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July 12, 2004

Via E-mail to: rule-comments@sec.gov

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

Re: Asset-Backed Securities – File No. S7-21-04

Ladies and Gentlemen:

This letter responds to the Commission's request for comments on its recent proposals set forth in Release Nos. 33-8419 and 34-49644 (the "Release" or the "Proposals"). As you know, the Proposals comprise a comprehensive scheme for the registration, disclosure and reporting requirements applicable to asset-backed securities under the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act"). This letter sets forth my comments in my capacity as an attorney with Trenam Kemker and does not represent the official position of the firm or any of its clients.

Terms that are capitalized or defined in the Proposals have the same meaning in this letter, unless specifically noted to the contrary. For convenience, references in this letter to specific portions of the Release are made using the alphanumeric outline format used in the Release posted on the Commission's Web site.¹

¹ See the Release posted at <http://www.sec.gov/rules/proposed/33-8419.htm>. Because the Release is posted as an html-formatted document, there are no numbered pages. For convenience, this letter identifies specific portions of the Release by reference to the appropriate Roman numeral and other outline designations used within the Release.

The comments are directed principally at the definition of “issuer” as set forth in specific rule proposals and related discussion in the text of the Release. Our comments respond to the request in the Release:²

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

We request comment on our proposed rule clarifying the “issuer” for an asset-backed security.

We believe the proposed rules in Regulation AB help to clarify the definition of “issuer.” However, we believe there is a potential for unnecessary confusion arising from (1) other proposed revisions to SEC rules and (2) certain portions of the text of the Release that discuss informally the intended clarification of the definition of issuer. We believe this potential for confusion is easily avoided by slightly modifying the rules and text, along the lines suggested below.

The Release clearly states the intention to classify the depositor as the “issuer” for registration and liability purposes under the 1933 Act:³

We propose to clarify that the depositor — often the sponsor or an affiliated intermediary that receives the pool assets and transfers them to the issuing entity — would be the statutory “issuer” for purposes of signing the registration statement for the asset-backed securities transaction.

We believe the proposed Regulation AB definitions are consistent with this pronouncement and help to identify the separate roles and responsibilities of the principal participants in ABS transactions. In pertinent part, they provide:⁴

(b) *Asset-backed issuer* means an issuer whose reporting obligation results from either the registration of an offering of asset-backed securities under the Securities Act, or the registration of a class of asset-backed securities under section 12 of the Exchange Act (15 U.S.C. 78l).

* * * *

² See III.A.3.d of the Release “Determining the ‘Issuer’ and Required Signatures.”

³ See I.B of the Release “Securities Act Registration.” Substantially similar language appears in the introduction to the discussion of 1934 Act issues at III.D.2 “Determining the ‘Issuer’ and Operation of the Section 15(d) Reporting Obligation.”

⁴ Section 229.1101 (Item 1101) Definitions.

(e) *Depositor* means the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity. For asset-backed securities transactions where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term *depositor* refers to the sponsor. For asset-backed securities transactions where the person transferring or selling the pool assets is itself a trust, the *depositor* of the issuing entity is the depositor of that trust.

(f) *Issuing entity* means the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

* * * *

(l) *Sponsor* means 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.

However, in discussing the identity of the depositor as the “issuer” for use of the appropriate registration statement form, the Release uses language that is slightly different from the language in the definitions:⁵

We propose to clarify that the depositor for the asset-backed securities, acting solely in its capacity as depositor to the issuing entity, is the “issuer” for purposes of the asset-backed **securities of that issuing entity**. (*Emphasis added*)

Substantially identical text appears again in discussing the identity of the “issuer” for 1934 Act purposes⁶ and in the text of proposed Rule 191⁷ and proposed Rule 3b-19.⁸ Pertinent portions of the text of the Release and proposed rules accompany this letter as Exhibit A.

Unintended confusion could result from use of these variations in wording in the text of the Release and in the proposed rules, particularly if the wording is considered in isolation from the definitions and the Release’s overall philosophy to codify a principles-based regulatory regime for ABS transactions.

⁵ See III.A.3.d of the Release “Determining the ‘Issuer’ and Required Signatures.”

⁶ See III.D.2 of the Release “Determining the ‘Issuer’ and Operation of the Section 15(d) Reporting Obligation.”

⁷ Section 230.191 Definition of “issuer” in section 2(a)(4) of the Act in relation to asset-backed securities.

⁸ Section 240.3b-19 Definition of “issuer” in section 3(a)(8) of the Act in relation to asset-backed securities.

First, it might be suggested that phrase “securities of the issuing entity” at the end of the sentence identified securities other than and distinct from those issued in the name of the issuing entity for which the depositor is the statutory “issuer.” In this regard, it might be suggested that there were securities for which the issuing entity should be the statutory “issuer” (as distinguished from securities for which the depositor is the statutory issuer).⁹

We do not believe the authors of the Release intend this result. Section 2(4) of the 1933 Act and applicable interpretations do not support such a result. Reading the Release and its rule proposals in their entirety, the better (and less confusing) interpretation of the quoted language is that it is simply an inarticulate reference to the securities that are issued in the name of the issuing entity (for which the depositor is the statutory issuer). In this analysis, there are no “other securities” beyond those for which depositor is the statutory issuer and the depositor is the only statutory issuer.

This view is supported by the S-Form registration statement rules as promulgated in the Code of Federal Regulations. For example, the heading appearing at the start of the general instructions to Form S-3 is entitled:

§239.13 Form S-3 for registration under the Securities Act of 1933 of **securities of certain issuers** offered pursuant to certain types of transactions.¹⁰ (*Emphasis added*)

⁹ Such an analysis could pose serious regulatory challenges for sponsors and depositors and their affiliates with active securitization programs. If the depositor is not the “issuer,” the depositor and its affiliates might be unregistered dealers because they could no longer satisfy the “dealer” exemptions afforded by applicable rules and interpretations under the 1934 Act. In this regard, Section 3(a)(5)(C)(iii) of the 1934 Act and SEC Rule 3b-18 provide a specific functional exemption for certain financial institutions from status as a “dealer” for the issuance and sale of asset-backed securities “through a grantor trust or other separate entity.” See Exchange Act Release No. 34-47364, Final Rule: Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (Effective Date: March 26, 2003). Finding that the issuing entity may be the “issuer” is also squarely at odds with the Second Circuit’s decision in *SIA v. Clarke*, 885 F.2d 1034 (2nd Cir. 1989) to the effect that bank sales of mortgage pass-through certificates did not violate the Glass-Steagall Act’s prohibition on banks engaging in “underwriting” and “dealing” activities because the banks were the “issuers” of the mortgage pass-through certificates.

¹⁰ Similar language appears on the title headings for other S-Forms, including Form S-2, Form S-11, Form F-1, Form F-2, Form F-3 and Form 20-F. Copies of the headings for most of these forms accompany this letter as Exhibit B. We are aware that the CFR references and bold headings are not included by most popular services that reprint SEC S-Forms and instructions, including the SEC’s versions of these forms posted on the SEC’s Web site.

Established practice and the clear language of S-Form instructions leave no doubt that the depositor (and not the issuing entity) is the “certain issuer” referred to in the S-Form CFR headings. When ABS securities are registered under the 1933 Act, the depositor (not the issuing entity) is the “registrant” whose securities are being registered and the depositor (not the issuing entity) is the entity signing the registration statement. SEC Rule 405 defines “registrant” as “the issuer of the securities for which a registration statement is filed.”

We believe the potential for confusion will be avoided by making identical, slight modifications in the language of the text of the Release discussing this matter and in the proposed text for Rule 191 and Rule 3b-19, to better conform to the language of the definitions in Regulation AB.¹¹

The suggested revisions are set forth below. Additions are bold red underlined and ~~deletions are blue strikethrough~~.

Proposed Revised Discussion Text¹²

We propose to clarify that the depositor for the asset-backed securities, acting solely in its capacity as depositor to the issuing entity, is the “issuer” for purposes of the asset-backed securities issued in the name of¹³ ~~of~~ that issuing entity.

¹¹ The introductory language for both proposed Rule 191 and proposed Rule 3b-19 specifically adopt the definition provisions of Regulation AB.

¹² The suggested change would also be repeated at III.D.2 of the Release “Determining the ‘Issuer’ and Operation of the Section 15(d) Reporting Obligation” where substantially the same text appears.

¹³ A possible alternative to the suggested revision would to insert “issued by” in place of the suggested revision. We believe the suggested revision more closely tracks the language in the Regulation AB definitions.

Proposed Revised Rules

§ 230.191 Definition of “issuer” in section 2(a)(4) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the “issuer” for purposes of the asset-backed securities **issued in the name of¹⁴** of that issuing entity.

Proposed Revised Rules Cont’d.

§ 240.3b-19 Definition of “issuer” in section 3(a)(8) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the “issuer” for purposes of the asset-backed securities **issued in the name of¹⁵** of that issuing entity.

The Release includes discussion and proposed rules to codify current practice to treat a depositor as a separate issuer for each distinct offering of ABS securities. This proposition is juxtaposed to the language identifying the depositor as the “issuer.” In reviewing this portion of the Release, we observed another use of language in the discussion portions of the Release and proposed rules that could be the source of confusion or misunderstanding:

Further, our proposed rule would specify that the person acting in its capacity as the depositor for the issuing entity of an asset-backed security is a different “issuer” from that same person acting as a depositor for any other issuing entity or for purposes of ***that person’s own securities***.¹⁶
(*Emphasis added*)

¹⁴ A possible alternative to the suggested revision would to insert “issued by” in place of the suggested revision. We believe the suggested revision more closely tracks the language in the Regulation AB definitions.

¹⁵ A possible alternative to the suggested revision would to insert “issued by” in place of the suggested revision. We believe the suggested revision more closely tracks the language in the Regulation AB definitions.

¹⁶ See III.A.3.d of the Release “Determining the ‘Issuer’ and Required Signatures.”

Substantially identical text appears again in the discussing the identity of the “issuer” for 1934 Act purposes¹⁷ and in the text of proposed Rule 191¹⁸ and proposed Rule 3b-19.¹⁹

§ 230.191 Definition of “issuer” in section 2(a)(4) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different “issuer” from that same person acting as a depositor for another issuing entity or for purposes of ***that person’s own securities***. (*Emphasis added*)

§ 240.3b-19 Definition of “issuer” in section 3(a)(8) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different “issuer” from that same person acting as a depositor for another issuing entity or for purposes of ***that person’s own securities***. (*Emphasis added*)

We are concerned that it may be possible to misinterpret the phrase “own securities” resulting in unnecessary confusion in the interpretation of the Release and the proposed rules. It might be suggested that the phrase “that person’s own securities” means that the depositor is not the statutory issuer of the ABS securities because some other securities are the depositor’s “own securities.” A better reading of the quoted language, and the Release and rule proposals in their entirety, is that the reference is to the non-ABS securities issued by the depositor.

We believe the potential for confusion will be avoided by making identical, slight modifications in the language of the text of the Release discussing this matter and in the proposed text for Rule 191 and Rule 3b-19, to better conform to the language of the definitions in Regulation AB.²⁰

¹⁷ See III.D.2 of the Release “Determining the ‘Issuer’ and Operation of the Section 15(d) Reporting Obligation.”

¹⁸ Section 230.191 Definition of “issuer” in section 2(a)(4) of the Act in relation to asset-backed securities.

¹⁹ Section 240.3b-19 Definition of “issuer” in section 3(a)(8) of the Act in relation to asset-backed securities.

²⁰ The introductory language for both Rule 191 and 3b-19 specifically adopt the definition provisions of Regulation AB.

The suggested revisions are set forth below. Additions are bold red underlined and deletions are blue strikethrough.

Proposed Revised Discussion Text²¹

Further, our proposed rule would specify that the person acting in its capacity as the depositor for the issuing entity of an asset-backed security is a different “issuer” from that same person acting as a depositor for any other issuing entity or for purposes of ~~that person’s own securities~~ **non-asset-backed securities issued by the depositor**.

Proposed Revised Rules

§ 230.191 Definition of “issuer” in section 2(a)(4) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different “issuer” from that same person acting as a depositor for another issuing entity or for purposes of ~~that person’s own securities~~ **non-asset-backed securities issued by the depositor**.

§ 240.3b-19 Definition of “issuer” in section 3(a)(8) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different “issuer” from that same person acting as a depositor for another issuing entity or for purposes of ~~that person’s own securities~~ **non-asset-backed securities issued by the depositor**.

* * * *

²¹ These suggested changes would also be repeated at III.D.2 of the Release “Determining the ‘Issuer’ and Operation of the Section 15(d) Reporting Obligation” where the same text appears.

Please feel free to call the undersigned with any questions or comments.

Sincerely,



Richard M. Leisner

RML/FSS
Exhibits

Exhibit A
Release Excerpts Referred to on Page 3

Excerpt From III.D.2. of the Release “Determining the ‘Issuer’ and Operation of the Section 15(d) Reporting Obligation.”

Similar to our proposal for the Securities Act, we propose to clarify that the depositor for the asset-backed securities, acting solely in its capacity as depositor to the issuing entity, is the “issuer” for purposes of the asset-backed securities of that issuing entity. (*Emphasis added*)

* * * *

§ 230.191 Definition of “issuer” in section 2(a)(4) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

- (a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the “issuer” for purposes of the asset-backed securities of that issuing entity. (*Emphasis added*)
- (b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different “issuer” from that same person acting as a depositor for another issuing entity or for purposes of that person’s own securities. (*Emphasis added*)

* * * *

§ 240.3b-19 Definition of “issuer” in section 3(a)(8) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

- (a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the “issuer” for purposes of the asset-backed securities of that issuing entity. (*Emphasis added*)
- (b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different “issuer” from that same person acting as a depositor for another issuing entity or for purposes of that person’s own securities. (*Emphasis added*)

Exhibit B
Excerpts from CFR Published S-Form Instructions

§ 239.12 Form S-2, for registration under the Securities Act of 1933 of **securities of certain issuers.**

This form may be used for registration of securities under the Securities Act of 1933 which are offered or to be offered in any transaction other than an exchange offer for securities of another person by any registrant which meets the following conditions:

(a) The registrant is organized under the laws of the United States or any State or Territory or the District of Columbia and has its principal business operations in the United States or its territories

* * * *

§ 239.13 Form S-3, for registration under the Securities Act of 1933 of **securities of certain issuers** offered pursuant to certain types of **transactions.**

This form may be used by any registrant which meets the requirements of paragraph (a) of this section (*Registrant Requirements*) for the registration of securities under the Securities Act of 1933 (*Securities Act*) which are offered in any transaction specified in paragraph (b) of this section (*Transaction Requirements*), provided that the requirements applicable to the specified transaction are met. With respect to majority-owned subsidiaries, see paragraph (c) below.

(4) The provisions of paragraphs (a)(2) and (a)(3)(i) of this section do not apply to any registered offerings of investment grade asset-backed securities as defined in paragraph (b)(5) of this section.

* * * *

§ 239.31 Form F-1, **registration statement** under the Securities Act of 1933 for **securities of certain foreign private issuers.**

(a) Form F-1 shall be used for registration under the Securities Act of 1933 (“Securities Act”) of securities of all foreign private issuers, as defined in rule 405 (§ 230.405 of this chapter) for which no other form is authorized or prescribed.

* * * *

§ 239.32 Form F-2, for registration under the Securities Act of 1933 for **securities of certain foreign private issuers.**

Any foreign private issuer, as defined in Rule 405 (§ 230.405 of this chapter), which meets the following conditions may use this form for the registration of securities under the Securities Act of 1933 (*Securities Act*) which are offered or to be offered in any transaction other than an exchange offer for securities of another person:

(a) The registrant is a class of securities registered pursuant to section 12