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August 19, 2002

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

Re: File No. S7-21-02

Ladies and Gentlemen:

The Bond Market Association (the "Association")[1] and the American Securitization Forum ("ASF")[2] appreciate the opportunity to comment on the Commission's proposed rules [3] regarding specified certification requirements for a company's quarterly and annual reports by its principal executive officers and principal financial officers. The Commission recently asked [4] for comments on these proposed rules in light of the requirement that the Commission adopt similar rules under Section 302 of the Sarbanes-Oxley Act of 2002. We are commenting on those proposed rules as they relate to asset-backed securities, the public market for which is extremely large. In the first half of this year alone, $303 billion were publicly issued.

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1 The Association is the bond market trade association, representing securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. The Association's members act as issuers, underwriters and dealers of mortgage and asset-backed securities and are active in the securitization and structured finance markets. More information about the Association is available on its Internet home page at http://www.bondmarkets.com. This comment letter was prepared in consultation with the Association's MBS/ABS Legal Advisory Committee.

2 The ASF is a broadly-based professional forum of participants in the U.S. securitization market. Among other roles the ASF members act as issuers, underwriters, dealers, investors, servicers and professional advisors working on transactions involving securitizations. The views expressed in this letter are based upon input received from a broad range of ASF members including members of the ASF Legal Subcommittee. More information about the ASF, its members and activities may be obtained from the ASF website at www.americansecuritization.com.

3 Release No. 34-46079 (June 14, 2002) [67 FR 41877] (the "June 14 release").

4 Release No. 34-46300 (August 2, 2002).

I. Executive Summary

The rules as adopted should make clear that the certification requirements of those rules and Section 302 of the Sarbanes-Oxley Act do not apply to reports filed by issuers of asset-backed securities ("ABS issuers") under Section 13(a) or 15(d) of the Securities Exchange Act of 1934. The primary reasons for their inapplicability to ABS issuers are:

- Section 302 and the proposed rules are only appropriate for and intended to affect:
  - — operating companies, which are actively managed by officers (including principal executive officers and principal financial officers) who make business decisions regarding the operations of such companies and who exercise discretion and control over the assembly and presentation of financial information and the results of their operations; and
  - — companies that are required to prepare and file balance sheets and income statements as part of their presentation of information;
- Section 302 and the proposed rules would not have their intended effect with respect to an ABS issuer and should not apply to an ABS issuer because:
  - — an ABS issuer is not an operating company and its activities are predetermined and limited by its governing documents;
  - — as a result, it is not managed by a principal executive officer, principal financial officer or other officers who make business decisions and who exercise discretion and control over the production and presentation of financial information and the results of its operations, and
  - — except in very few cases, ABS issuers do not prepare and file balance sheets or income statements or other financial statements whose preparation involves the application or interpretation of accounting principles by management.

II. Background on ABS issuers

ABS issuers[5] acquire and hold financial assets, the cash flow from which is used to make payment on the asset-backed securities. The financial assets include securities, installment sale

[5] "ABS issuer" as used in this letter is intended to refer to a category of issuers who have the characteristics outlined in this letter. Therefore, the term would include, but not be limited to, an issuer of asset-backed securities within the meaning of Rule 3a-7 under the Investment Company Act of 1940, the General Instructions to Form S-3 or the definition set forth in Rule 902(a)(2) of Regulation S.

agreements, accounts receivable, evidences of indebtedness, leases and other contracts and any other assets that by their terms convert into cash over a finite period. The purpose of an ABS issuer is limited to these activities and other related activities intended to enable it to make payments on its securities. All of these activities are specified in governing documents that are in place at the issuance of the applicable securities. Consequently, an ABS issuer is not an operating entity and does not have a management that runs a business and makes unrestricted decisions on its business activities. It does not have a principal executive officer or principal financial officer (or any other person who performs "similar functions") who makes business decisions or who exercises discretion and control over the process of producing and presenting financial information and the results of its operations. Further, except in very few cases, ABS issuers do not prepare or file balance sheets or income statements or other financial statements whose preparation involves the application or interpretation of accounting principles by management.

The staff of the Commission recognizes this fundamental difference between ABS issuers and operating companies to the extent it permits ABS issuers subject to Section 13(a) or 15(d) of the Exchange Act to file reports thereunder that do not include financial statements (i.e., a balance sheet, income statement, change in stockholders' equity and other statements contemplated by Regulation S-X) or responses to various other items required by Form 10-Q and Form 10-K that are not relevant to an ABS issuer. Instead, the staff has permitted ABS issuers to file their monthly distribution statements[6] on Form 8-K and to report certain additional items of information (number of securityholders, the annual servicer's certificate of compliance and the annual accountants' statement) on Form 10-K. The production and presentation of this information is ministerial and mechanical in nature. The information set forth in such distribution statements does not involve decision making as to how to produce or present information or the application or interpretation of accounting principles and is typically undertaken by the servicer of the securitization.

The staff of the Commission has recognized the fundamental differences between ABS issuers and operating companies in several other important contexts.[7]

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[6] This position was established in many no action letters. See e.g., ITT Floorplan Receivables, L.P. (July 1, 1994). The contents of distribution statements vary with each ABS issuer. They typically include the amount of cash collected on its assets, the applications of those collections to payments on the securities and payment of expenses of the ABS issuer, loss and delinquency information, the receivable pool balance and credit enhancement available amounts.

[7] The Commission amended Form S-3 to allow ABS issuers to use that form and Rule 415 even though the ABS issuer had no reporting history. Release No. 33-6964 (October 29, 1992). The Commission's decision to exempt ABS issuers from the prior reporting history requirements further supports the understanding that the usual types of financial reporting seen in other securities transactions simply are not relevant to asset-backed securities. In its "aircraft carrier" proposal to revamp the disclosure system the Commission proposed a separate rule-making project to deal specifically with the unique character of asset-backed securities and create specially tailored disclosure rules. Release 33-7606A. These same considerations underlie our view that the certification requirements should not apply to ABS issuers.

III. Discussion of Provisions of Proposed Rules

Certification of disclosure in quarterly and annual reports is intended only for (A) operating companies and (B) companies required to file audited financial statements.

A. Section 302 of the Sarbanes-Oxley Act applies to a "company" and speaks in terms of principal executive officers, principal financial officers, disclosure to auditors and audit committees. The June 14 release states that the proposed rules are intended (i) to engage top management officials of a company in the disclosure process so that the process receives more attention within the company and (ii) to maintain the sufficiency of its information production and reporting process. These concepts are relevant to an operating company that (i) has a management that makes business decisions that are not contractually restricted, and who exercise control and discretion over the assembly and proper presentation of financial information and the results of operation, (ii) requires internal controls that respond to varying business activities and related processing of varying types of information and therefore must be continually adjusted and audited and (iii) applies accounting principles that are subject to interpretation as to applicability and manner of application. We do not believe they are relevant to ABS issuers, which have a limited, contractually restricted purpose, are not "companies" in any conventional sense of the word or as used in Section 302 and do not have management that performs the functions referred to above.

B. The language of Section 302 and its legislative history indicates that Section 302 applies only to companies that are required to file audited financial statements under the Securities Exchange Act of 1934. The language of Section 302(a)(3) assumes that the filing company has financial statements and principal executive and financial officers: ". . . (3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operation of the issuer . . .". In Senate Report No. 107-205 that accompanies S 2673 (the Senate version of the Act), Section 302 is described as applying to " … periodic reports containing financial statements". The term "financial statements" is not defined in the Sarbanes-Oxley Act or in the federal securities laws. The common meaning of the term and Regulation S-X require the conclusion that financial statements at least include a balance sheet and income statement. As described in section II above, a balance sheet and an income statement are not relevant to an ABS issuer and have not been required by the staff in reports filed by ABS issuers under the Exchange Act.

Section 302 by its terms applies only to annual and quarterly reports and does not apply to reports on Form 8-K. Reports on Form 8-K rarely include financial statements and the form certainly does not call for financial statements on a regular basis. The exclusion of reports on Form 8-K from the operation of Section 302 is consistent with Section 302 not being applicable to an ABS issuer that is not required to file financial statements.

Accordingly, we do not believe that Section 302 is intended to apply, or that the proposed rules should apply, to ABS issuers.

If Section 302 and the proposed rules were to apply to reports filed by an ABS issuer under the Exchange Act, how should the required certification be revised?

If the Commission does not agree with us that Section 302 does not, and the proposed rules should not, apply to an ABS issuer, then we believe the Commission must address two complex issues: (1) what should the content of the certification be and (2) who should sign the certification.

Content. We believe that the certification, if required, should state that the signer has reviewed the distribution statement and, based on the signer's knowledge, the information in the distribution statement is accurate in all material respects. As noted in section II, the requirements for reports filed by an ABS issuer have been adjusted so that they do not call for information that is not meaningful to investors. As the staff stated in the June 14 release under the heading "II. Proposed Rules – A. Certification of Disclosure in Quarterly and Annual Reports – 2. Description of Proposal," the certification in a quarterly report " … would be similar [to that for the annual report], but would take account of the narrower disclosure required in these reports." We believe that the distribution statements are appropriately narrower than the periodic reports required of operating companies and that any certification the Commission may require should extend only to the accuracy of the distribution statements filed on Form 8-K. (However, as stated below, we believe that any such certification should be given annually and cover the distribution statements for the prior year.) We believe that any certification beyond the accuracy of the distribution statement would be unreasonable and impracticable because the form and content of the information are based on unpublished staff positions and market practices that have developed without a body of extensive disclosure regulations comparable to those available to operating companies. As discussed above in footnote 6, the staff has recognized the need for specially tailored disclosure guidance for ABS issuers.

Signer. As to the question of who should sign the certification, the ABS issuer has no management, much less a principal executive officer or a principal financial officer, and the trustee or trustees are contractually limited in what they are required to do and are not responsible for processing information.

The entity that produces and presents information for the distribution statement is normally the servicer. In securitizations where the servicer services all of the assets and prepares the distribution statements, the servicer may be the appropriate signer. However, in a great many securitizations, there is a master servicer that has engaged one or more subservicers to service the assets or a segment of the assets and produce the information in respect of those assets. Subservicers are engaged under subservicing contracts that were entered into either at the initial issuance of the asset-backed securities or, in many cases, a long time before that. If a subservicer were to be a signer, we believe it would be difficult and may take considerable time to inform subservicers, who are usually not close to the securitization level of activity, about a certification

requirement. They may resist making any certification as being beyond the scope of their engagement. As to a master servicer, it would seem unrealistic to require a master servicer to certify information that it has not generated unless it is explicitly permitted to assume its accuracy. We feel that the complex information gathering structures in these types of securitizations must be fully understood before any rules requiring certification of information produced by them are adopted. Further, we feel that it would not be helpful to adopt a rule that does not deal with all ABS issuers at the same time.

We suggest that the Commission consider the following course of action: (i) meet with us to learn about the various information gathering processes to determine a certification process that is effective and fair for all types of ABS issuers; (ii) delay the adoption of any rule applicable to ABS issuers until that certification process has been determined, with some additional time for implementation; and (iii) make the certification an annual (not monthly) requirement, covering the distribution statements for the prior year. In any event, any rule adopted should make clear that a signer who receives information provided by a third party is entitled to rely on the accuracy of that information. We believe this is appropriate because, unlike an operating company that controls its internal system of producing and reporting information, an ABS issuer has no such control.

IV. Conclusion

The Association and the ASF appreciate the opportunity to address issues raised by Section 302 of the Sarbanes-Oxley Act and the proposed rules. We look forward to discussing these issues with the staff of the Commission. Please do not hesitate to contact John Ramsay (212 440-9404) or Nadine Cancell (212 440-9454) on the staff of the Association.

Sincerely,

Jay Strauss
Chair of Association's Legal Subcommittee

Cameron Cowan
Chair of ASF's Legal Subcommittee