ABS need to be considered. Although the eligibility criteria for the initial Company Registration pilot envisioned by the Advisory Committee would operate to exclude issuers of mortgage and asset-backed securities[13], as a conceptual matter it is difficult to envision the manner in which a "Company Registration" paradigm could be applied to such securities, where issuers are usually distinct, special purpose entities without ongoing business activities. Once an MBS or ABS offering has been completed, the performance of the related securities depends on the cash flows generated by the underlying collateral, and in most circumstances is entirely unrelated to the financial condition and prospects of the "issuer". This limited role of the issuer renders conventional notions regarding ongoing financial and other issuer disclosure irrelevant; the nature of the assets underlying the MBS/ABS offering and the structure of the transaction become, instead, the paramount considerations for investors. As a consequence, the Company Registration concept would appear to require significant rethinking and modification before its application to the MBS and ABS markets could be considered. Given the general inapplicability of this concept to a large and growing sector of the fixed income marketplace, PSA would therefore urge the Commission to consider reforms outside of the context of Company Registration that may address more directly and effectively the unique needs and circumstances of the MBS and ABS markets.

Securities Act Concepts

General. PSA's Mortgage and Asset-Backed Securities membership equally appreciates the continuing challenge for the Commission to adapt the disclosure framework of the Securities Act to developments and innovation in the primary markets, while ensuring that investors receive full and fair disclosure in a manner and at a time that allows for informed decision-making. The Commission's pending initiatives concerning capital formation present a unique opportunity to address these challenges in a manner that adequately accounts for the unique requirements of MBS and ABS.

In the past several years, market participants have identified and worked with the Staff to resolve a number of securities regulatory issues of particular significance to the MBS/ABS markets. These issues have arisen in connection with, among other things, the desire to clarify the circumstances in which MBS/ABS research reports may be circulated without resulting in prohibited "market conditioning" or "gun jumping" activity; the use of "computational materials" and related term sheets to communicate essential collateral and structural information to investors

[13] Under these criteria, issuers would be required to: have registered at least one public offering under the Securities Act; have been reporting under the Exchange Act for two years; have a public float of at least $75 million; and have securities listed on the New York Stock Exchange, the American Stock Exchange or NASDAQ NMS. See footnote 11 of the Concept Release.

and potential investors in MBS and ABS offerings; the distribution of preliminary prospectuses; and the treatment of re-securitization transactions, among others.

Although PSA recognizes the substantial efforts by the Staff to address such issues consistent with the requirements of the securities laws, the Staff's positions on a number of these significant regulatory questions has not been wholly adequate to accommodate the legitimate and sometimes unique business needs of the MBS/ABS markets. In particular, the Staff has imposed a number of conditions and restrictions in connection with its no-action or other relief that unnecessarily burden issuers and underwriters and otherwise interfere significantly with the efficient distribution of securities and information in the MBS/ABS markets.

In PSA's view, many of the unnecessarily restrictive and burdensome requirements currently imposed on MBS/ABS issuers and underwriters reflect the difficulty of fitting these securities into a regulatory framework that, as discussed above, was largely developed prior to the existence of the MBS/ABS markets. Many of the traditional views underlying the existing federal securities law regime regarding the nature of the offering process and the information relevant to investors do not apply in these markets. In particular, the distinctive features of the MBS and ABS markets render it essential that asset originators, underwriters and investors engage in an iterative structuring process that differs significantly from the process for offering most other securities. In light of these considerations, PSA hopes to use the Commission's pending initiatives regarding capital formation and the securities offering process to work with the Staff to identify steps that can be taken to address more effectively the needs of the MBS/ABS markets. Our specific comments in several key areas are provided below.

Quality of Ongoing Disclosure. PSA firmly believes that the Commission should work to rationalize and codify the nature of the ongoing disclosure requirements applicable to MBS/ABS issuers to reflect the differences between the categories of information relevant to MBS/ABS investors on an ongoing basis and those relevant to other types of securities investor.

PSA has considered whether the existing disclosure system for MBS/ABS could adequately be improved simply by modifying the instructions to Forms S-3 and S-11 and the related provisions of Regulation S-K in a manner that would eliminate inapplicable provisions and otherwise more appropriately adapt these forms and rules to the realities of the MBS/ABS market. PSA's view is that such incremental modifications would be difficult to implement, would be confusing to apply and would not sufficiently resolve existing problems. Instead, PSA would urge the Commission to consider promulgating a new regulation specifically designed to create a disclosure system that meets the unique requirements of the MBS/ABS market and better serves the needs of MBS/ABS investors, issuers and underwriters. Approaching the matter de novo, with full participation of all market participants, is most likely to achieve a reform that will serve the interests of investors, while enabling the market to operate in a more efficient fashion.

Closely related to the disclosure system are the reporting requirements under the Exchange Act as they apply to MBS/ABS. In connection with any reform of the MBS/ABS disclosure system, PSA suggests that the Commission also consider a parallel reform of the

Exchange Act reporting system as applied to MBS/ABS. The inapplicability of many of the requirements of the Exchange Act continous reporting rules to MBS/ABS is evidenced by the fact that virtually every registrant seeks either an exemptive order or a no-action letter to relieve it of inappropriate reporting requirements. This process alone consumes significant time of both the Staff and registrants and should be replaced with a rule of general applicability.

A fundamental problem with the existing reporting system is demonstrated by the fact that most registrants "deregister" at the earliest possible opportunity, not because they wish to stop supplying information to investors but because they wish to avoid liability for information over which they have no control. An issuance of MBS/ABS by its nature is a stand-alone structure. Once the securities have been sold, information about the registrant (which often is itself a special purpose entity that exists only to bring together pools of assets and securitize them) is immaterial to investors. What investors and the secondary market need is information about the performance of the pool of assets. This typically is supplied by filing copies of the periodic reports that the trustee is required to send to investors. These reports in turn incorporate information provided by the servicer. All of the relevant information is internal to the pool of assets and is generated by entities, such as the trustee and servicer, whose function in the transaction is to provide services to the investors.

The current system does not adequately serve the interests of participants in the secondary market, who need as much current information as possible about the performance of the pools of assets underlying MBS/ABS. This concern is shared broadly by such participants, including investors and broker/dealers. Accordingly, PSA would propose that the Commission consider adopting rules to replace, for MBS/ABS, the reporting requirements currently applied under the Exchange Act with a requirement (a) that all transaction documents require the trustee or servicer to report to investors at least a prescribed minimum set of information no less often than or shortly following each payment date on the securities and (b) that all such information provided to investors be made available by the trustee or servicer on request to any requester (which requirement could be met by making such information generally available to the public, either directly or through third-party data providers). Compliance with these requirements should obviate the need for filing such information under the Exchange Act, although PSA would urge that registrants (including issuers whose securities are already outstanding) that satisfy these requirements should still be considered reporting companies for technical reasons (e.g., eligibility to use Form S-3 and the availability of Rule 139).

Informing Investors: Timing; Limitations on Written Communications.

A. Term Sheets. In many respects, existing rules relating to the offering of MBS/ABS have the effect of constricting the flow of relevant information to investors, especially to the sophisticated institutional investors who make up the vast bulk of the market for these securities. A number of pending problems in this area could be addressed as part of the Commission's broader consideration of reforms to the capital formation process. Many of these stem from general Section 5 prohibitions on the distribution of written non-prospectus communications.

PSA believes that one of the principal goals of regulatory reform should be enhancement of the ability of asset originators, underwriters and investors to work together to achieve the most efficient structures for MBS/ABS offerings without artificial and unnecessary constraints under the federal securities laws on the dissemination of computational materials, term sheets and other communications designed to facilitate the structuring process. In the MBS/ABS market broker-dealers and issuers attempt to structure their offerings to meet particular investor needs and constantly changing market conditions. MBS/ABS offerings are typically divided into a number of separate classes of securities, with cash flows of principal and interest in the underlying assets allocated among the classes according to specified payment risks. Unlike a going concern that issues debt or equity, the key characteristics of each MBS/ABS transaction essentially are invented in response to investors and the market.

The demands of the institutional investor market, coupled with the inherent quantitative nature of MBS/ABS collateral and structural information, require that underwriters of MBS/ABS be able to circulate a brief description of the economic features of a specific transaction to institutional investors before the final prospectus supplement is distributed. Consistent with the views previously expressed by PSA's Corporate Bond Division, we believe that Commission (even if a more extensive reform of the MBS/ABS regulatory system is not undertaken) should consider promulgating a rule that makes circulation of such a term sheet possible without violating the prospectus rules, as long as a complete prospectus is delivered to the investor in connection with the consummation of any sale.

B. Preliminary Prospectuses. PSA believes that requirements governing the timing of distribution of preliminary and final disclosure materials in the context of MBS/ABS offerings should be revisited in light of the practical limitations on the ability of underwriters to prepare in a timely fashion materials that are both responsive to investor needs and consistent with the requirements of the federal securities laws. Preparation of a "red herring" preliminary prospectus addressing in detail all aspects of a possible transaction is not a feasible or desirable means in every case to provide important information to investors or to bring securities to market.

Rule 15c2-8 substantially predates the evolution of the MBS and ABS markets in their current form, as well as the current widespread availability of the Commission's shelf registration rule. In general, PSA believes that the application of Rule 15c2-8(b) to MBS and ABS offerings (regardless of whether made pursuant to a shelf registration statement) is not necessary to achieve the rule's policy objectives. Although such offerings generally involve an issuer which, at the time of the offering, has not been filing reports pursuant to Section 13(a) or 15(d), the absence of such reports is merely a reflection of the difference between the MBS and ABS markets and the traditional markets for debt and equity securities, and should not be construed to imply that the offering falls into the "new or speculative" category that originally led the Commission to adopt the rule.

Moreover, the features of an MBS or ABS offering, particularly its structure, evolve throughout the offering process, often until shortly before the closing of the transaction. As a result, a preliminary prospectus typically could not provide much of the critical information that is expected by investors and, indeed, even a final prospectus, reflecting structural and other changes that occur up until the moment of pricing, must be prepared under considerable-time constraints. Investors have sought other, more timely and effective means of obtaining the information they regard as essential in arriving at informed investment decisions, such as through the distribution of computational materials. As described above, PSA believes that similar benefits would accrue from a liberalization of the use of other forms of written communication in the MBS and ABS markets, including term sheets and other structuring information. In light of these considerations, PSA believes that the Commission should codify through specific rulemaking the basic policy set forth in the Staff's existing no-action position concerning the application of Rule 15c2-8(b) to MBS and ABS[14]; namely, that no preliminary prospectus need be delivered at least 48 hours prior to the sending of a confirmation, as long as a final prospectus is sent or given to a purchaser prior to or at the same time a confirmation is sent.

C. Computational Materials. PSA believes that the market and the interests of all participants would best be served by adoption of a rule that replaced the current burdensome and untargeted system of filing certain computational materials and term sheets by a system that greatly liberalizes the ability to send to potential investors a wide range of information without a requirement that it be filed, so long as the prospectus (or prospectus supplement) includes indicative materials covering, with respect to the final structure of the transaction, the topics and types of data addressed in those preliminary materials. If only on the basis of practicality and cost, the formal disclosure document can not and should not include every item sent to every potential investor about every possible structure. Ready distribution of term sheets and other information would respond most directly to the expressed need of potential investors to obtain an early and meaningful understanding of proposed transactions. The market can do a better job of informing investors (and getting reactions from investors to possible structures) on a timely basis without the procedural burdens of the existing system - and the formal offering documents can be better focused on providing useful information.

D. Information Relating to Underlying Assets. A particular problem under the current disclosure system arises in connection with certain MBS/ABS transactions in which some (but not necessarily all) investors seek access to voluminous information about the underlying assets. This is particularly characteristic of securitized offerings of commercial mortgage loans, in which some institutional investors, even though the securities are being publicly offered, wish to perform their own due diligence on the underlying loans and real properties as if they were purchasing an interest in those assets directly. Such investors often seek access to third-party documentation held by the issuer and underwriters, such as appraisals, environmental reports, property managers' reports and engineering reports. Existing law makes unclear the ability of issuers and underwriters to furnish such materials or their liability for doing so. It would seem appropriate, if individual investors wish to have access to underlying information that the issuer has not deemed requires disclosure in the prospectus (or has covered by summarizing in the prospectus), for such

[14] See Public Securities Association, SEC No-Action Letter on Asset Backed Securities, File No. TP 95-450 (December 15, 1995). PSA notes that certain technical issues and limitations on the scope of this no-action relief would need to be addressed in any rulemaking initiative.

investors to have that option, so long as any prospective investor is given the same access upon request. However, there should be no requirement for the issuer to include such material in the prospectus or file it with the Commission, or for either the issuer or the underwriters to be required to assume liability under the Securities Act.

E. Electronic Access to Transaction Information. Another issue under current rules is the desire of investors to have electronic access to information about the pools of assets underlying a proposed issue of MBS/ABS at the earliest possible moment. For example, both investors and underwriters would like underwriters to be able to post information about the characteristics of underlying pools on electronic bulletin boards, such as Bloomberg, no later than when the prospectus is delivered to the underwriters, or in some cases even earlier. This information is contained in the prospectus (and currently is also furnished by some issuers to investors in an electronic medium together with the prospectus). It is generally not practicable to post the entire prospectus on such a bulletin board or to establish a hyper-text link to another site containing the prospectus. The current rules should be reformed to make clear that such a posting is permissible, as long as investors can obtain the entire prospectus upon request. It would also be desirable to make it possible for issuers to post on the same bulletin boards the computer models they have used to produce information in the prospectus, such as the effect of various interest rate and prepayment scenarios on yields. This would make it easier for prospective investors to model other scenarios that better fit the investor's own assumptions or needs.

F. Research Reports. The state of the law currently is unclear as to the ability of broker-dealers to rely on current Rule 139 as the basis for permitting the distribution of research reports and similar published information concerning MBS and ABS offerings. As a result, broker-dealers face significant practical and interpretive uncertainties in attempting to distinguish normal or routine MBS and ABS research publications from those which might be deemed to condition the market for an upcoming offering. Analogous to its views on Rule 15c2-8(b), PSA does not believe that the absence of an Exchange Act reporting status for MBS and ABS issuers—a circumstance that relates more to the structure of MBS/ABS offerings than it does to any inherent speculative quality of the securities involved—should prevent the market from benefiting from widespread research coverage of both new and seasoned MBS and ABS issues, and in particular those that qualify for an investment-grade rating. PSA believes that the Commission should use the opportunity of more general regulatory reform to establish a framework for distribution of MBS/ABS research materials that is consistent with concerns identified by PSA in the context of existing rules, with particular emphasis on eliminating formalistic prohibitions that limit the ability of underwriters to distribute accurate materials while engaging in their ordinary, ongoing business activities involving the structuring of MBS/ABS offerings.

G. Resecuritizations. The state of the law currently is similarly unclear as to the ability of an issuer of MBS/ABS to include, as part of a pool of collateral, assets that are indirectly held through a securitization vehicle that has been the subject of a private placement or an earlier public offering. A variety of views expressed by members of the Staff to different issuers at different times has left market participants in a state of uncertainty. Any reform of the existing rules should address this issue and should eliminate artificial distinctions between securitized and unsecuritized assets. As long as there is full disclosure in the prospectus of relevant information about the assets underlying an issue of MBS/ABS (including any material disclosure about the effects that prior securitization may have on servicing, cash flows or other relevant matters), there seems no reason to raise obstacles to including assets that have already been securitized or to require registration or reregistration of the earlier transaction in which such assets were securitized.

III. CONCLUSION

PSA appreciates this opportunity to provide its views to the Commission. If it would be helpful to the Staff and the Commission, we would be most willing to make PSA staff and member firm personnel available to meet and discuss any of the points raised in this letter. Please address any questions or requests for additional information to Joseph W. Sack, George P. Miller or Sarah M. Starkweather of PSA, at 212-440-9400.

Very truly yours,

Stanley J. Becchetti
Chairman, PSA Corporate Bond Division
(Vice President, A.G. Edwards & Sons, Inc)

Thomas K. Guba
Chairman, PSA Mortgage and Asset-Backed Securities Division
(Managing Director, Donaldson, Lufkin & Jenrette Securities Corporation)

Arthur D. Hyde
Vice Chairman, PSA Corporate Bond Division
(Managing Director, Salomon Brothers Inc.)

Lawrence E. Thomas
Vice Chairman , PSA Mortgage and Asset-Backed Securities Division
(Manager/General Partner, Edward Jones)

cc: The Honorable Arthur Levitt, Chairman, Securities and Exchange Commission
The Honorable Steven M. H. Wallman, Commissioner
The Honorable Norman S. Johnson, Commissioner
The Honorable Isaac Hunt, Jr., Commissioner
Brian J. Lane, Director, Division of Corporation Finance
David A. Sirignano, Associate Director, Division of Corporation Finance
Anita Klein, Office of Chief Counsel, Division of Corporation Finance

Attachment

PSA's CORPORATE BOND DIVISION

EXECUTIVE COMMITTEE

Stanley J. Becchetti, Chairman
A.G. Edwards & Sons, Inc.

Arthur D. Hyde, Vice Chairman
Salomon Brothers Inc

James J. Baldino
BA Securities

Thomas E. Bernard
Lehman Brothers Inc.

Steven Bowman
Smith Barney Inc.

Robert F. Campbell
First Albany Corporation

Louis S. Caro, Jr.
The Industrial Bank of Japan

Nelson D. Civello
Dain Bosworth Incorporated

Thomas S. Dillon
Daiwa Securities America Inc.

Michael Evelyn
Deutsche Morgan Grenfell

Alan M. Green
McFadden Farrell & Smith, L.P.

Raleigh Hortenstine III
Nations Securities

Christopher T. Huff
EVEREN Securities, Inc.

William H. James
Lazard Freres & Co. LLC

Ronald G. Keenan
Chase Securities, Inc.

Gregory F. Kiernan
PaineWebber Incorporated

Ferdinand Masucci
Morgan Stanley & Co. Incorporated

Bart McDade
Lehman Brothers Inc.

Kent B. Monypeny
Morgan Keegan & Company, Inc.

Richard W. Morton
First Chicago Capital Markets Inc.

Vincent Murray
ABN AMRO Securities (USA) Inc.

Sal Naro
Bear, Stearns & Co. Inc.

Barry Nordstrand
Piper Jaffray Inc.

Timothy O'Neill
Bear, Stearns & Co. Inc.

Randall C. Outlaw
J.P. Morgan Securities Inc.

Steven C. Rattner
Donaldson, Lufkin & Jenrette
Securities Corporation

Steve Renehan
Merrill Lynch & Co., Inc.

Lewis A. Sachs
Bear, Stearns & Co. Inc.

J. Hamilton Scherer, Jr.
Wheat First Butcher Singer

Philip W. Seefried, Jr.
CS First Boston

Joseph P. Shea
Cantor Fitzgerald Securities

Michael Shea
J.C. Bradford & Co.

James P. Sickling
Raymond James & Associates, Inc.

James F. Smith
Freeman Securities Company, Inc.

Salvatore J. Trani
Garban Corporates Inc.

Michael Walsh
Chapdelaine Corporate Securities Inc.

I. Ladd Weinberg
Asiel & Co.

Jon Winkelreid
Goldman, Sachs & Co.

Stephen W. Yarbrough
Interstate/Johnson Lane Corporation

40 Broad Street
New York, NY 10004-2373
Telephone 212.440.9400
Fax 212.440.5260
www.bondmarkets.com

Washington Office:
1445 New York Avenue, NW
Washington, DC 20005-2158
Telephone 202.434.8400
Fax 202.434.8456

Doc. I. A. 2.

THE BOND MARKET ASSOCIATION

June 30, 1999

Mr. Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: The Regulation of Securities Offerings (File No. S7-30-98)

Dear Mr. Katz:

The Bond Market Association (the "Association")[1] is submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission" or "SEC") for comments on its proposal to change the regulatory framework established for the conduct of offerings under the Securities Act of 1933 (the "Securities Act") and to modify certain reporting and related requirements under the Securities Exchange Act of 1934 (the "Exchange Act").[2] The reforms proposed in the Release are intended to modernize and clarify the existing offering process and the Association believes its comments regarding the proposed reforms will assist the Commission in achieving these goals. The Association appreciates the opportunity to participate in this important undertaking.[3]

This letter is organized into five sections. In the first section, the Association presents a brief summary of its views on certain major aspects of the Commission's proposal. In the second section, the Association discusses various aspects of the Release and assesses the impact of the proposed reforms on existing practices. In the third section, the Association examines the proposed reforms in more detail and responds to certain specific questions posed by the Commission in the Release. In the fourth section, the Association presents its views regarding the treatment of mortgage and other asset-backed securities (collectively, "ABS") under the proposal. In the fifth section, the Association presents its

---

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 approximately ninety to ninety-five percent of the initial distribution and secondary market trading of corporate debt securities, including investment grade and non-investment grade corporate debt securities, mortgage and other 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.*

2 SEC Release No. 33-7606A; 34-40632A; IC-23519A (Nov. 13, 1998) (the "Release").

3 To facilitate your review of this letter, we have attached a table of contents as Appendix 1.

overall conclusions with respect to the proposal. *As discussed below, the Association believes that a number of the fundamental concepts embodied in the Release should not be pursued, while others should be pursued on a "stand-alone basis".* The focus of this letter is thus on the main principles that form the basis for the proposals. We would expect to provide more detailed comments on specific appropriate reproposed rules.

I. EXECUTIVE SUMMARY

The capital formation process continues to evolve, and the Commission is correct in seeking to examine how the regulation of the offering process can be modified to assure investor protection while accommodating accelerating change, globalization of the securities markets and the explosion in information technology *In the Association's view, however, many of the fundamental concepts embodied in the Release are seriously flawed.* They are in fact inconsistent with evolving debt market practices and needs and will not contribute to investor protection (and indeed may well lead to exclusion of certain classes of investors, especially retail investors, from many offerings). They may also negatively impact the competitive position of the U.S. fixed income capital markets. ***The Association therefore believes that the proposals set forth in the Release should not be adopted without substantial modification.***

The Commission's proposals, which suggest sweeping changes to the existing debt offering framework, has received, and will no doubt continue to receive, a great deal of comment from various market participants. The Association recommends that the Commission weigh carefully the comments it receives and proceed on a step-by-step basis. The Association does not believe -- and the Commission has not brought forth any evidence of abuse or other rationale to demonstrate -- that a complete overhaul of the current regulatory regime is necessary. On the contrary, the Association believes that certain specific desirable reforms – for example, those concerning liberalization of communications, immediate effectiveness of registration statements and "pay-as-you-go" filing -- could, after modification and reproposal by the Commission, be adopted independently of any action taken to pursue more far-reaching and questionable proposed reforms – for example, the Form A and Form B proposals and their unprecedented requirements -- and could easily be integrated into the current system, which has worked quite well and is preferable to many of the proposals embodied in the Release.

Based on communications between the Association's members and various issuer clients, it appears that many issuers of debt (including large, well-known issuers) have serious concerns about the impact the proposal would have on their continuing ability to access the capital markets in an efficient and cost-effective manner. At the same time, they appear to have been put off by the sheer size and scope of the Release and are assuming that the proposals set forth therein will be substantially modified and resubmitted for further industry comment at a later date. It is our understanding that such issuers are thus taking a "wait and see" approach, believing either the proposals contained in the Release will not be adopted, or that they will have a chance to submit formal comments at the reproposal stage. Accordingly, while we recognize that certain Commission staff members have expressed an expectation that it would be possible to implement certain reforms suggested in the Release without further public review and comment, we believe that the failure to repropose will have severe negative repercussions because the views of issuers, and perhaps other market participants, may not be adequately represented at the initial comment stage.[4]

If the Commission determines, despite the objections raised by the Association, to go forward with the proposed reforms as presented, the Association has the following general comments and suggestions regarding the proposed rules and rule modifications set forth in the Release. In summary:

- *The Association opposes*:

    - The proposal to deliver a term sheet prior to sale in the case of Form B issuers, or a preliminary prospectus 3 or 7 days prior to pricing in the case of Form A issuers.

    - The proposed requirement that Form A issuers deliver material updating information 24 hours prior to pricing.

    - The proposed disqualification approach to use of Form B and incorporation by reference on Form A. The "bad boy" disqualification provisions, in particular, are unwarranted and unworkable.

    - The suggestion in the Release that delayed shelf registration procedures would no longer be necessary if the Form B proposals are adopted. The Association urges instead that existing delayed shelf registration procedures be retained.

    - The proposed elimination of "Exxon Capital" exchange offer procedures.

    - The proposals that road show materials be deemed "free writing" and that free writing materials, especially those prepared by underwriters and dealers, be filed with the Commission.

---

4. The Association points out that reproposal by the Commission is quite common in connection with proposals likely to have significant market impact. The reproposal approach was taken, for example, in connection with the adoption of Rule 144A and Regulation S -- both extremely significant proposals, but of far less overall importance to the market than the complete overhaul of the debt offering process suggested by the Release. Given the comprehensive nature of the proposed reforms and the impact implementation of the reforms will have on the fixed income market, the Association believes that reproposal of certain specific proposals suggested in the Release is warranted.

- The imposition of eligibility thresholds for Form B that would have the effect of excluding issuers currently eligible to register their offerings on current Forms S-3 and F-3.

- The proposed exclusion of dealers and investment advisers in connection with Form B offerings solely to qualified institutional buyers ("QIBs").

- The proposed additional director and officer certification requirements in both Securities Act registration statements and Exchange Act filings.

- The proposal to exclude Form B and other registration statements with respect to which the issuer is permitted to control the timing of effectiveness from Securities Act Rule 401(g).

- The proposed modifications to the rules regarding the U.S. – Canadian multijurisdictional disclosure system ("MJDS").

♦ *The Association (with, if applicable, the modifications noted) supports*:

- The proposal to allow the payment of registration filing fees on a "pay-as-you-go" basis.

- The proposed elimination of final prospectus delivery requirements.

- The proposal to allow Form B issuers, as well as certain Form A and Schedule B issuers, to control the timing of effectiveness of their registration statements.

- The proposed liberalization of communications around the time of an offering and the creation of "bright-line" communication safe harbors, but urges the Commission to clarify the meanings of certain key terms including "offering information", "free writing" and "offering period".

- The proposal to provide additional guidance regarding the adequacy of due diligence procedures, but urges the Commission to adopt a due diligence safe harbor, extend the proposed guidance to apply to offerings of investment grade debt securities, and acknowledge that issuer indemnification of underwriters is not against public policy.

- The proposal to allow issuers to tailor their disclosure as they deem appropriate to the particular type of offering being registered.

- The proposal to allow issuer-affiliated market makers to use Form B, but urges the Commission to consider an exemption from the registration requirement for ordinary course market making transactions by such entities.

- The proposed expansion of the research safe harbor rules, but urges the Commission to explicitly state that qualifying research will not be deemed "offering information" and will be exempt from Section 12(a)(2) liability.

- The proposed addition of a safe harbor for qualifying research distributed during Rule 144A and Regulation S offerings.

- The proposals with respect to the integration of public and private offerings. In addition, the Association urges the Commission to offer similar guidance with respect to "side-by-side" public and private offerings.

- The proposals to expand Form 8-K reporting obligations and accelerate the timing required for reporting certain events thereunder.

◆ *The Association also recommends that the Commission*:

- Focus on *availability*, rather than *delivery*, of information to investors.

- Reconsider the proposed standard for liability with regard to free writing materials so that information flow to investors would be encouraged, not discouraged.

- Expand, not narrow, the definition of "QIB" and broaden the categories of investors that may participate in Form B QIB-only offerings to include other "qualified purchasers".

- Permit unseasoned issuers to use Form B for non-convertible fixed income offerings to QIBs (including other "qualified purchasers" as noted above).

- Create a separate form specifically tailored to non-convertible investment grade securities in order to more properly address the differences between offerings of these securities and offerings of other types of securities.

- Adopt the same seasoning period for Form A issuers as Form B issuers and use the filing of at least one annual report as the appropriate measure of seasoning for both Form A and Form B issuers.

- Eliminate the proposed requirement for seasoned Form A issuers to deliver incorporated reports to investors with the preliminary prospectus.

With regard to the conduct of ABS offerings, the Association is concerned that the proposals contained in the Release do not present a workable model, and that the regulatory framework governing ABS offerings will be inappropriately influenced by decisions made and policies established in the context of the proposals made in the Release. In summary:

- *The Association opposes*:

  - The notion that a comprehensive review of the securities offering process should be undertaken without simultaneously addressing the impact of any proposed reforms on the ABS market.

  - The application of the proposals in the Release to ABS offerings. The fundamental differences between ABS markets and other debt securities markets dictate a need to pursue different regulatory approaches; the proposals in the Release do not present a workable model for ABS offerings.

  - Any regulatory mandates or requirements that restrict the flow of preliminary information to ABS investors. Instead, information flow to ABS investors should be encouraged and offering participants should be permitted (but not required) to provide ABS investors with explanatory information in the form of computational materials, term sheets and the like.

- *The Association recommends that the Commission*:

  - Revisit and rationalize its regulatory model for ABS offerings in a manner that accommodates their unique characteristics.

  - Permit ABS registrants to control the timing of offerings of investment-grade ABS.

  - Not use restrictive interpretations of the term "asset-backed security" to govern the choice of registration form.

  - Promulgate clear ABS disclosure guidelines and make changes in disclosure policy and interpretation on a general basis rather than in the context of review of particular registration statements.

- Establish a regime for Exchange Act reporting tailored to ABS.

II. DISCUSSION OF THE RELEASE

A. *The Association agrees with the Commission that registration should be encouraged and that the process of registration should be simplified so that issuers can access more quickly the capital markets and investors can access greater amounts of information, but believes that the Commission's proposed reforms will fail to achieve these goals.*

Under the Securities Act, an offering of securities must either be registered with the Commission or qualify for an exemption from registration. As noted in the Release, the Commission believes that "registration benefits all [market] participants: issuers, by lowering their cost of capital; investors, by enhancing disclosure and providing remedies [for faulty disclosure]; and the marketplace, by increasing depth and liquidity." Accordingly, the reforms proposed by the Commission in the Release are intended to remove unnecessary barriers to immediate access to the offering market for registered securities and make registration a more attractive alternative to issuers than offering securities in private placements or in offshore transactions.

The amendment of the Securities Act in 1996 pursuant to the National Securities Markets Improvement Act of 1996 ("NSMIA") to grant the Commission exemptive authority under the Securities Act for the first time has given the Commission an important new tool to accomplish its purposes. The Commission's release regarding Securities Act Concepts and Their Effects on Capital Formation,[5] the Task Force on Disclosure Simplification, the Advisory Committee on the Capital Formation and Regulatory Processes and other pre-NSMIA Commission efforts all operated within the premise, which presented significant disadvantages, that the Commission had to function more strictly within the Securities Act's statutory scheme. Now the Commission has for the first time an historic opportunity to use its exemptive authority appropriately to modernize the operation of the registration process and related matters to take account of contemporary conditions and expected future developments while preserving and strengthening the essential regulatory protections that the Securities Act provides to investors.[6]

The Release acknowledges the need for issuers to quickly access the capital markets and have more certainty over the timing of their offerings. The Association agrees with and supports these objectives, particularly as they relate to the debt capital markets.

---

5 SEC Release No. 33-7314 (July 25, 1996) (the "Concept Release").

6 Chairman Levitt has acknowledged that the broad exemptive authority granted to the Commission under NSMIA offers "an almost unique opportunity for change" and that a "new vista for possibilities has opened up." *See* Remarks by SEC Chairman Arthur Levitt, "Corporate Finance in the Information Age", Securities Regulation Institute (Jan. 23, 1997).

Accordingly, under the proposal, registration statements filed by large seasoned issuers and certain smaller seasoned issuers would not be subject to Commission staff review prior to effectiveness. In addition, although final prospectuses would be subject to a filing requirement, they would not need to be delivered to investors unless a copy was specifically requested.

The Release also recognizes the need to deregulate communications and encourage, rather than constrain, information flow to investors and the marketplace in general around the time of an offering. The Association also agrees with this objective.[7] Technological advances and increasing investor demand for access to information (including through the Internet) have made liberalization of communications essential. The proposal would thus remove many of the current absolute prohibitions with respect to the dissemination of offering-related information and broker-dealer prepared research reports. The proposal attempts to enhance reporting under the Exchange Act by adding to, and accelerating the timing of, the items that must be reported by issuers thereunder. The Commission also seeks to integrate further the disclosure system under the Securities Act and the Exchange Act. By doing so, the Commission recognizes that investors engaging in secondary market trading should have the benefit of disclosure of comparable quality to that of investors in the primary market. *The Association strongly supports the goals underlying the Commission's proposal and believes that those specific elements of the Commission's reform proposal cited above (i.e., effectiveness on demand for certain classes of issuers, elimination of final prospectus delivery requirements, liberalization of communications, and further integration of the disclosure system under the Securities Act and the Exchange Act) represent positive steps toward modernization of the securities offering process.*

The Commission, however, seems to have embraced some principles in the Release that will produce serious problems for issuers, markets and market participants and may indeed lead to results that are exactly contrary to those the Commission seeks. **Although it has been suggested that the proposals will speed access to the U.S. capital markets, the Association believes that they will instead, in certain contexts, considerably slow down the debt offering process, as well as increase the cost of raising debt capital. Thus, the Association fears that, contrary to the interests of U.S. investors, issuers, Association members and the U.S. debt markets in general, the proposals will lead to fewer rather than more public offerings in the U.S. markets.**

Specifically, the concept of ***delivery*** of information in written form to investors for <u>all</u> offerings prior to their making an investment decision, while attractive in the abstract,

---

7 As stated in *Bond Markets 2000: A Conceptual Framework for Efficient Regulation of the Fixed-Income Markets* (available on the Association's website, *www.bondmarkets.com*) the Association believes that "the securities laws should promote the free flow of information from an issuer to a prospective investor" (at page 4).

- runs contrary to decades of practice (and in particular to debt market developments over the past 15 years under shelf registration);

- is inconsistent with the increasing need of issuers for speed and certainty of execution at the most attractive pricing available;

- reverses years of progress by the markets and the Commission itself in emphasizing the need for ***availability*** of information to markets and investors as the preferred paradigm of disclosure;

- will slow down the capital formation process in the fixed income markets, particularly shelf takedowns and medium-term note, or "MTN", programs, with real economic consequences for issuers and other market participants; and

- will not provide any improvements to the quality of the debt offering process or to investor protection, because in those cases where investors require additional information before making their investment decision (in the form of preliminary prospectuses or, in the ABS area, computational materials or other information), natural market forces currently establish adequate incentives to promote dissemination of that information without the need for any additional regulatory prod.[8]

The proposals to liberalize "free writing" would be major steps forward in conforming the U.S. regulatory structure to meet the demands of market participants. The internationalization of the securities markets and the demands for more information and fewer restrictions on information flow that have been fostered, in part, by technological advances leave the Commission and the markets with little practical choice but to adapt. *The Association believes that tailored amendments to liberalize the debt offering process and free writing, which are discussed in more detail below and would include specific provisions applicable to offers of asset-backed securities, should be reproposed and adopted by the Commission separately from the other changes to the offering process proposed in the Release, which are much more controversial and, in the Association's view, much less helpful to either markets or market participants.*

In considering proposals for liberalizing the availability of information, however, the Commission has, apparently principally to reduce the incidence of what it considers to be selective disclosure, followed far-reaching principles of ***filing*** of free writing materials

---

[8] It is the case that the current prohibition of the Securities Act on written offering materials other than the statutory prospectus hampers freedom of communication with investors to some extent, but the proposals to permit increased "free writing" would in themselves be sufficient to *allow* market demands to operate more effectively without the delivery and filing *requirements* included in the proposal.

that will discourage the free writing that the Commission proposes to permit and may in fact even result in the dissemination of less information than is the case today. Although the Association is aware that the Commission and its staff have expressed certain concerns regarding the potential negative effects of selective disclosure, the Association is not convinced these concerns are valid and, even if valid, does not believe they are relevant in the fixed income or ABS markets.[9] More important, the Commission's proposals are inconsistent with the stated goal of increased liberalization of information because

- while it may be appropriate to have issuer-prepared documents filed on a theory of avoiding selective disclosure, the proposed filing requirements go far beyond that concern to cover any document prepared by any underwriter or dealer;

- applying a filing requirement to underwriters' and dealers' documents is clearly inappropriate because such documents could include proprietary or "branding" information not properly available to the general public and such documents might indeed be intended for a discrete group of investors or even a single investor with unique needs;

- the Commission's position in the Release that road show materials are written offering materials required to be filed is wholly inconsistent with decades of accepted legal interpretation and practice and is in fact most likely to reduce the amount of information available at road shows;

- the standard of liability for free writing material should be more closely examined by the Commission, because while there may be free writing materials prepared by or in conjunction with an issuer, with respect to which underwriters have an opportunity to perform an adequate diligence investigation, there are other materials where there is no such issuer involvement and no diligence opportunity; and

- under the Commission's proposal written materials prepared by one party could result in liability to another uninvolved offering participant (*e.g.*, an issuer could be liable for an underwriter's communication, an underwriter could be liable for an issuer's

9 *See, e.g.*, Remarks by SEC Chairman Arthur Levitt, "A Question of Integrity: Promoting Investor Confidence by Fighting Insider Trading", SEC Speaks Conference (Feb. 27, 1998). For a contrary view, *see* McLaughlin, "What's So Bad About Selective Disclosure", Insights, Vol. 13, No. 4 (April 1999) (arguing that, in certain circumstances, selective disclosure aids, rather than harms, smaller investors).

communication, and one underwriter could be liable for another underwriter's communication).

The proposals also appear to focus too much on procedures rather than the substance of improving disclosure. To give only two examples, the Association believes, first, that the Exchange Act portion of the proposal focuses too much on how to catch officers and directors (*e.g.*, by requiring additional certifications) and too little on quality and timeliness of disclosure and more complete integration of Securities Act and Exchange Act disclosure. Second, the disqualification and "bad boy" provisions precluding use of proposed Form B and precluding incorporation of reference under proposed Form A, backed up by the unjustified *in terrorem* threat of after-the-fact determinations by the Commission that use of the Form, or incorporation by reference, was not permissible -- and therefore that Section 5 of the Securities Act might have been violated, with wholly unacceptable and draconian consequences -- appear to be designed more to hold a procedural threat over issuers and underwriters than to improve disclosure or protect investors. For example, under the proposal litigants could take the position that investors have a right of rescission under Section 12(a)(1) of the Securities Act because it was discovered after the offering that the issuer and the Commission staff had one unresolved comment on an Exchange Act filing at the time of the offering, thereby making the offering ineligible for Form B. Moreover, the mere perception of such a threat will chill or deter communications regarding registered offerings and thereby tend to cause issuers and offerings to move into the Rule 144A or offshore markets, and away from the registered market -- exactly what the Commission suggests that it seeks to avoid.

The Association is also particularly concerned that in the investment grade (and, to some extent, non-investment grade) fixed income market, the Form B proposal -- with its mandated "speed bumps" -- will add delay to the capital formation process, with the result that many issuers might forego the U.S. registered market for the offshore markets. The offshore markets are an enormous potential source of fixed income financing. Fixed income offerings in the Euromarkets amounted to approximately $378.8 billion and $413.7 billion in 1997 and 1998, respectively, compared to approximately $914.3 billion and $1,283.3 billion in the SEC-registered market. The Association's members believe that the introduction of the Euro in January 1999 has made the Euromarkets an even more attractive potential alternative to the U.S. fixed income market. Investors in the Euromarkets now include the offshore arms of many if not most of the largest institutional investors that form the backbone of the U.S. fixed income market.

The Association fears that because of the easy availability of this offshore alternative, the Commission's proposal could have serious negative consequences for the U.S. debt capital markets. Such a result is not certain. However, the Form B proposal (and also the Form A proposal as discussed below) do not appear to be motivated by evidence of actual abuse and promise what would appear to be, at best, speculative benefits. Before the Commission adopts such a proposal, it should seriously consider the negative impact on U.S. capital markets and U.S. investors.

B. *The Commission's proposed reforms will negatively impact all market participants – issuers, underwriters and investors – as compared to the existing registration regime.*

In order to determine whether the benefits of the proposed new offering regime outweigh its burdens, the Association believes that it is useful to compare the proposed system to the current system. This comparison focuses on the fixed income markets, which are the Association's principal concerns.

1. *The proposed reforms will have a negative impact on market participants as compared to current delayed shelf registration procedures.*

Under the Commission's proposal, a new Form B would replace existing Forms S-3 and F-3 and would be available to large seasoned issuers and to certain smaller seasoned issuers in connection with certain types of offerings. Form B would offer eligible issuers the ability to control the timing of effectiveness of their registration statements (essentially, such issuers would enjoy effectiveness on demand). Form B also offers "pay-as-you-go" registration. Under current shelf registration rules, issuers must prepay the registration fee for the entire amount to be offered off the shelf. Accordingly, these two aspects of the Form B proposal offer obvious advantages over the current system.

However, Form B would also require the delivery of a term sheet or, under the Commission's alternative proposal, a preliminary prospectus prior to the time the investment decision is made (*i.e.*, prior to the time the investor agrees to purchase, not the later settlement of the transaction). This requirement, if adopted, will slow down the offering process, with real market and economic consequences. The requirement under Form B that a term sheet (or under the alternative proposal, a preliminary prospectus) be filed with the Commission and delivered to each investor prior to the investment decision is a dramatic departure from current practice. The amount of time that will be necessary to accomplish such a step will vary, but there is no one known to the Association -- market professionals, issuers and their counsel, regulators or others -- who does not believe that it will add some amount of time, from a couple of hours to a day or more, depending on the experience of the issuer and its advisers, the amount of advance notice, the type of offering and other factors. Offerings that can be accomplished under the current system without delay would be delayed under the proposed system by that amount of time or may even be abandoned -- and would thus cost issuers money, since the delay in being able to sell to investors (if the offering does go forward) would likely result in less favorable (or at least less certain) pricing, or may well encourage issuers to find alternatives to the registered market to raise capital. The delay that would result from imposition of the proposed procedures would also subject all market participants – issuers, underwriters and investors – to increased market risk and volatility. Moreover, the delivery requirement would result in greater concentration in marketing and offering efforts by underwriters. Deals would be conducted in a way that minimized the mechanical and compliance difficulties and thus would in many cases be marketed to a smaller universe of investors to the exclusion of smaller investors.[10]

In addition, the Association believes that, at least in the fixed income market, adequate disclosure is already provided to investors under the current system. In particular, the availability of base prospectuses and, where appropriate (*e.g.*, in the case of MTN programs) prospectus supplements, together with the availability of Exchange Act filings and incorporation by reference, currently provide adequate information to investors without the need for delivery of an additional document prior to sale. Indeed, the investors in these offerings are often repeat purchasers or sophisticated institutions who need and want no information other than the maturity date and pricing terms for the current offering (*e.g.,* whether the interest rate will be based on LIBOR, the Federal Funds rate, or some other basis), which information can easily be communicated orally. In the case of high yield offerings which contain complex financial covenants, the practice of using preliminary offering documents has already developed due to natural market forces and need not be mandated by Commission action.

In reconsidering the proposal that delivery of certain information be required, the Commission should consider, in a more focused way than is set forth in the Release, the types of information that need to be communicated to investors and markets. Insofar as ***company information*** (information about the issuer, its businesses, financial results and condition, and recent developments) is concerned, the Association strongly believes that all such information must be ***available*** to investors and the markets before an investment decision is made. However, the Association also believes that, at least for issuers that meet current Form S-3 or F-3 registration requirements,[11] the best way to accomplish that goal is to require issuers to make such information available to investors, including through Exchange Act filings as appropriate, prior to an investment decision, rather than requiring physical delivery. The Commission should be encouraging the use of technology and the increasing speed of information transmission for the dissemination of information to markets rather than focusing on delivery of information, in whatever form, to individual investors. Release and rapid transmission of information to markets would of course have the collateral benefits for investors and markets, which the Association favors, of providing availability of company information to secondary markets.

---

10 It has been suggested that, perhaps, the required term sheet could be drafted by a salesperson and immediately thereafter delivered to prospective investors without causing any significant delay in the offering process. However, under the Commission's proposal, each term sheet would be required to be filed as part of the registration statement and thus carry Section 11, as well as Section 12(a)(2), liability – for which the issuer and each offering participant would be liable. Accordingly, the issuer and the underwriters would very likely require that any term sheet be reviewed by them and their respective counsel prior to filing and delivery. Such a process would, of course, delay considerably the anticipated time frame for the offering.

11 As discussed below, the Association sees no justification for the stricter Form B eligibility test that would result in 30% of current Form S-3 and F-3 registrants to be ineligible to use Form B.

With respect to ***securities information***, the Association believes that the level of information currently provided by registrants on Forms S-3 and F-3 is sufficient and is provided in a timely manner. Base prospectuses and/or prospectus supplements are replete with detailed information about covenants and possible securities structures and, as noted above, competitive market forces create appropriate incentives for the disclosure of additional details to investors prior to the time investment decisions are made where such additional information is useful to the decision-making process (*e.g.*, in the case of novel structured or indexed securities).

Although the Association understands that the Commission staff has been informed by certain investors that they are not receiving adequate information to make an informed investment decision, the experience of the Association's members is exactly the opposite. Especially in the investment grade fixed income market where investment decisions are based primarily on credit rating, interest rate (both coupon and spread to the benchmark Treasury security) and maturity (and where such information can be quickly and efficiently communicated orally), no additional information is needed or, where the trade-off is a slowdown in the offering process, wanted by investors. In the case of complex or novel securities offerings, the market itself will demand, as it already does today, that additional information, above and beyond the current regulatory requirements, be provided to investors in order for them to make a fully-informed investment decision. The liberalization of communications proposed in the Release would remove current restraints on issuers and underwriters and enable them to meet the specific needs of investors by allowing delivery to investors of information tailored, if necessary, to their specific requests. <u>Allowing</u> written communications as appropriate, rather than <u>mandating</u> them, would be a sensible step to help assure investors have sufficient information. <u>Mandating</u> the delivery of term sheets (or preliminary prospectuses) prior to sale, however, is unnecessary and unfeasible and would be counterproductive. Such a requirement makes no sense in connection with "reverse inquiry" sales and will considerably slow down the offering process (particularly in the case of MTN programs and other debt offerings by frequent issuers). The delivery requirement may even cause issuers and underwriters to <u>exclude</u> certain categories of investors (*e.g.*, smaller institutional or accredited retail investors) from many offerings because of the added risk, cost and timing constraints, or to avoid the U.S. registered market altogether. Thus, this aspect of the Form B proposal would negatively impact the very investors the Commission seeks to protect.

The Commission staff has advised the Association that it seeks comments on its proposal that will assist the Commission in designing a registration system that operates for issuers, investors and market intermediaries while being consistent with the principles enunciated by the Commission in the Release. In the fixed income markets, it is clear that the Form B proposal should be fundamentally modified so that (i) current Form S-3 and F-3 registrants (and registrants proposed to be eligible to use Form B) are not required to physically ***deliver*** documents, (ii) ***company information*** (while not delivered) is required to be made ***available*** to markets on an ongoing basis, and (iii) current procedures, plus liberalization of the use of free writing, are relied on to make ***securities information*** available in a timely manner. After-the-fact filing with the Commission of prospectus supplements, such as is permitted today under offering procedures contemplated by shelf registration, should be maintained as the standard.

The Form B proposal appears to contemplate filing a registration statement for a single offering immediately before salesare made. This is in marked contrast to the existing shelf registration system, which favors early registration statement filing and procedures whereby contracts and closing documents (including underwriting agreements, indentures, terms of securities, accountants' comfort letters and legal opinions and disclosure letters) are negotiated well in advance of specific offerings. The Form B proposal would encourage accomplishing the foregoing tasks at the last minute -- immediately before sales -- and would thus provide less protection for market intermediaries (and ultimately investors) and put too much time pressure on both market participants and issuers. The last minute filing of the registration statement encouraged by the Form B proposal will also result in ***less*** opportunity for investors to review basic information regarding the issuer and the terms of the potential offerings (including basic underwriting arrangements and indenture provisions) than they have today, which is directly contrary to the Commission's stated goal of promoting ***earlier*** access to information. The need for officer and director certification at the time of each offering (including each takedown or MTN issuance), as compared to today's Rule 424(b) mechanism with respect to the filing of prospectus supplements, will also present significant delays and operational obstacles that will prove unworkable in practice. To permit a more measured consideration of documentation and offering procedures for a particular issuer and particular offerings, and thus maintain existing protection of investors and markets, it is crucial to maintain the availability of shelf registration procedures and the ability to determine documentation in advance of particular offerings. To do otherwise would risk delays and operational unfeasibility. *The genuine advances of Form B for issuers and markets, including effectiveness on demand, "pay-as-you-go" filing fees, and the elimination of the delivery requirement for final prospectuses, can easily be built into the existing shelf registration system.*

Like Forms S-3 and F-3, Form B would not be available to issuers subject to any disqualifying event. However, Form B broadens considerably the list of disqualifying events in a manner that is unwarranted and unworkable. The Association believes that, particularly in the absence of demonstrated abuse, Form B disqualifications should not go beyond what Forms S-3 and F-3 currently provide. For example, the "going concern" disqualification should be handled as it is today -- *i.e.*, by disclosure. In addition, linking the availability of Form B to resolution of staff comments is unwarranted and unnecessary. Moreover, the proposed "legal violations" or "bad boy" disqualification is too vague and too broad. This disqualification, for the first time, links market access and the ability to act as an underwriter to these events, without any apparent need, with no Commission indication that abuses exist that need correction, and with possible draconian consequences. Such events could well be unrelated to considerations of market access and depriving issuers of market access, and dealers the ability to act as underwriters, will be disproportionate in most cases. Indeed, many underwriters with technical violations of law may be forced out of business, to the detriment of issuers, investors and the marketplace. Moreover, issuers with disqualifications, but needing immediate market access, would be forced to turn to the private market (*e.g.*, through Rule 144A) or the Euromarkets -- a result that is in direct contrast to what the Commission is hoping to achieve.

The Form B disqualification approach is particularly unworkable because of the risk of the drastic consequences that filing on the wrong form might have. As noted above, if an issuer that files on Form B is later found to have been subject to a disqualifying event, investors could possibly claim rescission rights under Securities Act Section 12(a)(1) -- unrelated to any defect in disclosure or otherwise related to the offering -- against not only the issuer, but also against selling underwriters and dealers. This is not a risk that market intermediaries should be required to bear and there is no indication that any provision of this sort is necessary.

Fundamental modification is thus required to the proposed disqualification provisions. The Association urges the Commission to retain only those provisions analogous to those currently in Forms S-3 and F-3. Some proposed additions, such as the "going concern" provision, should simply be eliminated as being inappropriate. The "bad boy" provisions, insofar as they relate to underwriters, are also wholly inappropriate, since whether an underwriter has committed a violation or other enumerated act is entirely unrelated to whether an issuer should be eligible for Form B or whether an issuer's new or pre-existing disclosure is adequate. *If the Commission wishes to sanction particular underwriters, it should do so directly through its existing authority under Exchange Act Section 15(b)(4) and not through overbroad, indirect and unjustified means.* As to certain of the other proposed disqualifying provisions, including in particular those related to whether an issuer has committed a violation or other enumerated act or whether there are significant disclosure issues involving an issuer, the Association believes that it is overbroad to provide for disqualification from Form B. In any event, no automatic sanctions should be provided. If the Commission genuinely believes that it needs the ability to consider the disclosure or other aspects of the registration of large seasoned issuers, then rather than disqualify an issuer from use of Form B, the most the Commission should contemplate is a proposal that, upon action by the Commission (or its staff pursuant to delegated authority) and not automatically, it could suspend immediate effectiveness for issuers as to which it identifies disclosure issues or legal problems that justify delay and review.

2. ***The proposed reforms would have a negative impact on market participants as compared to the existing non-shelf fixed income market.***

Under the proposal, issuers ineligible to use Form B to register their offerings would be required to use Form A. Form A would replace existing Forms S-1, S-2, F-1 and F-2. Because of the additional threshold requirements for Form B compared to existing Form S-3/F-3, however, a substantial number of issuers (by the Commission's count, 1,427[12])

---

12 Although the text accompanying footnote 84 of the Release states that the number of issuers unable to use Form B due to size requirements would be 1,175, the Commission indicates elsewhere in the Release that this number may be as high as 1,427. *See, e.g.*, "Table: Impact of

eligible to use Form S-3/F-3 today would be ineligible to use Form B and would thus be forced to use Form A. Accordingly, the proposal would slow down dramatically the capital formation process for such issuers. The Association does not believe that eligibility requirements for these issuers should be modified.

Form A issuers would be required to file and deliver preliminary prospectuses to ***all*** investors three or, in some cases, seven days prior to pricing. Form A issuers would also be required to file and deliver to all investors material updating information 24 hours prior to pricing. Such requirements would have the effect of slowing down the capital formation process for all Form A issuers (including those that are non-shelf filers today), and would interfere with the normal marketing process, which builds a book of investors in an interactive manner over time. For example, the proposal provides that an entire offering would have to be delayed if even one investor failed to receive the preliminary prospectus, or if a single new investor is identified to participate in the offering after the initial prospectus delivery period has commenced, or if after the commencement of such period a single additional underwriter or dealer is added to the offering group (and needs to deliver preliminary prospectuses to its customers). More likely of course, rather than risking the consequences of a delay, new investors will be excluded from participating in the offering. The proposals would also likely cause issuers and underwriters to narrow the universe of prospective investors to whom an offering is initially directed. In particular, it can be expected that retail investors will receive the opportunity to participate in fewer offerings than currently as a direct result of the proposals.

In the instances involving Form A in the fixed income market, including in particular offers of high-yield securities and other offerings by unseasoned issuers, the Association appreciates the Commission's concern that adequate information be available in a timely manner. However, where under existing rules or the Form A proposal incorporation by reference is permitted, the Association would submit that ***company information*** continue to be made available as is currently the case, by assuring availability to the market prior to investment decisions. As with our discussion of Form B above, the Association believes that ***availability*** to the market rather than ***delivery*** to each individual investor should be the focus of the Commission's concern. Moreover, where appropriate in connection with offerings of high yield or other complex securities, market practices involving the use of preliminary offering documents have, as previously noted, already developed in response to competitive market forces.

In the case of issuers where incorporation by reference is deemed inappropriate because an issuer is not seasoned or the market and market following are too shallow, the Association supports the Commission's view that information should be available, but again believes that delivery is the wrong standard. Requiring delivery would force lengthy delay of as much as three to seven days, including in all of the completely common cases described above (a single case of non-delivery, a newly identified

---

Proposed Form Requirements on Registrants" and accompanying text under Part XIV(B) of the Release.

investor, a new underwriter or selling group member), since pricing would not be permissible for that period under the Form A proposal. Availability of company information is much more consistent with developing trends involving technology and information transmission. Such an approach would be workable and would give just as much information to markets and investors with an interest in an issuer. Such a system could also be combined with the necessary and laudable Form A proposal to require filing, but not delivery, of final prospectuses. On the other hand, to condition the exemption from final prospectus delivery on compliance with the proposed preliminary prospectus delivery requirements serves no investor protection purpose (even by the Commission's own admission that the objective is to make information *available* to investors prior to the final prospectus).

The ability of seasoned Form A issuers to incorporate by reference would be eliminated for those issuers subject to any disqualifying event (the disqualifications proposed are the same as those proposed for Form B). For the same reasons noted under Part II.B.1. above, such disqualification approach is unwarranted and unjustified. Indeed, such an approach would represent an unprecedented step backward for the system of integrated disclosure. The integrated disclosure system properly recognizes that secondary and primary market investors should receive comparable information. Moreover, the Commission has received comments from various industry groups, committees and task forces formed by the Commission itself suggesting that reliance on integrated disclosure or a comparable system should be increased, not undercut, as the Form A disqualification proposal would do.[13] The Association believes that its concerns and suggestions regarding the Form B disqualification procedures are equally applicable here.

C. ***The elimination of so-called "Exxon Capital exchange offers" is unwarranted and would disadvantage high-yield and other fixed income issuers.***

The Association understands that the Commission wishes to encourage issuers to register their securities rather than rely on private placement procedures. As noted above, the Commission believes that registration will result in more information regarding the issuer to be available in the marketplace. Accordingly, the Commission notes in the Release its intention, assuming the reforms proposed in the Release are adopted, to repeal the Exxon Capital line of interpretive letters.[14] The Commission also states in the Release that it may repeal the Exxon Capital letters even if the proposed registration reforms are not adopted.

With certain exceptions, the Exxon Capital letters allow issuers that have privately placed non-convertible debt to file a registration statement offering to exchange registered (but

13 *See, e.g.*, Report of the Advisory Committee on the Capital Formation and Regulatory Process (July 24, 1996).

14 *See, e.g.*, Exxon Capital Holdings Corp., SEC No-Action Letter (avail. May 13, 1988); Morgan Stanley & Co., Inc., SEC No-Action Letter (avail. June 5, 1991) (collectively, the Exxon Capital letters").

otherwise essentially identical) securities for those privately placed. Holders participating in the exchange (other than certain dealers or affiliates of the issuer) thus receive freely tradable securities and may resell such securities without complying with the prospectus delivery requirements of the Securities Act. The repeal of the Exxon Capital letters would preclude issuers that could not control registration effectiveness from accessing markets immediately at the lowest possible cost.

The elimination of Exxon Capital exchange offers would be a serious step backward for many high yield issuers (and other issuers of fixed income securities in certain circumstances). High yield offerings in particular must be executed under very rapidly changing market conditions, and instant market access is essential. The risk of delay caused by potential Commission review and the length of time necessary to prepare and present information in a form that complies in all respects with Commission accounting and disclosure rules applicable to registered offerings can preclude the use of the registered market under such circumstances. Rule 144A offerings allow quick market access to the investor universe (*i.e.*, QIBs) that are the market for these types of securities – investors that are sophisticated and able to fend for themselves. The Exxon Capital letters recognize the timing difficulties faced by issuers and provide a mechanism whereby these issuers can quickly tap the institutional market through a Rule 144A offering and then thereafter offer participating institutional investors the opportunity to exchange their restricted securities for registered securities. Exxon Capital exchange offers also provide a mechanism for certain institutional investors *e.g.*, insurance companies and mutual funds that have limits (or "baskets") on the amount of restricted securities they can hold, to purchase restricted securities. Exxon Capital procedures allow these institutional investors to participate in private offerings because of the prospect that the restricted securities purchased in such offerings will soon be registered, thus allowing the investors to place the securities in a different and less limited "basket" or to exclude them from specific basket limitations altogether. In addition, the use of Exxon Capital exchange offers permits issuers to access the QIB investor market at lower, public market yields.

One reason expressed by certain staff members as to why the Commission may repeal the Exxon Capital letters is the fear that the securities received in the Exxon Capital exchange offer are being sold to retail investors. Since the premise of the relief granted by the staff in the Exxon Capital letters was that the investor universe for these securities would be the large institutions that held the pre-exchange restricted securities, the Commission is concerned that Exxon Capital procedures are being used by issuers indirectly to distribute such securities to the general public. The Association does not believe this to be the case. Although a subsequent Exxon Capital exchange offer does provide greater liquidity and "unrestricted" status for the securities received in the exchange, the Association and its members believe that the investor base in the post-exchange markets in question continues to be institutional. Indeed, most of these securities are sold in large blocks, making investment by retail purchasers difficult. Moreover, in the experience of the Association's members, institutional investors do not participate in Exxon Capital exchange offers so that they can resell the registered securities received. On the contrary, they participate in these exchange offers because they want to retain such securities in their own portfolios while continuing to participate in other offerings, but in order to do so they must first remove the unregistered securities from their "restricted baskets".

In the Release, the Commission also advances its view that Exxon Capital procedures would no longer be necessary because seasoned issuers that do not meet the "float" or trading volume requirements for general use of Form B would nonetheless be permitted to use Form B to conduct QIB-only offerings. Again, the Association disagrees with the Commission's view. Many issuers who currently conduct Rule 144A offerings and follow such offerings with Exxon Capital exchange offers (*e.g.*, in connection with acquisition financings) would be ineligible to use Form B because of the Form's seasoning requirement. For example, a significant number of high-yield offerings conducted under Rule 144A relate to leveraged buy-outs or other acquisition-related financing where the issuers would not be seasoned. *Therefore, even with the proposed Form B availability, and even if the disqualification provisions of Form B are substantially eliminated or modified as suggested above, there will be a significant number of high-yield issuers that would not be able to use Form B and would therefore be significantly disadvantaged by the repeal of the Exxon Capital letters.*

Moreover, the Form B QIB-only proposal eliminates certain categories of QIBs --dealers and investment advisers -- from the ability to participate in such offerings. Such entities make up a large portion of the QIB universe and a large portion of the investor market for Rule 144A offerings. Prohibiting investment advisers, in particular, from the ability to purchase for advised accounts limits greatly the utility of this proposal.

The utility of the Commission's proposal to make Form B available for offerings only to QIBs will be further reduced by the warning in the Release that there is a risk of Section 5 liability under the Securities Act if there is subsequent public resale outside the QIB universe of investors. This statement, which appears to reinvigorate the long-discredited "presumptive underwriter" doctrine,[15] will, unless disavowed by the Commission, cause investors to shy away from these Form B offerings.

Thus, the totality of the Commission's proposals would leave many issuers needing Exxon Capital procedures to assure instant market access. If issuers were not permitted to conduct an Exxon Capital exchange offer following a Rule 144A offering, such issuers would have to pay higher yields to sell their securities under Rule 144A to the same investors and would thus be deprived of market access at the lowest cost. Furthermore, in order to accommodate the needs of institutional investors for unrestricted securities, such issuers would have to maintain evergreen resale registration statements, at

---

15 *See generally*, SEC Report entitled "Disclosure to Investors -- A Reappraisal of Administrative Policies Under the 33 and 34 Acts" (Mar. 27, 1969) (the "Wheat Report"), in which the doctrine was first alluded to, and American Council of Life Insurance SEC No-Action Letter (avail. May 10, 1983), in which the doctrine was essentially abandoned.

significant cost and expense,[16] and such institutional investors would be required to be named as selling shareholders and take on prospectus delivery obligations and additional liability – consequences that issuers and institutional investors would not welcome. The Commission has not, in the Release or elsewhere, advanced any evidence of abuse resulting from the use of Exxon Capital procedures in the fixed income markets and there appears to be no reason based on practical concerns regarding investor protection to eliminate the procedure. Moreover, elimination of this procedure is likely to drive more issuers offshore and away from the U.S. registered market. Accordingly, the Association encourages the Commission to preserve its Exxon Capital letters, regardless of whether the reforms proposed in the Release are adopted.

The Association believes that, while the Commission should retain the availability of the Exxon Capital procedures, the Commission could also make the registration process more attractive to some high-yield issuers (and thus enable such issuers to rely less on the Exxon Capital letters) if the Commission took the following steps:

- Eliminate and modify the disqualification provisions of Form B as discussed above.
- Eliminate the exclusion of dealers and investment advisers from the provisions of Form B permitting offers only to QIBs.
- Disavow the suggestion in the Release that the "presumptive underwriter" doctrine may apply to purchasers in QIB-only offerings.
- Allow unseasoned issuers of any size to use Form B (with immediate effectiveness and no staff review) for QIB-only offerings of non-convertible fixed income securities.

The Association recognizes the unusual nature of this last proposal, but would point out that, based on the Commission's well-considered views -- with which the Association agrees -- that QIBs are sophisticated investors and can fend for themselves in securities offerings, the proposal should not raise investor protection concerns. As previously discussed, the Association also strongly believes that securities sold in Exxon Capital transactions continue to be held in institutional hands even after the completion of the associated exchange offer and does not believe that this result will change if the Association's proposal to allow use of Form B for these types of offerings is adopted. The proposal would also make it more likely that unseasoned high-yield issuers could access the registered market in a manner that is consistent with their timing and market

16 Note that such resale registration would be required to be filed on Form A because of the Commission's proposals regarding secondary offerings and that many such issuers would not be able to meet Form A's seasoning requirements permitting incorporation by reference. Moreover, the Commission states in the Release that Form A issuers will not be permitted to use delayed shelf registration procedures. Providing investors with resale registration rights would thus become costly, inefficient and cumbersome for these issuers.

needs and would encourage non-U.S. issuers to access the U.S. registered market as well.[17]

D. ***Significant liability and other issues must be addressed before the Commission's proposals to liberalize communications around the time of an offering can achieve the Commission's desired effect.***

As noted above, the proposal to liberalize communications and permit additional "free writing" around the time of an offering is a major step forward in modernizing the offering process. Although this proposal would likely have only a modest impact in certain fixed income markets (there is, for example, little demand for increased free writing in the offer and sale of investment grade corporate debt through MTNs or other underwritten shelf takedowns), the proposal could permit issuers and market intermediaries to make market-driven decisions regarding the use of free writing materials as part of the offering process for high yield and certain other securities. This proposal also would be of particular importance in connection with ABS offerings, and perhaps for other structured securities, where the inability to provide written information outside the confines of the statutory prospectus can inhibit communications with investors. The Association has been in the forefront of forging solutions to this long-recognized problem, including through the procurement of a staff no-action letter permitting such communications.[18] Accordingly, the Association supports the Commission's objective to eliminate unnecessary restraints on the flow of information to investors regarding an offering. *The Association believes, however, that the proposals relating to the liberalization of communications should be reproposed with appropriate modifications and should be adopted independent of the action taken on other matters raised in the Release.*

In order for the communications proposals to be useful and for market intermediaries to take advantage of them, significant liability and commercial issues raised by the proposals must be addressed. For example, under the proposed rules relating to Form B, and in particular the definition of "offering information," certain materials used by one underwriter or dealer could be deemed "offering information" and be required to be filed as part of the registration statement, thus causing all underwriters to be subject to the liability standard imposed by Section 11 under the Securities Act for those materials. This situation, and all other situations where underwriters could be required to take responsibility under Section 11 for materials of another underwriter (or dealer), must be

---

17 It is unclear whether the Commission in its discussion of the Exxon Capital letters also intended to address the availability of a similar procedure for non-U.S. issuers. *See, e.g.,* Vitro, Sociedad Anonima, SEC No-Action Letter (avail. Nov. 19, 1991); Corimon C.A. S.A.C.A., SEC No-Action Letter (avail. Mar. 22, 1993). This line of letters has been important to non-U.S. issuers in taking a staged, "stepping stone" approach to accessing the U.S. capital markets, starting with an offering under Rule 144A and then following such offering with a U.S. registered offering. This approach should continue to be favored by the Commission and made available to non-U.S. issuers.

18 *See* Distribution of Certain Written Materials Relating to Asset-Backed Securities, SEC No-Action Letter (avail. Mar. 9, 1995) (the "Association Letter").

eliminated. *The Association believes, in general, that Section 11 liability should extend only to written materials prepared by an issuer as to which the underwriters have had an opportunity to perform due diligence.*

In addition, the need to file free writing materials used by an underwriter or dealer (as well as the proposed liability standard for such materials as further discussed below) will substantially discourage the free writing and liberalization of information flow sought by the Commission. Filing will represent an additional step in the offering process and an additional compliance burden that market intermediaries will be reluctant to take and, because of the retroactive nature of the requirement, will find difficult to comply with. This will particularly be the case with Form B, where the vagueness of the definition of the period that triggers the filing requirement will discourage written communications. Moreover, the requirement to file proprietary materials used by a broker-dealer will unjustifiably eliminate any commercial advantage that broker-dealers seek to create and maintain by developing expertise in a particular market, issuer or offering or by "branding". There is no evidence presented that filing of such proprietary or other materials is necessary for investor protection (indeed, the Release notes that even non-filed free writing materials will be subject to Securities Act liability) and, while the filing of materials prepared *by an issuer* may be appropriate in some cases to discourage the most egregious examples of "selective disclosure", extending filing requirements for that reason to market intermediaries is unwarranted.

Road show materials (including presentation "slides" and "power point" presentations) also should not be required to be filed as free writing materials. Road shows, which serve an important role in developing prospectus disclosure and setting price levels, have historically been viewed as oral communications and the Commission staff continues to express this view in granting no action requests related to road show presentations.[19] The Association sees no reason to change this characterization, particularly since the likely result will be to discourage such communications from taking place – to the detriment of all investors in the offering.

Finally, the Commission should reconsider its position regarding liability for free writing materials. The Association recognizes that this is an extremely difficult question. Nonetheless, the Association believes that if liability is determined pursuant to Section 12(a)(2), the concerns raised by the possible imposition of this standard will discourage the use of free writing materials, thereby undermining the positive reforms the Commission is attempting to make.

The Securities Act provides that a "prospectus" carries Section 12(a)(2) liability, and it is logical to proceed to the conclusion that any written offering material should carry the same liability. However, the statute also contemplated that during the offering process

---

19 *See, e.g.,* Private Financial Network, SEC No-Action Letter (avail. Mar. 12, 1997); Net Roadshow, Inc., SEC No-Action Letter (avail. Sept. 8, 1997); Bloomberg L.P., SEC No-Action Letter (avail. Dec. 1, 1997); Thomson Financial Services, Inc, SEC No-Action Letter (avail. Sept. 4, 1998).

there would be some use of free writing material to which Section 12(a)(2) liability did not attach. The question for the Commission, nearly 70 years after the adoption of the Securities Act, is what categories of information today are analogous to the free writing materials originally excluded from the definition of "prospectus". Where complete and up-to-date company information -- exactly what would be available in a final prospectus -- has been filed by an issuer under the Exchange Act and is available to investors and the markets, and where an issuer updates such information promptly and continually in accordance with Exchange Act requirements, should other written offering materials (at least those prepared by underwriters and dealers) be excluded from the definition of "prospectus" and subjected to liability under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, rather than under Section 12(a)(2) of the Securities Act? The same question can be asked with respect to securities information where a base prospectus or supplement is available that accurately and completely describes the terms (except for the permitted exclusion of pricing information) of a security being offered.

In answering these questions, the Commission should recognize that increasing the scope of written material subject to Section 12(a)(2) liability will certainly reduce the amount of information available to investors and potential investors. Underwriters and dealers will, to control liability risk, restrict the use of offering materials that they are confident are not fraudulent, but which they have not prepared with or reviewed with the issuer (and as to which they are therefore unwilling to assume the burden of a due diligence defense) and which is not covered by issuer representations and other contractual arrangements with the issuer. The Commission is therefore faced with the choice of facilitating the flow of information by treating at least some free writing materials as not subject to Section 12(a)(2) (as is the case today, for example, with certain categories of research under Rules 138 and 139)[20] or discouraging the flow of information by seeking to expand the ambit of Section 12(a)(2) liability, and in making this choice the Commission must decide which approach is in the best interests of investors and markets.

E. ***The Commission should explicitly recognize that underwriters face difficult challenges in performing the comprehensive "gatekeeper" function by creating a due diligence safe harbor and reversing its view that indemnification of underwriters is against public policy.***

The Association recognizes that much comment during the recent reconsideration of the offering and registration process has addressed the due diligence obligations of underwriters. Although underwriters once played a more comprehensive "gatekeeper" function and were generally involved in all elements of the preparation of registration statement disclosure relating to a particular offering of securities, the adoption of shelf registration and integrated disclosure, coupled with the speed of the markets, has largely changed the underwriters' role and their ability to meaningfully affect the content of company disclosure, particularly the incorporated documents that are prepared and filed in a context totally separate from the offering.

---

20 Note that such information would still, in any event, be subject to Rule 10b-5 liability.

Accordingly, while the Association supports the Commission's proposals to add additional guidance to Rule 176 under the Securities Act, the Association believes that the Commission has not gone far enough given the reality of modern offerings and the speed at which they are occurring. Indeed, even if the offering process is slowed down by the proposals (*e.g.*, because of the proposed term sheet/preliminary prospectus delivery requirement) set forth in the Release to the detriment of market participants otherwise, the timing of this slow-down (at the end of the offering process) would not in fact lessen the current pressures on the underwriters' conduct of appropriate due diligence.

Thus, although the modifications to Rule 176 include certain improvements, such as the extension of Rule 176 to include guidance with respect to due diligence obligations under Section 12(a)(2) as well as Section 11 and the addition of procedures that largely follow existing procedures as factors that are positive indicators that due diligence has been exercised, serious issues remain or are created by the proposed changes to Rule 176. For example, the Rule 176 proposal should be modified so that the rule is also applicable to offerings of investment grade debt (with appropriate modifications to the procedures enumerated in the rule so that these procedures are consistent with responsible practice in the investment grade debt market). At a minimum, Rule 176 should provide that, at least for investment grade debt, the procedures proposed to be enumerated can be carried out periodically (as is the case currently for many MTN programs) rather than for each takedown.

As indicated above, the limitation of the application of Rule 176 to circumstances where the time period before pricing is compressed misconstrues the period during which time pressures are greatest and must be addressed -- the time <u>before</u> appointment; therefore the five-day condition in the proposal is irrelevant and should be eliminated. Moreover, by refusing to provide guidance that will be necessarily meaningful to a court (as opposed to enumerating a list of "relevant circumstances") as to what procedures constitute due diligence -- a "reasonable investigation" under Section 11 or "reasonable care" under Section 12(a)(2) -- the Commission's proposal fails to address the principal issue that underwriters currently face and will continue to face under the proposal -- continued uncertainty as to whether the procedures that they currently undertake (which market participants and their advisers generally believe are reasonable under the circumstances of today's offering processes and which the Commission is willing to embody in Rule 176) will meet the statutory standard.

The due diligence area has become highly technical and seems to be one where meaningful rule-making and guidance by the regulator is appropriate. There are procedures which are well-known to the regulator and which the regulator can evaluate, but which will be less familiar to a court faced with a Section 11 or 12(a)(2) claim. Moreover, the consequences for an underwriter of failing to meet the statutory standard can be very significant, and therefore the uncertainty has meaningful consequences. The Association therefore encourages the Commission to take a more active role in providing guidance in this area and reiterates its view that safe harbor protection in this area is warranted.

On a related point, the Association notes that as a result of the continuing trends towards issuers, especially seasoned issuers, controlling their disclosure and towards decreasing time periods during which underwriters and prospective underwriters can evaluate that disclosure, the relative importance of the role of issuers with respect to disclosure has increased significantly, especially over the last 20 years. In these circumstances, the Commission's historical position that indemnification of underwriters is against public policy should be reversed. Where issuers dominate the disclosure process as they currently do, no sound policy is served by seeking to prohibit allocation of liability, by agreement between an issuer and the underwriters, onto the issuer.

III. ADDITIONAL SPECIFIC COMMENTS REGARDING THE PROPOSAL

A. ***The Association believes that certain of the Commission's registration reform proposals, with the modifications noted below and elsewhere herein, can be integrated into the current system and that a complete overhaul of the current system is unnecessary and unwarranted. Nonetheless, if the Commission determines to go forward with its proposals despite the objections expressed by the Association and others, the Association has the following specific suggestions and comments with regard to the Commission's proposed rules and rule modifications.***

1. ***The Association agrees that Form B should be available to seasoned issuers of a certain size and for certain types of offerings. The Association's specific comments and suggestions with respect to Form B are set forth below.***

a. ***Issuers currently eligible to register their securities on Forms S-3 and F-3 should be eligible for Form B registration.***

Under the Commission's proposal, an issuer would be eligible to use Form B for any securities offering if it has at least a one year reporting history with the Commission (including the filing of at least one annual report) and has either (x) a public float of at least $75 million and an average daily trading volume ("ADTV") of at least $1 million, or (y) a public float of at least $250 million.

The Association believes the dollar thresholds for Form B eligibility should be the same as for current Form S-3/F-3 eligibility (*i.e.*, a public float in excess of $75 million). Those issuers currently eligible to use shelf registration procedures under Form S-3/F-3 should likewise be eligible to use the expedited offering procedures offered by Form B. There is simply no justification (and, indeed, the Commission has articulated no rationale) for excluding over 1400 issuers from the ability to use Form B.

The Association also believes that the requirement of one annual report is a sufficient measure of seasoning for Form B (and for Forms S-3 and F-3 if they are retained) and, accordingly, recommends that the one-year reporting history requirement be eliminated.

b. ***The Association favors an approach to disclosure that would allow issuers more flexibility to tailor their disclosure as necessary to the particular type of offering being registered.***

The SEC proposes two alternatives to disclosure: the first would permit issuers discretion as to materiality and applicability of traditional items of transactional disclosure; the second alternative would mandate that issuers set forth in Form B the items of transactional disclosure required under current rules. The Association believes that the first alternative, which would allow issuers greater flexibility to tailor disclosure to the particular type of offering being registered and the ability to better respond to the informational needs of the investors being targeted for the offering, is most appropriate for today's rapidly changing markets. However, to make this alternative workable, the term "offering information" must be better defined. The requirement to include in the prospectus all "offering information" (which, the proposal states, consists among other things of "all information regarding the transaction that is material"), is likely to result in issuers tracking current Regulation S-K items of disclosure and therefore will likely fail to achieve the SEC's desired result. In addition, the distinction between "offering information" and "free writing materials" must be clarified. This is particularly critical given the fact that an underwriter could be subject to Section 11 liability for material disseminated by another underwriter if such material is deemed to constitute "offering information". Moreover, the failure to file such material as part of the registration statement may result in a Section 5 violation and investors could thus possibly claim entitlement to rescission under Securities Act Section 12(a)(1).

The Association supports the Commission's proposal to have bright-line safe harbors for the dissemination of information regarding an offering. In this regard, the Commission states in the Release that materials used prior to the commencement of the Form B "offering period" would not be subject to Section 11 or 12(a)(2) liability (but would continue to be subject to Rule 10b-5). This intent, however, should be more clearly stated in the proposed rules. Specifically, the proposed rules should expressly state that oral statements made, or written materials used, prior to the commencement of the offering period are not "offers" within the meaning of Section 5 and are not "prospectuses" within the meaning of Section 2(a)(10) or 12(a)(2). In addition, the Form B "offering period", which refers to the period commencing 15 days prior to the "first offer by or on behalf of the issuer" and ending upon completion of the offering, must be clarified so that there can truly be a "bright-line" (*i.e.*, what is the meaning of "first offer" for this purpose in an environment where there are multiple offering participants, unlimited oral offers and liberalized communications?). The "look-back" concept also appears unworkable in that it would require issuers to obtain information about all offering activities of every prospective underwriter for the period prior to the time the underwriter became a participant in the offering (and would require prospective underwriters to track such information) under penalty of possible Section 5 and Section 12 sanctions.

c. ***The Association agrees that Form B issuers should be permitted to control the timing of effectiveness of their offerings.***

The Association supports the SEC's desire to give greater flexibility to "seasoned" issuers in determining when to go effective and agrees that such issuers should be able to control the timing of effectiveness. However, the Association also believes that ABS issuers (see Part IV below), for whom the concept of "seasoning" is not meaningful, should be permitted to control the timing of effectiveness of their offerings.

Because of the issuers' control over effectiveness, the Commission questions whether issuers should be required to file evidence of the underwriters' concurrence as an exhibit to the registration statement; the Association believes that such a requirement would have the effect of delaying issuer access to the markets and is not necessary.

d. ***Delayed shelf registration procedures should continue in place with the modifications discussed below.***

As noted above, the Association supports the Commission's proposal to permit "pay-as-you-go" filing and believes such proposal would be an improvement over the current system. The Association would also suggest that time limits and restrictions on the amount that may be registered on a delayed shelf should be removed. All of these modifications can easily be accommodated within the existing shelf registration system.

However, as discussed above, the proposed requirement to file information regarding the offering off the shelf at the time of sale, rather than up to two business days after pricing or first use of the prospectus supplement, will place an unwarranted burden on issuers and underwriters, particularly in the case of MTN, ABS and other shelf offerings, and represents a step backward in the debt offering process. In the Association's view, the existing shelf registration system, which has worked quite well since its adoption, should be retained (with the modifications noted in the immediately preceding paragraph).

e. ***The Association agrees that issuers that do not qualify under Form B's size requirements should nonetheless be permitted to use Form B for certain types of offerings.***

(1) ***The Association supports the Commission's proposal that smaller seasoned issuers be permitted to use Form B for QIB-only offerings, but believes that, given the sophistication of QIB investors, unseasoned issuers also should be allowed to use Form B for QIB-only offerings of non-convertible fixed income securities.***

The Commission proposes that Form B be available for QIB-only offerings by smaller seasoned issuers that have a one year reporting history with the Commission (including having filed at least one annual report).[21] The Association agrees with the Commission that QIBs have the ability to fend for themselves and that other investors would benefit from the information that would be made generally available if offerings to QIBs were permitted to be registered on Form B. Allowing QIBs to obtain freely tradable securities would also reduce transaction costs for issuers and would alleviate "basket"-type restrictions imposed on certain categories of QIBs.

As noted above, however, the Association disagrees with the proposed exclusion of dealers and investment advisers from the types of QIBs eligible to participate in QIB-only Form B offerings. The Association also believes that the *in terrorem* "indirect distribution to the public" language in the Release (recalling the "presumptive underwriter" doctrine of the past) is entirely inappropriate and will make the proposal unattractive and unworkable.

Indeed, rather than limiting the categories of eligible purchasers, the Association believes that the categories should be expanded to include those categories of "qualified purchasers" (or at least institutional "qualified purchasers") that Congress believed were sophisticated enough to fend for themselves in offerings of investment companies exempt from registration under the Investment Company Act of 1940 (the "1940 Act"). With respect to the Commission's inquiry regarding whether to raise the thresholds for attaining QIB status, the Association does not believe that there is any need to increase the current thresholds. On the contrary, the QIB threshold (other than for dealers, which currently have, and should continue to have, a $10 million threshold) should be lowered to $25 million (the threshold for institutional "qualified purchasers" under the 1940 Act).

As discussed above, the Association also recommends that the Commission consider permitting unseasoned issuers of any size to use Form B (or Form S-3 or F-3) for QIB-only non-convertible fixed income offerings.

---

21 As noted above, the Association believes that the filing of at least one annual report is a sufficient measure of seasoning and, accordingly, recommends that the one-year reporting history requirement be eliminated with respect to Form B QIB-only offerings

(2) ***The Association generally supports the proposal to allow registration of offerings of non-convertible investment grade securities by smaller seasoned issuers on Form B, but recommends that the Commission consider the creation of a separate form for the registration of these types of securities.***

The differences between debt and equity securities clearly demonstrate that the Commission's "one size fits all" approach to registration does not work and is not reflective of market realities. As discussed elsewhere in this letter, the market for investment grade securities (like the ABS market) is sufficiently unique to justify a separate registration scheme with different disclosure requirements. With respect to other types of debt securities offerings, however, although the Association believes that pre-sale term sheets should not be mandated for any offering, the utility of such term sheets is particularly limited (and the resulting timing delay particularly unjustified) in the case of non-convertible investment grade securities, where investment decisions are based primarily on credit rating, interest rate and maturity. In such cases, oral communication of such information is generally deemed sufficient and mandating the delivery and filing of a term sheet (or preliminary prospectus) prior to sale is unwarranted and will prove unworkable. As discussed above, market forces have sufficed to produce dissemination of information regarding securities where necessary to the market. A separate registration form tailored to the realities of the market for these fixed-income offerings is therefore appropriate.

The Association notes that, in a change from past practice, in order to be considered an "investment grade security" for purposes of Form B, the security must not only have received at least one investment grade rating from a nationally recognized statistical rating organization (as is currently required), but also must not have received a below investment grade rating from any such rating organization. The Association disagrees with this change and continues to believe that the standard should be simply to have received one investment grade rating and that the additional requirement to have not received a lower rating should not be imposed. We note in this regard the growing practice for rating organizations to issue a rating even if not specifically requested to do so (often called a shadow rating) and, in so doing, may not have received all relevant information from the issuer in making its determination.

(3) ***Although the proposal to permit affiliated market makers to use Form B is a step in the right direction, the Association believes that the Commission should go even further.***

Although the proposal would ease the current burden on affiliated market-makers in terms of prospectus delivery, the Association believes that the Commission should use its exemptive authority under NSMIA to eliminate this burden altogether in connection with ordinary market-making transactions by exempting such secondary market transactions from the registration requirement. There is simply no need to continue such requirement, particularly in light of existing Exchange Act and SRO rules that require broker-dealers to disclose their affiliation with the issuer of a security prior to or at the time of sale.[22] The Association also believes that the proposal should not exclude securities transferred from one affiliate to another.

f. ***The Association strongly disagrees with the Commission's Form B disqualifications approach.***

As discussed above, the proposed approach with respect to Form B disqualifications is unwarranted and unworkable. In particular, the "bad boy" disqualification provisions are unjustified and the consequences for issuers or underwriters with a few "rotten apples" are simply too severe. Indeed, if the "bad boy" disqualification provisions are adopted, many of the largest and most well-known underwriters would be rendered unable to underwrite Form B offerings due to existing technical violations of law or administrative sanctions.[23] In the absence of demonstrated abuse, the disqualifications for Form B eligibility should not go beyond Form S-3/F-3 requirements. As discussed above, automatic sanctions should not be provided for other reasons in any event. If the Commission considers it necessary, it could use existing enforcement mechanisms to take action against particular underwriters or their personnel (including suspension or revocation of registration) for specific, egregious violations of the federal securities laws or propose, on its motion only, providing for suspension of immediate effectiveness for issuers with serious Exchange Act disclosure issues or other legal problems that cause the Commission sufficient concern.

2. ***The Association strongly opposes the preliminary prospectus delivery requirements included in the Form A proposal. The Association's specific comments and suggestions with respect to Form A otherwise are set forth below.***

a. ***Form A issuers who have filed at least one annual report should be permitted to incorporate information by reference.***

Form A would be the basic form for registration under the Securities Act and would be available for any offering for which no other form is authorized or prescribed. An issuer using Form A (assuming it is not subject to a disqualification event) would be permitted to incorporate Exchange Act reports by reference if it (i) has been reporting for at least 24

22 *See, e.g.*, Exchange Act Rule 15c1-5; Conduct Rule 2240 of the National Association of Securities Dealers, Inc.

23 *See, e.g.*, SEC Release No. 34-40900, Administrative Proceeding File No. 3-9803 (Jan. 11, 1999) and accompanying Orders Making Findings and Imposing Sanctions (sanctions imposed against 28 firms for violations of certain antifraud and other provisions of the federal securities laws in connection with Nasdaq market-making activities).

months and has a public float of at least $75 million, or (ii) has been reporting for at least 24 months and has filed at least two annual reports.

The Association believes that, as with Form B, the filing of one annual report is a sufficient measure of seasoning and, accordingly, that a FormA issuer should be permitted to incorporate by reference if it has filed at least one annual report with the Commission. The Association also believes that the requirement to deliver incorporated reports to investors with the preliminary prospectus is costly and unnecessary. The Association proposes instead that such incorporated material be provided to investors only upon their specific request.

b. ***As with Form B, the Association believes the Form A disqualification approach is unnecessary and unworkable.***

Under the Commission's Form A proposal, Form A issuers subject to a disqualification event would not be able to incorporate by reference or control the timing of effectiveness. The Association reiterates the same concerns with respect to the proposed disqualifications as expressed in Part II and Part III.A.1.f. above for Form B issuers. The Association does not believe that any differentiation between Form B and Form A issuers is warranted for these purposes.

c. ***The Association strongly believes that Form A issuers should be permitted to use delayed shelf registration procedures.***

Under the proposal, Form A issuers would not be permitted to use delayed shelf registration procedures. The Association believes that this restriction is unwarranted and encourages the Commission to permit Form A issuers the flexibility to use delayed shelf procedures.

Delayed shelf registration is particularly important for secondary offerings by affiliates and holders of privately placed securities of issuers that do not qualify for Form B. These offerings are very important to capital formation, especially for smaller issuers not eligible for Form B. Legitimate private placement capital formation will be discouraged if resale shelf registration is not permitted; non-shelf registration of resales is cumbersome, expensive and often unavailable. (Registration of resales will also be particularly important for Form A issuers if, as the Commission proposes, the Exxon Capital letters are repealed.)

The Association disagrees with the Commission's premise in this area that secondary and primary offering standards for shelf registration should be identical. The Association understands the Commission's concerns regarding indirect public offerings by issuers using exempt offerings followed by secondary offerings. However, most secondary offerings are not the second step of an abusive transaction. As indicated above, most secondary offerings are legitimate transactions and can be vital to smaller issuers. The Commission should find another approach to address disguised primary offerings.

Eliminating secondary shelf registration for smaller issuers is a destructive, overbroad approach to a narrow problem.

d. ***The Association agrees that there should be a "bright-line" safe harbor for communications made by Form A issuers during the pre-filing period.***

The proposal states that communications made more than 30 days prior to the filing of a Form A registration statement would not be subject to Section 11 or 12(a)(2) liability because such communications would not be "offers" for purposes of Section 5. The Association believes that this intended result should be more clearly stated and recommends that proposed Rule 167 expressly provide that such communications also are not "prospectuses" for purposes of Section 2(a)(10) or 12(a)(2) of the Securities Act. Furthermore, the requirement that issuers take reasonable steps necessary to ensure that a communication made during the "safe harbor" period is not republished within the 30 day pre-registration period adds uncertainty that blurs the "bright-line" and could have the effect of artificially delaying certain offerings. For the proposed rule to truly be a "safe harbor", and for issuers to take advantage of the rule, this uncertainty must be eliminated. Finally, in response to the Commission's specific query, the Association does not believe that there is any need to require filing of any materials used during any period prior to the 30-day "quiet" period. Such a requirement would add unnecessary cost, would be likely to chill the dissemination of such communications and would ultimately prove unworkable.

3. ***The Commission should not adopt modifications to the MJDS rules that limit the utility of the MJDS, or limit access to Form B by certain MJDS filers.***

The MJDS was adopted by the Commission in 1991 in order to facilitate cross-border securities offerings and periodic reporting by eligible Canadian issuers. The MJDS allows eligible Canadian issuers to satisfy registration and reporting requirements under the Securities Act and the Exchange Act through the use of disclosure documents prepared under Canadian securities law. Issuer eligibility requirements under the MJDS vary according to the transaction being registered and are generally based today on minimum public float (otherwise eligible non-convertible investment grade offerings are not subject to the float test). The Commission is proposing to modify the public float eligibility criteria for the MJDS forms (*i.e.*, Forms F-8, F-9, F-10, F-80 and 40-F) by replacing the current minimum public float levels with the proposed public float/ADTV thresholds used to determine Form B eligibility. Thus, a Canadian foreign private issuer would be eligible to use the MJDS (assuming it met the other MJDS eligibility criteria) if it had (i) a public float of at least $75 million and the U.S. ADTV of its equity securities is at least $1 million, or (ii) a public float of at least $250 million. The public float thresholds would be measured in U.S. dollars, as opposed to Canadian dollars as is the case for certain transactions under the MJDS currently. The proposed revisions would not add a public float requirement for any transaction registered under the MJDS that does not currently require one, such as otherwise eligible offerings of non-convertible investment grade securities.

The Commission acknowledges that some Canadian issuers currently eligible under present rules would be precluded from using the MJDS because of the new thresholds. In addition, MJDS issuers that file annual reports on Form 40-F or whose previous offerings have been registered under the Securities Act on MJDS forms will not be eligible to use Form B since none of those forms require prior review by the Commission staff. The Association urges the Commission not to adopt any proposal that would have the effect of limiting the utility of the MJDS or prohibiting issuers eligible under current rules from using the MJDS in the future. The Association also recommends that MJDS issuers be permitted to use Form B, regardless of whether they have filed their annual reports on Form 40-F or used MJDS forms to register past offerings. Moreover, the Association recommends that the Commission allow the aggregation of U.S. and Canadian trading (particularly since, as the Commission acknowledged in adopting the MJDS, the trading markets for these securities are so closely linked) for purposes of calculating ADTV.

4. ***The Association agrees that seasoned foreign governments should, like Form B issuers, be permitted to control the timing of effectiveness of their offerings and follow other Form B procedures.***

Under proposed Securities Act Rule 462, certain "seasoned" foreign governments registering offerings on Schedule B under the Securities Act would be able to control the timing of effectiveness of their registration statements. Such registration statements would not be subject to Commission staff review. Eligible foreign governments would be those that (i) are registering offerings on Schedule B of at least $250 million (the Release does not state whether this is determined by principal amount, gross proceeds or some other measure) where such offerings are underwritten on a firm commitment basis, and (ii) have registered an offering under the Securities Act within the three most recent years. The Commission believes that the requirements that the offering be at least $250 million and be underwritten on a firm commitment basis will ensure that the offering will "attract significant market, analyst and investor attention" and that the prior filing requirement will ensure that "these issuers had some experience with registration under the Securities Act" and "guarantee that some public information would be available before a foreign government issuer could rely on the Rule."

With respect to prospectus delivery, foreign government issuers registering a firm commitment underwriting in excess of $250 million more than one year after the effective date of their initial registered offering would be permitted to follow procedures similar to those under Form B by filing with the Commission and delivering to investors before sale either a term sheet or preliminary prospectus. For other foreign government issuers, Form A-type procedures, requiring delivery of a preliminary prospectus no later than three or seven days before pricing and delivery of a document reflecting material changes at least 24 hours before pricing, would apply.

For the same reasons expressed above, the Association believes that the term sheet and preliminary prospectus proposals are unnecessary and unworkable. In addition, foreign government issuers should be permitted to control the timing of effectiveness for any offering other than its initial registered offering or, at the very least, for any offering registered within five (rather than three) years of a prior Securities Act registered offering. The five-year look-back period would be comparable to existing shelf procedures.

B. ***The Association strongly believes that issuers should continue to be permitted to engage in Exxon Capital exchange offers.***

As discussed above, the Association believes that theExxon Capital letters (and similar letters for non-U.S. issuers) should remain in place regardless of whether or not the registration reforms are adopted. Exxon Capital transactions have served a useful function in blending the need of companies to quickly access the capital markets and the desire of institutional investors to hold freely tradable securities. The Commission has not demonstrated any practical abuse associated with these transactions. Issuers, even those eligible to register on Form B, may wish to offer their securities under Rule 144A or in other private placements to QIBs and other accredited investors for a variety of reasons. In the absence of demonstrated abuse, the SEC should not deprive issuers of this flexibility or, effectively, impose higher transactional costs (through higher yields or necessity to maintain a resale registration statement).

C. ***The Association agrees that communications during the offering process should be liberalized, but believes that the proposed filing requirements and liability standards imposed in connection therewith will discourage rather than encourage information flow to investors.***

The liberalization of offering communications is a major advance and is necessary given the increasing speed of the markets, expanding technological capabilities and increasing demands of investors to have greater access to information. This is particularly the case in the ABS context, where an understanding of the transaction depends in part on a review of models and scenario analyses that are generally outside the framework of the statutory prospectus. *As discussed above, the Association believes that the Commission's proposals relating to the liberalization of communications should be considered separately from the other proposals set forth in the Release, should (with appropriate modifications) be reproposed and should be adopted and irrespective of the action taken on other matters raised in the Release.*

However, as discussed above, the proposed filing requirements and liability standards that would be imposed with respect to "offering information" and "free writing materials" will chill, not encourage, such communications. Moreover, the terms "offering information", "free writing materials" and "offering period" need to be better defined, for purposes of understanding both liability and filing obligations. For example, according to the Release, "offering information" would include, among other things, "any *offering information* disclosed by or on behalf of the issuer during the offering period, other that information communicated orally" and "*offering information* communicated orally that the issuer chooses to file" (emphasis added). Defining a term by reference to the term itself makes the definition unintelligible and of potentially limitless scope. "Free writing materials", according to the Release, would include "all written information disclosed by or on behalf of the issuer during the offering period, other than 'offering information,' factual business communications and limited notices of proposed offerings." Without an understanding of the boundaries of what would constitute "offering information", the definition of "free writing materials" is also rendered unintelligible. The term "offering period", which (in the context of Form B offerings) refers to "the period beginning 15 days in advance of the *first offer* made by or on behalf of the issuer in connection with the offering and ending when the offering is completed" (emphasis added) is similarly confusing. As discussed in Part III.A.1.b. above, what does "first offer" mean in this context? With multiple offering participants and liberalized communications, how will the issuer or the underwriters know when the "first offer" has taken place?

D. ***The Association generally supports the proposed modifications to the research safe harbor rules, but believes that additional modifications to the rules are necessary.***

1. ***Rules 138 and 139 should continue to explicitly exempt qualifying research reports from Section 2(a)(10) and 12(a)(2) of the Securities Act and that such qualifying research should not be deemed "offering information".***

The Association supports the Commission's proposals to expand the coverage of the research safe harbors provided by Securities Act Rules 137, 138 and 139. The Association notes, however, that current Rules 138 and 139 exempt qualifying research reports not only from Section 5(c), but also from Section 2(a)(10) (and, as a consequence, Section 12(a)(2)) under the Securities Act. The Association assumes that the Commission did not intend to change the liability standard with respect to qualifying research reports under the safe harbors and therefore suggests that the Commission expressly clarify in the rules that covered research reports are not "prospectuses" for purposes of Section 2(a)(10) or Section 12(a)(2). The Association also believes that the Commission should clarify that research reports prepared and distributed in accordance with the safe harbors would not be deemed "offering information". If the Commission did intend to change the liability standard with respect to qualifying research reports, the Association believes that such change is unwarranted and would seriously limit reliance on the safe harbors and, consequently, availability of information to markets and investors as discussed above. As a result, investors would be deprived of the very information the Commission wishes to make available to them.

2. *The Association supports the Commission's proposal to expand the coverage of Securities Act Rule 138.*

In response to the Commission's inquiry as to whether to expand Rule 138 further and permit research with regard to debt securities issued in a prior public offering by an issuer that had subsequently terminated its reporting status, the Association believes that such additional expansion is appropriate, particularly given the retention of the "regular course of business"[24] requirement, and will serve to further the Commission's goal of promoting increased investor access to information regarding an issuer's securities.

3. *The Association supports, with certain modifications, the Commission's proposed expansion of Securities Act Rule 139.*

The Association supports the proposed elimination of the "reasonable regularity" requirement for issuer-specific (or "focused") reports.

The Association also supports the proposal to expand the coverage of the industry-wide research report safe harbor and to eliminate the favorable recommendation prohibition. However, the Commission also should amend the rule to eliminate the "reasonable regularity" requirement for unseasoned companies and for projections. The Association believes (as the Commission acknowledged in proposing the elimination of the reasonable regularity requirement in connection with focused research reports) that the requirement that reports be distributed "in the ordinary course of business" is sufficient protection against "hyping" and that there is no need for the additional reasonable regularity requirement.

4. *The Association supports the Commission's proposals with regard to research reports used during Rule 144A and Regulation S offerings.*

The Association believes that the proposed addition of a safe harbor for research distributed during Rule 144A and Regulation S offerings is appropriate and supports such proposal. However, the Association also recommends that the coverage of the industry-wide research safe harbor be expanded to include issuers about whom such reports could be distributed if an offering was registered. In addition, as discussed above, the Association believes that the "ordinary course of business" requirement provides sufficient protection against hyping and that the "reasonable regularity" requirement with respect to research distributed during Rule 144A and Regulation S offerings be eliminated. As the Commission has often recognized, the investors in these offerings are

24 Given the potential for confusion as to the meanings of the "regular course" requirement in Rule 138, the "normal course" requirement in Rule 139 and the "ordinary course" requirement used by the Commission elsewhere in the Release (although we understand the standards to be identical in practice), the Association suggests that the Commission use the same terminology throughout the relevant rules. Since there is already a "reasonable regularity" concept, the use of either "normal" or "ordinary" would seem appropriate.

generally sophisticated institutions and other entities capable of fending for themselves and less in need of the protection of restrictive Commission rules.

E. ***The Association supports the Commission's proposal to eliminate the final prospectus delivery requirement in registered offerings, but believes that freedom from this requirement should not be conditioned on satisfaction of other information filing and delivery requirements. The Association strongly opposes, however, the term sheet and preliminary prospectus delivery proposals.***

The Commission's proposal to eliminate final prospectus delivery requirements addresses the growing difficulty and strain on Association members in delivering prospectuses as settlement cycles became shorter and technology accelerates communications. Indeed, this change will be become essential when, as contemplated within the next few years, settlement cycles are reduced to T+1. However, the Association disagrees with the Commission's proposal that conditions the elimination of the final prospectus delivery requirement on satisfaction of other information filing and delivery requirements. The Commission would require that the final prospectus be filed, and that step is sufficient to provide availability to markets and investors. As discussed extensively above, availability and not delivery should become the focus of the Commission's concerns.

The Association also disagrees with the proposed term sheet and preliminary prospectus delivery proposals. As discussed above, the requirement to deliver a term sheet (or, under the Commission's alternative disclosure proposal, a preliminary prospectus) prior to first sale in the case of Form B offerings, or a preliminary prospectus three or seven days prior to pricing in the case of Form A offerings, is simply not workable in today's fast-paced markets. This same concern is present in connection with the Commission's proposal to require material updating changes to be delivered to investors at least 24 hours prior to pricing. The proposal over-emphasizes the importance of delivery of written information and the Association believes that the Commission has misapprehended investor concerns in this regard. The experience of the Association and its members is that investors focus on availability in the market, rather than delivery. Moreover, the speed of communications and markets makes the concept of delivery outmoded. Investor access to information provided orally or through EDGAR or other electronic means is sufficient.

In addition, the Association notes the Commission's proposal to require a uniform 25-day aftermarket prospectus delivery period for dealer transactions. In the Commission's view, such a requirement would, in the aftermath of the Supreme Court's decision in Gustafson v. Alloyd Co.,[25] help ensure that Section 12(a)(2) is applied consistently in all registered offerings. The delivery obligation would be satisfied if the final prospectus is on file with the Commission during such period and the dealer notifies each investor, before or at the time it receives a confirmation, where it can obtain the final prospectus free of charge. The Association strongly disagrees with the Commission's proposed

---

[25] 513 U.S. 561 (1995).

approach in this regard and does not believe that such an approach is workable. For example, the obligations of the issuer, and the liability of the dealers, during this period are unclear. Would the issuer be required to update the prospectus during the 25-day period? Would the dealer be liable if the issuer fails to do so or the updated document is incomplete or inaccurate? If the 25-day aftermarket delivery period is meant to address Gustafson, the Association believes that the Commission should do so directly and not indirectly through the imposition of an artificial, costly and unnecessary prospectus delivery period.

F. ***With certain exceptions, the Association supports the proposed expansion of Securities Act Rule 176.***

The Association generally supports the proposed expansion of Rule 176 to cover the additional items set forth in the Release. In connection with the item relating to consultation with a research analyst, however, the Association notes that most broker-dealers have put in place information barriers designed to separate the investment banking function from the research coverage function. Accordingly, to avoid forcing broker-dealers to bring their analysts "over the wall" (thereby restricting the analysts from publishing research or talking to customers until the transaction has become public), the Association recommends that such item be eliminated as a positive factor to be considered. With respect to other suggested items on which the Commission has requested comment, such as the inclusion of a management report to the audit committee of the board of directors of the issuer or the report of a "qualified independent professional", as factors to be considered in determining the sufficiency of due diligence procedures, the Association does not believe that such additional factors are necessary or should be included in Rule 176. *Moreover, as discussed above, Rule 176 should be expanded (with appropriate modifications) to cover all offerings -- whether or not conducted on an expedited basis -- of investment grade debt.* In this regard, the Association suggests that the Commission provide that with respect to investment grade debt offerings (including investment grade MTN programs and other continuous offerings), the courts should consider as positive factors whether the underwriter has received opinions or letters of issuer's and/or underwriter's counsel, officer certifications, and accountants comfort letters on an annual, quarterly or other periodic basis.

Finally, the Association believes that the time has come for the Commission to formally acknowledge the evolving role of underwriters in today's markets. As discussed above, due to the adoption of shelf registration and integrated disclosure, together with the increased speed of the markets, underwriters face difficult challenges in performing a comprehensive "gatekeeper" function or being involved in all elements of the preparation of registration statement disclosure relating to a particular offering of securities. Accordingly, Rule 176 should provide not merely guidance but a safe harbor for underwriters, and the Commission should expressly acknowledge that issuer indemnification of underwriters is not against public policy.

G. ***The Association agrees that additional guidance with respect to the integration of private and public offerings is necessary and, with certain modifications, supports the Commission's efforts in that regard.***

The Association supports the Commission's proposals with respect to the integration of private and public offerings. However, guidance with respect to the conduct of "side-by-side" private and public offerings is also necessary. Accordingly, the Association recommends that the Commission expressly state that a private offering (especially one only to institutional accredited investors) conducted simultaneously with a registered offering will not be integrated with, or lose its private placement exemption because of, that registered offering. As the Commission has often acknowledged, participants in such private offerings can fend for themselves and are not in need of the protections registration offers. Accordingly, the Commission should expressly state that a concurrent registered offering should not be deemed "general solicitation or advertising" with respect to an otherwise properly conducted private placement.

H. ***The Association supports the Commission's proposals to expand Form 8-K reporting obligations and accelerate the timing required for reporting certain events thereunder, but disagrees with the proposed certification requirements.***[26]

As noted in its letter to the Commission dated November 8, 1996 with respect to the Concept Release, the Association supports the acceleration of the filing requirement of certain Form 8-K items from 15 days to 5 days and believes that more timely reporting will improve disclosure. The Association also supports the expansion of current Form 8-K reporting obligations to cover the additional items proposed in the Release, such as material modifications to the rights of securityholders, departure of certain senior executives and material defaults on senior securities. Finally, with respect to the proposed additional certification requirements, the Association believes that imposition of such requirements is impractical, unwarranted and will unnecessarily delay the filing of such reports, as well as any Securities Act offering in which such reports are incorporated by reference.

I. ***The Association strongly disagrees with the proposed modifications to Securities Act Rule 401(g).***

Under the proposal, the Commission would amend Securities Act Rule 401(g) (which provides that effective registration statements are presumed to be on the proper form) so that it would no longer be applicable to registration statements for which the issuer is permitted to control the timing of effectiveness. The Association reiterates its concern noted above with respect to the severe negative consequences of a *post-effective*

---

26 The Association is commenting in only a limited way with respect to Commission's Exchange Act proposals, which are principally addressed to issuers.

determination by the staff that, for example, a Form B registration statement was improperly filed on Form B or that a Form A registration statement did not contain all required "offering information" because the issuer was found to be subject to a disqualification event (and was therefore ineligible to incorporate by reference). The potential for investor rescission claims is simply too high a price to pay for immediate effectiveness and will make the "effectiveness on demand" process unattractive and unworkable. Accordingly, Rule 401(g) should continue to apply to those registration statements for which the issuer can control effectiveness.

IV. APPLICATION OF THE PROPOSAL TO ASSET-BACKED SECURITIES

A. *The Association is concerned that the regulatory framework governing ABS offerings will be inappropriately influenced by rules and policies established through the adoption of proposals contained in the Release.*

The Release explains that ABS offerings are not addressed by the Commission's registration reform proposals. The Association believes that, given the far-reaching implications of the Release, the failure to confront and address ABS issues in the context of the current proposal is a significant shortcoming. We acknowledge that a separate ABS rulemaking project is underway; however, both its content and timing are uncertain. If the Commission does not concentrate on ABS now in the context of the current proposal, the Commission will continue, at least for some period of time, to be faced with a need to react to ABS issues on a case-by-case basis, through no-action letters, exemptive orders and interpretive releases. Moreover, the Association and its members are concerned that the directions established by the proposals made in the Release may exert undue influence, and establish unwarranted precedent, in any subsequent ABS rulemaking. Any general or specific regulatory changes effected for non-ABS offerings should not dictate similar or analogous treatment for ABS offerings.

1. *Comprehensive reform of the securities offering process should not be considered or enacted without simultaneously addressing the treatment of ABS.*

The ABS markets are large and growing. Annual issuance volume now exceeds that of traditional corporate debt and, as the Commission has recognized, asset backed financing "has become one of the dominant means of capital formation in the United States." The size and importance of the ABS markets strongly suggests the need to address the unique circumstances of these markets now, as an integral part of any offering process reform -- not as an afterthought or as part of a separate, "follow on" rulemaking.

2. *The ABS markets differ in fundamental respects from other debt securities markets.*

Features of the ABS market that distinguish it from the corporate and other debt markets include: (i) a principal focus in the ABS market on the structure of one or more classes of securities and the nature of the assets backing those securities rather than on the financial prospects of an issuer with an ongoing business, (ii) the special purpose and/or bankruptcy remote nature of the depositor of the collateral, (iii) the importance of evaluating the impact of alternative potential future cash flows in making a meaningful assessment of a security's yield, and (iv) the essential interaction between broker-dealers and investors in tailoring collateral pools and offering structures to meet investor needs. ABS issuing vehicles are specifically designed to avoid prior activity or history in order to isolate them from the credit of the originator of the related receivables or the sponsor of the transaction. ABS investors are concerned with the nature and quality of the underlying assets and the structure and timing of cash flows supported by those assets, not with the current financial condition and future earnings of the issuer, as is the case in other types of debt offerings.

3. ***The Association believes that these differences dictate a need to pursue different regulatory approaches to accommodate the distinctive features and characteristics of ABS offerings. The proposals in the Release do not present a workable model for such offerings.***

The primary eligibility requirements and the main presumptive benefits of the Commission's proposals are predicated on the existence of a seasoned operating company having significant public float and Exchange Act reporting history – structural characteristics that are not generally shared by ABS issuers. Moreover, these characteristics are not relevant to the protection of investors in ABS. The Association urges the Commission not to adopt offering process reforms predicated on the existence of structural characteristics that definitionally exclude ABS. Instead, reforms should be tailored to the distinctive aspects of the capital markets -- including ABS -- as they presently exist.

The processes and timing constraints associated with assembling collateral for an ABS offering, structuring cashflows and individual classes of securities to meet investor requirements, and other ABS "transaction assembly" dynamics make a number of the basic requirements of the Commission's proposals either unworkable or extremely inefficient, and would if enacted directly threaten the viability of the ABS offering process. The end result would be to make the capital formation process for ABS issuers more costly and less efficient, and raise the cost of financing for homebuyers, consumers and businesses.

4. ***Rather than attempting to fit ABS into the conceptual framework set forth in the Commission's proposals, the Association recommends that the staff revisit and rationalize its regulatory model for ABS offerings in a manner that accommodates their unique characteristics.***

The Association believes that the Commission should develop a new set of regulations specifically designed to meet the unique requirements of the ABS markets. Although one could imagine preserving for ABS the existing shelf registration system, together with the array of no-action and interpretive guidance that has been crafted to attempt to fit ABS offerings into the current scheme, while reforming the regulatory scheme for other offerings, the Association believes that such an approach would be unwise. Preserving a complex set of interpretations designed to address ABS under a system not designed for them, while otherwise replacing that very system, would be likely to produce unexpected and adverse regulatory and interpretive consequences and burdens.

The Association urges the Commission to pursue more fully the goals of removing barriers to access to the public markets, making registration a more attractive alternative for issuers and enhancing information communicated to potential investors by taking affirmative steps to serve those goals in respect of ABS. The following discussion presents the Association's specific recommendations for ABS offering process reforms, grouped into the following major categories:

- ABS registration forms, eligibility requirements and required disclosures.
- Communications with investors during the offering process and related filing requirements and liability standards;
- Term sheet and prospectus delivery requirements and related liability standards.
- Post-issuance periodic reporting and related liability standards.

B. ***The Association has the following specific proposals for a new regulatory regime specifically tailored to the ABS market.***

1. ***ABS registration forms should reflect eligibility and disclosure requirements meaningful in the context of ABS offerings.***

ABS registrants should have at least the same ability they have at present under the shelf registration system to bring transactions to market quickly. Users of a new form for ABS offerings should be able to anticipate reasonably the effective date of registration and complete their transactions without uncertainty as to the timing and extent of staff review. The loss of predictability of market access under the proposals for non-Form B eligible issuers would be burdensome in general, as discussed above, but would be a potential disaster for ABS. ABS deals are created in an interactive, time-sensitive process involving the parties who bring the deal to market, potential investors and movements in multiple financial markets. In general, the structure and terms of the deal are highly sensitive to market developments. It is worth noting that in ABS transactions this sensitivity relates not only to the price and yield of the securities to be offered but also to a number of collateral characteristics and structural features to be designed as part of the deal. Requirements that would result in the loss of control over the timing of market access would severely hamper the ability of market participants to respond to the market and would likely cause significant volumes of transactions not to be done, to be executed at higher costs or to be done pursuant to an exemption from registration -- directly frustrating the policy objectives of the Release.

a. *Registrants should be able to control the timing of offerings of investment-grade ABS.*

The Association specifically recommends thatregistrants should be able to control the timing of their offerings of investment-grade ABS to the same extent as currently, or to a greater extent. The investment-grade ratings of most ABS reflect a level of scrutiny by a sophisticated third party, and a level of safety, that permits a flexible registration system to be fully consistent with investor protection.

Because of the potential risks involved in non-investment grade ABS, and the complexity of these offerings, we believe that registrants should not be able to designate the effective date for registration statements for these securities unless they are offered solely to QIBs and institutional qualified purchasers.

b. *Float, trading volume, Exchange Act reports and the like should not determine an ABS registrant's ability to control timing.*

Eligibility to designate effectiveness of ABS offerings should depend solely on ratings and the nature of the offerees. The Release's proposed criteria for lifting its restrictions on access to the public markets do not apply well to ABS. Public float and average daily trading volume have no real significance for ABS offerings, which are typically made through special purpose entities. Similarly, an Exchange Act reporting history does not have significance for most ABS issuers, and is not relevant to the policy concerns addressed here. For ABS, Exchange Act reports generally provide data only on the performance of a discrete pool of assets. Moreover, a well-established ABS program may use a new trust, depositor or other special purpose entity for each new offering; thus, identifying an entity with a reporting history may be problematic.

In the context of an ABS offering, an investment-grade rating is an effective substitute for the other criteria on which the Release proposes to rely. The rating reflects the quality of the assets, the structure of the transaction, legal protections, the tax treatment, the servicer's capabilities and experience, and the credit enhancement for the transaction. A rating indicates that the risks associated with the transaction have been fully analyzed by a sophisticated third party that specializes in this type of analysis. These ratings, together with the extremely limited discretion afforded to issuers after the securities have been established, make investment-grade ABS transactions a suitable circumstance in which to afford issuers more control over the timing of the offering process.

c. *The staff should not use restrictive interpretations of the term "asset-backed security" to govern the choice of registration form.*

In the years since Form S-3 eligibility was extended to ABS registrants, the staff has repeatedly reinterpreted the regulatory language to exclude certain offerings, notwithstanding the Commission's statement that "a broad standard has been adopted in order to provide sufficient flexibility and to accommodate future developments in the asset-based marketplace." For example, the staff has taken the position that delinquent assets that do not "by their terms convert into cash in a finite period of time" and that securitizations that include certain percentages of delinquent assets should not qualify as asset-backed securities. This type of interpretation should not be used to restrict eligibility to use a registration form.

d. ***ABS disclosure guidelines should be promulgated; changes in disclosure policy and interpretations should be made generally rather than in the context of particular registration statements.***

One reason for the bulk and complexity of current ABS disclosure documents is the cumulative effect of disclosure requirements that have been imposed over time through the process of staff reviews of individual registration statements. Many of these requirements have evolved into informal disclosure standards that are observed throughout the entire ABS industry. Historically, ABS disclosure developed over time without a system of formalized disclosure rules, and the staff attempted to address structural or disclosure concerns that it had with respect to the industry as a whole in the context of the review of filings pending at the time when the concern arose. Although we appreciate the need for this approach during the period that ABS was a new sector of the market, the market has now matured beyond this point. *The Association encourages the Commission to undertake a deliberative process to publish for comment and, where warranted, formally codify informal staff views and positions in disclosure rules applicable to ABS offerings.* We believe that such a process will be helpful in limiting or eliminating unnecessary and inapplicable disclosure practices, and would result in clearer and more specific guidance to market participants concerning those disclosures that are required in particular circumstances. To the extent that ABS disclosure concerns of the staff continue to evolve, we strongly recommend that the staff communicate these concerns to all ABS issuers through formal releases or interpretations.

2. ***Barriers to communications with investors during the offering process should be removed, but particular communications should not be mandated.***

We are concerned that the proposals for communications in the Release will not improve the quality or timeliness of disclosure to ABS investors. The Association suggests that the Commission permit, and even encourage, the early circulation of term sheets and other structuring information where useful to investors. Delivery of such information (including term sheets or preliminary prospectuses) prior to pricing, however, should not be mandated, but rather should be left to market forces. Although the Association Letter and related no-action letters have served their purpose as a temporary regulatory accommodation under rules that were not designed to cope with ABS offerings, the Association suggests, consistent with the objectives of the Release, that the Commission take this opportunity to craft a system under which additional information can be provided on a more timely basis to investors.

a. ***The Commission should avoid imposing mandatory pre-pricing communication requirements.***

Proposals to require delivery of disclosure documents and material updating changes at specified intervals before pricing would be especially burdensome in ABS transactions. The interactive process of deal structuring and the sensitivity of structures to market changes, discussed more fully above, would be heavily burdened by such proposals. Certain ABS transactions simply could not be brought to market as registered offerings under such rules.

b. ***Access to information should be expanded by permitting computational materials to be circulated without filing or Section 12(a)(2) liability.***

Computational materials should not be filed at all. These materials, often produced at the request of an investor and often reflecting assumptions specific to the investor, are quantitative presentations of securities performance under a variety of assumed characteristics and not subjective projections of a "future" that the issuer or underwriter actually contemplates. Computational materials permit potential investors to appreciate and understand the hypothetical behavior of securities. To best serve the goals of early access to whatever information an investor needs, filing and Section 12(a)(2) liability are counterproductive. Subject to Rule 10b-5 constraints, the free flow of information is the best solution.

c. ***Access to information should be further expanded by permitting electronic posting and access to computer models.***

The Commission should also permit broader investor access to information relating to underlying assets without triggering filing requirements or Securities Act liability. More generally, the Commission should permit electronic posting of transaction information in both the public and private offering context and allow access to computer models that would enable investors to tailor scenarios to their own needs.

d. ***The ability to publish research reports on ABS should be clarified.***

The Commission should clarify the ability of broker-dealers to publish and distribute research reports in reliance on the research safe harbors provided by the Securities Act in the context of ABS offerings without looking to "seasoning" or other standards not meaningful in the ABS context.

3. ***Structural term sheets should not be subject to Section 11 liability and prospectus delivery requirements should reflect the needs of the ABS market.***

We urge the Commission to make clear in regulations that structural term sheets -- which are summary documents not intended to be complete -- are not subject to the Section 11 liability that should apply to the disclosure document prepared for the purpose of conveying full, complete and final information. ABS issuers and underwriters often provide investors with "structural term sheets," which describe the financial terms of an offering, including the securities to be offered and the structure of the offering; "collateral term sheets," which describe the assets underlying the offering; and "series term sheets," which combine aspects of both structural term sheets and collateral term sheets and are often provided in connection with an offering of securities under an effective shelf registration statement. Under the Release, ABS term sheets could be considered to be "offering information" becoming part of the registration statement and creating Section 11 liability. By their nature, term sheets are summary disclosure and do not purport to fully describe all material aspects of the offering. Term sheets are intended to summarize what the prospectus will fully disclose about the securities and the offering. The prospectus will supersede the term sheet and should contain all the information contained in the term sheet, along with full disclosure on the offering. Section 11 liability rests more appropriately with that disclosure document.

Prospectus delivery requirements should reflect the longer time required to prepare ABS disclosure documents. The Commission has long recognized that it takes longer to complete the documentation for an ABS offering than it takes for other offerings. For example, Instruction 1 to Rule 424(b) permits registrants to file a form of prospectus or prospectus supplement relating to an offering of ABS on a delayed basis pursuant to Rule 415 no later than the second day after first use, instead of requiring them to file no later than the earlier of the second day after first use or the second day after the determination of the offering price. Because ABS issuers negotiate the structures and terms of their offerings with their investors, using the computational materials and terms sheets described above, they often cannot begin to fully document the structure until around the time of pricing. And because of the complexity of these transactions, they often cannot complete this documentation within a day or two of pricing.

The ABS market has been extremely proactive in formulating approaches, such as term sheet delivery, to provide investors with material offering information in a concise and timely fashion without restraining issuer's ability to access the market quickly. We are very much concerned that the proposals in the Release may severely impair the ability of ABS issuers to adapt their offerings to existing market conditions

4. *Exchange Act reporting should be tailored to the circumstances of ABS offerings.*

The current approach, under which ABS transactions operate under no-action letters and exemptive orders and then deregister, should be replaced with a system under which relevant ABS performance data is made readily available for the life of a transaction on a regularized basis. Accordingly, the Commission should define the nature and scope of ongoing/integrated disclosure that is relevant in the ABS context, and create a formal and tailored "reporting company" status for ABS offerings.

a. *Create an Exchange Act reporting regime for ABS.*

ABS issuers -- special purpose vehicles, trusts and the like -- have been the subject of countless no-action letters and exemptive orders relating to Exchange Act filings. The generally applicable Exchange Act requirements simply do not fit these transactions. The Association urges that a specific list of core disclosure items for ABS transactions should be established as the basis for satisfying Exchange Act requirements. These core requirements should focus on the data typically sought by investors in the ABS market:

- the amounts collected on the assets during the applicable period;
- the amounts paid or allocated to investors with respect to principal and interest on the securities during the applicable period;
- the amount of assets that have defaulted during the applicable period, and the extent to which investors have suffered a loss because of the default;
- the delinquency status of the assets; and
- whether the credit enhancement for the securitization has been reduced or increased during the applicable period.

Registrants could be required to file under the Exchange Act at whatever interval they report to investors under the operative documents for the transaction, and in any event at least every three months, on Form 8-K. Alternatively, transaction documents could be required to provide that the trustee or servicer report such information to investors and make it available to others on request, which requirement could be met by making such information available on publicly accessible information networks (e.g., via the Internet or third-party information vendors.) Such issuers would be treated as reporting companies for purposes of the Exchange Act by virtue of such filings or availability of information. We note that in contrast to the existing system in which ABS transactions typically cease to file Exchange Act reports after a short period of time as soon as they can deregister, the filing or availability of core information can and should be required for the life of the deal. Such an approach would make more information available and would have the additional benefit of encouraging helpful standardization.

b. ***Clarify liability for such information.***

To encourage full availability of core information for the life of ABS transactions, rather than deregistration, we suggest that such information not carry with it Exchange Act liability. This information for ABS transactions is not gathered or prepared by ABS issuers. Rather, it is routinely processed entirely by intermediaries such as servicers or trustees and is not comparable to information filed by other reporting companies. Unlike information included in Exchange Act filings for other registrants, the gathering and dissemination of information on the amounts collected on underlying assets and the amounts paid on ABS securities is a limited, mechanical and ministerial activity. The ABS issuer typically has no particular access to information pertaining to this data or the activities that the data reflect. Unlike an operating company whose management would have access to information and ongoing involvement in the activities that generate the information set forth in Exchange Act filings and are described by such filings, ABS issuers have no such access or role. Hence, the policy objectives of liability are not served.

Moreover, important policy objectives would be served by eliminating such liability. As noted, under current regulations, ABS transactions are routinely deregistered and cease to file periodic reports soon after issuance. By eliminating liability for the filing and public dissemination of this data, it would become feasible to make the core information described above available by filing it with the Commission and thereby enhance the transparency of markets for the benefit of all participants. The only tangible effect of imposing liability in the context of ABS transactions is to make information less available.

V. CONCLUSION

The Commission's proposal with regard to the conduct of offerings represents a fundamental change in the current registration system and is likely to engender a great deal of comment. Accordingly, the Association recommends that the Commission proceed cautiously in this area. After the Commission has had a chance to review and assess the reactions and concerns raised by market participants, it should carefully consider how to proceed with various aspects of the proposal.

Although certain of the reforms proposed by the Commission represent improvements in the current system (such as, for example, more issuer control over the effectiveness of filed registration statements, "pay-as-you-go" registration, elimination of final prospectus delivery requirements, liberalization of restrictions on the dissemination of offering-related information and broker-dealer research reports, and clarification of the integration doctrine), the burdens imposed by the proposed new regime (including the requirement to deliver term sheets and preliminary prospectuses prior to sale, the requirement to file "free writing" materials, the potential elimination of Exxon Capital exchange offer procedures and the increased liability imposed with respect to "free writing" and other communications) far outweigh any perceived benefits.

The Association believes that, on balance, the proposal will have the effect of slowing down the offering process and increasing capital costs, without any meaningful improvement in investor protection. The Association therefore believes that the proposal should not be adopted in its present form. Indeed, the Association questions whether a new system is truly warranted, especially where changes could be made to the existing system to address the Commission's and the industry's concerns. For example, the Commission's proposals with respect to the timing of effectiveness, "pay-as-you-go" registration, elimination of final prospectus delivery requirements, liberalization of communications (if liability and filing issues are appropriately addressed) and the integration of private and public offerings could be adopted and implemented today in the context of the current system.

If, however, the Commission determines that the current system should be replaced as suggested by the Release, the Association recommends that the Commission consider taking an incremental approach to registration reform, rather than radically overhauling the whole system at once, and should proceed by issuing reproposals in those areas where it determines to proceed initially. For example, the suggested reforms regarding the liberalization of communications could be considered and reproposed separately from other aspects of the Commission's proposal, as could the proposals with respect to the integration of offerings.

* * *

The Association appreciates this opportunity to provide its views to the Commission in connection with this important project. If it would be helpful to the Commission and the staff, we would be most willing to make Association staff and member firm personnel available to meet and discuss any of the points raised in this letter. Please address any questions or requests for additional information to Paul Saltzman, George P. Miller or Sarah M. Starkweather of the Association at 212-440-9400, or to Alan L. Beller of *Cleary, Gottlieb, Steen & Hamilton*, the Association's special outside counsel in connection with this project, at 212-225-2450.

Very truly yours,

William H. James

William H. James, Chair
Corporate Bond Division
(Senior Vice President,
Lazard Freres & Co.)

Steven T. Mnuchin

Steven T. Mnuchin, Chair
Mortgage and Asset-Backed
Securities Division
(Managing Director,
Goldman, Sachs & Co.)

Leslie K. Gardner

Leslie K. Gardner, Chair
Corporate Legal Advisory Committee
(Vice President and Assistant
General Counsel,
J.P. Morgan & Co. Incorporated)

Michael M. McGovern

Michael M. McGovern, Chair
Mortgage and Asset-Backed Legal
Advisory Committee
(Director and Senior Counsel,
Merrill Lynch & Co. Inc.)

cc: The Honorable Arthur Levitt, Chairman
The Honorable Norman S. Johnson, Commissioner
The Honorable Isaac C. Hunt, Jr., Commissioner
The Honorable Paul R. Carey, Commissioner
The Honorable Laura S. Unger, Commissioner
Harvey J. Goldschmid, General Counsel, Office of the General Counsel
Brian J. Lane, Director, Division of Corporation Finance
Anita T. Klein, Senior Special Counsel, Division of Corporation Finance
Paul M. Dudek, Chief, Office of International Corporate Finance
Annette L. Nazareth, Director, Division of Market Regulation
Gregg W. Corso, Senior Counsel to the Chairman
Martin P. Dunn, Associate General Counsel, Division of Corporation Finance
Mark Green, Director, Office of Asset-Backed Securities, Division of Corporation Finance

Appendix 1

TABLE OF CONTENTS

Page

40 Broad Street
New York, NY 10004-2373
Telephone 212.440.9400
Fax 212.440.5260
www.bondmarkets.com

1399 New York Avenue, NW
Washington, DC 20005-4711
Telephone 202.434.8400
Fax 202.434.8456

St. Michael's House
1 George Yard
London EC3V 9DH
Telephone 44.20.77 43 93 00
Fax 44.20.77 43 93 01

December 4, 2001

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 - *The Bond Market Association*

...celebrating our first quarter century

40 Broad Street
New York, NY 10004-2373
Telephone 212.440.9400
Fax 212.440.5260
www.bondmarkets.com

1399 New York Avenue, NW
Washington, DC 20005-4711
Telephone 202.434.8400
Fax 202.434.8456

St. Michael's House
1 George Yard
London EC3V 9DH
Telephone 44.20.77 43 93 00
Fax 44.20.77 43 93 01

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.

---

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:

---

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).

---

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.

---

[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, <u>except</u> 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]

---

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. <u>ABS Markets: Communications Practices and Issues</u>

1. <u>Section 10 prospectus information vs. background information</u>

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

---

[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. <u>Timing of disclosure in an ABS offering</u>

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.

---

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. <u>Methods of delivery of non-prospectus information</u>

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

---

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

---

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.

---

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. <u>Seasoned Issuer Fixed Income Markets: Communications Practices and Issues</u>

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

---

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

---

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. **<u>There is little risk of conditioning the market for the types of securities covered by the proposal.</u>**

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. **<u>An overly expansive view of what constitutes a "prospectus" is no longer appropriate.</u>**

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. **<u>Exchange Act reports provide current information about an issuer.</u>**

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. <u>Prospectus delivery requirement needs revision.</u>

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. <u>PRIVATE OFFERINGS OF ABS AND SEASONED ISSUER FIXED INCOME SECURITIES</u>

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. <u>ABS and seasoned fixed income issuer markets: communications practices and issues</u>

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:

---

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 underpinning 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).

****

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

/s/ Bianca A. Russo

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

Bianca A. Russo
J.P. Morgan Chase & Co.
2001 Chair, MBS/ABS
Legal Advisory Committee
of the Bond Market Association

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.

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

---

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.

<u>EXHIBIT 1</u>

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*

<u>First factor (parties' motivation)</u>: 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

<u>Topic 4 - market making prospectus delivery requirements</u>

<u>Statement of Issue</u>

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.

<u>Our Position</u>

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.

<u>Requested Relief</u>

---

[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
regarding specific Securities Act reform proposals
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.