

**U.S. BANK NATIONAL ASSOCIATION**  
**Corporate Trust Services**  
60 Livingston Avenue  
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July 9, 2004

By [E-mail: rule-comments@SEC.gov](mailto:rule-comments@SEC.gov)

Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0609  
Attn: 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 U.S. Bank National Association in response to the Commission's request for comments in Release Nos. 33-8419, 34-49644 dated May 3, 2004 (the "Release"). The Release sets forth proposed rules and forms to address the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act").

We appreciate the efforts of the Commission staff to develop a comprehensive set of regulations for asset-backed securities. We commend the thoughtful approach taken in preparing the Release as well as its design to codify, streamline and consolidate existing staff interpretations and industry practice. We support improvements that will make ABS disclosure and reporting more accessible and useful to investors.

As recognized in the Release, the ABS market has rapidly become an important part of the U.S. capital markets. U.S. Bank National Association is often involved in these asset securitizations in the role of trustee and administrator. Trustees and administrators involved in asset securitizations will be greatly affected by the proposed rules.

Our key concerns fall broadly into the seven (7) categories outlined below. The comments set forth below explain our principal concerns and, where applicable, provide suggested alternatives.

1. Execution of Form 10-D and Form 10-K.

We agree that legal responsibility for signing and filing periodic reports on Form 10-D and annual reports on Form 10-K should fall on the depositor, and that a duly authorized representative of the servicer (or a duly authorized representative of the master servicer if there are multiple servicers involved) should be permitted to sign. While recognizing that there are fundamental differences in roles among a trustee, an administrator and a servicer, there are transactions in which, based on the particular functions being performed by an administrator or the trustee, we believe that it would be appropriate to permit a duly authorized representative of an administrator or trustee to sign, if such party agrees to do so. We recommend that, in such circumstances, the parties to a securitization should be permitted to contract among themselves who among these parties should sign the Form 10-D and Form 10-K reports.

In the alternative, we request clarification that a power of attorney can be used in connection with the execution and filing of a Form 10-D and Form 10-K (thereby permitting a trustee or administrator that has contractually agreed to do so to execute and file Form 10-D and Form 10-K on behalf of a depositor), if the Commission elects not to change the rule to permit administrators or trustees to sign Form 10-D and Form 10-K.

2. Content and Filing of Form 10-D.

We also believe that the amount of information to be provided in Form 10-D constitutes a major expansion of the typical distribution report. What has in the past been a report determined by agreement among issuers and investors, will become an expanded and more standardized formal checklist of information which, we believe in many cases, is not needed for ABS. In many instances, the information that the proposal requires in the monthly reports is information that either is not available for the transaction or was not agreed upon among the issuers and investors. These proposals would substantially change the nature of the monthly reports in ways that will require added time and expense for the industry to adjust and comply.

Item 1119 of Regulation AB should state that the items described therein are for illustrative purposes only and there should be no implication that all of the items listed must be included in all reports; indeed, as is currently the case with the monthly servicing reports, the items included are those that are needed to inform securityholders and the marketplace of the ongoing performance of the pool of assets. The contents of the reports should be dictated by the market and contain such information as is appropriate for the market in each individual deal.

We believe that more guidance is needed to distinguish when a Form 8-K is to be used as opposed to the new Form 10-D. It appears that there are numerous areas where the requirements of both Form 8-K and Form 10-D would require the same or similar

disclosure, with different filing deadlines. An example of such an instance is Item 1119(l), to be reported under Item 1 on Form 10-D, provides for the reporting of breaches of representations, warranties and covenants. Item 2.04 of Form 8-K requires reporting of triggering events that accelerate or increase a direct financial obligation. The proposed instructions to Form 8-K make it clear that this item is required if an early amortization, performance trigger or other event, including an event of default has occurred that would materially alter the payment priority or distribution of cash flows. To the extent a breach does not fall under this item, it would be reported under Item 8.01 Other Events. Reporting this information on Form 10-D is an example of the overlap of the purposes of Form 10-D and Form 8-K.

We believe that any filing rule for periodic reports should incorporate an extension mechanism comparable to that currently available to corporate issuers pursuant to Exchange Act Rule 12b-25. We believe a filing extension of at least 5 business days would be appropriate. The rules should also provide that the Commission staff, in its discretion, may extend a filing deadline. This discretion may be particularly important as the market adjusts to the new reporting requirements. As discussed above, the information-flow on a transaction may be overseen by the administrator; however, this information is not always generated or otherwise in the control of the administrator. When information is provided by other parties or is otherwise gathered and aggregated by the administrator, especially any new information required by Form 10-D, there may, for example, be unforeseen difficulties in providing some of that information. We also request that the Commission include a provision pursuant to which the staff may waive late filings which are subsequently cured. This provision would be particularly important in the context of Form S-3, where form eligibility is conditioned on timely reporting requirements.

3. Better Definition of Roles – Definition of “Servicer.”

We believe that there is an important need for further clarification of the roles of the parties in ABS transactions. Specifically, the Release sets forth a definition of the term “servicer” that we feel is overly broad.

As proposed, “servicer” could arguably be read to include entities that perform bond administration only (e.g., calculate amounts distributable on the various classes and make distributions to investors) or coupled with paying agency and bond register services (e.g., remittances to investors), but which are not involved in servicing of pool assets. Conceivably it could also include trustees in a resecuritization (where the trustee receives cashflows from underlying securities, not from a servicer directly, and allocates those distributions among the resecuritization securityholders) where the duties of administering the assets are substantially different. We are of the view that it is important to differentiate between the functions being performed by servicers or master servicers on the one hand, and those performed by parties acting solely as administrators or trustees

on the other. This would recognize the fact that although administrators assume a greater role than trustees in certain day-to-day activities, for which a bank may be best suited to perform, such as cashflows among the underlying accounts, the administrator nonetheless remains fundamentally passive in its role in the transaction. The ultimate economic risk of the transaction rests squarely with the servicer or the master servicer because they have the most direct effect on the performance of the assets. For this reason, we feel that there should be separate definitions provided for “trustees” and “administrators,” and that the definition of “servicer” should be clarified to exclude administrators and more clearly exclude trustees.

In addition, we respectfully submit that the detailed background and other information contemplated by proposed Item 1107 is excessive and unduly burdensome as it may relate to entities performing the limited functions of a bond administrator. We request, therefore, that the Commission revise the definition of “servicer” to distinguish and demarcate the customary differences among trustee, administration and servicing functions thereby significantly reducing the level of background and other information required for entities performing only bond administration activities. We suggest that item 1107-type disclosure (servicer type) is not appropriate for such parties, but that information similar to that required for trustees under item 1108 would be appropriate.

In addition, to the extent this clarification of the roles of administrator and trustee ensures that they will be excluded from the definition of “servicer,” we recognize that it may be appropriate to require compliance certification items for such parties, similar to that contemplated by item 1121. In that case, any such certification, if imposed, should be tailored and limited to a statement of compliance by such party regarding its own activities and with respect to its own duties set forth in the applicable transaction agreement by which it is bound.

We understand, as of the time of drafting this letter, that a comment letter to be submitted by the Committee on Federal Regulation of Securities of the American Bar Association Section of Business Law will include a proposal to revise the definition of “servicer”, and will propose definitions for “master servicer”, “trustee” and “administrator,” substantially as set forth below. To address our concerns described above, we would support the adoption of these definitions:

*“Servicer means any person that is contractually responsible for the management or collection of any of the receivables or other financial assets underlying the asset-backed securities, provided that no other servicer or master servicer is contractually liable to the issuing entity for such person’s activities as to those assets. The term “servicer” also includes any person responsible for making allocations or distributions to holders of the asset-backed securities that also performs servicing functions.*

*Master Servicer means any person that does not itself perform servicing functions but as to the issuing entity is either: 1) contractually liable for the activities of servicers or subservicers in servicing the pool assets, or 2) contractually responsible for monitoring the activities of the servicers or subservicers and replacing them if needed. The term “master servicer” also includes any person responsible for making allocations or distributions to holders of the asset-backed securities that also performs master servicing functions.*

*Trustee means the person with fiduciary obligations to protect the interests of the holders of the asset-backed securities under the primary operative document establishing the rights of those holders. The trustee may or may not be responsible for making allocations or distributions to holders of the asset-backed securities.*

*Administrator means any person responsible for making allocations or distributions to holders of the asset-backed securities, but that does not also perform the functions of a master servicer, servicer or trustee.*

*Originator means, as to any of the receivables or other financial assets underlying the asset-backed securities, the entity whose underwriting or credit granting criteria were applied in making the decision to approve the asset prior to funding, and that agreed to fund or purchase the asset.”*

4. “Responsible Party” Assessment.

While we applaud and support the Commission’s effort to set forth an enhanced and clarified servicing compliance regime, we feel that imposition of the contemplated assessment of compliance by a “responsible party” is misplaced and possibly unworkable. The proposed scheme appears to be based on an assumption that the designated “responsible party” would have the requisite skills and information to make such an assessment. That is not necessarily the case – in fact, in most cases we believe it would not be the case. There are often multiple parties involved, some or all of whom may be unaffiliated, each having different responsibilities and skills, none having complete access to information. Notwithstanding a desire to view servicing as a cohesive whole, it is in reality often a process made up of disparate parts. It seems to us to be simplistic and inequitable to impose an overriding responsibility for servicing assessment on a single party and unlikely to produce the desired assurance. We believe that the “responsible party” is poorly positioned to be charged with the task of testing or proving any assessment of compliance made by unaffiliated third parties. The responsibility for assessing compliance with the servicing criteria set forth should be placed solely, in each case, with the individual party whose servicing activities are being evaluated, and tested by an independent third party if appropriate; it cannot be productively placed on an unaffiliated party.

We suggest that the desired objective can be achieved in a far more effective and appropriate manner by requiring each servicer to provide its own servicing compliance statement as required by item 1121. If deemed necessary, those individual compliance statements could be expanded to include a certification by the servicer that it has also performed an assessment of its servicing platform in accordance with the criteria of item 1120(d), to the extent applicable to the servicing being performed by it.

In any event, we wish to emphasize to the Commission the importance of understanding (as the Release currently does) that neither trustees nor administrators are in a position to act as a “responsible party” to provide the overall assessment of servicing compliance as presently proposed. Trustees and administrators may act in their respective capacities for a wide variety of ABS transactions involving many different types of asset classes (each involving their own particular servicing issues). They do not necessarily have the expertise, and generally do not have access to appropriate or complete information, that would be necessary to make such an overriding assessment. The trustee is typically not affiliated with other transaction parties and generally is merely the recipient of information produced by others. Moreover, the trustee and administrator typically receive very limited fees that are not at all compatible with the kind of obligation that the contemplated “responsible party” would involve.

5. Use of Form 8-K.

As set forth in the proposal, the events required to be reported on Form 8-K would be expanded to include events specific to ABS. One of the events to be reported on Form 8-K is the occurrence of an early amortization event, performance trigger or other event, including an event of default, under the transaction agreements that would materially alter the payment priority or distribution of cash flows or the amortization schedule. We ask the Commission to give some type of guidance on what is considered “material” or to consider the standard as being “material to the reasonable investor”. There are numerous examples where such an event would be considered by one investor to be material while to the average reasonable investor it would not be material. The failure to file, or the late filing of a Form 8-K while the filer is at odds as to the materiality of an event, would be magnified in the context of Form S-3, where form eligibility is conditioned on timely reporting requirements.

6. Effective Date and Grandfathering.

We urge the Commission not to underestimate the burden, time and expense that will be involved in complying with the significant changes covered under the proposed reporting rules. Compliance will require substantial changes in procedures and systems, and will require the cooperation of a variety of market participants.

ABS transactions are governed by specific contractual arrangements which define the responsibilities and duties of the parties and set forth established procedures and timetables for each applicable transaction. Along with other compliance issues relating to timing, format and content, the enhanced reporting requirements in the proposed rules may require information that may not be in the possession or control of the party subject to the reporting obligation. If the contracts in place for existing deals do not provide the means by which that information can be obtained, it may be impossible for the obligated

party to obtain necessary information called for by the enhanced reporting rules within the specified time-frames, or even at all.

Contracts governing existing ABS transactions also set forth established fee and expense structures. Cost associated with compliance with the proposed rules, especially if made applicable to existing transactions which already have their own reporting requirements and procedures in place, will be significant. It is unfair to impose these costs upon parties confined by existing structures that may not allow for them to be appropriately shared in the transaction. Parties to existing deals, and bound by their terms, did not have an opportunity to negotiate the fair allocation of these costs when those deals were put in place.

Implementation of the final rule will require appropriate changes and adjustments in the terms of new deals being brought to the market, appropriate training and changes in reporting procedures and systems by those charged with disclosure and reporting responsibilities, and coordination among the various market participants involved (e.g., issuers, servicers, administrators and trustees).

Therefore, we strongly urge the Commission to make the proposed rules applicable only to ABS securities issued after the effective date of the new rules, grandfathering ABS transactions in existence on or before the effective date. We also request the Commission to allow sufficient time between the publication of the final rule and its effective date to allow for proper implementation in new transactions. For ABS issued after the effective date of the final rules, we request a transition period of not less than six months to allow issuers and servicers to become familiar with the new forms, hire and train staff and develop systems to provide and present the additional information in the manner required.

#### 7. Itemization of Expenses

We support those aspects of the Release that seek to improve disclosure regarding fees and expenses in ABS transactions. However, we do not think that this purpose is necessarily served by requiring, and indeed that it is not truly possible to produce, an itemized list of all estimated fees and expenses to be paid out of the cash flows, at least not in an exhaustive way. Specifically, disclosure should be improved to clarify to investors that in a default or servicing transition situation, expenses will be incurred, the amount of which will depend on the circumstances and cannot be effectively estimated in advance.

In the normal situation, with respect to ordinary services to be provided in a transaction that has not gone into default, it is appropriate to require that an estimate of expected fees and expenses be set forth. However, when unexpected circumstances arise, particularly in a default or where servicing issues must be remedied, expenses cannot

