

February 22, 2005

**VIA E-MAIL**

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

**Re: Release Nos. 33-8501; 34-50624; and IC-26649 (File No. S7-38-04)**

Ladies and Gentlemen:

State Street Global Advisors, the investment management arm of State Street Corporation ("SSgA") is submitting this letter in response to the request for comments made by the Securities and Exchange Commission (the "Commission") in Release Nos. 33-8501, 34-50624 and IC-26649) dated November 3, 2004 (the "Proposing Release"). The Proposing Release sets forth proposed modifications to the registration, communication and offering processes for securities under the Securities Act of 1933 (the "Securities Act").

SSgA is the world's largest institutional asset manager<sup>1</sup> with over \$1.2 trillion in assets under management as of December 31, 2004. SSgA has over 3,200 institutional clients, including corporate pension plans, public retirement plans, insurance companies, endowments and foundations. SSgA is a division of State Street Bank and Trust Company, a subsidiary of State Street Corporation. State Street Corporation is a publicly traded bank holding company with more than \$9.4 trillion in assets under custody. SSgA has been investing extensively on behalf of its institutional clients in the registered and unregistered asset-backed securities ("ABS") market across a broad spectrum of asset classes practically since the inception of the ABS market, with a focus on investment grade ABS.

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<sup>1</sup> Based on Pensions & Investments 2004 Money Manager Survey.

SSgA is one of the largest institutional managers of ABS in the market with over \$50 billion in ABS under management. SSgA's views as expressed in this letter are presented solely in its capacity as an investment manager and a fiduciary for its institutional clients that invest in registered ABS.

SSgA supports the Commission's efforts to modify and advance significantly the processes as described in the Proposing Release, including providing more timely information to investors and the integration of disclosure and other processes. We believe these changes will have a significant and positive effect on the ABS market. In the context of these broad proposals, we offer the following limited comments on two aspects of the proposals.

### **Free Writing Prospectuses – NRSRO Pre-Sale Reports**

Proposed Rule 433(f) provides that a written communication about an issuer or its securities that is "published or disseminated by a person unaffiliated with the issuer" will constitute a "free writing prospectus" if it contains information provided by "an issuer or any person participating in the offer or sale of the securities or any person acting on their behalf." In an ABS offering, when a Nationally Recognized Statistical Rating Agency ("NRSRO") assigns a credit rating to a series of securities, it typically requires certain information from the issuer or underwriter, which information is then typically checked for error by the provider. We believe that the rule should specify that a pre-sale report issued by an NRSRO based on this information should be treated as a free writing prospectus.

Typically, a pre-sale report is paid for by the sponsor of the issuer. As the name indicates, these reports are generated prior to issuance of the ABS. The availability of a pre-sale report is often announced during a road show, and an investor may work through the underwriter to schedule a call with the NRSRO analyst to clarify information in the report, occasionally resulting in a revision or correction of the report.

The more established an ABS issuer is, the less likely a sponsor is to pay for a pre-sale report (considering it to be an unnecessary marketing expense). For example, well established credit card master trust sponsors rarely pay for this service due to the homogeneity of the risks from one transaction to the next. Thus, from an investor's perspective, a pre-sale report is part of the offering information prepared "by or on behalf of" the issuer or other participant in the offering and comments made in a pre-sale report can be influential, particularly when the sponsor is unknown and the collateral supporting the ABS is untested.

Given the importance of a pre-sale report from an investor's perspective and the fact that the report typically is paid for by the sponsor and based on information provided by the issuer or underwriter, we believe that a pre-sale report involves the issuer or underwriter and that the issuer or underwriter has at least implicitly approved the information contained in the report. Accordingly, from an investor's perspective, we believe a pre-sale report should constitute a "free writing prospectus" under proposed Rule 433(f), and that the rule should be clarified to avoid any uncertainty.

### **Rule 159 – Timing of Contract of Sale**

Proposed Rule 159 provides that for purposes of Section 12(a)(2) and Section 17(a)(2) of the Securities Act of 1933, information conveyed to an investor after the time of the "contract of sale" will not be taken into account. We support Rule 159 as proposed, and suggest that at least in the context of ABS, the investment professionals who participate in the market generally agree that when an investor orally commits to the underwriter that he or she will purchase bonds by stating he or she is "done" (or the colloquial equivalent) on a certain size, at a certain spread versus an index or Treasury bond, an investment decision has been made and an order pursuant to that decision has been communicated to the underwriter. In light of this convention, in the ABS market, investors should be fully informed by this point in time so that they are not making decisions based in part upon untrue statements or material omissions.

Because of the role of institutional investors and the characteristics of the ABS markets, we believe it is not difficult to establish an appropriate definition of time of sale. Certain points in the sales process can be ruled out from consideration as the time of sale because they clearly occur before (*e.g.* soft circle) or after (*e.g.* pricing) the investor makes her or his decision. A soft circle cannot be a sale because, by definition, some part of the investor's analysis has yet to be completed.<sup>2</sup> Converting a spread to a dollar price, on the other hand, is a largely mechanical process that takes place well after the investment decision has been made.

We believe the proposed Rule 159 provides a significant advance beyond the current process and remedies certain issues that are significant to investors. In the current process, issuers may cure previously communicated errors or omissions that were included in a "red herring" prospectus by correcting them in

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<sup>2</sup> The phrase "soft circle" is more typically used in conversations between brokers and traders within a sell-side firm, and with respect to secondary market transactions. Investor intentions to participate in a syndicate are usually described as being "indications of interest".

the final prospectus, yet the final prospectus is typically not provided until after the sales contract is finalized and even if it is provided prior to the final investment decision, the investor generally does not have sufficient time to do a word-by-word review of the two documents to identify changes. Thus, we believe the current process can disadvantage investors, and that the significant difference that would be produced by proposed Rule 159 is that issuers and underwriters would have an incentive to accelerate the process for providing complete and correct information to investors so that investors can make informed decisions.

SSgA appreciates the opportunity to comment on the proposals detailed in the Proposing Release. Should you have any questions concerning these comments, please contact Daniel Stachel at 617-664-6249.

STATE STREET BANK AND TRUST COMPANY, acting through its division  
State Street Global Advisors

By: /S/ Daniel W. Stachel\_\_\_\_\_

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