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4. August 2004

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0609  
UNITED STATES

**Re: Release Nos. 33-8419; 34-49644 (File No. S7-21-04)**

Dear Mr. Katz,

The European Securitisation Forum<sup>1</sup> (ESF) submits this letter in response to the request for comments made by the U.S. Securities and Exchange Commission (the "*Commission*") in Release Nos. 33-8419; 34-49644, dated 3. May 2004 (the "*Proposing Release*") setting forth proposed rules and forms (the "*Proposed Rules*") relating to the registration, disclosure and reporting requirements for asset-backed and mortgage-backed securities ("*ABS*") under the Securities Act of 1933 (the "*Securities Act*") and the Securities Exchange Act of 1934 (the "*Exchange Act*"). The ESF appreciates the opportunity the Commission has extended to provide its comments on the Proposed Rules.

The ESF welcomes the Commission's decision to improve the shelf registration system creating a level playing field for foreign issuers in the US market. The comments expressed in this letter reflect our views after receiving the Proposing Release and considering any significant effects of the Proposed Rules on European ABS issuers issuing ABS in the US markets. The ESF has limited its comments to several issues that specifically affect European ABS issuers.

**1. Definition of Asset-Backed Security**

The Proposed Rules provide a new definition of ABS. Securities that fit within this new definition will be subject to the alternative disclosure and regulatory regime described in the Proposing Release. Structured securities that do not fit within this definition could still be publicly offered in the US, although it is not clear what disclosure and regulatory regime they would follow. The Commission could require that they follow the rules for corporate issuers or they could continue to fall in the less well defined regime that ABS now occupy. Given the uncertainty, it is more likely that issuers of these types of structured securities will opt to issue in the unregistered market.

ABS take a number of forms and can be issued by different types of issuers. The market continues to evolve and new types of ABS are created every year. As a result, ABS are difficult to define in an all-encompassing or prescriptive manner. Given its importance, therefore, the proposed definition of ABS should be as flexible and principles-based as possible while still serving its regulatory function.

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<sup>1</sup> The European Securitisation Forum is an organisation which brings together securitisation market participants throughout Europe in order to promote the efficient growth and continued development of securitisation. Membership of the ESF comprises over 120 firms from across Europe, including Germany and Austria, France, Italy, England, Scotland, Spain, Ireland, Holland, Belgium, Switzerland, Luxemburg, Sweden, Norway and Portugal. Participants include securities firms, banks, issuers and arrangers, investors and asset managers, trustees, servicers, legal and accounting firms, rating agencies, financial guarantors, stock exchanges and industry utilities and other participants in the European securitisation markets. The ESF is a European financial markets trade association sponsored by the Bond Market Association ("*BMA*").



The definition of ABS in the Proposed Rules, however, is highly prescriptive and could in its current form be interpreted to exclude a large number of European securitisations that have to date been registered with the Commission under the Securities Act. While Item 1101(c)(3)(i) of the Proposed Rules explicitly permits the use of master trusts, Item 1101(c)(3)(iii) of the Proposed Rules excludes asset pools of fixed receivables or other financial assets if the structure has a revolving period that exceeds one year, or if the amount of additional assets acquired during the revolving period exceeds 50% of the proceeds of the offering (an even more restrictive version of the above is employed in determining eligibility to use Form S-3). This restriction could be interpreted to exclude structures like the UK mortgage master trusts, which have been among the most prolific issuers of European ABS in the US public markets.<sup>2</sup> While the Commission indicates in Section III.A.2.e of the Proposing Release that “a structure could employ one or more of these features and still qualify as an asset-backed security” (referring to the use of master trusts, prefunding periods and revolving periods), it would logically follow that employing any one of these features in a way that fails to satisfy the “discrete” requirement of the definition of asset-backed security would disqualify a security from falling within the definition. We do not believe there is a clear investor protection rationale to create a new regulation that excludes mortgage or other fixed receivable master trusts. For this reason and the reasons stated above, the ESF respectfully requests that the Commission considers revising the definition of ABS in the Proposed Rules to better reflect the ABS market. The ESF would therefore advocate a more flexible and principles-based definition that, on the one hand, includes all current forms and structures of ABS, on the other hand, is flexible to allow the inclusion of new ABS structures in the future.

## **2. Use of Separate Base Prospectus and Form of Prospectus Supplement for Different Countries**

Paragraph A of part V of the General Instructions to Form S-3 would require a separate base prospectus and form of prospectus supplement for each country of origin or country of property securing pool assets that may be securitised in a discrete pool in a takedown of ABS under a shelf registration statement. It is quite common for European ABS to encompass assets from two or more European countries. While it is market practice to describe the differing legal regimes of each country and the risk factors specific to each country, it is not market practice to provide separate offering documents for each country of origin or country of property securing pool assets. Since most of the disclosure regarding the terms of the securities, the structure of the securitisation, the issuer, the trustee, the servicer and the majority of risk factors would be the same, this requirement would appear to add significant costs and burdens without substantively increasing the quality of disclosure. Therefore, in order to avoid duplicate information, the ESF suggests that this requirement should not apply if the information concerning foreign ABS for each country of origination required by Regulation AB is set forth in the base prospectus and form of prospectus supplement.

## **3. Cross Currency Swap Providers and Audited Financial Statements**

Almost by definition European ABS issued publicly in the US market will contain a cross currency swap to convert payments on the assets, which will be in a European currency, into US dollars to make payments to investors. The Proposed Rules would require enhanced disclosure concerning cross currency swap counterparties if they were liable or *contingently liable* to provide payments representing 10% or more of the cash flow supporting any offered class of ABS. If the 20% threshold were breached, audited financial statements meeting the requirements of Regulation S-X would be required. Given that, at least theoretically, currencies can have unlimited changes in value against each other, it is difficult to see how the conclusion could be reached that any cross currency swap provider is not *contingently* liable for 20% or more of the cash flow supporting an ABS class.

Also current ABS practice towards derivatives and the rating agency approach to derivatives is to rely on the ratings of derivatives counterparties and structural enhancements (such as the

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<sup>2</sup> In 2003, three of the UK mortgage master trusts, Northern Rock’s Granite Mortgages, HBOS’s Permanent Financing and Abbey National’s Holmes Financing registered approximately \$19.5 billion of ABS with the SEC.



requirement to find a replacement counterparty or to post collateral if the derivative counterparty is downgraded). In our experience, investors rely on ratings and structural enhancements rather than audited financial statements when determining whether derivatives counterparties are able to fulfil their obligations to an ABS issuer. The practical effect of the Proposed Rules on derivatives would be to limit the market to participants who are already reporting companies under the Exchange Act, since few cross currency swap providers would be willing to provide the required financial statements solely for the purposes of providing cross currency swaps for ABS issuers. We believe it would be detrimental to limit the market in this manner, thereby putting European issuers issuing in the US at a competitive disadvantage in this important segment of the global financial markets.

Accordingly, the ESF urges the Commission to have regard for the consequences that the Proposed Rules on derivatives counterparties would have on European ABS issuers.

The ESF very much appreciates the opportunity to provide the foregoing comments in response to the Commission's Proposing Release. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact Scott-Christopher Rankin, ESF Executive Director, at +44.20.77 43 93 00.

Yours sincerely,

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(Commerzbank Securities)*

Gerwin Scharmann  
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