ABA

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

Section of Business Law
321 North Clark Street
Chicago, IL 60610
312.988.5000
email: businesslaw@abanet.org
website:
www.abanet.org/buslaw

March 2, 2005

By E-Mail to: rule-comments@sec.gov

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Attn: Jonathan G. Katz, Secretary

Re: Securities Offering Reform
Release Nos. 33-8501 and 34-50624 (File No. S7-38-04)

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law (the "Committee") in response to the request of the Securities and Exchange Commission (the "Commission") for comments on Release Nos. 33-8501 and 34-50624, dated November 3, 2004 (the "Release"). The Release sets forth proposals (the "Proposal") that would modernize the registration, communications and offering processes under the Securities Act of 1933, as amended (the "Securities Act"), and continue integration of disclosure processes with the Securities Exchange Act of 1934, as amended (the "Exchange Act").

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

necessarily reflect the views of all members of the Committee. This letter also does not represent the views of any other ABA Section.

This letter relates to the asset-backed securities ("ABS") aspects of the Release only, and it supplements our separate letter, dated February 11, 2005 (the "Primary ABA Letter"), commenting on the Release generally.

I. Overview

As we noted in the Primary ABA Letter, the Committee strongly supports the Proposal. In addition to the suggestions we made in the Primary ABA Letter, we have some suggestions that would be applicable only to ABS and a few suggestions that would apply universally but would have separate practical implications for ABS.

Registration. We suggest that the Commission modify the Proposal so that ABS issuers are provided the benefits that are afforded to well-known seasoned issuers. In response to the Commission's inquiry, we believe that Rule 415(a)(1)(vii), which permits mortgage related securities to be registered for offering on a delayed or continuous basis, should be retained, as an alternative to registering pursuant to Rule 415(a)(1)(x). We believe it is important to retain both alternatives for ABS issuers for the reasons outlined below. In that light, we suggest what we believe is a technical correction to Rule 430B to clarify that Rule 430B applies to registration statements filed pursuant to Rule 415(a)(1)(x) relating to ABS. Finally, we urge the Commission to eliminate the three year limitation on effectiveness for ABS registration statements, so that ABS registration statements need be updated only if changes have occurred that otherwise require such an update.

Communications. We have a few, relatively modest, suggestions that we believe would improve the Commission's Proposal relating to communications. We recommend that a few additional items be permitted to be disclosed pursuant to Rule 134. In addition, we urge the Commission to accord the benefits of several of the rules relating to communications to a broader group of ABS issuers. For example, as discussed below, we suggest that the safe harbor of proposed Rule 168 be made available to a broader group of ABS issuers and that a broader group of ABS issuers be permitted to use free writing prospectuses. We also suggest some technical corrections relating to the communications portion of the Proposal.

Web Site, Regulation FD Disclosure, Research Reports and Liability. We commend the Commission for encouraging the use of Web sites as a means of providing information to investors and prospective investors. In that connection, we request that the Commission clarify that static pool data provided on a Web site does not constitute a free writing prospectus under Rule 433, on the basis that the data is deemed incorporated by reference in the registration statement and statutory prospectus pursuant to Rule 312 of Regulation S-T. We also request that the Commission revise Rule 433 to clarify that Rule 426 governs the timing of filing of ABS informational and computational materials. The Proposal provides that free writing prospectuses are excluded from Regulation FD, and we request that the Commission also confirm that static pool data posted on a Web site is excluded from Regulation FD. With respect to Research Reports, we request that Rule 139a be amended to eliminate the requirement of publication with reasonable regularity and the prohibition on broker-dealers' making a recommendation more

favorable than the last recommendation. We recommend that, if there is to be a rule regarding information deemed available at the time of sale for Section 12(a)(2) purposes, the Commission either: A) confirm that a contract of sale may be subject to a condition that there are no material changes between the preliminary information and the final prospectus that would render the preliminary information materially false or misleading, or B) clarify that if appropriate procedures are followed (as described herein), the investor will be deemed to have reconfirmed its investment decision after receipt of subsequent information. We are concerned that, without clarification, Rule 159 could have the practical effect that no information conveyed after the "trade date" will be considered in determining liability under Section 12(a)(2). This result would cause a major disruption in the ABS marketplace, as explained below. We also request that the Commission clarify what information would be presumed as having been "conveyed" at the time of contract.

Risk Factors in Exchange Act Reporting. Although risk factor disclosure may be appropriate in Exchange Act reports of corporate issuers that conduct ongoing active businesses, such disclosure would be inapplicable with respect to ABS, and accordingly, we ask the Commission not to require ongoing disclosure of risk factors for ABS after the offering has been completed.

II. Securities Act Registration Proposal

A. Certain Benefits Provided to Well-Known Seasoned Issuers under the Proposal Should Be Provided to ABS Issuers.

Under the Proposal, the Commission has defined a class of issuers designated as "well-known seasoned issuers" or "WKSIs" and has accorded to WKSIs certain benefits, including:

- automatic shelf registration with respect to their registration statements on Form S-3;
- the ability to pay SEC filing fees on a "pay-as-you-go basis" at the time of each takedown off of a shelf registration statement in an amount calculated for that takedown;
- the ability to omit from the base prospectus, in an automatically effective shelf registration statement, more information than is currently the case in a regular shelf offering registration statement and to add such information to the prospectus by means other than a post-effective amendment to the registration statement; and
- the ability to add additional securities to an automatically effective shelf registration by means of a post-effective amendment which is itself automatically effective.

The Proposal denies WKSI status to issuers of ABS, and it provides instead that ABS issuers offering securities on Form S-3 are to be considered "seasoned issuers" and ABS issuers offering securities on Form S-1 are to be considered "non-reporting issuers." As a result, the benefits of WKSI status described above are denied to ABS issuers, regardless of form eligibility or their history of prior participation in the public ABS market.

We urge the Commission to revise the Proposal to permit all ABS issuers eligible to offer securities on Form S-3 to enjoy the benefits of WKSI status described above. We note that the Commission has long recognized that in a global market characterized by the need for flexibility and efficiency, a flexible system of securities registration comparable to that provided to well-seasoned non-ABS corporate issuers is of critical importance to issuers of ABS. Thus, in 1992, the Commission extended the benefits of Form S-3 shelf registration and delayed and continuous offerings to investment grade ABS "to provide greater flexibility and efficiency in accessing the public securities markets."[1] More recently, as part of its Final Asset-Backed Securities Regulations[2], the Commission further expanded the availability of Form S-3 to foreign ABS issuers and to certain ABS backed by pools of leases in the belief that "this will make the offering process less costly for these issuers."

While shelf registration on Form S-3 has been available to issuers of investment grade ABS, those issuers have come to rely on the flexibility provided by the shelf registration process – the knowledge that their access to the capital markets depends only on the availability of liquidity in such markets and not on the timing and scope of staff review of a registration statement. This reliance has been further justified by the Commission staff's *de facto* practice of generally not reviewing repeat ABS shelf registration statements, and, in recent years, of generally not reviewing initial filings of ABS shelf registration statements, at least to the extent that the registration statements relate to ABS backed by commonly-registered asset classes. The Commission staff's *de facto* practice of not reviewing subsequent ABS registration statements of related issuers covering the same asset class is founded on both experience and logic. From a cost-benefit standpoint, the benefits from changes that have resulted from such reviews when they were done rarely justified the time and expense incurred by ABS issuers and the Commission in going through the review process. Furthermore, there was an inherent capital market cost associated with the delay occasioned by Commission review.

We believe that the Commission's historical policy of making available to ABS issuers the same flexibility in registering their securities as is accorded to well-seasoned non-ABS corporate issuers and the Commission's *de facto* practice of not reviewing registration statements in the situations described above argues strongly for according ABS issuers automatic shelf registration with respect to their registration statements on Form S-3, the ability to pay SEC filing fees on a "pay-as-you-go basis" and the other WKSI benefits described above. Moreover, we are unable to discern any valid reasons for not extending such benefits to ABS issuers. We note that the Commission has not offered any reason for not treating a Form S-3 ABS issuer as a WKSI (or according it any of the benefits proposed for a WKSI) despite its clear and exhaustive codification of ABS offering and disclosure rules in the Final Asset-Backed Securities Regulations.

Historically, the Commission has rightly focused on an investment grade rating of ABS as an effective substitute for the criteria that have been applied to corporate issuers to determine the degree of flexibility to be accorded in the registration process. Ratings reflect that the transaction risks have been fully evaluated by sophisticated analysts who have special expertise

---

[1] Simplification of Registration Procedures for Primary Securities Offerings; Release Nos. 33-6964; 34-31345 (Oct. 22, 1992).

[2] Asset-Backed Securities; Release No. 33-8518; 34-50905 (Dec. 22, 2004) ("Final Asset-Backed Securities Regulations").

with these types of transactions. Securities of ABS issuers, even those that are rated investment grade, generally are offered and sold only to institutional investors. The same cannot be said for investment grade corporate debt, which is often widely held by retail investors. We believe that an investment grade rating should be the only criterion required for extending WKSI benefits to an ABS issuer otherwise eligible to file on Form S-3.

In the alternative, if the Commission does not extend WKSI benefits to all ABS issuers, we propose that such benefits be extended to certain ABS issuers that we will call "Asset-Backed Seasoned Issuers" or "ABSIs." An ABSI would include any registrant of ABS that has previously had declared effective, or any registrant that is affiliated with a registrant that has previously had declared effective, a registration statement on Form S-3 covering securities backed by the same "asset class" as the securities being registered under the registration statement being filed. The requirement that the ABSI or an affiliate has previously had declared effective a registration statement on Form S-3 covering securities backed by the same asset class as is covered by the registration statement being filed would ensure that the Commission staff has had at least one opportunity to review and comment on a registration statement covering securities that are substantially similar to those that would have the benefit of automatic shelf registration and pay-as-you-go registration fees. Because, as discussed above, it is the current practice of the Commission not to review repeat registration statements of ABS[3], we believe that this component of our definition of ABSI should ensure that our recommendation with respect to ABSIs does not result in substantial changes to the Commission's current review practice as it relates to ABS registered on Form S-3.

We are not requesting that ABS issuers or ABSIs be considered WKSIs, but instead that ABS issuers eligible to register on Form S-3, or, in the alternative, ABSIs, initially be accorded the same benefits as WKSI status under the Proposal. This approach would enable the Commission to review, on a case-by-case basis, whether any future benefits accorded to WKSIs after the initial adoption of the Proposal should also be extended to ABS issuers or ABSIs.

B. Subsection (vii) of Rule 415(a)(1) Should Be Retained As an Alternative to Rule 415(a)(1)(x).

In the Proposal, the Commission requests comment on whether it would be appropriate to delete Rule 415(a)(1)(vii) in light of the implementation of the Final Asset-Backed Securities Regulations.

Since 1983, Rule 415(a)(1)(vii) has permitted mortgage related securities to be registered for offering on a delayed or continuous basis regardless whether the offering was registered on Form S-3 or on another form.[4] The Commission staff has made clear that:

> although the Securities Act and the rules thereunder do not define mortgage related securities, the Exchange Act was amended to provide such definition in Section 3(a)(41). Because the term in Rule 415 was intended to have the same meaning as ultimately

[3] We recognize that the Commission will deviate from this practice in connection with the transition to Regulation AB, but presumably, this increase in review will be temporary.

[4] See Shelf Registration, Securities Act Release Nos. 33-6499; 34-20384; 35-23122 (Nov. 17, 1983).

> decided upon by Congress, a security meeting the definition in Section 3(a)(41) will also be deemed to be a mortgage related security for purposes of Rule 415… Permitting subsection (vii) to be available only for mortgage related securities as defined by Section 3(a)(41), but at the same time permitting other subsections of Rule 415 to be available for other filings involving mortgages, is consistent with the Congressional policy of facilitating the marketability of mortgages.[5]

Section 3(a)(41) was added to the Exchange Act by the Secondary Mortgage Market Enhancement Act of 1984 ("SMMEA").[6] The intent of SMMEA was to facilitate the secondary mortgage market by, among other things, providing certain preferred treatment to "mortgage related securities," which are defined as securities that are rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization and that (i) represent ownership interests in notes or participations in such notes, which notes are secured by a first lien on a single parcel of real estate and are originated by certain qualifying entities, or (ii) are secured by one or more such promissory notes or participations in such notes, and by their terms provide for payments in relation to payments or reasonable projections of payments on such notes or participations. Significantly, as reflected in the definition, the rating requirements for a security to be a mortgage related security (in the top two rating categories) is considerably higher than the ratings (in the top four rating categories) required for a security to be an asset-backed security eligible for registration on Form S-3 and therefore eligible to be offered on a delayed and continuous basis under subsection (x) of Rule 415(a)(1).

We believe that SMMEA, and its underlying Congressional policy of facilitating the marketability of mortgages, continue to support the Commission's long-standing policy of permitting mortgage related securities to be offered on a delayed or continuous basis and that this result should not be altered by the fact that such securities do not also qualify as ABS eligible for delayed and continuous offering pursuant to subsection (x) of Rule 415(a)(1). In addition to Congressional policy, we believe that the high ratings threshold for securities to qualify for this treatment supports such a practice. Accordingly, we urge the Commission to retain subsection (vii) of Rule 415(a)(1).

C. ABS Issuers Making Offers under Rule 415(1)(x) Should Be Permitted to Use Rule 430B.

As proposed, new Rule 430B would provide that information that is unknown or is not reasonably available may be omitted from a base shelf prospectus and later included in a prospectus supplement, Exchange Act report incorporated by reference or a post-effective amendment. Among other things, this rule would have the effect of eliminating the "convenience shelf" doctrine by allowing primary offerings on Form S-3 to occur promptly after effectiveness of a shelf registration statement, with the information omitted from the prospectus at the time of effectiveness subsequently provided in reliance upon new Rule 430B.

---

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

[6] Pub. L. 98-440.

As proposed, new Rule 430B would apply to delayed offerings under Rule 415(a)(1)(x) and to offerings of mortgage related securities under Rule 415(a)(1)(vii). In discussing Rule 430B, the Commission suggests that it is available to delayed offerings under Rule 415(1)(x) only to the extent the offering is made by issuers eligible to use Form S-3 to register a primary offering of securities in reliance on General Instructions I.B.1 or I.B.2 of Form S-3 Rule 430B.[7] This implies that Rule 430B would not apply to offerings under Rule 415(a)(1)(x) made by issuers eligible to register primary offerings of securities in reliance on General Instruction 1.B.5. – the instruction that issuers generally rely upon to register ABS on Form S-3.

We believe that the Commission's failure to refer to General Instruction 1.B.5. describing the applicability of Rule 430B may have been unintentional.[8] We see no reason that ABS issuers should be excluded from relying on Rule 430B or from being able to offer ABS promptly after effectiveness of a shelf registration statement. Accordingly, we request that the Commission clarify that Rule 430B applies to offerings made under Rule 415(a)(1)(x) by issuers eligible to use Form S-3 to register primary offerings of securities in reliance on General Instruction I.B.5 and that offerings of such securities promptly after effectiveness of a shelf registration statement are permitted.

D. The Three-Year Limitation on the Effectiveness of an ABS Shelf Registration Statement Should Be Eliminated.

We support the Commission's proposal to eliminate the provision of Rule 415 that limits the amount of securities that can be registered to the amount that the issuer intends to offer and sell within two years from the registration statement's effective date. We note, however, that, under the Proposal, a shelf registration statement could remain effective for only three years. This limitation appears designed to require an update of the disclosure document from time to time in order to make the relevant disclosure simpler for investors to locate. The theory is that, over time, issuers may file numerous prospectus supplements, post-effective amendments and incorporated Exchange Act reports, some of which relate only to specific offerings and some of which may have continuing relevance for future offerings. After three years, the burden imposed on investors finding the relevant filings will be too great in comparison to the cost of requiring the issuer to update the registration statement.

Although this rationale might apply to registration statements of some corporate issuers, it would not apply to most ABS registration statements. In general, prospectus supplements and Exchange Act reports filed by ABS issuers relate solely to one offering, and not to all offerings relating to a shelf registration statement. This general practice will continue after the Asset-Backed Securities Regulations become effective. ABS prospectus supplements will relate only to a single offering. ABS informational and computational materials will be filed on Form 8-K, and distribution date statements will be filed on Form 10-D, and both filings will relate only to a single offering. As a result, investors in ABS safely can assume that none of the materials filed with the SEC are relevant to future offerings except the registration statement itself and certain post-effective amendments. For example, they do not need to find and read numerous Exchange

[7] See fn. 261 of the Release.

[8] See fn. 131 of the Final Asset Backed Securities Regulations (indicating that the elimination of the restriction on "convenience shelves" would apply to ABS).

Act filings to understand the securities being offered. Nevertheless, the three-year limitation on ABS registrants would require each ABS registrant to undertake the time and expense of renewing its existing registration statement every three years (including filing new exhibits). We do not think any benefit to investors achieved by such an automatic requirement would be significant enough to justify the cost to registrants.[9]

We urge the Commission to modify the proposed requirement in connection with ABS registration statements to require that those registration statements be updated only if fundamental changes have occurred that otherwise require such an update under existing Commission rules.

If the Commission retains the three-year restatement requirement for ABS issuers, we would ask that our suggestion, made in the Primary ABA Letter, that use of the pre-existing shelf registration statement be permitted to continue pending completion and SEC staff review and effectiveness of the restated shelf registration statement, in order to avoid black-outs, be applied to ABS issuers.

III. Communications

A. Permitted Continuation of Ongoing Communications During an Offering

As noted by the Commission, a number of the safe harbor exclusions from gun-jumping will have only limited practical applicability to ABS issuers. Among those that will have some application in the ABS context is proposed Rule 168, which would be a safe harbor from the gun-jumping provisions for reporting issuer's continued publication or dissemination of regularly released factual business and forward-looking information. The only categories of factual business information covered by proposed Rule 168 that are likely to be applicable to an ABS issuer would be (a) factual information about the issuer or some aspect of its business or about its business or financial developments, (b) factual information about business or financial developments with respect to the issuer, and (c) factual information included in a report that the issuer files pursuant to the Exchange Act. The Commission cites, as an example of where Rule 168 could apply depending on the facts and circumstances, information conveyed to investors in outstanding ABS, such as static pool information provided to investors in outstanding ABS with respect to pools underlying such outstanding ABS, either in Exchange Act reports or other communications.

[9] We are not suggesting that ABS issuers do not encounter changes requiring post-effective amendments to registration statements nor are we suggesting any changes to the current requirements to file post-effective amendments in those circumstances.

We are concerned that factual business and forward-looking information published in respect of one issuing entity would not be protected by Rule 168 in respect of another issuing entity. Proposed Rule 168 protects information published by an "issuer" from being treated as an offer by that issuer for Securities Act purposes. Rule 191 provides that for ABS, however, the depositor for the ABS acting solely in its capacity as depositor for the issuing entity is the issuer; that depositor is a different "issuer" when acting as depositor for another issuing entity. This leads to the possibility, which we believe the Commission did not intend, that factual information published by the depositor in respect of one ABS issuing entity, but that may have some relevance to future ABS issuing entities of the same depositor, could be treated as gun-jumping offering material in respect of another ABS issuing entity about to engage in an offering.

In addition, as the Commission has clarified in the Final Asset-Backed Securities Regulations, each takedown by a new issuing entity triggers a separate Section 15(d) filing requirement. Whether Exchange Act reports must be filed with respect to a particular issuing entity at a given time often depends on whether enough time has passed since its last offering for its obligations to file such reports to have been automatically suspended under Section 15(d) of the Exchange Act. As a result, a depositor could be required to file Exchange Act reports with respect to an issuance by one issuing entity, but no longer be required to file reports with respect to an issuance by another issuing entity because of the automatic suspension of its filing obligations pursuant to Section 15(d). In this circumstance, it would be unclear whether the protections of Rule 168 would be available, even if the problem described in the previous paragraph is addressed, in circumstances where the information relates both to issuing entities still subject to Exchange Act reporting obligations, and to older issuing entities no longer subject to such requirements.

In fact, we believe that the automatic suspension of filing obligations that is frequently applicable to ABS issuers pursuant to Section 15(d) of the Exchange Act is an inappropriate distinction on which to base the disclosure of information to investors and should not serve to prevent the distribution of information to investors that the SEC would otherwise encourage. Accordingly, we believe that the Commission should permit reliance on the proposed Rule 168 safe harbor by all ABS issuers that have previously filed reports under the Exchange Act, regardless whether they are current filers. This more flexible approach would allow ABS investors access to greater information in a manner that is consistent with the goals of proposed Rule 168. Such an approach would properly balance the needs of ABS investors and the market for information, while retaining sufficient safeguards through ABS issuer liability for such information under Exchange Act Section 10(b) and Exchange Act Rule 10b-5.

In order to address these problems, we recommend that Rules 167 and 168 be modified to provide that an "issuer" for purposes of these safe harbors means the depositor acting for any issuing entity. Furthermore, we recommend that Rule 168 also be made available to ABS issuing entities having a common depositor that have previously been required to file reports under the Exchange Act, even if none of them is currently required to file such reports.[10]

B. Relaxation of Restrictions on Written Offering-Related Communications

1. We Recommend Modest Additions to Rule 134.

We appreciate the careful consideration that the Commission has given the comment letters that were submitted in connection with the Proposed Asset-Backed Securities Regulations,[11] which has resulted in revisions to Rule 134 that will promote disclosure that is more pertinent to potential ABS investors. Two additional changes to Rule 134 would permit a disclosure package regarding ABS securities that would be as useful to potential ABS investors as the type of information currently permitted is to corporate investors.

With respect to ABS, we recommend that Rule 134 be expanded to include:

- summary basic terms of the securities, such as first and last payment date, accrual periods and weighted average life (this would be consistent with information currently permitted, such as maturity and interest rate provisions); and
- basic ERISA information (similar to the tax information that is currently permitted).

We believe that permitting the disclosure of these factual items pursuant to Rule 134 will be beneficial to potential investors and helpful to issuers and will not damage the integrity of the Securities Act disclosure system.

2. Permissible Use of Free Writing Prospectus

[10] Please note that we suggest including not only voluntary filers, but also registrants that are not required to file, and do not file, Exchange Act reports.

[11] Asset-Backed Securities; Release Nos. 33-8419; 34-49644 (May 3, 2004) ("Proposed Asset-Backed Securities Regulations").

Under the Asset-Backed Securities Regulations, "ABS informational and computational materials" relating to an offering would have to be filed on Form 8-K and incorporated by reference into the registration statement, regardless who prepared the materials. Under proposed Rule 164, which would supersede the regime contained in the Asset-Backed Securities Regulations, such informational and computational materials would be considered free writing prospectuses whose use would be conditioned on satisfying the conditions set forth in proposed Rule 164 and proposed Rule 433. In some respects, existing Rule 167 is better tailored to ABS offerings than are the rules regarding free writing prospectuses. For example, the filing deadlines in the Proposal are more restrictive than those of Rule 426.

Accordingly, we respectfully suggest that the Commission retain Rule 167 and the provisions of Rule 426 that govern related filings as alternatives to the free writing prospectus rules for ABS. We respectfully request, however, that the Commission permit that the ABS informational and computational materials be filed not in a Form 8-K, but rather by a separate form that is not incorporated by reference into the registration statement, much as provided in Rule 433. There would be two benefits to making this change. First, if a different form is used, ABS informational and computational materials, like distribution reports after they are filed on Form 10-D, would be easier to find on EDGAR and to distinguish from true updates requiring filing on Form 8-K. Second, by clarifying that ABS informational and computational materials are not incorporated by reference into the registration statement, the Commission would clarify that any liability associated with such materials would be limited to Section 12(a)(2) or 17(a)(2) as in effect provided under Rule 433, rather than be subject to Section 11 liability. In addition, we have a few suggestions for improvement of the rules regarding free writing prospectuses as those rules apply to ABS.

(a) ***We Urge the Commission to Make Free Writing Prospectuses Available to All ABS Issuers*****.** In the Proposal, the Commission asks whether it should "be more restrictive regarding the use of free writing by ABS issuers and, as is the case today, only permit it for ABS issuers eligible to use Form S-3."[12] We respectfully suggest that the Commission should not restrict the use in this manner.

We believe that the intended function of free writing prospectuses under the Proposal is fundamentally different from the objective of the no-action letters that currently serve as the basis for allowing written communications in connection with offerings off shelf registration statements that are substantially similar to previous offerings. Although the no-action letter approach has been largely codified in the Final Asset-Backed Securities Regulations, the Commission made clear that this result was in large part due to the fact that these issues were to be revisited and addressed in connection with the Proposal. Through the innovative free writing prospectus framework that the Commission has unveiled in the Proposal, the Commission has promoted the dissemination of information to investors generally, and such goals are best and most successfully realized through the extension of the free writing proposal to all ABS issuers.

[12] Securities Offering Reform, Proposed Rule; Release Nos. 33-8501; 34-50624 (November 17, 2004), p. 67444.

As a result, we recommend that the Commission allow the use of free writing by ABS issuers on the same basis as corporate issuers and not limit its use to ABS issuers eligible to use Form S-3. We note that proposed Rule 168 appropriately refrains from conditioning the application of the safe harbor on whether the related securities were registered on Form S-1 or Form S-3. We believe that disclosure to prospective investors through free writing prospectuses should similarly be encouraged regardless whether the offering is being conducted on Form S-1 or Form S-3.

In the ABS market, historically many issuers may have filed on Form S-1 rather than Form S-3 either because they did not contemplate another transaction within the following two years or because, in the case of lease transactions, the securitized pool balance may have been supported in part by the residual values of the related vehicles. In the latter case, within certain limits, these transactions will now be eligible under the Asset-Backed Securities Regulations to be filed on Form S-3. In either case, it would not be favorable to facilitate disclosure to investors in transactions where the depositor contemplates doing more than one transaction in two years and, therefore, registers its transaction on Form S-3, while discouraging disclosure to investors in an otherwise identical transaction, but for the fact that the depositor in that case only contemplates one deal in the following two-year period. In fact, such an approach would unfairly subject smaller issuers that do less frequent transactions to a competitive disadvantage to larger issuers, with no corresponding benefit to investors. Alternatively, going forward, this restriction may simply encourage smaller issuers that contemplate only one transaction to register that transaction on Form S-3 so as to have the marketing advantages available through the use of free writing prospectuses.

(b) ***We Suggest Technical Corrections to the Term "Seasoned Issuers" as Applied to ABS.*** In Part VIII of the Release, the Commission states that "ABS issuers eligible to use Form S-3 would be seasoned issuers." Proposed Rule 433 would condition use of free writing prospectuses in offerings registered on Form S-3 on filing a registration statement containing a statutory prospectus complying with our requirements, but not on actual delivery of that prospectus."[13] However, there are several anomalies that should be corrected to ensure that the Commission's stated intent is realized.

To meet the Commission's stated intent, it should be clear that Rule 433(b)(1), which requires actual prospectus delivery, and not just filing, as a condition to free writing, should not apply to ABS issuers eligible to use Form S-3. Similarly, it should be clear that Rule 433(b)(2) applies to ABS issuers eligible to use Form S-3.

The introductory paragraph of Rule 433(b)(1), however, omits a necessary reference to General Instruction I.B.5 (the instruction applicable to ABS issuers) in the list of Form S-3 instructions set forth therein. This omission results in the application of Rule 433(b)(1) to these ABS issuers. Because of this technical oversight, proposed Rule 433(b)(1), as written, would require delivery of the prospectus prior to or concurrent with the delivery of the applicable free writing prospectus. Because this result would be inconsistent with the

[13] Securities Offering Reform, Proposed Rule; Release Nos. 33-8501; 34-50624 (November 17, 2004), p. 67443.

Commission's stated intent, we recommend that General Instruction I.B.5 be added to the list of Form S-3 instructions set forth in Rule 433(b)(1).

Similarly, Rule 433(b)(2) excludes ABS issuers from using a free writing prospectus. The problem is that Rule 433(b)(2) purports to apply only "[i]f at the time of the filing of the registration statement and at the time of an amendment to the registration statement for purposes of complying with Section 10(a)(3), the issuer is a well known seasoned issuer, or if not a well known seasoned issuer, *is an issuer eligible to use Form S-3* or Form F-3 … to register securities to be offered and sold by or on its behalf, on behalf of its subsidiary or on behalf of a person of which it is the subsidiary pursuant to General Instructions I.B.1, I.B.2, or I.C. of Form S-3 or General Instruction I.A.5, I.B.1 or I.B.2 of Form F-3. . . ." (emphasis added). The references to the General Instructions (which do not include I.B.5 of Form S-3) serve as a limitation on the italicized language, and accordingly the language excludes asset-backed issuers from treatment as seasoned issuers. Adding General Instruction I.B.5 to the list of Form S-3 instructions set forth in Rule 433(b)(2) would implement the Commission's stated intent.

The same technical comments are applicable to Form S-3 General Instructions II.D and II.F, to which we recommend including references to General Instruction I.B.5 in each such instruction where the list of the applicable general instructions is set forth therein.

To clarify the Commission's intent regarding ABS issuers' use of Rule 433(b), the Commission could consider adding a new defined term "seasoned issuer" to proposed Rule 405, which would be defined to include, among other things, ABS issuers eligible to use Form S-3 pursuant to General Instruction I.B.5. This defined term could then be used in place of the seasoned issuer description that is currently utilized in Rule 433(b)(1) and (2) and in other rules in the Proposal.

(c) *We Suggest that Underwriter Materials that Are Based Upon, But Do Not Include, Issuer Information Need Not Be Filed.*

The Commission has inquired whether a set of computational materials prepared by an underwriter, to the extent those materials are based upon asset data received from the issuer, but do not actually include that information, should be considered an "issuer-prepared free writing prospectus" and thus be required to be filed. We request that the Commission clarify that, as long as the issuer information provided to the underwriter is not included in the underwriter-prepared computational materials and the underwriter-prepared computational materials contain only output based on the issuer information, the underwriter information need not be filed. This result is consistent with the Proposal as it applies to corporate issuers generally,[14] and it appropriately removes a burden from filing on issuers that have not prepared such information or had such information prepared on their behalf. The Commission's rationale that the benefits of such a filing to investors do not outweigh the corresponding burdens placed on corporate issuers applies with even more force in the realm of ABS issuers, which are not operating companies and which would suffer from compliance burdens to an even greater degree than would operating companies, both in terms of expense and effort.

[14] See Part III.D.iii.(a)(3)(a) of the Proposal.

Moreover, as we noted in the Primary ABA Letter, it is unfair, in our view, for an issuer to be compelled to assume the risk of Section 12(a)(2) liability for the content of a third-party communication disseminated in some cases before the issuer even has an opportunity to review and correct any possible misstatements, much less file the communication in a timely manner. This is particularly troublesome in ABS offerings, where underwriter-prepared computational materials may be complex and require significant time and effort to verify.

(d) ***We Suggest Some Clarifications in the Application of Other Portions of the Communications Provisions of the Proposal to ABS Offerings.***

(i) Pre-Sale Reports. We request that the Commission clarify that, under the Proposal, a rating agency's pre-sale report, if distributed by a party other than the issuer or an underwriter and not used in connection with an offer to sell by either the issuer or an underwriter, would not violate Section 5 of the Securities Act and would not be a free writing prospectus that the issuer would be required to file with the Commission under proposed Rule 433.

As we mentioned in the Primary ABA Letter, we suggest that the Commission clarify that these rating agency reports are not free writing prospectuses, and therefore not subject to Section 12(a)(2) liability or filing requirements, because these reports are not offers within the meaning of Securities Act Section 2(a)(3), unless the issuer or underwriter uses the reports in making offers. The language of Rule 433(f) suggests that any third party publication would be a free writing prospectus if the issuer or other offering participant provided information to the third-party. We believe the Commission did not intend that result in respect of rating agency reports that are not used by the issuer or an offering participant in making offers.

(ii) ABS Informational and Computational Material. We request clarification that following the adoption of the Proposal, materials that would have previously consisted of "ABS informational and computational materials" as set forth in Item 1101(a) of the Asset-Backed Securities Regulations instead will be considered free writing prospectuses and will be treated accordingly under the Proposal's regime and that the Final Asset-Backed Securities Regulations' concept of ABS informational and computational materials and the related filing rules will no longer apply.

We also recommend that, with respect to ABS, the Commission permit free writing prospectuses that previously constituted ABS informational and computational materials to continue to be subject to the more generous filing timeframe requirements as set forth in Rule 426(b)(2), which is more consistent with past ABS no-action letters and current ABS practice, than the required filing timeframe proposed in Rule 433(d)(1). Filing ABS informational and computational materials on EDGAR can also be particularly time-consuming for ABS issuers and underwriters due to the format of the materials that must be filed, so the time period currently permitted for such filings is necessary in order for such materials to be able to be used practically. Adherence to the more rigid timeframe in Rule 433 would be a step backwards from the striking advances that the Commission has realized with respect to communications in the ABS market through its recent adoption of the Final Asset-Backed Securities Regulations.

(iii) Shell Companies. Although we recognize that the Commission's intent is that an ABS depositor or issuing entity would not be considered a "shell company" that would constitute an "ineligible issuer" under proposed Rule 405, we request clarification of that fact in the definition of Rule 405, because that definition could be read to capture these entities. Asset-backed transactions include depositors and issuing entities that are purposefully structured to have limited activities and to hold no assets other than those related to the transaction. These are fundamental requirements in the definition of "asset-backed security" and in the related conditions as recently promulgated by the Commission in the Final Asset-Backed Securities Regulations. As the Commission is aware, these structural features offer bankruptcy protections and other benefits to investors by decreasing risks not related to the pool assets being securitized and thereby increasing the value of the ABS being issued.

(iv) Ineligible Issuers. We recommend that clause (1)(i) of the definition of "ineligible issuer" set forth in proposed Rule 405 be limited to a one-year time frame as it applies to ABS, which would then be consistent with the look-back window for shelf eligibility. Filings before that period are not likely to have any relevance with respect to potential investors in securities backed by pools of assets yet to be securitized by an issuer. Furthermore, even in the context of a master trust, there would not be any significant additional benefit to potential investors if the issuer were prevented from using free writing prospectuses as otherwise permitted by a seasoned issuer, and in fact the result may be detrimental to such investors in that they would most likely get even less information because it would be more difficult for an issuer or underwriter to provide it.

(v) Time of Determination. We respectfully request clarification that the question whether an issuer is an "ineligible issuer" be determined only at the time that a free writing prospectus is used.

(vi) Reasonable Belief. We recommend that Rule 433(b)(4) be revised to allow parties other than the issuer to rely on Rule 433 based on such party's reasonable belief that the issuer is not an "ineligible issuer."

IV. WEB SITE, REGULATION FD DISCLOSURE, RESEARCH REPORTS AND LIABILITY.

A. Web Site and Other Electronic Communication Issues.

Please clarify that static pool data provided on an issuer Web site are not a free writing prospectus under proposed Rule 433.

We commend the Commission for encouraging the use of Web sites as a means of providing information to investors and prospective investors, both in the Proposal and in the Final Asset-Backed Securities Regulations. We have the following specific comment:

The Final Asset-Backed Securities Regulations permit issuers, as an alternative to inclusion in the prospectus, to disclose static pool data on a Web site, provided certain conditions are met. Static pool data disclosed on a Web site are deemed to be included in the prospectus and subject to the same liability provisions, including Section 11 of the Securities Act, as if the

information were directly included in the related prospectus and registration statement.[15] Under new Rule 312 of Regulation S-T adopted as part of the Final Asset-Backed Securities Regulations, at least until December 31, 2009, static pool data disclosed on a Web site are not required to be separately filed on EDGAR, provided the stated conditions are met.

We request that the Commission clarify that static pool data properly disclosed on a Web site and deemed included in the prospectus pursuant to the Final Asset-Backed Securities Regulations is not a free writing prospectus requiring separate filing on EDGAR. Because such static pool data is deemed included in the statutory prospectus, there is no reason to view it as separate free writing prospectus.

Although we believe this outcome is intended by the Commission, proposed Rule 433(e) would provide that historical issuer information properly segregated and identified as such is not a free writing prospectus "unless such information has been incorporated by reference into or otherwise included in a prospectus . . . ." We are concerned that under this provision static pool data could be viewed as "historical issuer information" that constitutes a free writing prospectus by virtue of its inclusion in the prospectus pursuant to the Final Asset-Backed Securities Regulations and that such free writing prospectus must be filed on EDGAR, thereby superseding the provision of the Final Asset-Backed Securities Regulations that otherwise establishes that, at least until December 31, 2009, static pool data properly disclosed on a Web site need not be filed on EDGAR. We urge the Commission to make clear, either in the adopting release or the final regulation itself, that Rule 433 does not override the Final Asset-Backed Securities Regulations provisions regarding presentation of static pool data.

B. Regulation FD.

Please clarify that the exclusion from Regulation FD applies to static pool data disclosed on a Web site in accordance with the Asset-Backed Securities Regulations and Regulation S-T.

As previously noted, the Final Asset-Backed Securities Regulations and revisions to Regulation S-T promulgated under the Final Asset-Backed Securities Regulations provide that static pool data may be filed on a Web site provided certain conditions are met. We further understand, as set forth in Section IV.A. above, that static pool data (other than static pool data relating to periods prior to January 1, 2006) are part of the registration statement and statutory prospectus (and do not constitute a free writing prospectus). We also note that under the revisions to Regulation FD included in the Proposal, the registration statement and statutory prospectus are to be specifically excluded from the application of Regulation FD. Therefore, static pool data posted on Web sites in accordance with the Final Asset-Backed Securities Regulations and Regulation S-T would be excluded from Regulation FD. We request that the Commission confirm this. In addition, because the transition rules permit the use of static pool

[15] In recognition that parties may not have been gathering information with Section 11 liability in mind, the Commission has provided an exception to this result for information relating to the sponsor's prior securitized pools that were established before January 1, 2006, and for information on currently offered pools for periods prior to January 1, 2006. This information may be omitted in certain circumstances and if it is included it is not deemed to be incorporated into the registration statement. See pp. 1543-1544 of the Final Asset-Backed Securities Regulations.

data relating to prior securitized pools and information prior to January 1, 2006 without incorporating this information into the registration statement, we request that the Commission clarify that static pool information used in this fashion also is excluded from Regulation FD. This confirmation and clarification are reasonable in light of the Commission's acknowledgement that this information is an integral part of the registration and offering process, because of the various practical difficulties in disclosing such information in a format other than on a Web site, and because of the practical difficulties posed by filing such data on EDGAR, as already acknowledged by the Commission's determination not to require EDGAR filing of such data at least until December 31, 2009.

C. Research Reports and Other Information, Opinions and Recommendations.

Please amend Rule 139a to conform to the liberalized provisions of Rules 137, 138 and 139.

The Final Asset-Backed Securities Regulations include Rule 139a, which codifies a no-action letter regarding the distribution of research reports and other information, opinions and recommendations pertaining to ABS. The Proposal would liberalize several current requirements applicable to the distribution of research reports under Rules 137, 138 and 139. The Commission notes in the Proposal that, to the extent changes to Rules 137, 138 and 139 are adopted, the Commission will consider making similar changes to Rule 139a.

In this regard, we specifically request that, to the extent such proposals are adopted in the final regulations, Rule 139a be amended to eliminate the requirement of publication with reasonable regularity and the prohibition on broker-dealers making a recommendation more favorable than the last recommendation. We urge the Commission, however, not to narrow the scope of Rule 139a to apply only to research reports. That change would be a major truncation of the 1997 no-action relief upon which Rule 139a was based. Instead, Rule 139a should apply to "information, opinions and recommendations," as did the original no-action relief and as do current Rules 137-139. Our reasons are the same as those stated in the Primary ABA Letter for not similarly limiting the Rules 137-139.

D. Liability.

We appreciate the guidance with regard to determination of and standards for liability that the Commission is trying to provide to market participants and investors by proposing new Rule 159. We agree that materials such as term sheets that are within the definition of "ABS informational and computational materials" as defined in the Final Asset-Backed Securities Regulations should be subject to liability under Sections 12(a)(2) or 17(a)(2) to the same extent as free writing prospectuses would be under the Proposal. We endorse the concept underlying proposed Rule 159 – that disclosure liability should be predicated on information conveyed up to the time the investor is unconditionally bound. We believe, however, that without further clarification that the current prevailing mechanics and customs in the ABS market are consistent with proposed Rule 159, "speed bumps" and disruption of the current ABS market will occur. This concern stems from the fact that ABS market participants currently convey term sheets and a base prospectus by "trade date," and provide a subsequent right to disaffirm after conveyance

of the final prospectus if the disclosures in the final prospectus would render the term sheet and other prior disclosures materially untrue or materially misleading.

We note that Proposed Rule 159 may be unclear about the time when the accuracy of any free writing prospectus would be tested, in cases where a free writing prospectus was provided at or before the time of the initial creation of the contract of sale (the "trade date"), but the contract of sale contains an enforceable condition subsequent to the effect that the investor is not obligated to purchase if there is a material change between the preliminary information as of the trade date and the final prospectus. In this regard, we reiterate the proposal in the Primary ABA Letter requesting the Commission to provide an express definition for the relevant time. In the Primary ABA Letter, we urged the Commission to adopt a definition for the phrase "time of sale" to clarify the Commission's intention.[16] We note that whenever Rule 159 uses the term "time of sale," a parenthetical follows, either "(including, without limitation, a contract of sale)" or "(including a contract of sale)." The intention of our proposal in the Primary ABA Letter was to suggest a clarification of the time of sale, including the time of any contract of sale, for purposes of Rule 159.

Addition of the proposed definition would confirm that the underwriter and investor could enter into a contract of sale under which they agree that the investor's obligation to purchase is subject to the condition subsequent that there are no material changes between the preliminary information and the final prospectus that would render the preliminary information materially false or misleading. With that agreement, Section 12(a)(2) and 17(a)(2) liability would be based on the totality of information conveyed during the offering process, including the final prospectus, and would not be based solely on the preliminary information. We believe that state laws governing contracts would permit this kind of agreement, but the requested definition is intended to clarify that nothing in Rule 159 is intended to call into question this basic right of contract.

If that proposal is not accepted by the SEC, we are concerned that uncertainties about operation of Rule 159 would cause ABS market participants to believe they must make significant changes relating to the use of preliminary information, which would have a major disruptive effect. Please also note our alternative proposal under IV. D. 3. below.

In this regard, we have the following specific comments:

---

[16] The Primary ABA Letter proposed that the following definition of "time of sale" be added to Rule 159:

> For purposes of this rule, "time of sale" means the time when, under the terms of the contract of sale pursuant to which the purchaser buys the offered securities and under applicable state law, the purchaser is obligated to purchase the offered securities without conditions relating to information that may in the future be conveyed to the investor. Such a condition includes a right by the purchaser to disaffirm based on information conveyed, whether that right is part of the original contract of sale or is subsequently granted to the purchaser.

1. Proposed Rule 159, if adopted without change, could cause a substantial change in ABS market participants' current practice relating to use of term sheets in the ABS markets, and could be disruptive to the market.

If proposed Rule 159 is adopted without change, ABS market participants would be justifiably concerned about investor allegations that no information after trade date may be taken into account under any circumstances.[17] Such investors would allege liability under Sections 12(a)(2) or 17(a)(2) based solely on an error or omission contained in the preliminary information provided to those investors at the trade date, when the contract of sale was initially created, regardless whether that error or omission was corrected at any subsequent stage in the offering process or in the final prospectus before the investor became unconditionally bound. Under these kinds of allegations, if a security is sold on the basis of preliminary information, but the investor is informed of a material change, either by a correction made in the final prospectus or through some other document subsequently conveyed, and the investor decides, despite the new information, to go forward and purchase the security, the issuer and underwriter nevertheless would be left with potential liability under Sections 12(a)(2) or 17(a)(2) based on preliminary information, which the issuer and underwriter cannot cure. Given the risk that such claims could succeed in some situations, despite our view that such an outcome would be contrary to the intent of proposed Rule 159, ABS market participants would likely change their practices to avoid that risk.

Under the existing ABS framework, investors and underwriters alike act in a manner that reflects a belief that if there is a material change between the preliminary information and the final prospectus the investor has the right to break the trade before settlement based on a material change that renders the preliminary information materially false or misleading. If a material change occurs, it is customary practice for the underwriter to bring the change to the attention of each investor before settlement, and, depending on the nature of the change, either permit the investor to disaffirm the purchase or expressly confirm whether the investor intends to complete the purchase notwithstanding the material change.[18] Clearly, an underwriter that failed to follow this practice would be at risk. But the prevailing ABS framework, as understood by both underwriters and investors, does not include the right to break the trade, if a material change occurs, for *any* reason unrelated to the material change.

As long as term sheets and other preliminary information are used in a manner consistent with the preceding paragraph, we believe that participants in the ABS market generally do not perceive that there can be any potential Section 12(a)(2) or 17(a)(2) claims based solely on the preliminary information. We note that until the recent adoption of the Final Asset-Backed

---

[17] We believe that, even if adopted without the change proposed in the Primary ABA Letter, proposed Rule 159 should be interpreted so that "time of sale (including, without limitation, contract of sale)" takes into account information conveyed after trade date if the investor has the right to disaffirm based on final information subsequently conveyed. However, potential Section 12(a)(2) and 17(a)(2) liability is a very serious consequence, and accordingly ABS participants are likely to change their practices to protect against this consequence.

[18] For example, if the material change resulted from the inclusion of material information in the final prospectus of a type that was not included in the preliminary information but does not conflict with it and the final terms are believed consistent with the expectations of the investor based on market practice and prior dealing with the same depositor, it would be incumbent on the investor to review the final prospectus and disaffirm if the investor believes there are material changes that render the preliminary information materially untrue or materially misleading.

Securities Regulations, ABS term sheets routinely stated that their content would be superseded by the contents of the final prospectus, consistent with the no-action letters that originally permitted the use of these types of materials.

We note in this regard that a term sheet is not designed to stand on its own. For example, it would typically not include risk factors or the detailed disclosure about significant servicers and credit enhancers that is required under the Final Asset-Backed Securities Regulations.

For these reasons, the current practice of using term sheets in ABS transactions would become problematic if Rule 159 is adopted without change, due to the concern by issuers and underwriters that they would face a risk of Section 12(a)(2) and 17(a)(2) liability based on the term sheet alone, without regard to the final prospectus and related right to disaffirm based on those disclosures. Term sheets used today in ABS offerings do not contain all material information about the offering. Rather, they contain effectively only a summary of the most important material information, and are subject to a condition subsequent that there will be no material changes between the time that the term sheet or other preliminary information is disseminated and the time of the final prospectus. We also note that, in Rule 167, which the Commission only recently adopted in the Final Asset-Backed Securities Regulations, the Commission expressly sanctioned the use of such a term sheet, in lieu of a conventional preliminary prospectus normally used in the non-ABS context. Nevertheless, if the Commission adopts Rule 159 in its current form, Rule 159 could create a risk, or perception of a risk, that liability would be imposed upon issuers and underwriters that are using term sheets fully in compliance with Rule 167.

Currently, underwriters do not obtain a disclosure letter (sometimes referred to as a "10b-5 letter") from outside counsel as to the accuracy of ABS term sheets. Although term sheets are subject to Section 12(a)(2), that potential liability is assessed today as part of the total mix of information conveyed to the investor before it is unconditionally bound, including the final prospectus. We submit that if issuers and underwriters believed that they could have Section 12(a)(2) liability on an ABS term sheet without regard to the contents of the final prospectus, they may not permit such materials to be used without a 10b-5 letter. As a practical matter, these letters may be difficult to obtain with respect to term sheets and other preliminary information. In order to obtain these letters, or merely as a risk management strategy, participants could be required to convey at the term sheet stage additional information, such as offering-specific risk factors. Given the lack of precedent for evaluating Section 12(a)(2) liability on an ABS term sheet without regard to the contents of the final prospectus, it appears at this time that issuers and underwriters would in effect be forced to increase the information provided in term sheets to a level approaching that of a final prospectus in order to obtain a 10b-5 letter. Although some of this information could be conveyed prior to pricing, some is pricing-related and therefore could not be conveyed in advance, with the result that a major "speed bump" will have been created.

For these reasons, Rule 159 as proposed creates a new risk — that liability would be determined at initial creation of the contract of sale without regard to a right to disaffirm based on information subsequently provided, including in the final prospectus. Without changes to Rule 159, this new risk would dramatically change ABS offering practices.

Footnote 247 of the Proposal refers to reforming or entering into a new contract at the time of provision of subsequent information. The difficulty with this approach, if applied formalistically, is that, because reforming a contract means that the old contract is being replaced by a new and different contract, the investor under this approach would have the ability to refuse to enter into the new contract for any reason whether or not related to the material change, including for example changes in market conditions. Unfortunately, this solution is not helpful to market participants, because it effectively gives the investor an option whether to not go forward for any reason in the event of any material change in disclosure. Issuers and underwriters do not want to give that option, which could also have adverse net capital and other consequences by calling into question whether a sale has occurred, and investors do not want to pay for that option.

With offerings of ABS, like non-ABS, there may be legitimate opportunities to include in the final prospectus material information that is not known at the time of entering into the contract of sale or that is beyond the level of detail typically included in a term sheet. In the ABS context, this information includes detailed information about significant servicers and enhancement providers, the precise terms of enhancement agreements and the final composition of the pool assets. It is quite common that information such as this, which may well be material and may in hindsight raise concerns that the preliminary information was materially false or misleading, only becomes finalized after the parties enter into the contract of sale.

The Proposal also does not seem to contemplate the iterative aspect of an ABS offering as applied in the shelf context. ABS offerings often take place over a period of days or weeks based on preliminary information, even before a final term sheet can be provided, with investors giving indications of interest on a rolling or staggered basis, and the structure is fine-tuned and at times substantially revised based on the input received from investors over this period. This iterative method of offering allows investor input into the structure and provides better pricing and thus greater market efficiency than would be the case if investors could not participate in developing the structure. In ABS offerings pursuant to an already-effective shelf registration statement, contracts of sale may be made instead of mere indications of interest. Making firm sales (subject to a right to disaffirm based on final prospectus disclosure) has the effect of reducing uncertainty about the ultimate success of the offering on the indicative terms, which improves efficiency of pricing and other terms. Even if it were possible to provide materially complete information for contracts of sale made at the end of this process, it would likely not be possible to provide complete, or as complete, information to investors that agree to purchase earlier in the process. An allegation that information conveyed after these sales cannot be taken into account, even where a right of disaffirmance is granted, would, if successful, be fatal to this iterative market practice. Accordingly, it appears inevitable that the adoption of proposed Rule 159 without change would result in significant delays in the offering process, by inducing participants to delay the times when many binding contracts of sale are entered into.

In the Proposal, the Commission states that "materially accurate and complete information about an issuer and the securities being sold should be available to investors at the time of contract of sale." We submit that this goal is not achievable without forcing substantial change in the manner in which ABS are offered, such as providing substantially more information at the time the contract of sale is created or delaying the time at which a binding contract of sale occurs. We are also concerned that the "materially… complete" language quoted

above from the release may go farther than the literal text of proposed Rule 159 and form the basis of allegations that the rule should be interpreted to require that the full contents of the final prospectus be provided at the creation of the contract of sale, notwithstanding the existence of a right to disaffirm based on the final prospectus.

We believe that investors are adequately protected under the existing framework, provided that term sheets are used in a manner consistent with industry practices as outlined above.

2. The existing framework in the ABS market for determining liability based on the use of preliminary information provides adequate legal protections for investors.

In the ABS market, under current practice, issuers and underwriters as well as investors act in a manner that reflects a belief that if a contract of sale for a security is entered into on the basis of preliminary information, and if there are material changes between the preliminary information and the final prospectus that renders the preliminary information materially false or misleading, then, until the time of settlement, the investor has the right to break the trade based on information conveyed about the material change.

In the ABS market, "preliminary information" normally constitutes all information conveyed to the investor at the time a contract of sale is executed, whether in the form of term sheets or computational material (the most common form of such information and now explicitly permitted as ABS informational and computational material under Rule 167), a preliminary prospectus, a free writing prospectus or oral statements. In the ABS markets, a "material change" that renders the preliminary information materially false or misleading may include (a) a material error in the preliminary information that is corrected in the final prospectus, (b) a change of a material term or pool characteristic between the preliminary information and the final prospectus or (c) the omission of material information from the preliminary information, which omitted information was ultimately included in the final prospectus and the absence of which rendered the preliminary information materially false or misleading. Generally, the omission from the preliminary information of information that was ultimately included in the final prospectus would not be considered an omission that rendered the preliminary information materially false or misleading if such information related to provisions that are consistent with the investor's expectations based on prevailing ABS market practices or prior offerings by the depositor.

If the issuer or underwriter believes that there are material changes between the preliminary information and the final prospectus, current best practice is to alert the investor prior to settlement and to give the investor an opportunity to break the trade or to agree to re-price the trade. However, if the investor does not avail itself of this opportunity and instead goes on to settle the trade, it is generally believed that the investor has reaffirmed the transaction and therefore, that the investor does not have a claim for rescission or damages under Section 12(a)(2).

This framework is consistent with the view that Section 12(a)(2) liability is based on the aggregate information provided during the offering period until the time that the investor cannot disaffirm the transaction based on final information, including the final prospectus, as well as the

manner in which the information is provided, and that such liability should not be based solely on preliminary information provided to the investor. It is also consistent with the view that the phrase "in the light of the circumstances under which they were made" refers to the entire offering process in determining whether a materially misleading statement or omission was made for purposes of Section 12(a)(2).

This framework is also consistent with the position that, in any contract of sale based on preliminary information, the investor's obligation to purchase is subject to the condition subsequent that there are no material changes as described above between the preliminary information and the final prospectus. Without that condition subsequent, the investor could be obligated to purchase based on preliminary information even if that information proved materially false or misleading, and the underwriter could be subject to liability for selling based on preliminary information that was materially false or misleading. Under current law and practice, we believe industry participants assume that any such sale would give rise to a possible Section 12(a)(2) claim under the Securities Act. Accordingly, under existing ABS practice, the investor's right to break the trade if there is a material change between the preliminary information and the final prospectus provides appropriate protections to the investor, consistent with current law.

3. If the Commission is unwilling to make the changes to Rule 159 requested in the Primary ABA Letter, alternative changes would need to be made to the Rule to prevent market disruption.

We request that the Commission revise Rule 159 as suggested in the Primary ABA Letter, as discussed and with the effect noted above.

If the Commission does not adopt the definition of "time of sale" and the related suggestions, we would respectfully request that the Commission clarify that if a contract of sale (the "original contract") for a security is entered into prior to delivery of the final prospectus, and if settlement subsequently occurs, then the investor will be deemed to have reaffirmed its investment decision upon delivery of the final prospectus (and the time of contract of sale will be deemed to be the time of delivery of the final prospectus for purposes of Rule 159) provided that:

(a) if any material information contained in the final prospectus, or in any other information conveyed after the original contract but prior to the final prospectus, revises and materially conflicts with any preliminary information provided at or prior to the original contract, then the issuer or underwriter has brought to the investor's attention the revised information prior to settlement, or

(b) the final prospectus has been delivered in a manner that provides the investor a reasonable time to review it prior to settlement.

In determining whether either these requirements were complied with, one would undertake a facts and circumstances analysis. For example, if the original contract was entered into based on a preliminary term sheet, and if any material information in the preliminary term sheet was materially changed, the underwriter would generally be viewed as having brought to the investor's attention the material change to the investor if it provided a final version of the

term sheet with the correct information prior to settlement. Similarly determining a reasonable time for review would depend on the facts. We believe that generally 48 hours (excluding non-business days) should constitute a reasonable time for an institutional ABS investor to review the final prospectus prior to settlement.

We believe that this approach provides ample protection for investors that enter into contracts of sale based on preliminary information. With respect to material changes that constitute revisions that materially conflict with the preliminary information, the change must be brought to the investor's attention before settlement or the investor must have a reasonable opportunity to review the final prospectus prior to settlement. With respect to material changes that constitute information included in the final prospectus but omitted from the preliminary information, the investor will be provided the opportunity to review the final prospectus prior to settlement. [19] In either case, the investor has the ability to make its own determination whether the change was so significant that the investment no longer is desirable. If neither of these requirements is met, then the investor will have a potential claim under Section 12(a)(2) pursuant to Rule 159 for any material change from the preliminary information that renders the preliminary information materially false or misleading.

In making this alternative proposal, we note that in practice one result of this approach may be to add a significant amount of time to the period between the trade date and settlement, perhaps as much as an additional 48 hours, as compared to the current practice, for many ABS offerings. We believe that an economic analysis of the cost and market impact of this approach may be warranted. For this reason, we reiterate our support for the revision to proposed Rule 159 as suggested in the Primary ABA Letter.

4. The concept in Rule 159 of what is "conveyed" at the time of sale should be clarified.

In the context of ABS, it is not clear under the Proposal what information will be deemed to be "conveyed" to the investor at the time of sale. In the ABS market, as the Commission recognized in adopting Rule 167, a variety of documents (i.e., term sheets and computational materials, etc) may be provided. We ask that the Commission provide more specific guidance for ABS market participants regarding what information will be deemed conveyed at the time of unconditional contract of sale for purposes of proposed Rule 159. Among other things, we ask that this guidance also be consistent with what the Commission already permits under Rule 167.

We request that the Commission clarify that, at a minimum, specified filings pertaining to the particular offering, or any participant in the offering (such as the sponsor, originator or issuer, etc.), made via EDGAR should be presumed to be information that has been conveyed to investors under Rule 159, to the extent it has been on file long enough to be deemed "conveyed" under a facts and circumstances analysis, because the information would be readily available to

[19] We are not recommending that the Commission reconsider the exemption from Exchange Act Rule 15c2-8(b) – requiring delivery of a preliminary prospectus 48 hours prior to sending the confirmation of sale in initial public offerings – that was codified for ABS issuers using Form S-3 under the Final Asset-Backed Securities Regulations.

the investors. We propose that the following documents and information be presumed to be deemed "conveyed" if on file for a sufficient period of time:

- the issuer's filed registration statement and any pre-effective amendments;
- any filed Exchange Act report of the issuer incorporated by reference into the registration statement;
- any Rule 424 prospectus of the issuer that has been filed; and
- any free writing prospectus of the issuer that has been filed.

Of course, any other information that is delivered to the investor or brought to its attention may also be conveyed. This could include any other information filed on EDGAR that is in any filing pertaining to the issuer, depositor, sponsor, trustee and any servicer, significant obligor, credit enhancer or derivatives counterparty related to the ABS transaction.

V. Risk Factors in Exchange Act Filings

Proposed Item 1A of proposed Form 10-K would require each issuer to include in its Form 10-K the risk factors normally required in a registration statement, "including the most significant factors with respect to the registrant's business, operations, industry or financial position that may have a negative effect on the registrant's future performance."

According to the Release, this requirement would "enhance the contents of Exchange Act reports and their value in informing investors and the markets" and would enhance the ability of reporting issuers to incorporate risk factor disclosure from Exchange Act reports into Securities Act registration statements to satisfy risk factor disclosure requirements.

We respectfully suggest that, like Proposed Rule 415(a)(4), this requirement addresses risks that would be significant in respect to an operating company. But, as with Management's Discussion and Analysis of Financial Condition and Results of Operations, risk factor disclosure does not have the same continuing relevance to issuers of ABS after completion of the offering. The Commission has acknowledged the distinction between the disclosures appropriate for ABS issuers and those appropriate for operating companies. As set forth in the ABS Final Release, ABS prospectus disclosure and Annual Reports on Forms 10-K appropriately exclude any Management's Discussion and Analysis or the audited financial statements that are required of corporate issuers. We believe the same rationale applies to the inclusion of risk factors in the Forms 10-K of ABS issuers. Although prospectus disclosures include risk factors relating to the securities and the pool of assets, because of the passive nature of ABS issuers, after issuance there would generally not be "significant factors with respect to the registrant's business, operations, industry or financial position" that would be comparable to those of a corporate issuer or that would have changed materially from the initial prospectus disclosures.

Finally, the burden of preparing such disclosure for Exchange Act filings would generally fall on servicers, who may not have been involved in preparing the original risk factor disclosure and who will have assumed the reporting function based solely on their familiarity with the performance of the asset pool. Changes in risks of a transaction are almost entirely

related to changes in the underlying pool of assets, and the statistical information to be included in Exchange Act reports under the Final Asset-Backed Securities Regulations is the best information for updating risk factor disclosures. To impose a requirement on servicers in effect to restate risk factors not originally prepared by them would be quite burdensome for essentially no benefit. Investors who wish to review the original risk factors will continue to have access to the original statutory prospectus filed in connection with the initial offering of the ABS.

We therefore respectfully request that the Commission amend proposed Form 10-K to provide that issuers of ABS are not required to include risk factors in the Form 10-Ks filed by such issuers.

* * *

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

Respectfully Submitted,

/s/ Dixie L. Johnson
Dixie L. Johnson, Chair
Committee on Federal Regulation of Securities

/s/ Starr L. Tomczak
Starr L. Tomczak, Co-Chair
Subcommittee on Structured Finance

/s/ Amy McDaniel Williams
Amy McDaniel Williams, Co-Chair
Subcommittee on Structured Finance

(Enclosure)

cc: Hon. William H. Donaldson
Chairman of the Securities and Exchange Commission

Hon. Paul S. Atkins
Commissioner

Hon. Roel C. Campos
Commissioner

Hon. Cynthia A. Glassman
Commissioner

Hon. Harvey J. Goldschmid
Commissioner

Alan L. Beller
Director, Division of Corporation Finance

Annette L. Nazareth
Director, Division of Market Regulation

Paul F. Roye
Director, Division of Investment Management

Giovanni P. Prezioso
General Counsel

Martin Dunn
Deputy Director, Division of Corporation Finance

Amy M. Starr
Senior Special Counsel, Division of Corporation Finance

Drafting Committee

Chairs of Drafting Committee: Amy McDaniel Williams and Starr L. Tomczak

Registration Team

Team Leader: Renwick D. Martin
Co-Leader: Andrew M. Faulkner

Rudene Bascomb	Stuart M. Litwin	Paul W. Scott
Martin Fingerhut	Stephen G. Rooney	Ray Shirazi
Scott J. Gordon	Daniel M. Rossner	Stephen T. Whelan

Communications Team

Team Leaders: Jason H.P. Kravitt and Robert A. Villani

Richard Careaga	Mark W. Harris	Oliver Rust
Cameron Cowan	Matthew P. Joseph	Lisa M. Sloan
Richard D. Davidson	Myongsu Kong	Randolph F. Totten
Anna Glick	Patrick T. Quinn	Jon Van Gorp

Website, FD Disclosure, Research Report and Liability Team

Team Leader: Stephen S. Kudenholdt
Co-Leader: Kenneth E. Kohler

John Arnholz	Ellen R. Marshall	Susan L. Welsh
Kevin J. Buckley	Lawrence D. Rubenstein	George M. Williams, Jr.
Frederick L. Feldkamp	Richard M. Schetman	John Williams
Henry A. LaBrun	Lynn A. Soukup	

Prospectus Delivery, Exchange Act and Market-Making Team

Team Leader: Karsten Giesecke
Co-Leader: Ellen L. Marks

Russell A. Brien	Stuart N. Goldstein	Frank Polverino
Rachel B. Coan	Timothy M. Harden	Neila Radin
Kenneth F. Cogland	David Krohn	Patrick C. Sargent
Robert J. Coughlin	Phillip R. Pollock	Jordan M. Schwartz

Additional Issues and Transition Team

Team Leader: Bruce Bolander
Co-Leader: Michael S. Gambro and Walter G. Van Dorn Jr.

Pierre F. de Ravel d'Esclapon	Anthony R. G. Nolan	Y. Jeffrey Rotblat
Michael J. Gamsky	Douglas P. Quay	Bianca A. Russo
Mark C. Kanaly		

Resource Team

Former Commission Staff: Michael H. Mitchell, James J. Moloney and Walter G. Van Dorn Jr.
Government-Sponsored Enterprises: Cynthia L. Fatica
Investors: Robert Lawrence
Issuers: Lawrence Rubenstein
Underwriters: George P. Miller and Bianca A. Russo
Foreign Issuers: Christopher Bernard, Martin Fingerhut and F. Gordon Thompson
Comment Letter Coordinator: Dusan Stojkovic