

Clients & Friends Memo

SEC Final Rules for Regulation of Asset-Backed Securities

January 4, 2005

In a new release¹ (the “ABS Release”), the Securities and Exchange Commission (the “SEC”) adopted sweeping changes to the rules governing the issuance of asset-backed securities (“ABS”).² The ABS Release reflects the adoption of final rules (the “Final ABS Rules”) that were first proposed (the “Proposed ABS Rules”) by the SEC last May.³ The SEC received over 50 comment letters in response to the Proposed ABS Rules. The Final ABS Rules reflect a number of changes to the Proposed ABS Rules that were recommended by the commenters. This memorandum summarizes the most significant aspects of the Final ABS Rules.

The adoption of the Final ABS Rules is distinct from a broader SEC initiative (the “Securities Offering Reform Proposal”)⁴, which proposes sweeping changes to the SEC rules governing all SEC-registered securities offerings (not just ABS), including significant modifications to the registration, communications and offering processes under the Securities Act of 1933, as amended (the “Securities Act”). The Securities Offering Reform Proposal is separately described in a Cadwalader Clients & Friends Memorandum dated November 12, 2004. The November 12, 2004 Clients and Friends Memorandum contains a summary of the specific impact of the Securities Offering Reform Proposal on ABS issuers.

The express provisions of the rules under the Securities Act, and the Securities Exchange Act of 1934, as amended (the “Exchange Act”), are more suitable to an ordinary operating company that issues conventional debt or equity securities than to a securitization trust that issues pass-through or pay-through securities. As the SEC observed in the ABS Release, “[m]any of the SEC’s existing disclosure and reporting requirements, which are designed primarily for corporate issuers, do not elicit the information that is relevant for most asset-backed securities transactions.” In the past, the SEC bridged the gap between rule and practice with informal guidance, no-action letters and, in

¹ Release Nos. 33-8518; 34-50905; File No. S7-21-04. Available for review at <http://www.sec.gov/rules/final/33-8518.htm>.

² This would include residential and commercial mortgage-backed securities.

³ Release Nos. 33-8419; 34-4964; File No. S7-21-04. Available for review at <http://www.sec.gov/rules/proposed/33-8419.htm>.

⁴ Release Nos. 33-8501; 34-50624; File No. S7-38-04. Available for review at <http://www.sec.gov/rules/proposed/33-8501.htm>.

very limited instances, rules directed specifically to the ABS industry. As the SEC acknowledged in the ABS Release, “the accumulated informal guidance, while helpful to some ABS transactions, has diminished the transparency of applicable requirements because an ABS registrant or investor seeking to understand the applicable requirements must review and assimilate a large body of no-action letters and other staff positions. This time-consuming practice decreases efficiency and transparency and leads to uncertainty and common problems.”

The SEC seeks to remedy this in adopting the Final ABS Rules. The Final ABS Rules primarily address four areas of securities regulation:

- **Securities Act Registration.** The SEC is expanding the definition of “asset-backed security” and codifying certain staff positions (with some changes) relating to registration of securities on Form S-3, including the loss of eligibility as a consequence of failure to timely file Exchange Act reports.
- **Disclosure.** The SEC is adding substantial disclosure requirements relating to the background, experience, performance and roles of various transaction parties, as well as historical performance data relating to the applicable party’s portfolio and individual securitized pools, and, where relevant, for the assets proposed to be securitized.
- **Communication During the Offering Process.** The SEC is codifying the SEC’s no-action positions with respect to (a) distribution of term sheets and computational materials to investors prior to the distribution of the final prospectus and (b) publication of research reports relating to ABS.
- **Ongoing Reporting Under the Exchange Act.** The SEC is codifying, with some changes, the modified reporting system under the Exchange Act that is currently in place for issuers of ABS.

We summarize certain highlights of the Final ABS Rules below.

EFFECTIVE DATE AND GRANDFATHERING

In order to provide the participants in the ABS market ample time to prepare for and satisfy the new requirements, the Final ABS Rules will apply to all ABS offerings commencing after December 31, 2005. All ABS offerings commenced prior to such date will be grandfathered under the existing regime. If an offering after December 31, 2005 is pursuant to a shelf registration statement, the prospectus supplement and prospectus used for such offering must comply with the Final ABS Rules; however different time periods will apply with respect to when amending shelf registration statements is required, depending on when the registration statement was filed. Shelf registration statements filed after August 31, 2005 will need to comply (or be amended to comply) with the Final ABS Rules in connection with transactions commencing after December 31, 2005. Shelf registration statements filed before August 31, 2005 will generally need to be amended with

respect to required issuer undertakings in connection with transactions commencing after December 31, 2005 and, if they are used for ABS transactions commencing after March 31, 2006, to revise the prospectus included in the registration statement.

SECURITIES ACT REGISTRATION

For purposes of registering ABS under the Securities Act, the Final ABS Rules address three related topics: (a) the definition of “asset-backed security”, (b) eligibility to use Form S-3 for shelf registration and (c) the requirement for registration and delivery of a prospectus for market making transactions.

Definition of “Asset-Backed Security”

Under existing authority, investment-grade securities that meet the definition of “asset-backed security” may be registered on a shelf-registration basis on Form S-3. As defined in Form S-3, “asset-backed security” means “a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.”⁵ The SEC has made the changes to the definition of “asset-backed security” described below.

Lease-Backed Securities. The Final ABS Rules extend shelf registration to securities backed by leases with the addition of a proviso to the definition of “asset-backed security” to the effect that “in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases.”

However, the SEC has limited the portion of the cash flow to repay the securities anticipated to come from the residual value of the physical property. For the general definition of “asset-backed security,” the residual value will not be permitted to constitute 50% (or, solely with respect to automobile leases, 65%) or more, as measured by dollar volume, of the original asset pool.⁶ However, in order to use Form S-3 for shelf registration, the residual value would not be permitted

⁵ By moving the definition of “asset backed security” to the definition section of Regulation AB, the SEC made clear that, under the new format, a security that meets the definition is to be subject to the requirements of the Final ABS Rules regardless of which Form is used for registration.

⁶ As in the case of determination of delinquency thresholds, the SEC clarified in the Final ABS Rules that the appropriate measurement date is the cut-off date for the transaction (i.e., the date on and after which the collections on the assets accrues for the benefit of the ABS holders).

to constitute 20% (or, solely with respect to automobile leases, 65%) or more, as measured by dollar volume, of the original asset pool.⁷

Nature of the Issuing Entity. The Final ABS Rules codify two SEC interpretations concerning the issuing entity as conditions to the definition of “asset-backed security.” The first condition is that neither the depositor nor the issuing entity is an “investment company” under the Investment Company Act of 1940, as amended, nor will either become one as a result of the ABS transaction. The second condition is that the issuing entity must be passive and its activities must be restricted to acting in a single ABS transaction. This position excludes from the definition of “asset-backed security” any security issued by a “series trust,” where a single trust issuer holds multiple pools of assets and issues multiple series of securities.⁸

Synthetic Securitizations. The Final ABS Rules implement the SEC’s position that the definition of “asset-backed security” specifically excludes “synthetic” securitizations. Synthetic securitizations often involve derivatives such as a credit default swap or total return swap to create exposure to an asset not in the pool. The SEC takes the position that the definition of “asset-backed security” is limited to those securities whose payments are primarily based on the performance of a discrete pool of assets, not by reference to assets outside the pool. As adopted, this provision will have a significant impact on the ability to conduct these transactions with registered securities and will force these transactions into the Rule 144A, Regulation S and private markets and may materially inhibit the growth of a public market for “synthetic” securitizations. However, the SEC did acknowledge that a separate registration regime might be appropriate for these types of transactions and requested comment on whether the SEC should consider the creation of such a regime and several specific issues related to such securities.

Delinquent and Non-Performing Pool Assets. The Final ABS Rules codify the SEC’s interpretive position that non-performing assets may not be part of the original asset pool at the time of issuance of the ABS. The Final ABS Rules define “non-performing” to be a pool asset if any of the following is true:

- The pool asset would be treated as wholly or partially charged-off under the requirements in the transaction agreements for the asset-backed securities;

⁷ The SEC stated that leases covered by residual value guarantees or insurance should not be counted against the applicable threshold.

⁸ Although the SEC noted that several commenters wished to relax the passive issuer requirement in order to allow series trusts with multiple unrelated transactions in order to reduce costs, the SEC specifically rejected these requests. The SEC did continue, however, to distinguish these series trusts from master trust structures typical in ABS backed by credit card receivables and from single transactions involving single asset pools subdivided so that one or more subpools back one or more specific classes of ABS.

- The pool asset would be treated as wholly or partially charged-off under the charge-off policies of the sponsor, an affiliate of the sponsor that originates the pool asset or a servicer that services the pool asset; or
- The pool asset would be treated as wholly or partially charged-off under the charge-off policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed above or the program or regulatory entity that oversees the program under which the pool asset was originated.⁹

The Final ABS Rules codify the existing no-action position with respect to delinquent assets. For the general definition of “asset-backed security,” delinquent assets are not permitted to constitute 50% or more, as measured by dollar volume, of the original asset pool. However, in order to use Form S-3 for shelf registration, delinquent assets are not be permitted to constitute 20% or more, as measured by dollar volume, of the original asset pool. A pool asset will be “delinquent” if it is more than 30 or 31 days or a single payment cycle, as applicable, past due from the contractual due date, as determined in accordance with any of the following:

- The transaction agreements for the asset-backed securities;
- The delinquency recognition policies of the sponsor, any affiliate of the sponsor that originated the pool asset or the servicer of the pool asset; or
- The delinquency recognition policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed above or the program or regulatory entity that oversees the program under which the pool asset was originated.¹⁰

The Final ABS Rules create provisions that prohibit improper re-aging or restructuring of delinquent accounts. The SEC also clarified that the appropriate measuring date for the applicable pool percentage is the cut-off date (i.e., the date on and after which the collections on the assets accrues for the benefit of the ABS holders). Finally, the SEC clarified that a transaction would not be disqualified from relying on the definition of “asset backed security” solely as a result of including non-performing or delinquent assets as part of a pool so long as such assets are not part of the funded portion of the pool and are not part of the cash flow calculations for the ABS.

Exceptions to the “Discrete Pool” Requirement. By its express terms, the existing definition of “asset-backed security” is limited to securities that are backed by a “discrete pool” of financial assets. In the past, the SEC has stated that, notwithstanding the discrete pool requirement, the definition of “asset-backed security” would include any security that involves a master trust

⁹ The Proposed ABS Rules only referred to charge-off policies of sponsor.

¹⁰ In response to commenters’ request for greater flexibility, the definition was modified. Under the Proposed ABS Rules an asset would have been “delinquent” if any portion of the required payment is 30 or more days delinquent without regard to the references to the servicer or the regulatory authorities.

structure, a prefunding period or a revolving period. The Final ABS Rules codify these recognized exceptions, as set forth below:

- Under the Final ABS Rules, any security issued in a master trust structure would meet the definition of “asset-backed security.”
- For prefunding periods, the Final ABS Rules establish up to 50% of offering proceeds (or, in the case of master trusts, up to 50% of the aggregate principal balance of the total asset pool whose cash flows support the ABS) may be used for subsequent purchases and the length of the prefunding period may not exceed one year.¹¹
- For revolving periods, the rule depends on the type of asset that backs the related ABS. For revolving assets like credit card receivables and home equity lines of credit, there is no limit on the quantity of assets or the duration of the revolving period. For fixed receivables, like residential mortgage loans and auto loans, an unlimited revolving period is permitted for up to three years, so long as the new pool assets that are added are of the same general character as the original pool assets.¹²

Securities Act Registration Statement

The Final ABS Rules require that, as a condition for filing a new Form S-3 registration statement, the depositor for an ABS offering or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor with respect to ABS involving the same asset class, must have timely complied with its Exchange Act reporting requirements for the prior 12 months.¹³ As a result of this requirement, if a depositor fails to comply with its obligations under the Exchange Act, that depositor, and *any other currently existing or newly formed depositor that is an affiliate of the same “depositor”*, would be precluded from registering securities relating to the same asset class¹⁴ on a new Form S-3.

The inability to file a new Form S-3 is very significant to active issuers (and their sponsors) because under the Final ABS Rules, registration of new ABS transactions that do not qualify for Form S-3

¹¹ The Proposed ABS Rules specified a two tier method similar to the residual values and delinquent assets described above. In response to comments received, the SEC eliminated this approach and used the higher threshold for all registration Forms.

¹² This represents a significant departure from both past practice and the Proposed ABS Rules. The Proposed ABS Rules limited the revolving period to one year and a threshold of either 50% or 25% of the proceeds, depending on which registration Form was utilized.

¹³ This represents a significant change from the Proposed ABS Rules. Under the Proposed ABS Rules, compliance with Exchange Act reporting requirements would have been required by any issuing entity established by the sponsor, regardless of asset class.

¹⁴ The SEC did not provide any explanation or examples of what asset types would be considered in the “same asset class.”

would only be permitted under Form S-1. Form S-1 does not permit incorporation by reference of other documents, thus precluding the use of term sheets and computational materials.¹⁵

Foreign ABS

The Final ABS Rules allow ABS issued by a foreign issuer, backed by foreign assets or effected by credit enhancement provided by a foreign entity to be registered on Form S-3, as long as the registration statement also describes applicable legal, tax, and other factors that could materially affect payments on, the performance of, or other matters relating to, the assets contained in the pool or the ABS.

Registration of Underlying Pool Assets

In some ABS transactions, such as resecuritizations, the underlying assets are themselves securities issued by another issuer. The Final ABS Rules require that, absent an exemption for the underlying securities under Section 3 of the Securities Act, registration of the underlying securities would be required unless all of the following three conditions are satisfied:

- Neither the issuer of the underlying securities nor any of its affiliates has a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the underlying securities and the ABS transaction;
- Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the ABS transaction; and
- The depositor would be free to publicly resell the underlying securities without registration under the Securities Act.

If any of the three conditions failed, the offering of the relevant underlying securities itself would be required to be separately registered as a primary offering of such securities, subject to additional conditions set forth in the Final ABS Rules.

No Market-Making Prospectus

Under existing authority, there are requirements for keeping an ABS prospectus current for market-making or remarketing transactions where there is an affiliation between the broker-dealer and the servicer. As a practical matter, broker-dealers that are affiliated to the servicers of ABS transactions comply with this requirement for delivery of an “evergreen” prospectus by continuing

¹⁵ As described below under “Communications During the Offering Process,” if the SEC were to adopt the proposed rules in the Securities Offering Reform Proposal, term sheets and computational materials would be considered free-writing prospectuses and their use would be conditioned on satisfying the requirements of the proposed rules in the Securities Offering Reform Proposal.

the Exchange Act reporting process beyond the time when transactions would otherwise be permitted to “de-list” from the Exchange Act reporting requirements. Some commenters (most persuasively the ABA comment letter) argued that an affiliation between the broker-dealer in an ABS transaction and the servicer does not imply a significant enough relationship to impose this heightened requirement for continuous updating of the prospectus. In response to comments, the SEC indicated that it will no longer require registration and delivery of a prospectus for market-making transactions involving ABS.

DISCLOSURE

The SEC has adopted new Regulation AB, which sets forth a “principles-based” set of disclosure items for ABS. While the ABS Release generally recognizes and adopts much of the disclosure regime reflected by existing practice, the SEC has added substantial disclosure requirements relating to the background, experience, performance and roles of various transaction parties such as the sponsor, the depositor, the servicer and the trustee, as well as historical performance data relating, at a minimum, to the applicable party’s prior securitized pools or portfolio of accounts, depending on whether the securitization involves an amortizing pool or a revolving master trust. In many cases, these disclosures are required “to the extent material” to the investors’ understanding of the ABS, although the SEC is clearly of the view that current transactions have too much unnecessary disclosure and not enough content related to the experience and performance of the transaction participants and their prior securitizations.

The discussion below focuses primarily on those aspects of the Final ABS Rules that materially differ from existing disclosure standards.

The Sponsor

The Final ABS Rules require disclosure relating to the sponsor of an ABS transaction. In addition to basic identifying information about the sponsor, the Final ABS Rules require a description of the sponsor’s securitization program. The description must consist, to the extent material, of both a general discussion of the sponsor’s experience in securitizing assets “of any type” as well as a more detailed discussion of the sponsor’s experience in, and overall procedures for originating or acquiring and securitizing assets of, the type to be included in the related transaction. To the extent material, information regarding the size, composition and growth of the sponsor’s portfolio of assets of the type to be securitized and information or factors related to the sponsor that may be materially relevant to an analysis of the origination and performance of the pooled assets are required to be disclosed. This may include information relating to prior securitizations that have defaulted or experienced an early amortization or other performance trigger event, or any action taken outside the ordinary performance of the transaction to prevent such an occurrence. Sponsor data also includes, to the extent material, the sponsor’s underwriting criteria for the assets being securitized and the extent to which they have changed, the extent to which the sponsor outsources to third

parties any of its origination or purchasing functions, and the extent to which the sponsor relies on securitization as a funding source. The Final ABS Rules also require a description of the sponsor's roles and responsibilities in the securitization, including whether the sponsor or an affiliate is responsible for the selection of the pooled assets.

The Depositor

If the depositor is not the same entity as the sponsor, separate identifying information about the depositor is required, including information on the ownership structure of the depositor and the general character of its activities other than securitizing assets. In addition, if material and materially different from the sponsor (such as in a "rent-a-shelf" context), information similar to that discussed for sponsors above regarding the depositor's securitization program and its experience is required. Disclosure is also required regarding the continuing duties of the depositor in the securitization.

Issuing Entity and Transfer of Asset Pool

Various information relating to the issuing entity and the transfer of the assets is required. This includes the issuing entity's permissible activities, restrictions on activities and capitalization. The amount paid or to be paid by the issuing entity for any pooled assets that are securities¹⁶ (including the principles followed in determining such amount) must also be disclosed, as well as information on any expenses incurred in connection with the selection and acquisition of the pool to be payable from offering proceeds. To the extent material, disclosure will also be required regarding whether security interests granted are perfected, whether the issuer can become subject to a bankruptcy or receivership proceeding, and whether the assets of the issuing entity could become part of the bankruptcy estate of the sponsor, originator, depositor or other seller of pool assets.

Servicers

The Final ABS Rules define "servicer" as any person responsible for the management or collection of the pooled assets or making allocations or distributions to holders of the ABS. This definition includes securities administrators, but does not include trustees if the trustee receives the allocation or distribution information from the servicer. The disclosure requirements require identifying servicers, including (a) each master servicer, (b) each affiliated servicer, (c) each unaffiliated servicer that services 10% or more of the pool assets and (d) any other material servicer responsible for calculating or making distributions to holders of the ABS, performing workouts or foreclosures or other functions on which the performance of the pool assets or ABS is materially dependent.

¹⁶ The Proposed ABS Rules would have required disclosure of the amount paid for all pool assets, regardless of type.

The Final ABS Rules also require additional information be disclosed for such servicers, except that with respect to an unaffiliated servicer, such additional disclosure is required only if the unaffiliated servicer services 20% or more of the pool assets. Required information will include a general discussion of the servicer's experience in servicing assets of any type, as well as a more detailed discussion of the servicer's experience in, and procedures for, servicing assets of the type included in the current transaction. Other material information could include whether the servicer has been involved in any prior transactions that have defaulted or experienced an early amortization or other performance triggering event because of servicing, the extent to which the servicer outsources its responsibilities, and whether there has been any material noncompliance with servicing criteria in other transactions. Other required disclosure include any material changes to the servicer's policies or procedures in servicing assets of the same type during the past three years, as well as information regarding the servicer's financial condition where it could have a material impact on one or more aspects of servicing that could have a material impact on pool asset performance or the performance of the ABS.

Trustees

The Final ABS Rules require disclosure of basic identifying information about any trustee, as well as disclosure regarding the trustee's prior experience in similar ABS transactions (if applicable), indemnification provisions, limitations on liability and removal or replacement provisions. The Final ABS Rules also require disclosure of the trustee's duties and responsibilities under the governing documents for the ABS and under applicable law, noting that such disclosure should address "material factors", such as the extent to which the trustee independently verifies distribution calculations, access to and activity in transaction accounts, transaction covenant compliance, use of credit enhancement, pool asset addition, substitution or removal, and the data underlying such determinations. Actions required by the trustee upon an event of default, potential event of default (and how defined) or other transaction covenant breach must also be described, including the required percentage of the ABS class(es) needed to require trustee action. Where multiple trustees are involved, the Final ABS Rules require disclosure of the roles and responsibilities of each trustee.

Originators

Recognizing that some ABS transactions involve pool assets that were not originated by the sponsor, the Final ABS Rules require identification of all originators that have originated 10% or more of the pool assets. The Final ABS Rules also require additional information for any affiliated originator and any unaffiliated originator that has originated 20% or more of the pool assets.¹⁷ The required information includes a brief description of the originator, and, to the extent material, a

¹⁷ The Proposed ABS Rules would have required the lower 10% threshold for unaffiliated servicers.

description of its origination program and experience, including the size and composition of the originator's portfolio as well as other information material to an analysis of the performance of the pool assets, such as the originator's underwriting criteria.

Static Pool Data

The Final ABS Rules require, if material to the transaction, historical performance data, or "static pool data." The Final ABS Rules provide separate "starting points" for static pool disclosure depending on whether the transaction involves an amortizing asset pool or a revolving master trust.¹⁸ For amortizing asset pools, the Final ABS Rules require five years of delinquency, loss and prepayment information for the sponsor's prior securitized pools involving the same asset type established during the period (or information for such shorter period that the sponsor has been making originations or purchases), presented in time increments (e.g., monthly or quarterly) material to the asset type. For unseasoned sponsors that have less than three years of securitization experience with assets of the same type, the SEC recommends considering presentation of static pool data by "vintage origination year" or purchases by the sponsor, as applicable for the relevant asset type. A vintage origination year represents assets originated during the same year. For revolving asset master trusts, the Final ABS Rules require data for the master trust revolving asset pool itself concerning delinquency, loss, prepayment, payment rate, yield and standardized credit scores or other applicable measures of credit quality, in separate increments based on the date of origination year, with the suggested timeframe being minimum 12-month increments through the first five years of the account's life. If the transaction involves a new master trust, the SEC noted that disclosure regarding, among other things, the sponsor's prior master trusts or vintage portfolio may be appropriate in addition to or in lieu of age-related information about the offered master trust pool.

Data for prior securitized pools or by vintage origination year must be presented over the life of such pool or vintage origination year, as applicable, and, with respect to the most recent periodic increment, as of a date that is not later than 135 days prior to the date of first use of the prospectus.

Beyond the two general categories, the Final ABS Rules also recognize that if information that would otherwise be required by the directed "starting point" is not material, but other static pool information would provide material disclosure, the alternative information is to be provided instead. The Final ABS Rules also require that static pool information regarding a party or parties other than

¹⁸ This starting point approach is a more refined approach than the approach the SEC proposed in the Proposed ABS Rules, which would have required disclosure of static pool data for each of the sponsor's overall portfolio, its prior securitized pools and the current pool itself, regardless of the type of asset pool.

the sponsor may be provided in addition to or in lieu of the contemplated information regarding the sponsor if appropriate in order to provide material disclosure (e.g., “rent-a-shelf” transactions).¹⁹

Method of Presentation. The Final ABS Rules expressly provide that static pool information can be provided via an Internet website so long as several conditions are met. The conditions include the intention to use a website for such disclosure and the specific website address must be disclosed in the prospectus, the website access must be unrestricted and free of charge, the information must be available on the website for five years (commencing with the earlier of the date of filing and the date of first use of the prospectus), and the registrant must retain all versions of the information as posted on the website for a period of five years. Information so posted on websites will be subject to the same standards of liability as if included in the prospectus. The Final ABS Rules state that such information provided by website in accordance with the above conditions need not be filed via EDGAR through 2009, by which time the SEC envisions that the EDGAR system will have been modified sufficiently to enable the filing of such information thereafter.

Transition Period Data. The Final ABS Rules provide for transition with respect to (a) data in respect of prior securitized pools established before January 1, 2006 and (b) data in respect of periods prior to January 1, 2006 for assets to be securitized in current pools. Such pre-January 1, 2006 data (“Transition Period Data”) that cannot be obtained without unreasonable effort or expense may be omitted provided that the registrant includes the Transition Period Data that can be so obtained and also a statement showing that unreasonable effort and expense would be involved in obtaining the omitted information. Even Transition Period Data that can be so obtained and included, though still subject to the general antifraud provisions of the Securities Act and the Exchange Act, will not be deemed to be part of a prospectus or registration statement for the ABS and will therefore not attract the same standards of liability for the issuers and underwriters of such securities. However, the fact that such Transition Period Data will not be subject to “normal” issuer and underwriter liability standards must be disclosed in the prospectus.

Pool Assets and Sources of Pool Cash Flow

The Final ABS Rules require that the solicitation, credit granting or underwriting criteria used to originate or purchase pool assets be described, as well as the selection criteria for the asset pool. Static pool data of the type discussed above may be required for the pool in the current transaction to the extent material (e.g., if the pool is a seasoned pool).

If the asset pool includes leases or other assets and a portion of the cashflow is anticipated to come from the residual value of an underlying physical asset, the Final ABS Rules require additional

¹⁹ The Proposed ABS Rules did not provide a basis to distinguish such transactions, potentially requiring sponsor disclosure in all situations.

disclosure on how residual values are estimated and derived, statistical information regarding estimated residual values and historical statistics on term-end rates and residual value realization rates. Information is also required regarding the manner and process in which residual values are to be realized, including disclosure of the entity that will convert the residual values into cash and the experience of such entity.

The Final ABS Rules affirmatively require disclosure of standardized credit scores for all consumer asset classes. Disclosure of proprietary internally-derived scores of the originator is not required, although a description of the material solicitation, credit granting and underwriting criteria used to originate the pool assets is required.

Transaction Structure

Although the Final ABS Rules do not change significantly the disclosure for the structure of the ABS, as a result of increased emphasis in the market on levels of fees and expenses involved in an ABS transaction, the Final ABS Rules require a separate table itemizing all estimated fees and expenses to be paid or payable out of the cashflows for the transaction, including the amount of the fee or expense, its general purpose and the party receiving such fee or expense. The Final ABS Rules also require disclosure of parties with authority to make decisions regarding the investment and use of cash generated by the pool assets, as well as information on the ownership of any residual or retained interests.

Significant Obligor

Under the Final ABS Rules, additional disclosure is required with respect to any significant obligors. A "significant obligor" is defined as:

- An obligor or a group of affiliated obligors on any pool asset or group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool; or
- A single property or group of related properties securing a pool asset or group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool; or
- A lessee or group of affiliated lessees if the related lease or group of leases represents 10% or more of the asset pool.

The Final ABS Rules require that cross-defaulted and/or cross-collateralized pool assets or properties underlying pool assets must be aggregated to determine concentration levels. If a mortgage or lease is non-recourse to the obligor, the obligor does not need to be considered as a separate significant obligor from the real estate. However, if there is recourse to the obligor, the obligor would be a significant obligor in its own right if any of the 10% thresholds are met.

Required descriptive information regarding a significant obligor includes its identity, its form of organization, the general character of its business, the nature of the concentration that causes it to be a significant obligor, and the material terms of the pool assets or agreements with the significant obligor. If the pool assets relating to a significant obligor represent 10% or more but less than 20% of the asset pool, selected financial data required by Item 301 of Regulation S-K will need to be provided. Item 301 requires, among other things, for each of the last five fiscal years (or the life of the significant obligor and its predecessors), the following financial data (subject to appropriate variation to conform to the nature of the obligor's business): net sales or operating revenues; income (loss) from continuing operations; total assets; and long-term obligations. If the pool assets related to a significant obligor represent 20% or more of the asset pool, audited financial statements meeting the requirements of Regulation S-X would be required. If the significant obligor is an asset-backed issuer and the pool assets related to the significant obligor are ABS, the Final ABS Rules require ABS disclosure conforming to much of the new Regulation AB rather than the foregoing financial information.

Credit Enhancement

Under the Final ABS Rules, the extent of information required of a significant credit or liquidity enhancement provider will essentially be the same as that of a significant obligor. The analysis of whether the amount of the enhancement exceeds the 10% and 20% thresholds would not be based on the current value of the enhancement, but rather on the payments that the enhancement provider is liable or contingently liable to provide. However, the Final ABS Rules contain an exception for derivative instruments if their primary purpose is not to provide credit enhancement. For such instruments, the percentage is determined relative to a reasonable good-faith estimate of the maximum probable exposure.²⁰

Affiliations in Certain Relationships and Related Transactions

Where material to an investor's understanding of the ABS, the Final ABS Rules require disclosure of any relationships, agreements, arrangements and the like entered into outside of the ordinary course of business or on terms other than would be obtained in an arm's length transaction with an unrelated third party (apart from the ABS transaction) between the sponsor, the depositor or the issuing entity, and any other material party to the transaction (e.g., master servicer, each affiliated servicer, each unaffiliated servicer that services 20% or more of the pool assets, trustee, 10% originator, significant obligor, 10% enhancement provider).

²⁰ The Proposed ABS Rules would have provided that if a swap were currently out of the money and no payments were required, but the swap provider was contingently liable for more than 10% or 20% of the cashflow supporting a class (for example, assuming for an interest rate cap or swap that interest rates change), disclosure would have been required on the same basis as any other form of 10% or 20% enhancement, even though the probability of payment might have been remote.

In addition, any material relationships related to the current ABS transaction and the pool assets must be disclosed even if such relationships exist in the ordinary course of business and are on arms-length terms. In addition, affiliations between the sponsor, the depositor and the issuing entity with the servicer, the trustee, a significant originator, obligor or enhancement provider, an underwriter²¹ or any other material parties to the transaction will also require disclosure.

COMMUNICATIONS DURING THE OFFERING PROCESS

Under the heading “Communications During the Offering Process,” the ABS Release addresses two discrete topics: (a) the use of term sheets and computational materials in the offering of ABS and (b) the publication by broker/dealers of research reports concerning ABS around the time of a registered offering of similar ABS.

The SEC declined to use the Final ABS Rules to implement any proposals to liberalize current restrictions on the use of communications in the offering process, observing that such proposals raise broader issues having implications for non-ABS offerings as well as ABS offerings. This section of the Final ABS Rules represents primarily a codification of existing SEC rules and informal positions, with certain clarifications and other changes, the most significant of which are summarized below. The SEC notes that pursuant to the Securities Offering Reform Proposal, it proposes to reform the current restrictions on communications in connection with all securities offerings, including ABS offerings, and the SEC will evaluate comments received regarding communications in ABS offerings in connection with that proposal. If the related provisions of the Securities Offering Reform Proposal are adopted as proposed, the Final ABS Rules described below regarding ABS Informational and Computational Material would no longer be applicable to ABS offerings. Instead, term sheets and computational materials used in the offering of ABS will be considered free-writing prospectuses, and their use will be conditioned on satisfying the requirements of the Securities Offering Reform Proposal. In addition, to the extent the SEC adopts the changes to the research report safe harbors as proposed in the Securities Offering Reform Proposal, the SEC indicated that it would consider making similar changes to the new ABS research report safe harbor adopted in the Final ABS Rules and described below.

ABS Informational and Computational Material

New Definition. The ABS Release adopts a streamlined approach to regulation of the use of term sheets and computational materials in ABS offerings. The centerpiece of the new approach is the adoption of a single definition of “ABS informational and computational material” to prescribe all permissible varieties of such materials. The new definition refers to written communications

²¹ Although the SEC decided not to include a specific reference to underwriters in the disclosure item (the Proposed ABS Rules had included the example of material credit arrangements relating to the pool assets provided by an underwriter), it noted that existing Item 508 of Regulation S-K already requires disclosure of material relationships with such parties.

consisting solely of one or more enumerated categories of information. It permits the inclusion of some categories of information that were not clearly permitted under previous authority and, in response to comments to the Proposed ABS Rules, the Final ABS Rules expressly permit information that is now commonly included in term sheets for certain types of ABS offerings.

- The new definition allows the inclusion in term sheets of “static pool data,” as described above under “Disclosure,” concerning the sponsor’s and/or servicer’s portfolio or prior transactions or the actual securitized assets themselves. It is suggested that this type of information can be used to illustrate the historical performance of assets originated or purchased by the sponsor of an ABS offering during defined periods in the past, and that such information may be used by potential investors in evaluating the future performance of the assets to be included in an ABS offering. This portion of the new definition appears to be in response to growing requests by investors in residential MBS transactions for delivery of information, prior to the availability of a final prospectus, relating to the originators’ prior experience with certain types of residential mortgage loans. The new definition does not allow the inclusion of static pool data concerning assets originated or acquired by competing sponsors for comparative purposes.
- The new definition specifically allows term sheets to identify the issuer of an ABS offering, and in response to comments to the Proposed ABS Rules, the identification of other key parties in an ABS transaction, such as servicers, trustees, credit enhancers and other important deal participants. In response to comments to the Proposed ABS Rules, the new definition expressly permits the inclusion of other structural information commonly included in structural term sheets, such as ratings, legal investment, tax and ERISA information. In addition, the new definition permits the inclusion of factual information about the offering process, such as names of underwriters, schedule of the offering and a description of marketing events, such as roadshows.
- Existing authority expressly sanctions the inclusion in collateral term sheets of information concerning the assets underlying an ABS offering on a pool-wide, statistical basis. The ABS Release clarifies that it is also permissible to provide information on a specific asset-by-asset basis, with due consideration for the privacy concerns of individual borrowers. This clarification is consistent with long-standing practice in the CMBS industry of providing information on specific loans and the related collateral properties, although the practice was not universally acknowledged as permissible by participants in other ABS markets.

New Filing Deadline. The Final ABS Rules eliminate the existing inconsistency in the filing deadlines for different types of term sheets and computational materials. Under the Final ABS Rules, all types of ABS informational and computational materials will be required to be filed with the SEC by the later of (i) the due date for the filing of the related final prospectus and (ii) two business days after the first use of such materials. In response to comments to the Proposed ABS Rules, the Final ABS Rules provide relief for an immaterial or unintentional failure to file or delay in meeting the filing requirements so long as a good faith and reasonable effort was made to comply

with the filing requirement and the material is filed as soon as practicable after discovery of the failure to file.

Information Provided to Analytics Firms. The ABS Release discusses requirements for filing of information that is provided to third-party analytics firms with respect to ABS offerings. These firms use data provided by the transaction parties to enable potential investors to perform their own analytics and computations in making their investment decisions. In general, the ABS Release clarifies that only the information provided to the analytics firm must be filed as ABS informational and computational materials (and not the myriad outputs that a particular investor may achieve by manipulating the information through the facilities of the analytics firm). However, the discussion suggests that an affiliate relationship between an issuer or underwriter with such an analytics firm or an unusual compensation structure between the firms may change the conclusion as to which materials must be filed.

Aggregation of Information Permitted. The ABS Release also clarifies that, where data may have been provided to different investors and to analytics firms at different times and in different forms, it is permissible to aggregate the data and file it in a consolidated form, so long as such aggregation does not result in omitting any information that was required to be filed.

Limitation on Restrictive Legends. The Final ABS Rules continue the current requirement that term sheets and computational materials carry a specified legend. However, the ABS Release indicates that it is not permissible to include disclaimers regarding the accuracy or completeness of the information or to include additional legends indicating that such materials do not constitute a prospectus or indicating that the materials are privileged or confidential. The inclusion of such statements on a term sheet or in computational materials is inconsistent with the incorporation of such materials in the issuer's registration statement upon filing with the SEC.

Elimination of Hardship Exemption. In light of improvements in the SEC's EDGAR system that make possible the electronic filing of materials in various software formats, the Final ABS Rules modify the current EDGAR rules to eliminate the ability of issuers to file computational materials in paper form rather than electronically.

Anti-Abuse Rule. The Final ABS Rules contain a provision specifying that they do not provide an exemption for any communications that may technically comply with the Final ABS Rules, if the primary purpose or effect of such communications is to condition the market for another offering, or if the communications are part of a scheme to evade the requirements of Section 5 of the Securities Act.

Research Reports

The Final ABS Rules codify the provisions of an SEC no-action letter issued in 1997 concerning the publication of research reports covering ABS. Specifically, new Rule 139a, which provides a safe harbor under which the publication by a broker/dealer of research reports concerning a particular type of ABS at a time when such broker/dealer is participating in an offering of similar ABS would not be deemed to be an illegal offer of, or a non-conforming prospectus for, such ABS. The new rule does not contain any significant variation from the existing authority on the subject.

Rating Agency Pre-Sale Reports

In response to comments, the ABS Release addresses when an underwriter or issuer would be liable for the information contained in pre-sale reports issued by rating agencies. The SEC indicated that an issuer or underwriter is liable for information prepared and distributed by third parties that are not participants in the offering (such as rating agencies) if such information can be attributed to the issuer or underwriter. Whether such information is attributed to an issuer or underwriter depends on whether the issuer or underwriter has involved itself in the preparation of the information (the “entanglement” theory) or explicitly or implicitly endorsed or approved the information (the “adoption” theory). The SEC indicated that liability for a pre-sale report under the entanglement theory depends on the level of pre-publication involvement in the preparation of the report. If an underwriter or issuer distributes a pre-sale report in connection with an offering, the SEC indicated that it would be appropriate to conclude that such party has adopted the report and should be liable for its contents.

ONGOING REPORTING UNDER THE EXCHANGE ACT

The SEC is codifying the basic modified reporting system under the Exchange Act that is currently in place for ABS issuers. Foreign ABS issuers would report on the same forms as domestic issuers. ABS issuers would be required to file periodic distribution and pool performance reports on a new Form 10-D, annual reports on Form 10-K and current reports on Form 8-K. Contrary to the current practice of some issuers, separate reports will be required to be filed for each issuing entity (*i.e.*, no combined reporting covering multiple issuing entities of the same depositor).

Form 10-D (Periodic Reports)

The Final ABS Rules require a new Form 10-D be used to file the periodic distribution and pool performance reports of an issuing entity that are currently filed under Form 8-K. The timing of the filing would be the same as under the current regime (within 15 days after each required distribution date), regardless of whether a distribution was made or a distribution date statement was actually prepared. The Form 10-D must be signed by the depositor or the servicer. The

trustee may not sign.²² In response to comments, the SEC extended to Form 10-D filings the relief available under Rule 12b-25 of the Exchange Act for inability to timely file certain reports. If the requirements of Rule 12b-25 are satisfied, untimely Form 10-D filings will be considered timely made for purposes of determining Form S-3 eligibility.

Form 10-D will require disclosure in a number of broad categories, including cash flows received, delinquency and loss information (including any material changes to how delinquencies and charge-offs are determined), updated pool composition information, material modifications, extensions or waivers to pool asset terms during the distribution period or that have cumulatively become material over time and material breaches of pool asset representations or transaction covenants. All the required information may be included in the distribution date statement delivered to investors, which distribution date statement is required to be attached as an exhibit to the Form 10-D. If the distribution date statement does not include all the required information, such missing information must be set forth separately in the Form 10-D itself. The SEC did not provide a standard format for the presentation of the required information, stating that the disclosure should be tailored to the nature of the specific asset pool and transaction.

Form 10-D will also cover legal proceedings, sales of securities and use of proceeds, defaults upon senior securities, submission of matters to a vote of securityholders, and updated financial information on significant obligors²³ of pool assets and significant enhancement providers, as further described under “Disclosure” above.

Form 10-K (Annual Reports)

The Final ABS Rules add additional disclosure items to the Form 10-K required to be filed by ABS issuers and codify, with certain modifications, the staff’s previous statement regarding Section 302 Sarbanes-Oxley certifications. The Form 10-K report must be signed by the depositor or the servicer.²⁴ The SEC indicated that, contrary to the staff’s position in prior no-action letters, a Form 10-K is required to be filed for those issuing entities that issued ABS near the end of its fiscal year where no distributions were made to investors prior to the end of such fiscal year.

²² The SEC clarified that another party may sign on behalf of the depositor or servicer under a power of attorney provided that all of the procedural requirements for the use of a power of attorney set forth in Item 601(b)(24) of Regulation S-K are satisfied, which includes, among other things, filing the power of attorney for each Exchange Act report to which it relates. A power of attorney that confers general authority is not permitted.

²³ The Final ABS Rules clarify that the determination of whether a party is a significant obligor is to be made as of the designated cut-off date for the transaction (in the case of master trusts, the cut-off date, or if none, the issuance date, for each issuance of ABS backed by the same asset pool). In addition, if the percentage concentration of a significant obligor or drops below 10% subsequent to the dates discussed above, then such entity no longer will be considered a significant obligor for purposes of reporting on Form 10-D.

²⁴ See footnote 22.

Servicer Compliance Statement. As is the case under the current system, the Final ABS Rules require a compliance statement by the servicer to be filed as an exhibit to the Form 10-K. This will address the servicer's compliance with its servicing obligations under the specific transaction agreement. If multiple servicers are involved for a pool of assets, the master servicer, each affiliated servicer and each unaffiliated servicer that services 10% or more of the pool of assets will be required to provide the statement.

Servicing Criteria Compliance and Accountant's Attestation. The SEC believes that the criteria set forth in the Uniform Single Attestation Program for Mortgage Bankers (USAP) is not designed for the variety of asset classes included in ABS offerings today. In addition, the SEC does not believe that USAP addresses all aspects of the servicing function that may be important in servicing ABS. This is because multiple unaffiliated third parties may be responsible for servicing an ABS and under the current system only the servicer's compliance with the transaction agreement is addressed. There is a gap, because the compliance by other parties involved in the ABS, such as a securities administrator, is not addressed.

Under the Proposed ABS Rules, the SEC proposed to require one "responsible party" to provide a report on assessment of compliance with the SEC's proposed servicing criteria, together with an attestation report of a registered public accounting firm, to be filed as an exhibit to the Form 10-K report. This proposal was the subject of many comments received by the SEC. In response to such comments, the SEC removed the requirement for a single responsible party to make the assessment. Instead, the Final ABS Rules require reports on assessment of compliance with servicing criteria from each party "participating in the servicing function", together with the attestation reports from the accountants of each such party. The reports for each such party are to be filed as exhibits to the Form 10-K filing. A party will be considered to be "participating in the servicing function" if it is performing activities that address the servicing criteria set forth in the Final ABS Rules, unless such party's activities relate only to 5% or less of the pool assets.

While the SEC will not require an assessment by a single responsible party, as discussed below, the SEC will require that the person that signs the Section 302 Sarbanes-Oxley certification certify that all assessments of compliance and related accountant's attestations that are required to be filed with the Form 10-K, have been included, except as otherwise disclosed. This revised approach will require coordination among the parties participating in the servicing function and the certifying person to insure compliance with the filing requirements.

The SEC recognizes that the current practice among servicers in performing compliance reviews appears to be a "platform" level review across all transactions involving a particular asset class and not a transaction specific review. The SEC accepts the "platform" level of assessment for the assessment report required by each party participating in the servicing function.

The Final ABS Rules provide for a set of servicing criteria to be used in assessing servicing compliance. There are four categories of servicing criteria: general servicing considerations; cash collection and administration; investor remittances; and reporting and pool asset administration. Each party providing an assessment report will be permitted to exclude any servicing criteria that is not applicable to servicing a particular asset class or not applicable to the assessing party based on the specific activities of such party in the related ABS transaction. While each assessing party will be permitted to exclude servicing criteria not applicable to such party, it will be incumbent on the person making the Section 302 Sarbanes-Oxley certification to certify whether all required assessment and attestation reports covering the entire servicing criteria applicable to the related asset class are included in the Form 10-K filing.

Each assessing party will be required to identify any material instance of noncompliance with the servicing criteria. Disclosure of noncompliance would be required if noncompliance occurred during the relevant period of the report, regardless of any correction that occurred before the end of the period. The Final ABS Rules require that any material instance of noncompliance reported in any of the assessment reports must be identified specifically in the Form 10-K report. The person making the Section 302 Sarbanes-Oxley certification will have to certify that all material instances of noncompliance with the servicing criteria described in the reports have been disclosed in the Form 10-K report.

The Final ABS Rules require that a registered public accounting firm for each assessing party will be required to attest to the assessment of compliance made by such assessing party, which attestation will be required to be filed as an exhibit to the Form 10-K report. The attestation will need to state the opinion of the accountant as to whether the assessing party's assessment of compliance with the applicable servicing criteria was fairly stated in all material respects, or must include a statement that such an opinion cannot be provided. In addition, the attestation must not include any restricted use language.

Sarbanes-Oxley Certification

The SEC has codified, with some modification, its previous releases regarding compliance by ABS issuers with the certification requirement of the Sarbanes-Oxley Act. The certification, which will continue to be filed as an exhibit to the Form 10-K report, will continue to cover the absence of material misstatements and omissions in all Exchange Act reports taken as a whole for the covered period. It will be expanded to require an affirmative statement that all information required under the Final ABS Rules (rather than under the transaction documents) is contained in the Exchange Act reports and would reference the servicer compliance statements required under the Final ABS Rules as a basis for certification that each servicer has complied with its obligations under the servicing agreement. In addition, because the Final ABS Rules now allow reports on assessment of compliance with servicing criteria by multiple parties (instead on one responsible party, as would

have been required by the Proposed ABS Rules), the Section 302 Sarbanes-Oxley Act certification must now provide that all of the reports on assessment of compliance, together with the related attestation reports that are required to be included in the Form 10-K filing, as described above, have been included, except as otherwise disclosed. The certifying person must also certify that any material instance of noncompliance with the servicing criteria set forth in the Final ABS Rules that is described in the assessment reports has been disclosed in the Form 10-K report.

The Section 302 Sarbanes-Oxley certification will be required to be signed by the senior officer in charge of securitization of the depositor or by the senior officer in charge of the servicing function of the servicer (or of the master servicer if multiple servicers are involved). The trustee will not be permitted to sign the Section 302 Sarbanes-Oxley certification.

Form 8-K (Current Report)

In March 2004, the SEC adopted amendments to expand the number of events reportable on Form 8-K, as well as to shorten the filing deadline for most items to four business days after the occurrence of the event requiring disclosure. The Final ABS Rules now clarify the application of the Form 8-K reporting items for ABS, as well as introduce new reporting items specific to ABS issuers.

With respect to the Form 8-K reporting items as previously amended, the Final ABS Rules provides that a reportable event for an ABS issuer also includes the occurrence of an early amortization, performance trigger or other event, including an event of default, that would materially alter the payment priority, distribution of cash flows or amortization schedule for the ABS. The new items that are to be reported on Form 8-K for ABS issuers include ABS informational and computational materials that are required to be filed, change of servicer or trustee, change of credit enhancer or other external support, and failure to make required distribution to securityholders.

In addition, the Final ABS Rules add a new item to Form 8-K for ABS issuers to address cases where the final pool at the time of issuance of the ABS is different from the pool of assets described in the final prospectus. Essentially codifying the current position of the SEC staff, disclosure of the composition of the final pool would be required if, in connection with a transaction off a shelf registration statement on Form S-3, the pool of assets at the time of issuance of the ABS differs by 5% or more (other than as a result of the pool assets converting into cash in accordance with their terms) from the pool of assets described in the prospectus.

CONCLUSION

This memorandum summarizes certain notable changes to the regulation of ABS offerings adopted by the SEC. As the ABS Release is close to 500 pages in length, many details that may be important to you have necessarily been omitted from this memorandum. If you have any questions

regarding the Final ABS Rules or any other matter addressed in the ABS Release, please call any of the partners in the Capital Markets Department.

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