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MEMORANDUM

To: Clients and Friends

From: Cadwalader, Wickersham & Taft

Date: September 11, 2002

Re: Issuers of Asset-Backed Securities and the Disclosure Certification Requirements under the Sarbanes-Oxley Act of 2002

I. INTRODUCTION

The recent bankruptcies of Enron Corp. and Global Crossing LLC caused many market participants to question the adequacy of the then-current disclosure regime for public companies as well as the integrity of the process under which corporate financial statements are created and audited. In response, Congress passed the Sarbanes-Oxley Act of 2002 (the "Act") on June 25, 2002. The Act is a corporate governance and accounting oversight bill that primarily affects accountants and corporate executives. The Act was signed by the President on July 30, 2002.

Most issuers of publicly-offered securities are required under Sections 13(a) and 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to file periodic reports with the Securities and Exchange Commission (the "SEC"). Sections 302 and 906 of the Act each require the chief executive and chief financial officers of each issuer to provide certain certifications regarding these reports. This memorandum will discuss the application of these sections to issuers of asset-backed securities ("Asset-Backed Issuers") and, if applicable, compliance by Asset-Backed Issuers.

In the context of Asset-Backed Issuers subject to the Exchange Act, it is important to note that: (1) each trust fund formed in connection with the issuance of securities registered under the Securities Act of 1933, as amended (the "Securities Act"), is treated as a separate reporting entity; and (2) the certification requirements do not apply with respect to private placements, including securities eligible for resale pursuant to Rule 144A under the Securities Act.

II. SECTION 302

Section 302(a) of the Act directed the SEC to adopt rules that require, for each company filing quarterly or annual reports under Section 13(a) or 15(d) of the Exchange Act, that such company's principal executive and financial officers each provide certifications regarding, generally speaking, the completeness and accuracy of the financial statements and other financial information included in such reports. Effective on August 29, 2002, the SEC adopted Exchange Act Rules 13a-14 and 15d-14 (the "New Rules")¹, which require such officers to make the certifications directed by Congress².

A. The Unique Treatment of Asset-Backed Securities under the Exchange Act

Under Section 15(d) of the Exchange Act, any issuer of securities registered under the Securities Act is required to file quarterly and annual reports on Form 10-Q and Form 10-K, respectively. Generally speaking, these reports require disclosure of, among other things, financial statements, management's discussion and analysis of financial condition and results of operation, market risks, legal proceedings, changes in securities and use of proceeds, defaults upon senior securities, submission of matters to a vote of security holders and, with respect to annual reports on Form 10-K only, the business of the issuer, properties owned by the issuer, the directors and executive officers of the issuer and executive compensation. An issuer is also required to file a current report on Form 8-K upon the occurrence of certain events.

For many of these items, such disclosure is not useful (indeed, in some cases, not possible) with respect to the trusts that usually serve as Asset-Backed Issuers. As a result, through various "no-action" letters³, the SEC has permitted Asset-Backed Issuers to comply with modified reporting requirements. Under the modified reporting requirements, in place of the management and financial information required to be provided by a typical issuer, the following reports are required for Asset-Backed Issuers: (i) on a monthly basis, a current report on Form 8-K that contains the related month's payment date statement forwarded to investors and (ii) on an annual basis, an annual report on Form 10-K that contains statements from the servicer and certified public accountants regarding compliance by the servicer with certain minimum servicing standards.

In a statement issued on the same day as the New Rules (the "Statement")⁴, the staff of the Division of Corporation Finance of the SEC (the "Staff") observed that, given the unique

¹ Available for review at www.sec.gov/rules/final/33-8124.htm.

² In general, the certification required under Section 302 of the Act and the New Rules must include a statement to the effect that, based on his or her knowledge, among other things, (a) the financial statements included in the related report fairly present in all material respects the financial condition, results of operations and cash flows of the issuer and (b) the certifying officers are responsible for establishing and maintaining disclosure controls and procedures for the issuer, such disclosure controls and procedures have been evaluated within 90 days of the date of the related report and the certifying officers have disclosed to the issuer's auditors and its audit committee all significant deficiencies in such disclosure controls and procedures.

³ See, e.g., Release No. 34-16520 (January 23, 1980); Release No. 34-14446 (February 6, 1978); *Bay View Securization Corporation* (January 15, 1998); *Key Bank USA, National Association* (May 9, 1997).

⁴ Available for review at www.sec.gov/divisions/corpfin/8124cert.htm.

reporting requirements applicable to Asset-Backed Issuers, the certifications required pursuant to Section 302(a) of the Act must be “tailored specifically” for such issuers.

B. Compliance by Asset-Backed Issuers with the New Rules

The New Rules create a separate certification requirement applicable only to Asset-Backed Issuers. Under the New Rules, each Asset-Backed Issuer must provide a signed certification addressing:

- a review by the certifying officer of the annual report and other reports containing distribution information for the period covered by the annual report;
- the absence in these reports, to the best of the certifying officer’s knowledge, of any untrue statement of material fact or omission of a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;
- the inclusion in these reports, to the best of the certifying officer’s knowledge, of the financial information required to be provided to the trustee under the governing documents of the issuer; and
- compliance by the servicer with its servicing obligations and minimum servicing standards.

As noted above, the certifications required from a typical issuer under Section 302(a) of the Act and the New Rules are required to be signed by the chief executive and financial officers of such issuer. The trusts that generally serve as Asset-Backed Issuers do not have either such officer. Therefore, the New Rules require that certifications provided by Asset-Backed Issuers be signed by either (i) the trustee of the trust (if the trustee signs the periodic report) or (ii) the senior officer at the depositor in charge of the securitization (if the depositor signs the periodic report). The New Rules also allow the senior officer in charge of servicing at the master servicer to sign the certification.

The Statement included a form certification to be signed by Asset-Backed Issuers, a copy of which is attached as Exhibit A. In the Staff’s view, an Asset-Backed Issuer would be in compliance with the New Rules if a certification in such form is included in each Form 10-K that it files with the SEC.

The Staff also indicated that paragraphs 1, 2 and 3 of the form certification apply to Form 10-K reports filed after August 29, 2002, while paragraphs 4 and 5 of the form certification apply to these reports filed for periods ending after that date. In any case, this means that the New Rules will apply to transactions closed in fiscal year 2002, whether before or after August 29, 2002.

It is important to note that the prevailing market practice in the securitization industry is to suspend filings of periodic reports for a particular transaction after the first fiscal year

of such transaction⁵. Therefore, this certification will usually be made only once in the lifetime of a particular transaction.

C. Liability and Penalties

1. *Liability and Penalties for Failure to Sign.*

The New Rule do not impose any new liability or penalty for failure to sign the certification. If the person responsible for the preparation of the report fails to sign the certification, the SEC will have at its disposal each of the provisions that are generally available for enforcement of the provisions of the Exchange Act. Such provisions include issuing an order of compliance under Section 15(c)(4) of the Exchange Act or a cease and desist order under Section 21C(a) of the Exchange Act or obtaining an order from a United States district court commanding compliance under Section 21(e) of the Exchange Act. Furthermore, Section 32(b) of the Exchange Act provides that any issuer which fails to file any information, documents or reports required under Section 15(d) of the Exchange Act is liable for a fine of \$100 for each day such failure shall continue⁶.

2. *Liability and Penalties for False Certification.*

Likewise, the New Rules do not create any additional liability or penalty for a false certification. In the release which adopted the New Rules, the SEC indicated that liability for a false certification would be based on already existing SEC rules and case law.

An officer providing a false certification could be subject to private action under Section 18(a) of the Exchange Act for false or misleading statements in any report filed pursuant to the Exchange Act with respect to any material fact to a person who purchased the security in reliance on such statement. Similar liability could be imposed under Section 10(b) of the Exchange Act and Rule 10b-5. In addition, the SEC could seek action against such officer under Section 13(a) or 15(d) of the Exchange Act (using certain of the provisions set forth above) and Section 10(b) of the Exchange Act and Rule 10b-5. In addition, to the extent a report filed under the Exchange Act is incorporated by reference into a registration statement on Form S-3 or into a prospectus filed pursuant to Securities Act Rule 424(b), a false certification could result in liability under Sections 11 and 12(a)(2) of the Securities Act⁷.

III. **SECTION 906**

Section 906 of the Act provides for a certification requirement that is separate and distinct from the certification requirements under Section 302(a). Under Section 906, each periodic report *containing financial statements* filed by an issuer with the SEC pursuant to Sections 13(a) and 15(d) of the Exchange Act must be accompanied by a written statement by the chief executive officer

⁵ Some issuers that are affiliated with the servicer and a broker-dealer choose to continue filing periodic reports to facilitate satisfaction of the broker-dealer's obligation to deliver a market-making prospectus.

⁶ In addition, it is possible that willful violation of the New Rules could lead to criminal sanctions under Section 32(a) of the Exchange Act.

⁷ In addition, it is possible that a willful and knowing false or misleading statement with respect to a material fact could lead to criminal sanctions under Section 32(a) of the Exchange Act.

and the chief financial officer of the issuer that shall certify that the periodic report containing such financial statements fully complies with the requirements of the Exchange Act and that the information contained in the periodic report fairly represents, in all material respects, the financial condition and results of operations of the issuer. Section 906 also provides that whoever makes such certification knowing that the related periodic report does not comport to all of the requirements of Section 906 shall be fined not more than \$1,000,000 or imprisoned not more than ten years, or both, with the penalties increasing to \$5,000,000 and twenty years if such violation is willful.

It would appear that neither the certification requirements nor the penalties of Section 906 generally apply to Asset-Backed Issuers because periodic reports filed by Asset-Backed Issuers do not usually contain financial statements.

IV. CERTAIN CERTIFICATION ISSUES

There are a number of issues raised by the Statement and certification requirement for Asset-Backed Issuers:

- Will it be permissible for there to be more than one signatory? Some items appear directed to the servicer (such as item 4), some to the depositor (such as item 5) and some to the trustee (such as item 3). While the New Rules contemplate alternative signatories, they do not expressly permit multiple signatories. However, in a telephonic response to an inquiry on this issue, the Staff indicated that the certification must be signed by one person.
- The Statement indicates that items 4 and 5 apply to periodic reports filed for periods ending after August 29, 2002. In a telephonic response to an inquiry, the Staff indicated that an Asset-Backed Issuer with a calendar fiscal year will have to include all five paragraphs in the certification relating to the Form 10-K filed in March 2003 with respect to calendar year 2002. For deals commencing in September 2002, deal participants will have the ability to draft provisions in the operative agreements designed to address these items in a way that will facilitate certification. However, for prior deals, deal participants will be bound by the existing language in the applicable operative agreements (unless the agreements are amended).
- What level of diligence would be necessary to provide the certification that the reports covered by the certification are not misleading? Clearly, an officer of a depositor not affiliated with the servicer cannot be expected to audit the performance of the trustee and the servicer in this regard, but would it be enough to ask questions of the trustee and the servicer as to the method by which they fulfill their information gathering and reporting functions?
- Is modification permitted to the form of certification described in the Statement? Under the New Rules, the SEC's periodic report forms were amended to set forth the required certifications for issuers other than Asset-Backed Issuers, and the SEC's adopting release for the New Rules makes clear that those certifications "must be in the exact form set forth in the amendments to the affected forms."

However, the Statement does not contain this limitation, potentially opening the door for deviation from the “safe harbor” provided by the Statement.

- Will it be advisable for a broker-dealer with market-making prospectus obligations to continue to rely upon incorporation by reference of Exchange Act reports to update prospectuses? The benefit of ease of prospectus updating will have to be weighed against the detriment of making annual certifications (assuming the certification obligation is imposed on an affiliate of the broker-dealer).
- If the SEC were to seek enforcement of the New Rules, against whom would it seek enforcement? Given the manner in which the depositor and the related trust share the status as “issuer” under the securities laws, it is unclear if enforcement would be sought against the depositor or the trustee, who may seek indemnification from the trust.

In any case, it will be important for participants in upcoming public deals to allocate responsibility for the certification requirement and work out some of these issues sufficiently in advance of pricing.

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Any questions or requests for additional information concerning the matters addressed in this memorandum should be addressed to Michael Gambro at (212) 504-6825, Anna Glick at (212) 504-6309, Jordan Schwartz at (212) 504-6136 or any other Capital Markets partner.

EXHIBIT A

**FORM CERTIFICATION TO BE
PROVIDED BY ASSET-BACKED ISSUERS**

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on Form 10-K, and all reports on Form 8-K containing distribution or servicing reports filed in respect of periods included in the year covered by this annual report, of [identifying registrant];
2. Based on my knowledge, the information in these reports, taken as a whole, does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading as of the last day of the period covered by this annual report;
3. Based on my knowledge, the [distribution or servicing] information required to be provided to the trustee by the servicer under the pooling and servicing agreement is included in these reports;
4. I am responsible for reviewing the activities performed by the servicer under the pooling and servicing agreement and based upon the review required under the pooling and servicing agreement, and except as disclosed in the report, the servicer has fulfilled its obligations under the servicing agreement; and
5. I have disclosed to the registrant's certified public accountants all significant deficiencies relating to the servicer's compliance with the minimum servicing standards in accordance with a review conducted in compliance with the Uniform Single Attestation Program for Mortgage Bankers or similar standard as set forth in the pooling and servicing agreement.

Date: _____

[Signature]
[Title]