

THE FINANCIAL SERVICES ROUNDTABLE



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

RICHARD M. WHITING
EXECUTIVE DIRECTOR AND
GENERAL COUNSEL

Re: Asset-Backed Securities; Proposal, File No. S7-21-04

Dear Mr. Katz:

The Financial Services Roundtable¹ (the “Roundtable”) appreciates the opportunity to comment on the proposed rule issued by the Securities and Exchange Commission (the “Commission”) relating to the registration, disclosure and reporting requirements for asset-backed securities (“ABS”) under the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”).

The Roundtable recognizes the tremendous growth of the securitization industry over the last decade. We commend the Commission for taking on the daunting task of codifying the treatment of ABS under the Exchange Act and the Securities Act. The Roundtable supports the goal of transparency for these types of transactions. We believe that the proposed rule (the “Proposal”) will benefit participants in the asset-based securitization marketplace.

The Roundtable endorses and generally supports the comprehensive comments submitted by other industry associations, including The Bond Market Association (“BMA”), the American Securitization Forum (“ASF”), and the Committee on Federal Regulation of Securities of the American Bar Association (“ABA”)(collectively, the “Associations”) on the technical issues arising out of the Proposal. The Associations’ comments provide detailed recommendations on the following categories; (a) Securities Act registration requirements, (b) disclosure requirements (c) communications during the offering process, and (d) ongoing reporting requirements under the Exchange Act.

¹ The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for \$18.3 trillion in managed assets, \$678 billion in revenue, and 2.1 million jobs.

The Proposal is detailed and seeks comments on a variety of issues that will affect the regulation of asset-backed securities. The following comments are not comprehensive, but echo some of the Associations main points and indicate some of the general concerns Roundtable member companies have with the Proposal.

I. Registration issues

Definition of asset backed security

The Roundtable recommends that the Commission adopt a more flexible principles-based definition of the term “asset-backed security.” We believe the proposed definition would exclude some securities that possess ABS characteristics. We believe that ABS supported by delinquent and non-performing pool assets, lease-backed securitizations supported by residual assets, and securitizations that make liberal use of prefunding and revolving periods have ABS characteristics.

We would urge the Commission to provide clarification on whether the proposed definition would include securitizations supported by asset pools comprised of (i) balloon loans, such as automobile balloon loans, (ii) insurance premium finance loans, (iii) revolving credit lines with no term limits but that can be terminated at any time and (iv) dealer floor plan loans that are payable on demand. In addition, we believe the use of “series trusts” is consistent with the fundamental principles underlying the definition of “asset-backed security”.

We also recommend that the Commission revise the proposed definition of “asset-backed security” to accommodate larger prefunded amounts. We believe that not only would such a revision serve to accommodate existing market practice, but it would promote the Commission’s goal to expand the eligibility of prefunded structures to the asset-backed securities regime. Therefore, we respectfully request that the Commission adjust the limitations in the context of Form S-3 to allow for a prefunded amount of up to 50% of the proceeds of the offering.

Form S-3 eligibility

The Roundtable believes that Form S-3 registration is vital to the issuance of ABS. Proposed General Instruction A.4 of Form S-3 requires timely filings of Exchange Act reports during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement by the depositor or any issuing entity previously established, directly or indirectly, by the sponsor or the depositor.

Roundtable member companies are concerned that this proposed instruction may cause a depositor to lose access to shelf registration in instances that are unrelated

to that depositor. We are also concerned that an ABS issuer with an effective registration statement would not be able to use that statement for a takedown if there had been a failure to comply with Exchange Act reporting requirements during the twelve months prior to the takedown.

The Roundtable recommends that the instruction provides that, in order to be eligible to file a registration statement on Form S-3 to register ABS, (1) the registrant depositor and any issuing entity formed by the registrant depositor must be compliant with their Exchange Act reporting obligations, and (2) no affiliate depositor of the registrant depositor has failed to file (without regard to timeliness) any required Exchange Act report with respect to a registration statement on Form S-3 to register the same asset class or classes due to a failure of the affiliate depositor to comply with Exchange Act reporting requirements.

We urge the Commission to state in the final rule that once an ABS registration statement on Form S-3 is declared effective, eligibility requirements relating to Form S-3 reporting will be deemed to have been satisfied at the time of filing. We also request that the eligibility requirements for ABS in Form S-3 not be impaired by immaterial, inadvertent or involuntary delinquencies.

Market making prospectuses

The Roundtable encourages the Commission to exempt market-making transactions from the registration provisions of the Securities Act or exempt any transactions where the subject ABS are rated investment grade as of the date of such resale or the purchaser is an institutional investor.

II. Disclosure issues

The Roundtable supports the Commission's principles-based approach for disclosure in the context of ABS. However, we are concerned that the rules may require additional information beyond current disclosure practices. We request further clarification from the Commission in relation to any additional disclosure required.

Proposed Item A 1104(e) and 1110(e) of Regulation S-K would require disclosure in the prospectus of static pool data in relation to the applicable asset type, to the extent material, with respect to the sponsor's portfolio, prior pools formed by the sponsor and the offered pool itself. In addition, "to the extent material", the rule would require that static pool information be presented according to factors relevant to the offered pool, such as by asset term, asset type, yield, geography or ranges of credit scores or other measures of obligor credit quality.

While we recognize the need for minimum disclosures of static pool data, some of our members request that the Commission provide more guidance and more flexibility in this area.

The Roundtable believes the Commission should permit sponsors and underwriters to be indemnified by originators for use of such static pool information by making an exception to the Commission's position that indemnification relating to liabilities arising under the Securities Act and the Securities Exchange Act is not enforceable as a matter of public policy. We believe indemnification arrangements hold responsible the party who controls and provides the information.

Proposed Regulation AB would substantially increase disclosure relating to third parties unaffiliated with ABS issuers. ABS issuers are uniquely dependent upon information provided by unaffiliated third parties in order to satisfy disclosure requirements arising under the Securities Act and the Exchange Act. We request that the Commission adopt a rule recognizing that an ABS issuer may reasonably rely on any information provided by unaffiliated third parties in connection with the preparation of any prospectus, report or other material filed with the Commission.

III. Communications During the Offering Process

The Roundtable supports the Commission's efforts to codify and simplify the procedures for filing of ABS informational and computational material. We encourage the Commission to adopt a more flexible, principles-based description of such material, consistent with the descriptions of that material in the no-action letters. We would like to reiterate the following recommendations offered by the Associations in relation to communications during the offering process.

- We strongly recommend that the Commission extend the proposed exemption permitting use of this material to ABS registered on a Form S-1 registration statement. We believe that the requirement that this material be filed on Form 8-K, and therefore become part of the prospectus, presents issues with respect to liability under the securities laws and is unnecessary.
- We request that the Commission amend Rule 134 to include items of information about ABS and ABS issuers that correspond to the items listed for corporate securities and issuers, and also permit the announcement of limited factual information concerning the scheduling of an offering.
- We recommend adding instructions to Rule 167(b) indicating that (i) the limited legend prescribed thereby is not exclusive and that other legends may be included to the extent appropriate and as otherwise required by law and (ii)

a failure by any party to the ABS transaction and any person authorized to act on their behalf to cause the filing of ABS informational and computational material in connection with an offering does not affect the ability of any other party who has complied with the procedures to rely on the exemption.

IV. Ongoing reporting under the Exchange Act

To date, the asset-backed securities industry has largely operated under a reporting system developed through Commission exemptive orders and no-action letters. The ongoing reporting system involves the filing of periodic distribution information, reporting of material events by Form 8-K and the filing of an annual report on Form 10-K.

The Roundtable appreciates the Commission's development of the Form 10-D and rules designed specifically for the ABS industry. The Proposal has created new reporting requirements and substantially expanded the amount of detail and information to be reported. Issuers and depositors do not currently have the systems in place, do not have access to some of the information required, and may have to increase personnel to comply with the proposals. We urge the Commission to provide entities adequate time to comply with these rules.

V. General Comments

The Roundtable strongly recommends that Commission carefully review comments submitted in conjunction with this Proposal, make any necessary revisions, and subsequently re-propose the rules and offer another opportunity for providing comments prior to the adoption of the final rules. We respectfully request that the Commission proceed with caution and modify the Proposal as warranted.

We encourage the Commission to be mindful of the burdens and costs created by changes to the asset-based securitization market. We urge the Commission to evaluate whether rule revisions are necessary and whether the costs and complexity to the marketplace would exceed any anticipated benefit to investors.

Effective Date

The Proposal represents a major change in registration, disclosure and ongoing reporting requirements. The Roundtable believes that it will take considerable time and expense to adjust current systems and business practices to adapt to these changes. Additionally, many of the disclosure and ongoing reporting rules require issuers to obtain information from unaffiliated third parties that have not furnished such information in the past. The process of obtaining and ensuring future

delivery of such information will take time, particularly for large issuers that deal with a wide array of unaffiliated third parties.

We believe that the Commission has underestimated the effort that would be required to implement the changes required under the Proposal. Therefore, with respect to the registration, disclosure and ongoing reporting requirements, we recommend an effective date not less than six to twelve months after the publication of the final rules in the Federal Register. Furthermore, we encourage the Commission to gradually implement the Proposal by breaking down the proposal into sections and staggering the effective dates. In addition, we believe that grandfathering ABS issued prior to or within twelve months after the effective date of the new rules would help with the implementation.

VI. Conclusion

We appreciate the opportunity to comment on the Proposal and thank the Commission for their efforts. If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel