



First Marblehead Corporation

The Prudential Tower
800 Boylston Street - 34th Floor
Boston, MA 02199-8157
Tel 617.638.2000 or 800.895.4283
Fax 617.638.2100 or 866.255.4583

230 Park Avenue, 10th Floor
New York, NY 10169
Tel 212.808.7225
Fax 212.808.7226

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

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

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

Dear Mr. Katz:

The First Marblehead Corporation (“First Marblehead”) is pleased to submit this comment letter to the United States Securities and Exchange Commission (the “Commission”) in response to the Commission’s request for comments regarding the proposed rules for asset-backed securities (“ABS”) contained in the above-referenced release (the “Release”).

We commend the Commission on its efforts to create a comprehensive set of disclosure regulations for the ABS market. We appreciate the codification of the ABS rules and guidelines, and the Commission’s development of a streamlined industry practice which will provide consistent disclosure and transparency to our investors. We believe that with appropriate clarification, the proposed rules will provide the predictability required by the ABS marketplace.

We note that the American Securitization Forum and The Bond Market Association have previously submitted comments. First Marblehead is an active member of the American Securitization Forum and we generally support its comments as well as those of The Bond Market Association. We would, however, like to briefly highlight below the two areas of primary concern to First Marblehead which we have identified in the Release.

First Marblehead is a Delaware corporation with its principal offices located in Boston, Massachusetts. We provide outsourcing services for private education lending in the United States. Our business is unique among student loan asset-backed issuers as we believe we are the only company focused exclusively on sponsoring securitization trusts to purchase private education loans (i.e., loans that are not guaranteed by the federal government).

First Marblehead is a leader in facilitating the securitization of private student loans, having structured and facilitated 22 securitizations consisting entirely of private student loans since our formation in 1991. We have securitized loan pools using various financing structures, including both public offerings and private placements, and have utilized various types of ABS, including commercial paper, auction-rate debt and senior, subordinated and third party credit enhanced debt. Earlier this year, one of our affiliates filed a \$2.5 billion shelf registration statement with the Commission (The National Collegiate Funding LLC, Registration Statement No. 333-113336). In our most recently completed fiscal year, we sponsored securitization trusts aggregating approximately \$1.58 billion, of which \$715.1 million was publicly registered, with the remainder issued in the private placement market.

Third Party Disclosure

The proposed Regulation AB adopts a “principles-based” set of disclosure requirements for ABS transactions. While we agree with the Commission that there is a need for disclosure regarding the roles of the various parties in an ABS transaction, we respectfully submit that certain of the proposed disclosure requirements are not consistent with current industry practice, are not material to investors and would be unduly burdensome and expensive to issuers.

The proposed rules define “sponsor” as the person “who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.” Although we do not believe that it is the Commission’s intention to do so, this definition might be interpreted to include as a “sponsor” for purposes of such transaction a financial institution which simply sells assets (in our business, student loans) in a securitization transaction to an unaffiliated depositor. This interpretation might result in multiple unaffiliated transferors being deemed “sponsors” for a single ABS transaction.

First Marblehead recently completed a transaction in which eleven different unaffiliated lenders sold assets to our affiliated depositor who in turn sold the assets into the securitization trust. Each of these unaffiliated lenders might be deemed to be a “sponsor” under proposed Regulation AB. In light of the additional disclosure requirements for sponsors, including those related to static pool data (discussed below), including parties which are simply selling loans into a transaction within the definition of “sponsor” would require extensive disclosure regarding these parties which, we believe,

will be difficult and expensive to obtain and not material to the investment decision making process of investors. Currently, our clients sell loans into securitization trusts sponsored by First Marblehead for cash, without receiving any subordinate or residual securities issued by the securitization trust, and without any recourse for the securities issued by the trust. These lending clients rely on our experience in structuring and consummating these securitization transactions. Our role as sponsor of these trusts is one of the services we provide these clients.

We respectfully propose that the Commission clarify this definition so that if two or more financial institutions participate in an ABS transaction solely as sellers of assets for cash, without receiving any subordinate or residual securities issued in the securitization transaction, and without any recourse for the securities issued, those entities would not be deemed “sponsors” under Item 1101(1) of the proposed rules. The financial institutions may be deemed to be originators, subject to disclosure requirements described in the following paragraph.

The proposed rules would also require extensive disclosure regarding any originator which originates (or is expected to originate) 10% or more of the pool assets. This required disclosure includes a description of any such originator’s origination program, its experience in originating assets, and the size and composition of its portfolio. The materiality of any information relating to originators may vary significantly depending upon the nature and structure of the particular loan program of the originator. We believe that the proposed disclosure requirement should be unnecessary as First Marblehead as sponsor of the securitization trust will cause all of the material disclosures relating to assets sold under our multi-seller securitization programs to be included in the prospectus.

Static Pool Data Disclosure

First Marblehead appreciates the Commission’s attempts in the Release to address the concerns of certain investors regarding the overall level of transparency in ABS transactions, and we fully support the Commission in this regard. We support the Commission’s focus in the proposed rules on static pool disclosure with respect to the current pool portfolio and agree with the Commission that additional disclosure regarding these pool assets is required. We believe that this data should be presented separately according to relevant factors, including asset type, yield and such other factors which can be supported by current industry practice and servicing.

The proposed rules, however, would also require, to the extent material, static pool data on a pool level basis with respect to prior securitized pools. We believe that disclosure with respect to prior securitized pools is not relevant to investors in a private student loan ABS transaction. Underwriting standards and financing structures with respect to pool assets for an ABS transaction may change from transaction to transaction. As a result, the credit quality and composition of the underlying pools may also

necessarily change. Accordingly, we believe that including static pool data relating to prior securitized pools may, in fact, be misleading to investors in the current ABS transaction.

Investors in student loan transactions are making investment decisions based on the pool assets actually securitized in the ABS transaction. Static pool data from prior securitized pools may lead investors to focus on data which is, in large part, immaterial to the pool assets in the transaction in which the investors are participating. Requiring disclosure regarding the prior pools will necessarily lead an issuer to provide additional disclosure as to the level of reliance investors should place on this data, why the issuer believes this data is not material, and reasons for differentiating it from the static pool data for the current pool. This will ultimately result in an issuer spending undue time and expense gathering the prior pool data, disclosing it in accordance with the proposed separation requirements and properly distinguishing it from the current pool data. We understand that the proposed rules only require the disclosure of static pool data to the extent material. Although we do not believe that prior securitized pool information is material, the uncertainty created by the Release in this regard would require this disclosure as a matter of course.

In First Marblehead's case, we have sponsored securitization trusts in both the private placement and publicly registered markets. Our legal counsel has advised it may be inappropriate to disclose publicly certain data from our private placement transactions. We are concerned that it may not be possible for us to comply with the proposed rules in this regard.

We respectfully submit that disclosure regarding prior securitized pools does not address the concerns of investors in the private student loan ABS market. In any case, we believe this data should be able to be provided by a sponsor outside of the prospectus, through website disclosure. Furthermore, we believe that the inclusion of this data should be determined by the sponsor taking into account all of the relevant factors inherent in the particular ABS transaction, and should not be required by the proposed rules.

We appreciate the opportunity to submit these comments and would be pleased to provide additional information and respond to any questions that the Commission may have.

Respectfully submitted,

THE FIRST MARBLEHEAD CORPORATION

By: /s/ John A. Hupalo
Title: Executive Vice President