

AUSTRALIAN SECURITISATION FORUM
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July 12, 2004

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

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attention: Jonathan G. Katz, Secretary

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

Ladies and Gentlemen:

This letter is submitted on behalf of the Australian Securitisation Forum (the "ASF") in response to the Staff's (the "Staff") request for comments in Release Nos. 33-8419, 34-49644 dated May 3, 2004 (the "Release"). The proposed rules discussed in the Release (the "Proposed Rules") intend to regulate asset-backed securities ("ABS") in four areas: (1) Securities Act registration, (2) disclosure under the new Regulation AB, (3) communications during the offering process, and (4) ongoing reporting requirements under the Exchange Act. The Proposed Rules attempt to codify and consolidate many existing practices particular to ABS which have developed over the past 20 years through no-action letters and the filing review process.

The ASF, formed in 1989 to promote and discuss the development of securitization in Australia, is a professional forum of participants in the Australian securitization market. Among other roles, the ASF's members act as issuers, underwriters, dealers, investors, servicers and professional advisors working on securitization transactions. The comments expressed in this letter represent the views of the members of a sub-committee of the ASF which have been chosen to review the Release and determine the possible effects of the Proposed Rules on Australian ABS issuers issuing ABS in the US markets. As a result, we have limited our comments to those issues which we believe would have an effect specifically relating to Australian ABS issuers. Where not otherwise addressed herein, we have reviewed and are in agreement with the comment letter submitted on behalf of the American Securitization Forum relating to the Proposed Rules to the extent the Proposed Rules affect members of the ASF. With respect to our comments regarding the disclosure of static pool data, we will be in contact with the American Securitization Forum to provide our input and concerns on this issue in the supplemental comment letter they expect to submit by July 30, 2004.

We commend the Staff's tremendous efforts to develop a comprehensive set of regulations specifically tailored for ABS and particularly its efforts to address issues which affect

foreign ABS issuers. We are also grateful to the Staff for providing us with an opportunity to share our thoughts and concerns regarding these proposed regulations.

DISCUSSION OF COMMENTS TO PROPOSED RELEASE

Questions regarding the nature of the issuing entity:

- (2) *We request comment on the proposed conditions regarding the nature of the issuing entity. Is the proposed condition on the passive and restricted nature of the issuing entity appropriate? Is any additional specificity or clarification needed for the condition? Should there be any exceptions to the condition? If so, what would they be and how would they be consistent with the notion of an “asset-backed security?”*

We are in agreement with the first condition that neither the issuing entity nor the depositor is an investment company under the Investment Company Act, nor will it become one as a result of the asset-backed securities transaction. We are, however, not sure we understand the requirement, “that the issuing entity must be *passive*” [emphasis added] and that the activities of the issuing entity be limited to “*passively* owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto.”

Unlike the United States, under the laws of Australia, trusts are not recognized as having a legal existence. Rather, at the time a trust is created a fiduciary trust company is appointed to act on behalf of the trust. The trustee is the entity which holds title to the assets on behalf of the trust and is the entity in whose name the ABS are issued. Since the fiduciary trust company is likely to perform the role of trustee for a variety of trusts in various ABS transactions, the activities of the fiduciary trust company are not limited to “passively owning or holding a pool of assets” for a particular ABS transaction and therefore do not satisfy the requirement of a passive entity. However, the trusts in respect of which the fiduciary trust company is appointed as trustee are passive entities and do satisfy the definition of “issuing entity”. Therefore, we would propose to amend the definition of “asset-backed security” as set forth in Annex A hereto in order to clarify that the “issuing entity” as it applies to foreign asset-backed transactions may, in fact be the trust and not the trustee.

Questions regarding presentation of disclosure in base prospectuses and prospectus supplements:

- (13) *Is the proposed specification that a separate base prospectus and form of prospectus supplement must be presented for each asset class and country of origin appropriate? If not, how would the staff ensure the base prospectus provides clear disclosure that did not confuse investors?*

We agree with the Staff’s position that a separate base prospectus and form of prospectus supplement should be prepared for each asset class, as long as assets with substantially similar characteristics are included in the same asset class (i.e. all residential mortgage loans, including multifamily, first lien and second lien residential mortgage loans would be considered part of the same asset class). However, we disagree with the Staff’s position regarding the requirement that separate base prospectuses and forms of

prospectus supplements must be prepared for a transaction that has assets with different countries of origin if the countries have legal systems which are substantially similar to each other (for example, Australia and New Zealand). Disclosure regarding the differences and legal risks which may exist among assets which are originated in different countries with similar legal regimes and practices may be easily highlighted in the base prospectus. Moreover, cross-border transactions involving issuers that conduct business in multiple foreign jurisdictions are increasingly becoming the norm. Requiring separate disclosure documents for transactions with assets with different countries of origin would not only prove to be burdensome and duplicative for these types of transactions, but would also provide minimal, if any, benefit to investors investing in such transactions.

Questions regarding proposed definition of “issuer” and signatures required:

- (18) *We request comment on our proposed rule clarifying the “issuer” for an asset-backed security. In addition to, or in lieu of the depositor, should another entity be considered the “issuer,” such as the sponsor, the servicer, the trustee or the issuing entity? What would be the bases for designating such entity or entities as the “issuer?”*

With respect to Australian ABS transactions, the proposed definitions of “sponsor”, “depositor” and “issuing entity” are not consistent with current SEC practice as regards to Australian ABS issuers. To date, following consultations with the SEC, the practice of Australian ABS issuers has been to deem a special purpose trust manager as the issuer of securities in these transactions and as a result the manager has signed the registration statement as the issuer for purposes of the Securities Act of 1933, as amended (the “Securities Act”) and the Exchange Act of 1934, as amended (the “Exchange Act”).

This reliance is based on the definition of issuer as it is contained in Section 2(a)(4) of the Securities Act, which defines the term “issuer” to mean in relevant part: “every person who issues or proposes to issue any security; except that with respect to . . . collateral trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) . . . the term “issuer” means the person or persons *performing the acts and assuming the duties of depositor or manager* pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued. . .” (emphasis added).

The revised definition of “issuer” for ABS transactions does not include reference to a manager. Typical Australian asset-backed securities transactions are structured without a depositor. Instead the manager acts as the issuer for purposes of the Securities Act and the Exchange Act on behalf of the trusts in respect of which it is the manager. Typically the manager is a subsidiary of the sponsor in respect of the transaction. The ability of the manager to act as “issuer” is important, as a matter of Australian law, as it is not an alternative for the sponsor (where it is a bank subject to Australian prudential regulations) to act as “issuer” given it would likely cause the sponsor to contravene certain Australian prudential standards.

The activities of the trust will be limited to passively owning or holding the relevant pool of assets and the trustee of the trust will not typically exercise its own discretion without reference to the manager. That is, all substantial duties and rights of the trust will either be exercised directly by the manager on behalf of the trust or by the trustee but only at the direction of the manager. As a result, it is unlikely that the trustee would be prepared to accept (and it is not appropriate to require the trustee to accept) the liabilities which flow from it being the “issuer” because of the role of the trustee in the transaction. In addition, the manager is the party to the agreements under which the securities are issued and is the party which is involved in the structuring and ongoing operations of the ABS transaction. Unlike many US ABS structures, Australian mortgage-backed securities (“MBS”) structures consist of a single tier transfer whereby the originator/seller transfers the assets directly to the trustee and such assets are then available to meet the liabilities of the trustee to the securityholders. Under Australian law, there are no true sale issues which would warrant an intermediate transfer from the originator/seller to the manager (or what would be the depositor in a domestic transaction) and then from the manager to the issuing entity. Accordingly, we recommend that the definition of “issuer” be amended to address the concerns of foreign ABS issuers by including in the definition “or manager” following each reference to “depositor” in the definition. Such a revision would codify existing practices and thus prevent the disruption of access by foreign ABS issuers to the US capital markets.

- (19) *Is there still a reason to require the issuing entity to sign the registration statement if formed prior to effectiveness? If so, who should sign on behalf of the issuing entity? Should any other party to the transaction be required to sign the registration statement?*

As discussed in greater detail in our response to comment #2 above, the issuing entity should not sign the registration statement. Since a trust has no legal standing under Australian law, the trustee would have to execute the registration statement on behalf of the trust in the case of Australian ABS transactions publicly registered in the US. We agree that it would be more appropriate for the issuer to sign the registration statement, as long as the trust manager is deemed to be the “issuer” for purposes of the asset-backed securities of that issuing entity. Since the trust manager is a party to the agreements under which the securities are issued and is involved in the ongoing operations of the transaction, it would be consistent with the definition of “issuer” as currently defined in Section 2(a)(4) of the Securities Act as well as the Staff’s reasons for making the depositor (in typical US ABS transactions) the “issuer”.

Questions regarding foreign ABS:

- (21) *We request comment on the application of our proposals to foreign ABS. Is there a need to create different regulatory requirements for foreign ABS? If so, what accommodations should be made and why? In particular, is there any reason why foreign ABS should be subject to differing ongoing Exchange Act reporting obligations than domestic ABS? We request comment particularly from the point of views of potential issuers of foreign ABS who would prepare this information as well as potential investors in foreign ABS regarding what information would be material to their investing decisions.*

We agree with the Staff's decision not to create different regulatory requirements for foreign ABS. Differences which may exist in the laws and practices regarding bankruptcy, property rights, tax, asset servicing, consumer protections and other matters of the foreign country may be addressed with additional disclosure. However, we do request that the Staff clarify the general instructions set forth under Item 1100(e) of Regulation AB which would require filings by foreign ABS to "describe any pertinent governmental legal or regulatory or administrative matters and any pertinent tax matters, exchange controls, currency restrictions *or other economic, fiscal, monetary or potential factors* that could materially affect payments on the performance of, or other matters relating to, the assets contained in the pool or the asset-backed securities." (Emphasis added.)

Under the current disclosure regime, disclosure of information relating to such items is already required and we request Staff clarification as to whether the proposed requirements of Regulation AB regarding foreign ABS reflect a codification of, or an addition to, current practice. Australian mortgage-backed issuers currently include detailed information on the material legal aspects of Australian retail housing loans and mortgages, including the different forms of title, enforcement of registered mortgages, environmental issues, differences in the bankruptcy regime, consumer credit legislation and relevant Australian tax provisions in their prospectuses. In addition, the current standard of materiality governs the Australian MBS issuers' disclosure decisions relating to new or different legal, tax or regulatory changes which could have a material impact on the payments or performance of the assets. As currently drafted, the additional requirement for foreign ABS is too broadly written and may be interpreted to require foreign ABS issuers to provide predictions of future or potential trends which may prove to be misleading or incorrect. The due diligence which would be required to provide such information may be unduly burdensome and impractical to perform and may not elicit information of benefit to, or currently sought by, investors.

- (22) *Should our proposed general instruction regarding foreign ABS disclosure be more specific? Are there any particular categories of disclosure that should be delineated?*

We refer the Staff to our comments above regarding the proposed general instruction regarding foreign ABS disclosure. We do not believe there are any particular categories of disclosure that should be delineated except to the extent the assets in a foreign jurisdiction may in the future require some different kind of specific disclosure.

- (23) *Are there any investor protection concerns raised by the approach of the proposals to foreign ABS? Should there be any additional conditions for Form S-3 eligibility for foreign ABS? For example, should there be a requirement of one or more previous registered offerings on a non-shelf basis? Should certain representations or undertakings be required, such as that subsequent offerings will be substantially similar to prior transactions? Should there be any minimum denomination requirements, investor sophistication or other suitability requirements regarding the types of investors that may invest? Should we have different standards regarding the type of pool assets*

(e.g., level of delinquencies) that may be securitized? Should any of these conditions also be imposed with respect to Form S-1, such as an investment grade requirement?

As long as issuers of foreign ABS adhere to the disclosure requirements as required under the proposed rules in the prospectus relating to the foreign ABS, we believe investors investing in such foreign ABS will be adequately protected. As previously stated, we believe that foreign ABS issuers should not be subject to a different regulatory regime than domestic ABS issuers.

Foreign ABS issuers should not be required to participate in one or more previous registered offerings on a non-shelf basis or be required to make certain representations or undertakings to be eligible for shelf registered offerings. As long as a foreign ABS issuer meets all of the shelf eligibility requirements, it should be able to offer securities on a shelf registration statement. Furthermore, we believe that separate requirements for foreign ABS issuers registering securities on Form S-1 should not have different conditions imposed upon them than those that are required for domestic ABS issuers registering securities on Form S-1. Separate requirements for foreign ABS issuers which are not based upon disclosing information which would highlight material differences in legal systems and practices would be unfair and unnecessarily penalize foreign ABS issuers looking to access the US markets.

No additional requirements regarding minimum denomination, investor sophistication or other suitability regarding the types of investors that may invest should be prescribed for foreign ABS issuers. On the basis that foreign ABS issuers should not be subject to a different regulatory regime than domestic ABS issuers, there should not be different standards regarding the type of pool assets that may be securitized.

(26) *Should the exclusion [from Exchange Act Rule 15c2-8(b)] be available for foreign ABS?*

The exclusion from Exchange Act Rule 15c2-8(b) should be available to foreign ABS. As stated in the Release, the exclusion from delivering the preliminary prospectus 48-hours before confirmation of sale is predicated on the practical difficulties in finalizing the preliminary prospectus since structures of many ABS transactions evolve during the offering process. We believe that since similar difficulties are met by issuers of foreign ABS similar relief should also be available for foreign ABS. We agree with the Staff that the ability to use ABS Informational and Computational Material will still provide investors with adequate information at the time of an investment decision in an ABS offering.

Questions regarding proposed definition of “issuer” and operation of Section 15(d) reporting obligation:

- (96) *We request comment on our proposed rule clarifying the “issuer” of asset-backed securities for purposes of the Exchange Act. In addition to or in lieu of the depositor, should another entity be considered the “issuer,” such as the sponsor, the servicer, the trustee or the issuing entity? What would be the bases for requiring the servicer to be the reporting entity?*

As discussed in more detail above in the response to item #18, the use of the term “issuer” in Australian transactions is inconsistent with the proposed definition of “issuer” in the Proposed Rules. We propose that the definition of “issuer” be amended to include “manager” for purposes of the Exchange Act with respect to Australian ABS. This amendment would maintain the current definition of “issuer” which contemplates a “manager” who performs similar duties of a depositor pursuant to the agreements under which the securities are issued.

Request for comment on proposed Form 10-D:

- (101) *We request comment on proposed Form 10-D. Would a separate form type for distribution reports be beneficial? Should additional parties be permitted to sign the report? Is there any additional identifying information that should be provided on the cover page?*

We believe that a separate form type for distribution reports would be beneficial. In order to provide an investor with one single report type to reference when making inquiries regarding distributions, a separate form type should be used exclusively for the information contained in a distribution report. However, it should be noted that although the Staff states in the Release that the proposed disclosures for Form 10-D are consistent with the current modified reporting system, various items such as: updated pool composition information, material modifications, extensions, waivers to pool asset terms and breaches of material pool asset representations and warranties, which are included in the proposed reporting requirements exceed that which is typically standard in the current reporting regime. Such additional items to be reported seem unduly burdensome and unlikely to enhance investor protection.

As discussed above, the manager in foreign ABS transactions (in lieu of the depositor) should be designated as one of the permitted signatories to sign the reports (each of the proposed Form 10-D and any other designated report to be filed in connection with such asset-backed securities transactions).

Questions regarding certifications:

- (118) *Should additional or different persons be permitted to sign the proposed certification? For example, should we permit the trustee to sign the certification? Should both the depositor and the servicer sign a certification? Should the designated person to sign for an entity be someone else, such as the entity's principal executive officer?*

We believe, consistent with the foregoing, the manager (in lieu of the depositor) should be one of the permitted signatories to sign a 302 Certification. As proposed, this would be the senior officer in charge of securitization of the manager. It would not be appropriate for the trustee to sign the certification as the trustee's only obligation in most Australian MBS transactions is limited to acting as a fiduciary on behalf of the trust, since it is not a recognizable entity under Australian law. We believe that Staff should maintain current practice and only require that the servicer execute the servicer compliance statement. The servicer should only be required to sign a certification relating to its servicing obligations.

Questions regarding proposed assessment of compliance with servicing criteria:

- (124) *We request comment on our proposed definition of "responsible party." Should any other entities ever be the "responsible party" (e.g., the trustee)? Should one party be required to assess and report on the entire servicing function?*

We agree with the Commission that the "responsible party" should be the manager (in lieu of the depositor). However, as previously stated, in the case of Australian MBS transactions, the manager should be deemed to be the depositor. See comment #118 above.

Questions regarding proposed Form 8-K reporting:

- (142) *We request comment on our proposed amendments to Form 8-K for asset-backed securities. Should additional or different parties be permitted to sign the report?*

As previously, stated the issuer in foreign jurisdictions, which in the case of Australian MBS issuers is the manager rather than the depositor, should be the entity which has the reporting obligations, on behalf of the trusts established by the manager, under the Exchange Act. See our response to comment # 96 above.

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We hope our comments are helpful to the Staff and would be happy to respond to any questions the Staff may have relating to the issues we have raised.

Respectfully submitted,

/s/ Stuart Fuller

Stuart Fuller

Alternative forms of definition of “asset-backed security”:

<p>(c)(1) <u>Asset-backed security</u> means a security that is primarily serviced by the cash flows of a pool of receivables or other financial assets, either fixed or revolving, that by their terms are required to convert into cash within a finite time period (without regard to current performance), plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders; provided that, in the case of leases, those assets may convert to cash partially (without regard to percentage) by the cash proceeds from the disposition of the physical property underlying such leases.</p> <p>(2) The following additional conditions, apply in order to be considered an <u>asset-backed security</u>:</p> <p>(i) Neither the depositor nor the issuing entity is an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a-1 <i>et seq.</i>) or will become an investment company as a result of the asset-backed securities transaction.</p> <p>(ii) The activities of the issuing entity are limited to owning or holding one or more pools of assets, issuing the asset-backed securities supported or serviced by the assets of one or more of such asset pools, and other activities reasonably incidental thereto.</p> <p>(iii) In the case of asset-backed securities backed by or representing interests in foreign assets, such foreign asset-backed securities may be issued by either a foreign trust company on behalf of a trust or any other entity as may be created under foreign law.</p>	<p>(c)(1) <u>Asset-backed security</u> means a security issued by a special purpose entity that entitles its holders to receive payments that depend primarily on the cash flows of [specific] financial and, in the cases of leases, other assets, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders.</p> <p><u>Special purpose entity</u> means a trust, limited liability company, corporation or other entity (other than an investment company) organized for the sole purpose of the acquisition, holding, collection (and, in the case of leases, disposition) of [specific] financial assets and issuing securities that entitle their holders to receive payments that depend primarily on the cash flows from such assets and in the case of asset-backed securities backed by or representing interests in foreign assets, such foreign asset-backed securities may be issued by a foreign trust company on behalf of a foreign sponsor as may be required under foreign law; provided that the term <u>special purpose entity</u> does not include any entity that is an operating business, has employees of its own or whose assets are actively managed to realize gains or losses upon disposition.</p>
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