ALLY FINANCIAL INC.
AMERICAN HONDA FINANCE CORPORATION
BMW US CAPITAL, LLC
CARMAX BUSINESS SERVICES, LLC
FORD MOTOR CREDIT COMPANY LLC
GENERAL MOTORS FINANCIAL COMPANY, INC.
HARLEY-DAVIDSON FINANCIAL SERVICES, INC.
HYUNDAI CAPITAL AMERICA
MERCEDES-BENZ FINANCIAL SERVICES USA LLC
NAVISTAR FINANCIAL CORPORATION
NISSAN MOTOR ACCEPTANCE CORPORATION
PORSCHE FINANCIAL SERVICES, INC.
SANTANDER CONSUMER USA INC.
TD AUTO FINANCE LLC
TOYOTA MOTOR CREDIT CORPORATION
VW CREDIT, INC.
WORLD OMNI FINANCIAL CORP.

October 13, 2011

By Email: rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE.
Washington, D.C. 20549-1090

Re: Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment
(Rel. Nos. 33-9244; 34-64968; File No. S7-08-10)

Ladies and Gentlemen:

The finance companies listed above ("we" or the "Vehicle ABS Sponsors") submit this letter to comment on the release identified above (the "Re-proposing Release") issued by the Securities and Exchange Commission (the "Commission"), consisting of re-proposed rules relating to shelf eligibility conditions for asset-backed securities (the "Re-proposed Rules"), the commentary on the Re-proposed Rules and additional requests for comment on other topics (the "Additional Requests for Comment").

The Vehicle ABS Sponsors provide financing for automobiles, trucks and motorcycles (collectively, "vehicles"). We fund our businesses in part through the issuance of asset-backed

securities ("ABS") backed by vehicle-related assets ("Vehicle ABS"). We focus in this letter on issues that are of particular interest to us as active issuers of Vehicle ABS.

The Vehicle ABS Sponsors

The Vehicle ABS Sponsors are the 17 finance companies listed at the top of this letter. We include all of the captive finance companies of the major automobile and motorcycle manufacturers, leading independent automobile finance companies and the leading issuer of ABS backed by medium and heavy duty trucks. The group includes issuers of prime and subprime automobile and motorcycle retail loan and lease ABS and floorplan loan ABS. Traditional, full-service banks, which have highly diversified portfolios of assets of which automobile loans and leases represent a relatively small part, are the only significant sponsors of Vehicle ABS that are not included in this group.

We have submitted several prior comment letters to the Commission:

(a) our comment letter dated August 2, 2010 (our "Original Reg AB II Comment Letter") regarding the Commission's Proposed Rules for Asset-Backed Securities (Release Nos. 33-9117; 34-61858; File No. S7-08-10) (the "Original Reg AB II Proposal");

(b) our comment letter dated November 8, 2010 (our "Supplemental Reg AB II Comment Letter"), which supplemented our Original Reg AB II Comment Letter and which largely endorsed the issuer views expressed in the comment letter dated August 31, 2010 submitted by the American Securitization Forum ("ASF") on behalf of the ASF Reg AB II Auto Subcommittee (the "ASF Auto Sector Letter"); and

(c) our comment letter dated August 1, 2011 (our "Risk Retention Comment Letter" and, together with our Original Reg AB II Comment Letter and our Supplemental Reg AB II Comment Letter, our "Prior Comment Letters") regarding the risk retention proposal by the Commission and several other federal agencies (the "Risk Retention Proposals").

We provided a great deal of background information on our securitization activity in Prior Comment Letters. While we will not repeat that information here, we do want to emphasize that:

- the Vehicle ABS Sponsors are frequent issuers of ABS, having issued almost 75% of the total Vehicle ABS issued from January 1, 2009 through June 30, 2011[1]
- Auto ABS is the largest category of ABS issued in the U.S. market, constituting 37% of all issuance over the same time frame[2]
- no ABS issued by any of us has ever defaulted or missed any payments
- since Standard & Poor's Ratings Services ("S&P") began rating auto ABS, no defaults have ever occurred on prime auto securitizations and only four defaults (all on non-investment grade bonds) have occurred on subprime auto ABS rated by S&P[3]

In short, Vehicle ABS is a key piece of the ABS market, and it has a laudatory track record.

[1] *See* our Risk Retention Comment Letter at 5.

[2] *See* our Risk Retention Comment Letter at 6.

[3] *Id.*

Costs and Benefits of Various Rules

We recognize that the financial crisis exposed flaws in certain sectors of the ABS market. In particular, it became evident that problems existed in the origination of certain types of residential mortgage and home equity loans and the design of ABS backed by those loans (collectively, "RMBS") and collateralized debt obligations backed principally by RMBS ("RMBS CDOs").

As a direct consequence of the problems in the RMBS and RMBS CDO sectors, a multitude of legislative and regulatory actions have been and are being taken. These actions are aimed at correcting conditions and practices that are believed to have contributed to the issuance of RMBS and RMBS CDOs that sustained significant losses. These actions are being taken, we are told, for the purpose of making the securitization market "stronger and more sustainable."

However, virtually all of these legislative and regulatory actions impose themselves on the entire ABS market, rather than just on the sectors in which problems were rife. The result is that ABS sectors with essentially spotless records, such as Vehicle ABS, are being forced to shoulder substantial additional burdens. Our securitization practices already produce high quality ABS.

We are concerned that no one is weighing the cumulative burden on sponsors of all of the incremental regulation. While the goal may be to strengthen the market, we think the impact could in fact be counterproductive, if otherwise sound business practices become so costly that they drive sponsors out of the market. We see no evidence that any regulatory agency is making an effort to comprehend the overall effect on sponsors of the enormous number of new rules or to ascertain whether these new rules create any real benefits to investors or to the U.S. capital markets as a whole.

The litany of new rules includes:

Rules already in effect

- Rule 17g-5
- Rule 436(g) repeal
- Repeal of ability to de-register under Section 15(d)
- Rule 17g-7

Rules adopted but not yet effective

- Rule 193 and Item 1111(a)(7)
- Item 1111(a)(8)
- Rule 15Ga-1
- Items 1104(e) and 1121(c)

Rules proposed but not yet adopted

- Risk retention
- Asset level disclosure
- Waterfall program
- Impact of derivatives regulation on ABS
- Shelf eligibility

- Conflicts of interest
- Third party due diligence reports
- Exemptions from the Investment Company Act of 1940

There are many costs borne by sponsors in adapting to new rules. Sponsors have incurred or will incur out-of-pocket expenses in the form of (a) increased fees to outside counsel to assist in interpreting the rules and drafting and negotiating revised disclosure provisions and operative documents, (b) increased fees to accounting firms or other third parties to perform additional reviews of assets, (c) increased costs to continue filing distribution reports on Form 10-D and other reports under the Securities Exchange Act of 1934 and (d) costs to add or upgrade information systems to handle greatly increased reporting. Further, sponsors have incurred and will incur additional internal costs in devoting more sponsor and servicer personnel time to these new rules. Finally, the need to respond to these regulatory imperatives—coupled with the cost constraints under which our businesses all operate—will force us to postpone other worthwhile projects which are competing for internal resources.

Most significantly, sponsors will incur material incremental capital costs if they need to raise additional (and more costly) funding in non-securitization markets. Their cost of capital will increase either because risk retention reduces the effective advance rates on their assets or because they elect to exit the ABS market altogether due to their unwillingness to disclose sensitive asset-level data, to incur the potential liability or cost of preparing a waterfall computer program, or simply to shoulder the ever-increasing costs of effecting securitizations.

We support the goal of a strong and sustainable securitization market. But we do not believe that burdening sponsors or asset classes that have superlative track records with substantial additional costs in order to comply with unnecessary regulation is beneficial to the market. To the contrary, it runs the substantial risk of shrinking the market.

The Re-proposed Shelf Eligibility Rules

Virtually all of the Vehicle ABS Sponsors have effective shelf registration statements for retail loan-backed ABS. Several of us also register ABS backed by leases or floorplan loans, or both, for sale off of a shelf. Accordingly, the Commission's re-proposal of the shelf eligibility rules is of significant interest to us. We want to continue to issue ABS "off the shelf," because the depth, liquidity, ease of access and efficiency of the U.S. public market make it the best place for us to obtain funding in many instances.

However, we do not blindly issue ABS off the shelf, oblivious to factors that render it unwise or unattractive for us to use that distribution channel. We are concerned that the Commission's Re-proposed Rules would make sales of shelf-registered ABS less attractive, and quite possibly substantially so. The Re-proposed Rules would create additional liability risks for our officers who are required to sign the proposed certification, and they would cause us to incur significant costs to negotiate and document arrangements regarding credit risk managers and dispute resolution provisions. All of these burdens would be forced onto issuers with, to our mind, no real benefit to investors. As we point out above, our Vehicle ABS have performed in stellar fashion over the past quarter-century. There is simply no indication that the "protections" supposedly created for investors by the Re-proposed Rules would provide any tangible benefit to our investors, but they would surely impose significant risks and costs upon issuers.

Although it is difficult to quantify the amount of cost, we can enumerate the types of costs we would incur if forced to effect shelf offerings on the basis spelled out in the Re-proposed Rules. In our commentary on each of the sections of the Re-proposed Rules, we will identify those types of costs.

A number of the Vehicle ABS Sponsors are also members of the ASF and participated in the process that formulated the ASF's comment letter on the Re-proposing Release submitted to the Commission on October 4, 2011 (the "ASF Shelf Comment Letter"), and the other Vehicle ABS Sponsors have familiarized themselves with the ASF Shelf Comment Letter. As a general matter, the Vehicle ABS Sponsors support the positions set forth in the ASF Shelf Comment Letter on behalf of issuers or as industry consensus positions with respect to the Re-proposed Rules, although we have some additional commentary provided below.

Certification by Officer of Depositor: The Vehicle ABS Sponsors strongly endorse the positions taken in the ASF Shelf Comment Letter with respect to the proposed certification.[4] We believe that the certification should include only paragraphs 1, 2 and 3, as revised in Exhibit A to the ASF Shelf Comment Letter. As issuers, we find it inappropriate for the Commission to require a certifying officer to make predictive statements that are beyond that officer's ability to know.

The Sarbanes-Oxley Section 302 officer certifications[5] to which the Commission analogizes[6] relate to matters that are internal to the reporting company—its disclosure controls and procedures and internal controls and procedures. Those certifications are intended to bolster confidence in a reporting company's financial statements, meaning that they relate ultimately to disclosure. The Commission does not under Sarbanes-Oxley require a certification of the reporting company's ability to satisfy its financial obligations or to maintain its stock price; those would be predictive exercises involving many factors beyond the certifying officer's control. We think that, likewise, the Commission should not here be requiring a certifying officer to predict the repayment of ABS as a condition to shelf eligibility. Such a requirement asks too much of the certifying officer and imposes an inappropriate risk of liability.

Credit Risk Manager and Repurchase Request Dispute Resolution: The Vehicle ABS Sponsors concur with the positions advanced by the ASF regarding the proposed credit risk manager and repurchase request dispute resolutions provisions.[7] Repurchase demands are not a fact of life in Vehicle ABS; indeed, while most of us are still working through the proposed reporting requirements of Rule 15Ga-1 and have not reached definitive conclusions, it could well be the case that none of us will report *any* repurchase demand activity.

We do not think it is appropriate for the Commission to require such an elaborate and costly architecture to be added into our transaction structures when there is no indication that unsatisfied repurchase demands are a problem in our asset classes. As the ASF Shelf Comment Letter noted, we would be required to negotiate and draft a new set of transaction terms among a variety of transaction participants, pay ongoing fees to credit risk managers and add disclosure

[4] *See* ASF Shelf Eligibility Comment Letter at 3-9.

[5] *See* Rules 13d-14 and 15d-14 under the Securities Exchange Act of 1934.

[6] *See* Original Reg AB II Proposal at 75 Fed.Reg. 23346, including fn. 145.

[7] *See* ASF Shelf Eligibility Comment Letter at 9-19.

regarding these provisions to the prospectus.[8] Many issues would need to be considered and resolved in the course of establishing these new provisions. One of the most important issues—and one which the Commission itself acknowledges is important later in the Re-proposing Release—is the confidentiality of information about obligors. We anticipate that it would be necessary to design significant controls over the disclosure and use of such information. We would need to assure ourselves that we are both complying with our legal obligations and protecting the privacy of our obligors.

It could easily cost a sponsor over $100,000 for each of its issuance platforms in out-of-pocket costs to effect these changes the first time. Thereafter, the sponsor would be subject to ongoing costs of paying a credit risk manager and its counsel, despite what we believe is a very small likelihood that the credit risk manager would ever be called upon to perform any substantive services.

As a result, the Vehicle ABS Sponsors believe that the Commission should adopt the suggestion made by the ASF to permit other options.[9] We believe that both of the ASF's suggestions in this respect are meritorious: (a) permitting an issuer to undertake to deliver a third party opinion in the event of an unsatisfied repurchase demand and (b) permitting an issuer to suspend the obligation to include credit risk manager and repurchase request dispute resolution mechanics so long as it has not received more than a *de minimis* level of repurchase requests in the preceding two years.

With respect to the specific terms proposed by the Commission for credit risk managers and dispute resolution, the Vehicle ABS Sponsors agree with the following recommendations in the ASF Shelf Comment Letter: [10]

- that the nomenclature be changed from "credit risk manager" to "independent reviewer"
- that the independent reviewer be appointed in the relevant agreement, but not solely by the trustee
- that the "one-size-fits-all" trigger tied to the "credit enhancement requirements . . . are not met" be replaced by a requirement that the transaction documents contain a trigger based upon objective factors
- that the scope of the review, once triggered, be specified in the transaction documents
- that the subjective, "investor-triggered" review provision be removed from the proposal
- that the independent reviewer's report, once delivered to the trustee, not be required to be republished in its entirety
- that the remedies for breach of representation or warranty be specified in the transaction documents and not in the shelf eligibility rules

We wish, particularly, to reinforce the points made by the ASF in respect of the objective trigger.[11] Even within an asset class as mainstream as retail auto loans, there are a number of different forms of credit enhancement employed, as well as different ways in which a single form

[8] *See* ASF Shelf Eligibility Comment Letter at 10-11.

[9] *See* ASF Shelf Eligibility Comment Letter at 11-12.

[10] *See* ASF Shelf Eligibility Comment Letter at 12-18.

[11] *See* ASF Shelf Eligibility Comment Letter at 14-16.

of credit enhancement is utilized. Although credit enhancement is a defining feature of a securitization, in many, if not most, transactions there is no express delineation of each element of credit enhancement or its required amount.

As an example, we explained in our Risk Retention Comment Letter that overcollateralization can be measured quite differently in a transaction utilizing a yield supplement overcollateralization amount than in a transaction using a discounted cash flow approach. In some transactions, credit enhancement is expected to increase over time, and in other transactions, credit enhancement can be reduced if certain performance results are achieved. The result, we think, is that a broadly applicable rule that is tied to the amount of credit enhancement cannot be fashioned.

The ASF approach of permitting transaction participants to fashion appropriate objective measures, without dictating what those measures are, is more sensible. In our retail transactions, for example, we think that an appropriate measure would be the occurrence of an event of default. We recognize that such a standard would not be appropriate across the board, as certain types of securitization structures do not have events of default.

We also believe it would be appropriate for transaction participants, in the design of an objective trigger, to take into account the prospect of investors being paid in full. Vehicle ABS issued by Vehicle ABS Sponsors in public offerings have experienced no defaults and just one early amortization event as a result of pool performance.[12] In that public transaction, as with every other matured Vehicle ABS issued publicly or privately by a Vehicle ABS Sponsor (including those few additional transactions which experienced early amortization events or events of default[13]), investors were nonetheless paid in full. No purpose would be served by an independent review when investors are paid in full, and we believe transaction participants should be able to take such factors into account in designing appropriate triggers.[14]

Investor Communications: The Vehicle ABS Sponsors agree with the ASF[15] that transactions should be permitted to employ various methods to facilitate investor communications, and that the use of Form 10-D should be a default mechanism if no other approach is set forth in the transaction documents.

Requests for Comment on Disclosure Requirements

The Commission has solicited additional comments on several issues raised by the Original Reg AB II Proposals. We have comments on several of these requests.

A. Exhibits to be filed with Rule 424(h) filing

In the Re-proposing Release, the Commission proposes to accelerate the filing of underlying transaction documents to the date on which the Rule 424(h) prospectus is required to

[12] One floorplan securitization went into early amortization because its payment rate declined.

[13] Early amortization events occurred in a few floorplan transactions and events of default occurred in a few lease transactions, in each case as a result of the bankruptcy of an affiliated auto manufacturer.

[14] In a floorplan securitization, we expect that an early amortization event would lead to the repayment of investors in affected series in an extremely short period—likely just one to three months. In such a circumstance, we see no reason why an independent review should even commence unless and until it becomes clear that investors are going to suffer a loss.

[15] *See* ASF Shelf Eligibility Comment Letter at 19.

be filed. [16] These documents would need to be filed in "substantially final form," so that subsequent changes to the agreements that were not "minor" (other than offering price) would necessitate a further filing.

We are supportive of the issuer views expressed in the ASF Shelf Eligibility Comment Letter. [17] Our transactions are not REMIC structures, so we do not have concerns with finalization of tax provisions. But we share the concerns of all issuers that the Commission is ignoring the primacy of the prospectus as a tool for disclosure and is proposing to require multiple filings of documents that may have very few differences from each other.

Our transactions can be among those that the ASF Shelf Eligibility Comment Letter characterizes as "highly standardized."[18] For retail loan offerings, many of our issuing entities always issue the same number of classes of ABS and employ the same waterfall priorities. We can and do have offerings in which the only differences between the transaction documents filed as exhibits to the registration statement and the documents for a specific transaction are those items that depend upon the specific securitized pool, such as:

- ABS class-specific details like the principal amount, interest rate, final maturity date and first payment date for each class
- asset pool-specific details like the cutoff date, the value of the securitized assets being transferred, the earliest scheduled payment date in the pool, and the earliest origination date in the pool
- transactional values whose dollar amount depends upon the size of the transaction (but which may be consistent across transactions on a percentage basis), like the amount in the reserve account or the amount of overcollateralization
- the dates of the transaction documents

We refer to these types of items as the "Offering-Specific Information." All of the Offering Specific Information is set forth prominently in the prospectus for the offering, and it is much easier to locate in the prospectus than in the underlying transaction documents. As the ASF Shelf Eligibility Comment Letter points out, there is no purpose in this situation to requiring a re-filing of the underlying transaction documents at the time of the 424(h) prospectus. A single filing of the executed documents should be permissible.

Another example arises in the situation in which an issuer "upsizes" an offering, which can occur with some frequency in ABS markets. For example, an issuer may originally offer ABS with an aggregate principal amount of $1,000,000,000, consisting of four classes of ABS of $250,000,000 each, with a discrete asset pool backing the offering that has a securitization value of $1,100,000,000.

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[16] Although the Commission has not sought comment on the appropriate length of the "waiting period" under proposed Rule 424(h), we reiterate the view expressed in our Original Reg AB II Comment Letter that the proposed five-day period is far too long. An excessively long period exposes both issuers and investors to increased risks of market volatility. We continue to support a two business day requirement for the first filing for an offering and a one-day requirement for a re-filing due to material changes, subject to an exception from this timing requirement for seasoned issuers. *See* our Original Reg AB II Comment Letter at 6-7.

[17] *See* ASF Shelf Eligibility Comment Letter at 22-27.

[18] *See* ASF Shelf Eligibility Comment Letter at 25-26.

The issuer and the underwriters may determine after the offering has commenced and the issuer has filed the requisite preliminary prospectus that there is sufficient investor demand to sell additional securities. The issuer may then increase, or "upsize," the overall offering to $1,200,000,000 (four classes of $300,000,000 each) and the asset pool to $1,320,000,000. The issuer typically updates the prospectus (either through re-filing the entire prospectus or filing a supplement to the prospectus) to disclose the change in the size of each offered class and the relevant information about the asset pool, including updated pool composition and stratification tables.

Very few changes will be made to the underlying transaction documents as a result of this upsizing of the offering—all of the changes will be Offering-Specific Information, but not all Offering-Specific Information will change. (For example, the maturity dates and first payment date for the ABS classes and the cutoff date for the pool will remain the same.) The new dollar amounts of the offered classes will change, as will the stated value of the pool assets and those dollar amounts that depend on the size of the transaction. The more detailed information contained in the description of the receivables pool in the updated prospectus will *not* be included in the transaction documents.

These values in the underlying transaction documents that do change will be reflected in the updated prospectus, and that information will again be much easier to find there than in the transaction documents. Investors will look to find such information in the updated prospectus. Although the changes to the underlying transaction documents were not and will not be substantial, it will create significant additional burdens in both timing and cost for the issuer to re-file these documents,[19] and it will provide no benefit to investors. Here, again, the final transaction documents must be filed upon the closing of the transaction, so investors will have the opportunity to view the final documents in executed form.

Accordingly, we request that the Commission not require the re-filing of underlying transaction documents in these circumstances. We also call to the Commission's attention that many registrants have been required by the Commission's staff in recent years to agree in the review process for an ABS registration statement, as a condition of effectiveness, to undertake to make more frequent or more accelerated filings. We ask that the Commission, if it adopts the more favorable rule we are proposing, to expressly permit such registrants to follow the new rule despite those undertakings given to the staff.

B. Requests for Comment on Asset-Level Information

1. Section 7(c) of the Securities Act

Section 942(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the "Dodd-Frank Act") added Section 7(c) to the Securities Act of 1933 (the "Securities Act"). The Commission asks in this portion of the Re-proposing Release several questions relating to its proposal for asset-level information in the Original Reg AB II Proposal.

[19] Out-of-pocket costs for an issuer to re-file the underlying transaction documents for a typical retail loan Vehicle ABS are typically several thousand dollars. For a sponsor that effects multiple transactions in a year and that would be forced to make two extra filings per offering, such costs will become significant.

RFC #68–Effective Implementation of Section 7(c). In this RFC, the Commission asks whether the Original Reg AB II Proposal implements Section 7(c) effectively. Our answer is that it does not.

At the outset, we want to comment on a fundamental (and, we believe, incorrect) assumption that the Commission appears to be making. The Commission seems to assume in this discussion that disclosure of data regarding assets, *on an asset-by-asset basis,* is required by Section 7(c) for virtually all asset classes.

The paradigm transaction toward which Section 7(c) is directed is one backed by mortgage loans: an offering of either RMBS or commercial mortgage backed securities ("CMBS"). The discussion of Section 7(c) in Senate Report No. 111-176 (the "Senate Report on Dodd-Frank"), which is a primary source of legislative history on the Dodd-Frank Act, where it directly discusses asset classes, mentions only mortgage loans. The witnesses cited in this section of the Senate Report on Dodd-Frank[20] reference no asset class other than RMBS when discussing loan-level data disclosure. Moreover, the Commission effectively acknowledges that the disclosures expressly delineated in Section 7(c), which are the items specified in clauses (i) and (ii) thereof,[21] relate exclusively to mortgage loans:

- *(i) data having unique identifiers relating to loan brokers and originators* – The Original Reg AB II Proposal required unique identifiers just for mortgage loans, and the Commission notes in the Re-proposing Release that it is unaware of any standardized system for identifying brokers or originators of other asset classes.
- *(ii) the nature and extent of the compensation of the broker or originator of the assets backing the security* – The Commission notes its belief (which the Vehicle ABS Sponsors share) that brokers are not used for asset classes other than RMBS and CMBS.

The Vehicle ABS Sponsors vigorously disagree with the Commission's apparent assumption that asset-level disclosure should apply to Vehicle ABS. First and foremost, we point out that Congress itself was very clear on this point in the Senate Report on Dodd-Frank:

> The Committee does not expect that disclosure of data about individual borrowers would be required in cases such as securitizations of credit card or automobile loans or leases, where asset pools typically include many thousands of credit agreements, where individual loan data would not be useful to investors, and where disclosure might raise privacy concerns.[22]

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[20] *See* the Senate Report on Dodd-Frank, footnotes 222 through 227.

[21] The Commission states that it is not proposing additional disclosure requirements for clause (iii) of Section 7(c), which covers "the amount of risk retention by the originator and the securitizer of such assets." The Commission notes that the Risk Retention Proposals do not require sponsors to retain risk on individual assets and that the Original Reg AB II Proposal required disclosure of the sponsor's risk retention. We think this treatment constitutes an acknowledgement by the Commission that clause (iii) of Section 7(c) makes little sense and cannot be implemented.

[22] At 131 (available at http://banking.senate.gov/public/_files/Comittee_Report_S_Rept_111_176.pdf.)

This piece of legislative history ought to be dispositive on the question of whether individual loan data is needed in Vehicle ABS transactions. The Senate Report on Dodd-Frank could not be clearer about the limited nature of Section 7(c).

As the Senate Report on Dodd-Frank notes, investors do not need data points on individual receivables when there are many thousands of assets in the pool. A single receivable is simply immaterial in a pool with the number of assets we typically securitize. As we noted in our Original Reg AB II Comment Letter, these assets do not fit the RMBS paradigm:

> Our retail auto loans and auto leases have relatively small values, often averaging in the range of $10,000 to $20,000. Equipment loans often range from $40,000 to $100,000, still well below the standard mortgage loan. The number of assets in our securitized pools is large. The tenor of the retail loans and leases is relatively short. The underwriting process is streamlined, with the loan usually being made the same day it is requested. Our transaction structures for retail loan and lease ABS are simpler than credit card structures. Our defaults are resolved quickly.[23]

In the context of asset-level disclosure, the same types of considerations apply to auto and equipment floorplan transactions. The values of the individual receivables are in the same ranges identified above; the number of receivables in a floorplan master trust is even larger than the number for a retail loan or lease transaction; the tenor of the receivables is extremely short, with most receivables being repaid in 90 days or less; and the frequency of default is exceedingly low.

In short, we do not believe that Congress intended, or that the SEC should require, asset-level disclosure for Vehicle ABS. Section 7(c) is not a blanket requirement applicable to all asset classes. Indeed, Section 7(c) itself requires asset-level data only "if such data are necessary for investors independently to perform due diligence."

The Commission itself has acknowledged the relevance of this limitation through its determination to retain the exemption of credit card and stranded cost ABS from asset-level reporting notwithstanding the enactment of Section 7(c). The logic of those exemptions should be extended to Vehicle ABS.

The large number of receivables in Vehicle ABS offerings, and the characteristics of those receivables that we identify above, makes it impracticable for investors to perform due diligence at the individual receivable level. Moreover, the retention by every issuer of Vehicle ABS of the most subordinated interest(s) in each securitized pool dramatically lessens the need for investors to analyze individual loans. As we note in our Risk Retention Comment Letter, we are the ones who will bear the first (and, based on 25 years of performance, the only) losses on receivables in these pools.

In addition, there are a great many practical problems that asset-level disclosure would cause for Vehicle ABS Sponsors. We enumerated these reasons in exhaustive detail in our

[23] Original Reg AB II Comment Letter at 25.

Original Reg AB II Comment Letter and our Supplemental Reg AB II Comment Letter,[24] and we highlight the key points here:

- Disclosure of so much data could cause irreparable harm to our businesses by compromising our proprietary know-how and by releasing information that is competitively sensitive.
- As we discuss in more detail below, the consumer asset disclosures create major privacy risks for obligors.
- The floorplan data disclosures would expose confidential information that could easily be tied to particular dealers.
- The amount of data specified in the Commission's proposals is overwhelming, when the amount of data sought for each asset is multiplied by the number of assets in a typical transaction—some 3 million items of data for a typical retail or lease transaction, and 13.6 million data points for a large floorplan issuer.
- Many of the data points are simply not applicable to Vehicle ABS transactions.

We think it is also germane that two different regulatory initiatives in Europe support the approach we are proposing. Under paragraph 7 of Article 122a of the Capital Requirements Directive[25] of the European Union, "sponsor and originator credit institutions" are required to disclose to prospective investors "all materially relevant data on the credit quality and performance of the individual underlying securitization exposures." Paragraph 128 of the guidelines to Article 122a promulgated by the European Banking Authority[26] specifies that "the term 'individual underlying exposures'. . . will typically mean that such data should be provided on an individual exposure (or 'loan-level') basis. However, it is recognized that there may be circumstances in which such loan-level disclosure is not appropriate; for instance, securitizations with a large volume of exposures that are highly granular." We believe that our Vehicle ABS pools fit into this category of having "highly granular" exposures.

Separately, the European Central Bank (the "ECB") is formulating templates for disclosure in ABS transactions; compliance with these templates will affect whether the ABS is acceptable to the ECB as collateral (and ECB eligibility could well dictate the willingness of ABS investors to purchase such ABS). The ECB has indicated that "for some very granular and well-diversified ABS asset classes loan-by-loan information may not be required."[27] Affiliates of several of the Vehicle ABS Sponsors have participated in a working group organized by the ECB, and the focus of their efforts in respect of data reporting has been a combination of grouped data and stratification tables modeled on the grouped data proposal contained in the ASF Auto Sector Letter. These affiliates have heard from the ECB that it expects to publish final

[24] *See* our Original Reg AB II Comment Letter at 18-26 and our Supplemental Reg AB II Comment Letter in its entirety.

[25] The Capital Requirements Directive of the European Union is comprised of Directive 2006/48/EC and Directive 2006/49/EC, as amended by Directive 2009/111/EC.

[26] *See* European Banking Authority (f/k/a Committee of European Banking Supervisors), *Guidelines to Article 122a of the Capital Requirements Directive,* 31 December 2010 at 51.

[27] *See* ECB website, available at http://www.ecb.int/paym/coll/loanlevel/transmission/html/index.en.html.

templates within the next two months, and the affiliates believe that the templates will closely parallel the proposal contained in the ASF Auto Sector Letter.

In RFC #68, the Commission also asks whether there are any changes or additions that would better implement Section 7(c). Notably, although the track record of Vehicle ABS is excellent, we are not simply requesting that the status quo be maintained with respect to disclosure practices. Instead, in our Supplemental Reg AB II Comment Letter we endorsed the dramatically expanded set of grouped data disclosures regarding pool assets that are laid out in the issuer portion of the ASF Auto Sector Letter. We believe that this proposal will present investors with a robust view of the assets we are securitizing. Further, it will facilitate the modeling of retail and lease Vehicle ABS transactions using "rep lines," which is the industry standard approach. We believe that those proposals strike the appropriate balance.

In sum, the Vehicle ABS Sponsors strongly believe that our grouped data proposals for Vehicle ABS are both consistent with the mandate of Section 7(c) and far superior to the proposed Schedule L and Schedule L-D disclosure regime. We ask the Commission to adopt our proposals.[28]

RFC #71–Brokers. The Commission asks whether asset classes other than RMBS and CMBS use brokers. We can inform the Commission that brokers are not used by the Vehicle ABS Sponsors to originate retail, lease or floorplan assets.

RFCs ##81-84–Privacy Issues. In this series of RFCs, the Commission asks questions about privacy issues that could result from the disclosure of asset-level information. We are pleased to see that the Commission is taking these privacy concerns seriously; we devoted a substantial portion of our Supplemental Reg AB II Comment Letter to that topic,[29] and we continue to believe that asset-level disclosure requirements would pose serious risks to our obligors from being "re-identified" through misuse of the asset-level data, even though the asset-level data has supposedly been "anonymized."

A significant protection against privacy problems would be to adopt the grouped data proposals in the ASF Auto Sector Letter.[30] For a large portion of the obligors in the pool, the use of grouped data will obscure their individual attributes.

However, even the use of grouped data is not perfect protection against privacy intrusions. As we noted in our Supplemental Reg AB II Comment Letter,[31] approximately 10 per cent of the data lines in the grouped data test run consisted of data related to a single obligor. These obligors likely could be re-identified with little difficulty, and the grouped data format would not protect sensitive information such as the approximate income level and FICO score band of these obligors. Another four per cent of the data lines in this test run consisted of two

[28] As the Re-proposing Release expressed some confusion as to Navistar Financial's view, Navistar Financial wishes to clarify for the Commission that it supports the grouped data proposals described in the ASF Auto Sector Letter and referenced in this letter and that it believes similar disclosures are appropriate for equipment ABS. Navistar Financial expects to submit a separate comment letter in the near future to the Commission.

[29] *See* our Supplemental Reg AB II Comment Letter at 17-23.

[30] *See* ASF Auto Sector Letter at 11-30.

[31] *See* p. 20.

obligors, which also puts those obligors at risk (particularly when one of them pays off the loan, leaving just a single obligor in that data line). Accordingly, the Commission should not view the use of grouped data as a means of eliminating all privacy concerns (which is part of the focus of RFC #83); while the grouped data reduces the risks, some risk remains.

We think sponsors should be permitted or required to take actions to obscure the data in data lines with very few obligors. Such action could consist of combining two or more such data lines, or of eliminating the most sensitive data points on such lines. Doing so would protect privacy while having a negligible effect on the quality of the grouped data disclosures.[32]

The Commission asks in RFC #82 whether eliminating the requirements for information about an obligor's credit score and income, while preserving the other proposed data points, would eliminate privacy concerns. While it would certainly be helpful to eliminate these two items, the Vehicle ABS Sponsors believe that other problematic data points would remain, and that disclosure of these data points would compromise an obligor's privacy. For example, disclosure would still be required at the outset under Item 1 of Schedule L for the original amount and interest rate of a loan. Ongoing reporting under Item 1 of Schedule L-D would be required to list how much the obligor had paid the prior month, whether an obligor was delinquent, the obligor's payment history and whether there are late charges (and the amount). Item 4 of Schedule L-D would require disclosure of whether the vehicle had been repossessed. We do not believe it is appropriate to be disclosing any of these types of information regarding obligors on an individual basis.

In RFC #85, the Commission asks whether there are other ways to present data that would help to address privacy concerns. We think that the Commission should consider seriously two other proposals that we made in our Supplemental Reg AB II Comment Letter:

- *Establishing a central "registration system" managed by the Commission or a third party that would permit access to this sensitive data only to persons who had independently established their identity as investors, rating agencies, data providers, investment banks or other permitted categories of users.* As the Commission recognizes, this data is very sensitive. The persons who are legitimately interested in this information for investment purposes comprise a very selective group; it would not be an overwhelming process to establish and maintain a restricted-access system. Moreover, Section 7(c) does not require that this information be made available for the entire world to see; we think the Commission would be well within its authority in limiting access.

- *Forbidding the use of this data for any purpose other than evaluating the performance of ABS and establishing appropriate penalties for misuse, especially the inclusion of this data in commercially distributed databases.* To us, such limitations are common sense.

[32] In the test run we performed, 14 per cent of the data lines had just one or two obligors. Although 14 per cent of the data lines seems like a significant amount, the proportion of the pool's total value represented in fact is exceedingly small. Assuming there were 1200 data lines in the test run, then 10% of them (those data lines having a single obligor) equates to 120 obligors. An additional four per cent (or 48) data lines having two obligors equates to another 96 obligors, for a total of 216 obligors. A typical retail auto pool has 50,000 obligors, of which 216 is just 0.43% of the total.

This data is being provided for a very limited purpose; the Commission should forbid its use for inappropriate purposes.

2. When to Require Schedule L

The Commission asks in RFC #92 whether it should specify that a new Schedule L should be filed when assets are added to the pool after issuance. The Commission notes that such additions could occur as a result of prefunding periods or revolving periods or when a substitution of an asset occurs.

The Vehicle ABS Sponsors have comments on three aspects of this proposal. In these comments, we refer to the information about new assets that is provided at the time of offering (whether on proposed Schedule L or in the grouped data format proposed in the ASF Auto Sector Letter) as "offering data."

Item 6.05 of Form 8-K. The Vehicle ABS Sponsors disagree with the Commission's assertion that the Original Reg AB II Proposal required the filing of offering data under Item 6.05 of Form 8-K if assets are added to the pool after issuance. Although footnote 235 makes such an assertion, there is nothing in the text of the proposed revisions to Item 6.05 that would require a filing to reflect assets added after the closing date of the transaction. Item 6.05, as proposed, relates solely to the composition of the asset pool at the "time of issuance of the asset-backed securities." If the Commission means to require updating for post-closing pool additions, then the Commission needs to make that explicit in Item 6.05.

However, we question why the Commission would seek to impose such a reporting requirement in Form 8-K. Item 1121(b) of Regulation AB already specifies the operative disclosure requirements for changes in pool composition during revolving periods and prefunding periods, and it expressly calls for such information to be provided in distribution reports on Form 10-D, rather than in current reports on Form 8-K. We think that Item 1121(b) is the better place to incorporate any changes to the existing disclosure obligations.

Revolving Asset Master Trusts. Notwithstanding the preceding discussion, the Vehicle ABS Sponsors believe a requirement to file offering data in respect of assets added after the measurement date is completely inappropriate in the context of a revolving asset master trust. The asset composition of a revolving asset master trust, such as a floorplan master trust, changes on a daily basis during its revolving period. The upshot of the Commission's proposal would be to require a floorplan issuer each month to file *both* the Schedule L offering data and the Schedule L-D monthly information. It also appears to be a burden that would be visited solely upon floorplan issuers, inasmuch as the Commission proposed to subject credit card ABS to a different reporting regime.

As the Vehicle ABS Sponsors explained in detail in our Original Reg AB II Comment Letter, the reporting regime for floorplan securitization would be astonishingly burdensome. The Schedule L requirements for a floorplan trust with 400,000 vehicles would amount to 13.6 million data points of offering data (and, under the concept contemplated in RFC #92, on a monthly basis thereafter), along with the burden of monthly Schedule L-D reporting. For that reason and others, the Vehicle ABS Sponsors endorse the grouped data proposals in the ASF Auto Sector Letter for floorplan securitization (which proposals were consensus positions of both issuers and investors).

Prefunding Periods and Revolving Periods for Non-Revolving Assets. The grouped data proposal for retail and lease securitizations in the ASF Auto Sector Letter did not address the offering data to be provided for non-revolving assets that could be added to an asset pool during a prefunding or revolving period. Much, but not all, of the information contained in the representative data lines and collateral reports that constitute the offering data would be included in the monthly representative data lines and monthly data stratification reports (collectively, the "monthly data") that are part of the grouped data proposal.

The principal grouped data points that are included in the offering data, but are not part of the monthly data (such data, the "unreported offering data"), in the retail loan grouped data proposal are the following:

In representative data lines for retail loans

- weighted average remaining term
- weighted average APR
- weighted average scheduled monthly payment
- aggregate balance of subvented assets

In collateral reports for retail loans

- weighted average obligor FICO score
- weighted average loan-to-value ratio
- weighted average payment-to-income
- percentage of new vehicles
- weighted average original term
- weighted average remaining term
- weighted average APR

Although we do not detail it here, the grouped data lease proposal also has unreported offering data.

For transactions that have revolving periods or prefunding periods and are not revolving asset master trusts, the Vehicle ABS Sponsors agree with the Commission that it is appropriate that investors be provided with unreported offering data about new assets. However, the Vehicle ABS Sponsors believe that additional disclosure should be provided only when the amount of new assets added to the asset pool is material. There is a burden to preparing this information, and we do not believe that the addition of an immaterial amount of assets to the pool should trigger such a reporting requirement.

For this purpose, we suggest that new assets having a value of one per cent or more of the total value of assets in the pool would be considered "material." We take this threshold from the reporting requirement proposed for Item 6.05 of Form 8-K in the Original Reg AB II Proposal. We suggest that an issuer would be required to provide information about new assets at any time that the assets added to the trust since the measurement date for the most recent disclosure of offering data (the "preceding measurement date") amount to one per cent or more of the total asset pool.[33] By delineating the filing requirement in this fashion, the Vehicle ABS Sponsors believe that issuers would be able to avoid the burdens of reporting on immaterial changes, but

[33] We think an issuer should be permitted to report more frequently, if it so chose.

investors would be protected against "creeping turnover" situations in which a small amount of monthly changes (*e.g.*, 0.5% per month) became a material amount over time.

Finally, we believe that the issuer should be given the choice of whether to present the offering data for just those assets that have been added to the pool since the preceding measurement date or for the entire asset pool. Ordinarily, we would expect issuers to provide offering data on just the new assets. However, in the case of relatively small pool additions, an issuer might prefer to report on all assets in the pool in order to minimize the privacy concerns resulting from the addition of relatively sparse data lines.

3. Privately-Issued Structured Finance Products

The Vehicle ABS Sponsors endorse the positions taken by the ASF in the Discussion Points attached to the ASF Shelf Comment Letter regarding the Commission's proposal with respect to the use of Rule 144A and Regulation D by issuers of asset-backed securities.

The Vehicle ABS Sponsors use the private markets, and the safe harbors from registration, for a variety of reasons. Some of us have relatively low volume securitization programs in an asset class that do not merit the benefits, or the attendant costs, of registered offerings. Others of us use the private markets for heavily negotiated transactions with commercial banks and ABCP conduits in which the concept of a separate disclosure document would be completely superfluous to the transaction, because of the extensive back-and-forth and informal provision of substantial information that occurs in such transactions.

The Vehicle ABS Sponsors are aware of issuers who, by virtue of being depository institutions subject to the FDIC's securitization safe harbor, have been forced to prepare disclosure documents for heavily-negotiated private transactions due to the "one-size-fits-all" nature of the safe harbor's disclosure requirement. The experience of the issuers in these transactions is that the investors pay no attention to the disclosure documents. The result is a deadweight loss to the issuers, who may have to pay legal fees in excess of $100,000 for the preparation of essentially useless disclosure documents. Accordingly, the Vehicle ABS Sponsors encourage the Commission to adopt the principles-based approach advocated by the ASF.

Conclusion

Vehicle ABS is a mature, well-performing and well-structured asset class. Even through the recent financial crisis, our transactions and structures withstood significant volatility while still protecting investors. We have shown that Vehicle ABS is a strong and sustainable securitization product, and we believe that the approach reflected in our comments will further strengthen and sustain the market. We urge the Commission to adopt our proposals.

* * * *

We greatly appreciate the hard work that the Commission and its staff have put into the Re-proposing Release and the opportunity to comment on the Re-proposing Release. If you wish to discuss further any of the points raised in this letter, please let us know.

Sincerely,

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