

**MEMO# 18386**

January 14, 2005

## **SEC ADOPTS RULES FOR REGULATION OF ASSET-BACKED SECURITIES**

[18386] January 14, 2005 TO: EQUITY MARKETS ADVISORY COMMITTEE No. 4-05 FIXED-INCOME ADVISORY COMMITTEE No. 1-05 MONEY MARKET FUNDS ADVISORY COMMITTEE No. 1-05 SEC RULES MEMBERS No. 9-05 RE: SEC ADOPTS RULES FOR REGULATION OF ASSET-BACKED SECURITIES The Securities and Exchange Commission has adopted new and amended rules and forms to address the registration, disclosure and reporting requirements for asset-backed securities ("ABS") under the Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>1</sup> The final rules and forms: (1) provide tailored disclosure guidance and requirements for Securities Act and Exchange Act filings involving ABS; (2) update and clarify the Securities Act registration requirements for ABS offerings; (3) streamline and codify existing interpretive positions that permit the use of written communications in a registered offering of ABS in addition to the statutory registration statement prospectus; and (4) consolidate and codify existing interpretive positions that allow modified Exchange Act reporting that is more tailored and relevant to ABS. The Commission has also requested additional comment regarding the appropriate treatment of certain structured securities that do not meet its definition of "asset-backed security."<sup>2</sup> The most significant aspects of the new rules and the Commission's request for additional comment are summarized below.

**Disclosures About ABS Offerings** The Commission has adopted, with modifications in response to comment, new Regulation AB, a "principles-based" set of disclosure items that will form the basis for disclosure in Securities Act registration statements and Exchange Act reports for ABS. Although the new disclosure items are based on the current disclosure regime, the Commission has added substantial disclosure requirements relating to the background, experience, performance and roles of various parties involved with an ABS transaction, such as the sponsor, the depositor, the servicer, and the trustee. The Commission also is requiring, for the first time, that certain statistical information on a "static pool" basis be provided, if material to the transaction. The Release explains that such data can indicate how the performance of groups, 1 Securities Act Release No. 8518 (Dec. 22, 2004), 70 Fed. Reg. 1506 (Jan. 7, 2005) ("Release"). The Release can be found on the Commission's website at <http://www.sec.gov/rules/final/33-8518.pdf>. 2 Comments are due to the Commission no later than March 8, 2005. 2 or static pools, of assets, such as those originated at different intervals, are performing over time.

**Securities Act Registration** The new rules limit the registration of ABS offerings to Forms S-1 or S-3 and expand the types of investment grade ABS that qualify for shelf registration. In addition, consistent with existing staff positions and pending consideration of the Commission's proposals recently issued for all Securities Act offerings,<sup>3</sup> the rules exclude offerings of ABS eligible for Form S-3 registration from the requirements of Exchange Act Rule 15c2-8(b) to deliver a preliminary prospectus prior to delivery of a confirmation of sale.<sup>4</sup> The Commission has adopted a principles-based

definition of “asset-backed security” that consolidates several staff positions, including those regarding delinquent and non-performing assets. The definition allows more leased-backed transactions to be included in the definition and permits the use of master trusts and revolving periods for more asset classes. The Commission has requested comment on whether it should consider an alternative scheme for securities that do not fall within the definition of asset-backed security, such as synthetic securitizations.<sup>5</sup>

**Communications During the Offering Process** The new rules permit the use of “ABS informational and computational material” <sup>6</sup> after the effectiveness of a registration statement for an offering of ABS registered on Form S-3 but before the delivery of the final prospectus under Section 10(a) of the Securities Act. Pending consideration of the Securities Act Reform Proposal, the rules also codify and simplify the current staff positions on when these materials can be used and when they must be filed with the Commission. <sup>3</sup> See SEC Release No. 33-8501 (Nov. 3, 2004), 69 Fed. Reg. 67392 (Nov. 17, 2004) (“Securities Act Reform Proposal”). For a summary of the Securities Act Reform Proposal, see Investment Company Institute Memorandum to Equity Markets Advisory Committee No. 45-04, Fixed-Income Advisory Committee No. 13-04, and SEC Rules Members No. 163-04, dated Nov. 15, 2004 [18189]. <sup>4</sup> The Release states that without this relief, most broker-dealers would be required to deliver a preliminary prospectus in ABS offerings because Rule 15c2-8(b) requires such delivery if the issuer has not previously been required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act, which most ABS issuers at the time of the ABS offering are not required to do. <sup>5</sup> 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 Release states 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. <sup>6</sup> “ABS informational and computational material” would include, among other things: factual information regarding the ABS being offered and the structure and basic parameters of the securities; factual information regarding the pool assets underlying the ABS; identification of key parties to the transaction; static pool data; statistical information for a particular class of ABS; the names of underwriters participating in the offering of the securities; the anticipated schedule for the offering and a description of marketing events; and a description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer. <sup>3</sup>

**Ongoing Reporting Under the Exchange Act** The new rules codify the modified reporting system under the Exchange Act that is currently in place for ABS issuers. Specifically, the new rules require ABS issuers to file periodic distribution and pool performance reports on new Form 10-D (this information is currently filed under Form 8-K). Form 10-D requires disclosure of a number of items, including, among other things, information concerning the distribution and pool performance for the distribution period, such as cash flows received and updated pool composition information, and certain non-financial disclosures, such as disclosure of legal proceedings, sales of securities, and use of proceeds.

**Compliance Dates** All ABS offerings commencing after December 31, 2005 must comply with the new rules. All ABS offerings commencing prior to such date will be grandfathered under the existing regime.

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