



February 4, 2005

**By E-Mail: rule-comments@sec.gov**

Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549  
Attention: Jonathan G. Katz, Secretary

Re: Securities Offering Reform (File No. S7-38-04; Release Nos. 33-8501; 34-50624; IC-26649)

Ladies and Gentlemen:

The American Securitization Forum (the "ASF") submits this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments to its release (the "Release")<sup>1</sup> of proposed rules and forms (the "Proposed Rules") relating to the registration, communication and offering process under the Securities Act of 1933 (the "Securities Act").

The Release represents a sweeping effort by the Commission to modify and advance the registration, communication and offering process for publicly-offered securities, and proposes many far-reaching changes to long-standing policies and regulations that we believe will have a

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<sup>1</sup> Release Nos. 33-8501; 34-50624; IC-26649; File No. S7-38-04 (November 3, 2004).

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significant positive impact on the capital markets system. Overall, ASF supports the policy goals underlying the Release, and adoption of rules that can streamline the offering process and remove regulatory barriers that currently inhibit, rather than promote, more meaningful and timely dissemination of investment-related communications.

Unlike the Commission's recently published release (the "ABS Final Release")<sup>2</sup> of final rules and forms (the "ABS Final Rules") relating to the issuance and offering of asset-backed securities ("ABS"), which was directed specifically to the ABS market, the broad scope of the Proposed Rules applies to all types of issuers and offerings. We are aware of several industry and professional organizations (including The Bond Market Association and American Bar Association) that are submitting comment letters that address the concerns of issuers, underwriters and other market participants regarding the impact of the Proposed Rules on the general corporate securities market. The Commission has long recognized (and the adoption of the ABS Final Rules underscores) that ABS have certain unique characteristics that should be specifically addressed in securities rules of general applicability. Therefore this letter may differ in some respects from submissions by participants in the general securities marketplace. We believe that the significant differences between the ABS and non-ABS markets merit different approaches to certain issues. In addition, we support the positions taken in the letter of The Bond Market Association dated January 31, 2005 titled "Securities Offering Reform (File No. S7-38-04) Impacts of Proposal in the ABS Markets."

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<sup>2</sup> Release Nos. 33-8518; 34-50905; File No. S7-21-04 (December 22, 2004).

The ASF is uniquely positioned to provide the Commission with comprehensive, balanced and practical recommendations regarding the applicability of the Proposed Rules to ABS. The ASF seeks to promote the efficient growth and development of the ABS markets by engaging in a variety of legal, regulatory, accounting, market practice and educational initiatives. Members of the ASF include investors, issuers, underwriters, servicers, trustees, rating agencies, law firms, accounting firms and other professional participants in the ABS market.<sup>3</sup>

When the Commission published its release (the “ABS Proposing Release”)<sup>4</sup> of proposed rules and forms (the “ABS Proposed Rules”) relating to the registration, disclosure and reporting requirements for ABS under the Securities Act and the Securities Exchange Act of 1934 (the “Exchange Act”), the ASF undertook a project of unprecedented importance to the ABS industry. The ASF submitted a comprehensive, 157 page letter (the “ABS Comment Letter”) to the Commission, which was followed by a second letter regarding static pool data, one of the more sensitive subjects covered by the ABS Proposed Rules. Those letters were drafted by a broad membership task force, comprised of approximately 140 individuals from over 50 ASF member firms.

We have assembled a second membership task force (the “Task Force”) to review the Release and prepare specific comments to the Release that address the registration, communication and offering process described in the Release as applied to ABS. This Task

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<sup>3</sup> Further information about the ASF is available on the ASF’s Internet home page at <http://www.americansecuritization.com>. A list of the ASF’s membership is available at <http://www.americansecuritization.com/member/page.aspx?type=22>.

<sup>4</sup> Release Nos. 33-8419; 34-49644; File No. S7-21-04 (May 3, 2004).

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Force is similarly comprised of numerous individuals representing the broad constituency of the ASF. As the Commission observed in the ABS Final Release<sup>5</sup>, since the inception of the ABS industry, the Commission staff has attempted to accommodate the different nature of ABS through numerous no-action letters and interpretive positions. The ABS industry has used this accumulated informal guidance to fashion procedures and standards for the ABS offering process and has evolved to produce an estimated \$850 billion of new issuances in 2004.<sup>6</sup>

### **PRIMARY CONCERNS AND RECOMMENDATIONS**

A primary concern of this letter is the liability regime under Proposed Rule 159. While we endorse Proposed Rule 159's goal of providing more complete information to investors, we believe that Proposed Rule 159 does not reflect the realities of the ABS market, and could inhibit, rather than promote, the circulation of investment-related communications at a time that is relevant to decision-making.

In contrast to the offering process for general corporate securities, the offering process in many ABS issuances usually involves a continuing dialogue between issuers and/or

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<sup>5</sup> See Section II of the ABS Final Release.

<sup>6</sup> As the Commission is aware, ABS are typically issued through a depositor, which creates a separate issuing entity for each ABS issuance, obtains the assets for each such issuance from a seller or sponsor, and transfers such assets to the related issuing entity. The term "depositor" is defined in new Section 1101 of Regulation S-K promulgated by the ABS Final Rules as "the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity." "Issuing entity" is defined in the same Section as "the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued." ABS Final Rule 191 under the Securities Act and ABS Final Rule 3b-19 under the Exchange Act each provide that with respect to ABS, (a) the depositor for the ABS acting solely in its capacity as depositor to the issuing entity is the "issuer" for purposes of the ABS of the issuing entity, and (b) the person acting in the capacity as the depositor specified in clause (a) above is a different "issuer" from that same person acting as a depositor for another issuing entity or for purposes of that person's own securities. In this letter, we use the terms "issuer," "depositor" and "issuing entity" as defined in the ABS Final Rules.

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underwriters, on the one hand, and investors, on the other. Issuers and/or underwriters provide increasingly detailed information as the offering process unfolds (and in some cases change the securities' terms based on investor feedback), and investors provide increasingly firm indications of interest in response to such increased information flow. There is therefore a general view in the ABS industry that performance by the purchaser under a contract entered into at pricing is subject to the condition, which can be satisfied only after the final prospectus is available, that the information contained in the final prospectus does not contain a material change from the information conveyed at the time such contract is entered into and is otherwise reasonably consistent with market customs and standards and/or the practice of the related depositor and/or its affiliates. Accordingly, the final condition to the contract of sale entered into at pricing for an ABS offering is satisfied only at the time of availability of the final prospectus.

We are therefore requesting that the Commission acknowledge that a contract of sale with an investor may be conditioned on there not being a material change between the preliminary information provided when such contract is entered into and the final prospectus, and in that event liability should be based on the totality of information provided during the offering process, including in the final prospectus. We are also requesting a safe harbor from liability for information in preliminary materials if a material misstatement or omission is corrected in the final prospectus and either (i) the issuer or underwriter specifically advised the investor about the material misstatement or omission prior to settlement and the settlement occurred, (ii) the final prospectus was available at least 48 hours prior to settlement or (iii) the

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investor did not notify the underwriter of an objection based upon a material change within 48 hours after availability of the final prospectus.

We also suggest that the Commission define more specifically what materials are considered to have been “conveyed” to an investor for purposes of Rule 159. In particular, we urge that, consistent with the “access equals delivery” principle articulated in the Release, certain materials filed with the Commission, or available on a web site (or portion thereof) which has been specifically referred to investors, be considered to have been so conveyed.

We also request the addition of certain items to Rule 134, including certain limited structural information, information regarding ERISA status, and information regarding the bid status and bid prices of the securities.

We strongly support the introduction of free writing prospectuses, and have a number of suggestions for clarifying Rule 433. These include technical drafting suggestions intended to implement more clearly the Commission’s stated intention in the Release that Rule 433(a)(2), which permits use of free writing prospectuses upon filing of the base prospectus, applies to ABS issuers. In addition, we request that rating agency pre-sale reports (which represent an independent analysis of an issuance by the rating agency), and investor-generated outputs from third party analytic services, be excluded from the definition of free writing prospectus. We also request that the timing of filing and certain other ABS sensitive provisions in ABS Final Rules 167 and 426 be added to Proposed Rules 164 and 433 with respect to free writing prospectuses that also qualify as ABS informational and computational materials. Finally, we propose

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changes and clarifications to the definition of “ineligible issuer” to address certain ABS specific issues.

Another objective of this letter is extension of well-known seasoned issuer status to ABS depositors that are eligible to use Form S-3. We believe such depositors merit this treatment because they register only investment grade debt and will be required to comply with the Exchange Act reporting scheme and expanded disclosure requirements codified in the ABS Final Release. In addition, because most of the variability among ABS transactions is based on specific attributes and market conditions at the time of pricing, and not on facts in existence at the time of effectiveness, eliminating Commission review of ABS registration statements can be expected to have a minimal effect on investor protection.

Finally, we support the “access equals delivery” principle of Rule 172. We request that the access equals delivery principle reflected in Rule 172 and Rule 433 (in terms of conditioning use of free-writing prospectuses by seasoned issuers on filing, rather than physical delivery of a statutory prospectus), also be incorporated into the traditional free writing exception.

We appreciate the efforts of the Commission staff to update the securities laws to reflect the true technological conditions of today’s capital markets. We hope that our comments facilitate the creation of nuanced rules that reflect the unique characteristics of the ABS industry and promote an efficient ABS market.

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## I. COMMUNICATIONS PROPOSALS

A. Factual Business Information and Forward-Looking Information. Proposed Rule 168 excepts from the definition of “offer,” for purposes of Sections 2(a)(10) and 5(c) of the Securities Act, the continued regular release of factual business information and forward-looking information by or on behalf of an issuer. Under Proposed Rule 168(a), this exception is only available to an issuer that is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act.

We note with approval that the Release provides that Proposed Rule 168 would apply to “information conveyed to investors in outstanding ABS, such as static pool information provided with respect to pools underlying outstanding ABS.”<sup>7</sup> However, we are concerned that the rule as drafted may, in fact, unintentionally limit its applicability and utility to issuers of ABS.

The ABS Final Rules define issuer as the depositor acting as depositor of the relevant issuing entity. An ABS depositor is generally not required to file Exchange Act reports for a given issuing entity prior to the time that such issuing entity has issued its ABS. Accordingly, technically most ABS issuers would never qualify to use Rule 168.

In addition, most issuers of publicly-offered ABS cease filing reports under the Exchange Act for any series of ABS once the reporting obligations for such series are automatically suspended by operation of Section 15(d) of the Exchange Act. Historically, those issuers who continued filing on a voluntary basis generally did so in order to keep a prospectus for a particular series of ABS current (through incorporation by reference of Exchange Act filings

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<sup>7</sup> See Section VIII of the Release.

under the modified reporting requirements applicable to ABS) and thereby satisfy any obligation to deliver a current market-making prospectus. However, given the recent adoption of the ABS Final Rules, which eliminate the requirement for delivery of a market-making prospectus for ABS offerings,<sup>8</sup> we expect that issuers of ABS will no longer file Exchange Act reports for any offering of securities with respect to which the reporting requirements are automatically suspended.<sup>9</sup>

Nevertheless, a depositor of no currently-reporting series of outstanding ABS could very well have valuable factual business information to provide to the marketplace, and the availability of such information should be viewed as desirable to investors in outstanding issuances, notwithstanding the fact that no specific series is currently filing Exchange Act reports. Depositors of ABS, or their related sponsors, may change their underwriting guidelines, operations, eligibility criteria, or other aspects of their overall program, and that information should be made available to the market. However, if read technically, Rule 168 would never be available to most ABS issuers, and even if not read in that manner, if a depositor's outstanding ABS have ceased reporting under the Exchange Act, the safe harbor of Proposed Rule 168 would not be available to any issuing entity of that depositor until a new series of ABS is issued and

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<sup>8</sup> See Section III.A.7. of the ABS Final Release.

<sup>9</sup> As the Commission is aware, the ABS Final Rules codify the modified reporting system by which issuers of ABS comply with their Exchange Act reporting requirements. Under the ABS Final Rules, each issuance of ABS registered on a shelf registration statement creates a discrete reporting obligation under the Exchange Act. Accordingly, the determination as to whether or not the reporting requirements with respect to a particular issuance have been triggered, suspended, or complied with, are likewise made independently. It would be extraordinary for any particular issuance to be held of record by more than 300 persons at the beginning of the fiscal year following the date of such issuance, and therefore the reporting obligations with respect to virtually all issuances of ABS are automatically suspended under Section 15(d) of the Exchange Act within one year of issuance.

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triggers Exchange Act reporting requirements for such series. Thus the depositor is essentially “blacked out” of the market for some period of time and unable to disseminate business information, notwithstanding the fact that the depositor is effectively still operational in that it will again issue new series of ABS through its issuing entities, and thus needs to avail itself of the safe harbor provided by Proposed Rule 168.

The anomalous situation described above should be addressed in the final rule. There appears to be no policy reason to preclude an ABS depositor or issuing entity from having the ability to release business information pursuant to Proposed Rule 168.

Furthermore, the Release identifies issuers of ABS registered on Form S-3 as seasoned issuers.<sup>10</sup> We therefore believe that the Commission did not intend to deny the benefits of Proposed Rule 168 to an issuer of ABS either due to the technical definition of issuer or merely because at a particular time the reporting obligations relating to all of its outstanding ABS had been suspended pursuant to Section 15(d) of the Exchange Act. We therefore respectfully request that Proposed Rule 168 be amended to provide that the safe harbor provided by such Proposed Rule is available to any depositor or issuing entity of ABS registered on Form S-3, irrespective of whether such depositor or issuing entity is currently filing reports under the Exchange Act.

In addition, we note that Proposed Rule 168 refers to the “continued regular release or dissemination by or on behalf of an issuer.” As discussed above, under the ABS Final Rules the

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<sup>10</sup> See Section VIII of the Release.

“issuer” of ABS means the depositor acting as depositor of the applicable issuing entity. Since most issuing entities issue only a single series of ABS, it is unlikely in most cases that there could be “continued regular release or dissemination” by the issuer of a new ABS series. Proposed Rule 168 as worded also would not cover the release of information by a newly-formed depositor, even if such depositor was affiliated with other depositors that had regularly released similar factual business information, such as information related to the underwriting practices of a related sponsor. Accordingly, we suggest that Proposed Rule 168 be clarified in the context of ABS to indicate that “continued regular release or dissemination” refers to release or dissemination by the related depositor or its affiliates with respect to any or all of their related issuing entities.

B. Tombstone Advertisements. In the ABS Comment Letter, we requested that the Commission amend Rule 134 to permit any ABS issuer to include brief descriptions of one or more of a list of specified items. We note with appreciation that Proposed Rule 134 does include several items that we requested, including the identity of key parties to a particular transaction and any credit enhancement associated with related series of ABS. We also note that while the Commission declined to expand Rule 134 in the ABS Final Rules, the Commission stated in the ABS Final Release that it encouraged ABS market participants to comment specifically on the proposals in the Release. Accordingly, we wish to convey that we still believe that certain limited items should be added to the list set forth in Proposed Rule 134 for the reasons set forth below, and ask that the Commission reconsider these items.

We are aware that the items described below would qualify as ABS informational and computational material as defined in the ABS Final Rules. However, the functions of a Rule 134 “tombstone” advertisement and ABS informational and computational materials are different. ABS informational and computational materials are typically provided to investors who have expressed interest in, or who underwriters otherwise have reason to believe are interested in, purchasing an offering. Rule 134 materials are typically disseminated in order to identify such investors who may be interested in an offering, prior to sending them the more detailed information provided in ABS informational and computational materials. We acknowledge that Rule 134 materials are not intended to take the place of ABS informational and computational materials, and we are not requesting that they do so. Rather, we are requesting that Rule 134 be amended to permit the inclusion of the information identified below, which we believe is highly important to fulfilling the function of Rule 134—identifying interested investors.

1. Limited Structural Information. Proposed Rule 134(a)(1) permits the description of the amount of the security being offered. Proposed Rule 134(a)(5) permits the description of the final maturity and interest rate of the security. While such data are useful to describe standard corporate debt, because of the structured nature of ABS, and the prepayment risk to which they may be exposed, such data is not sufficient to describe the basic structural features of ABS. We therefore believe that permitting description of certain other basic structural items would help significantly in identifying investors that might be interested in receiving a prospectus. Such items might include the security’s expected first and last payment date (that is, the principal window), weighted average life, interest accrual period and summary characteristics

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that are susceptible to being displayed in tabular format (such as weighted average life and weighted average maturity of the underlying assets). We believe that these items, particularly those items relating to anticipated timing of receipt of principal payments, would be particularly useful in locating investors interested in receiving an ABS prospectus. This is equally true after the issuance of the ABS. While an underwriter may be able to provide structural information during the prospectus delivery period by means of a free writing prospectus, to the extent that it desires to gauge investor interest by including basic standard terms, such as weighted average coupon, weighted average maturity, weighted average loan age or weighted average life, which fluctuate monthly, the issuer information required to update these terms would need to be filed by the issuer. As a practical matter, such issuer cooperation may be difficult to obtain after the ABS are issued.<sup>11</sup>

One of the fundamental hallmarks of ABS is time-tranching, which creates greater predictability with respect to timing of payments on different classes of securities backed by the same pool of assets as to which payments are made with less predictability and regularity. The anticipated timing of principal repayment could be as important to an investor as any other economic term of a security. Through the creation of multiple classes of securities (each of which might have the same credit rating), issuers can target the timing of principal repayments from long-term receivables, such as mortgage loans, to identifiable classes which would be repaid during certain anticipated “windows.” Thus, an investor can select those classes expected

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<sup>11</sup> Traditional free writing would likewise not work, since the targeted investor would not have received a prospectus. However, adoption of our access equals delivery proposal in Section IV.A. of this letter would address that issue.

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to be repaid during the same period that the investor would ideally like to receive its principal payments, whether to match expected liabilities, diversify an investment portfolio, or otherwise.

We therefore respectfully request that these items be added to the list of permitted information in Proposed Rule 134.

2. ERISA Information. Proposed Rules 134(a)(11) and (12) permit statements to the effect that, in the opinion of counsel, the security is a legal investment for specified entities and that the security is exempt from specified taxes. We believe that a brief description of the treatment of the securities under ERISA is substantially similar to the tax and legal investment status and would be similarly useful in locating investors that might be interested in receiving a prospectus. In particular, a fiduciary of an employee benefit plan or other retirement plan, and entities in which these plans may invest, such as insurance company general accounts, need to know whether a particular investment would result in a “prohibited transaction” or is otherwise not permitted under ERISA. Identifying a particular class of securities as eligible for purchase by plans subject to ERISA or similar investment limitations is comparable to identifying legal investment status of such securities for banks or other regulated institutions. We therefore respectfully request that ERISA treatment be added to the list of permitted information in Proposed Rule 134.

3. CUSIP Numbers. We believe that the inclusion of CUSIP numbers in a tombstone advertisement facilitates the identification of the securities by the investors in the same manner as the name of the issuer and the amount of the securities. We therefore

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respectfully request that CUSIP numbers be added to the list of permitted information in Rule 134.

4. Information Regarding Securities Bids. We respectfully request that the information permitted by Rule 134 be expanded to include the amount of each offered class of securities that has been bid on to date, the price at which it was bid, and whether and to what extent any class has been oversubscribed. Communication of such information is vital to investors in determining whether they want to make a bid, and at what price. These communications may take place either pre-allocation, to determine and reflect the indications of interest within the syndicate, or post-allocation, to indicate to potential investors whether a particular class has been sold (including classes other than those of interest to the investor), and whether the transaction is oversubscribed, or if not, what the subscription level is at that point. This dialogue between dealer and investor is important to both parties, and is important to the pricing process for ABS as it provides so-called “price guidance” for ABS. In effect, it is information that investors request and require. At minimum, dealers should be able to provide written information as to whether a given class is “open” or “closed,” which can be burdensome to convey orally in an offering with numerous classes. While we believe that the requested additional information falls within the ambit of the pricing information permitted by clause (a)(4) of the rule, because of the critical nature of this information, we request that the Commission expressly state that such information is permitted.

C. Free Writing Prospectuses.

1. Clarification Regarding Availability of Free Writing Prospectuses to ABS Issuers.

The Release states that a “seasoned issuer would be an issuer that is eligible to use Form S-3 or Form F-3 to register primary offerings of securities.”<sup>12</sup> The Release also states that “under our proposals, ABS issuers eligible to use Form S-3 would be seasoned issuers,” and notes that Proposed Rule 433 (which governs the use of free writing prospectuses) would permit use of a free writing prospectus in an offering registered on Form S-3 upon the filing of the statutory Section 10 prospectus (which for issuers using Rule 430B may be a base prospectus).<sup>13</sup> Accordingly, it is the clear intent of the Commission that ABS issuers eligible to use Form S-3 would be seasoned issuers and therefore would not be required to physically deliver a statutory prospectus in order to use a free writing prospectus.

However, the technical provisions of the Proposed Rules have not effectuated this intent. Proposed Rule 433(b)(2) permits the use of a free writing prospectus after the filing (rather than physical delivery) of a prospectus by any issuer eligible to use Form S-3 pursuant to General Instructions I.B.1, I.B.2 or I.C. thereto. The plain language of this Proposed Rule inadvertently restricts the ability of an issuer of ABS, which is only eligible to use Form S-3 pursuant to

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<sup>12</sup> See Section II.B. of the Release.

<sup>13</sup> See Section VIII of the Release.

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General Instructions I.B.5. thereto, to use a free writing prospectus prior to the physical delivery of the prospectus.<sup>14</sup>

Accordingly, we request that the Commission clarify that all provisions that apply to seasoned issuers<sup>15</sup> will apply to issuers of ABS eligible to use Form S-3 pursuant to General Instruction I.B.5. thereto. One method of effecting such clarification would be to define “seasoned issuer” in Rule 405 as an issuer eligible to use Form S-3 pursuant to any of General Instruction I.B.1., I.B.2., I.B.5. or I.C. thereto or eligible to use Form F-3 pursuant to any of General Instruction I.A.5., I.B.1. or I.B.2. thereto. The Commission could then refer to such definition (rather than referring to the applicable General Instructions) in each applicable rule.

We note also that Rule 433(b)(1), the portion of the rule that requires physical delivery of a statutory prospectus as a condition to use of a free writing prospectus, states that such portion of the rule applies to an issuer that at the time of filing of the related registration statement is not required to file Exchange Act reports. As we have discussed herein with respect to Rule 168: (a) under the ABS Final Rules the “issuer” of ABS is defined as the depositor acting as depositor of the relevant issuing entity (and as such is generally not required to file Exchange Act reports at the time of filing of the registration statement), and (b) ABS depositors generally have their reporting obligations for each issuing entity suspended by operation of Section 15(d) of the

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<sup>14</sup> We note that a similar comment may be made with respect to General Instruction II.F. to proposed Form S-3. Proposed Rule 430B(a) extends the benefits of Proposed Rule 430B (which governs the use of a base prospectus and a prospectus supplement) to any issuer eligible for shelf registration under Rule 415(a)(1)(x) (which permits the use of shelf registration by issuers of securities registered on Form S-3). However, proposed General Instruction II.F. to Form S-3, which permits the use of Rule 430B, refers to securities registered pursuant to General Instructions I.B.1., I.B.2. or I.C., but not pursuant to General Instruction I.B.5.

<sup>15</sup> Including the provisions of Proposed Rule 433 and General Instruction II.F.

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Exchange Act. These features of ABS offerings have been recognized by the Commission in the General Instructions to Form S-3, which, unlike the case for other issuers, do not require an Exchange Act reporting history for ABS issuers. Moreover, as discussed above, it is clearly the Commission's intent that Rule 433(b)(2), rather than Rule 433(b)(1), apply to ABS issuers eligible to use Form S-3. Accordingly, we request that the Commission clarify that the language regarding lack of reporting history in Rule 433(b)(1) does not apply to ABS issuers.

2. Rating Agency Pre-Sale Reports. We note that the ABS Final Release addresses the issue of pre-sale reports prepared and delivered by nationally recognized statistical rating agencies (each, an "NRSRO"). The ABS Final Release sets forth the Commission's position that an issuer or other offering participant may be liable for information prepared and distributed by third parties that are not offering participants if the issuer or offering participant involved itself in the preparation of the information. The Commission also states that liability under this "entanglement" theory will depend on "the level of pre-publication involvement in the preparation of the information." This position is consistent with Proposed Rule 433(f), which provides that a media publication about an issuer or its securities for which an issuer or any person participating in the offering (or any person acting on their behalf) provided information that is published or disseminated by an unaffiliated media company would be considered a free writing prospectus prepared by or on behalf of the issuer or such offering participant.

For the reasons set forth below, we respectfully suggest that an issuer or other offering participant should not bear responsibility for the content of a pre-sale report prepared and distributed by an NRSRO.

We recognize that in some instances it may be appropriate for an issuer or other offering participant to incur liability by providing information to a media company. Liability should attach to the cases where the issuer or other offering participant uses the media as a conduit to disseminate information to the market about an upcoming offering.

However, a pre-sale report prepared by an NRSRO is not a conduit for the issuer's dissemination of information. When an NRSRO assigns credit ratings to a particular series of ABS, it typically requires the issuer and/or underwriter to provide factual information regarding the underlying assets and the structure of the securities. The NRSRO will consider this information, in its sole and absolute discretion, when it makes its determination of the credit quality of the underlying assets and its assessment of the structural and legal aspects of the securities. The securities are unmarketable without a rating; a rating is unobtainable without the detailed factual information provided by the issuer and other participants in the offering. However, the actual information selected for inclusion in the pre-sale report, the description of the strengths and weaknesses of the transaction and the assessment of risks associated with likelihood of timely and ultimate payment to investors is within the sole and exclusive control of the NRSRO. The issuer's or other deal participant's involvement in the preparation of the report is limited, at most, to a review for factual inaccuracies or updates. We believe that such participant's discrete review and limited ability to comment on any pre-sale report does not mean

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that it is a person who “authorizes the communication or information and approves the communication or information before its use.”<sup>16</sup>

By its very definition, the NRSRO must remain independent from the offering participants. Investors rely on such independence, and any implication otherwise would undermine the confidence of investors in the rating process. The NRSRO’s analysis, research and criteria for its rating assignment is a qualitative process based only in part on data provided by the issuer and/or underwriter. It seems patently unfair to make the issuer or other deal participants responsible for the conclusions (be they positive or negative) reached by an independent party.

We therefore respectfully request that the Commission clarify in the final rule that, notwithstanding the provisions of Proposed Rule 433(f), a pre-sale report published by an NRSRO would not be considered a free writing prospectus.

We note that the ABS Final Release provides that “if an issuer or underwriter distributed the pre-sale report in connection with an offering of the securities, it would be appropriate to conclude that such party has adopted that report and should be liable for its contents.” We respectfully request that the Commission reconsider this approach. Underwriters are frequently and routinely requested by investors to provide copies of pre-sale reports. Under current practices, underwriters will not distribute such reports but will provide investors with the address for the NRSRO’s web site or other information on how to access such reports. This is a

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<sup>16</sup> See Proposed Rule 433(h)(3).

cumbersome approach that is less convenient for investors. Accordingly, given the independent determination made by the NRSROs, we request that the Commission consider taking the approach that a pre-sale report is not a free writing prospectus under any circumstance, even if distributed by the issuer or underwriter.

3. Third Party Analytics. The ABS Final Release discusses the use of third party analytic services in ABS offerings, such as Bloomberg and Intex. Such services allow an issuer or underwriter to transfer or upload data about the structure and underlying assets of an ABS transaction, so that investors can use the third party service to perform their own analytics. Alternatively, using software provided by the third party service, an issuer or underwriter can transfer data about the structure and underlying assets of an ABS transaction to a file, which is then given to an investor and can be utilized by the investor in accessing the third party service to perform its own analytics.

In the past, ABS market participants have been concerned that the no-action letters permitting use of “computational materials” in an ABS offering could be construed to create a filing obligation with respect to the outputs from these analytic services. In response to such concern, the Commission clarified in the ABS Final Release that in connection with the use of third party analytic services, only the “inputs, models and other information” about the structure and the collateral that were provided by the issuer or underwriter to the service are “ABS informational and computational material.” Accordingly, it was clarified that the outputs from these third party services are not subject to a filing requirement, and are not considered to be offering materials.

We note that in the discussion in the Release under “Definition of Free Writing Prospectuses—Media Publications,” language exists suggesting that even if the media outlet is unaffiliated with and not paid for by the issuer or offering participants, a media publication that is derived from a communication with the issuer or an offering participant during an offering could be deemed to be a free writing prospectus that may be subject to a filing requirement. Given the recent clarification regarding outputs from third party analytic services, we believe that the Commission did not intend for such outputs to be treated as a free writing prospectus. Accordingly, we request that the Commission expressly exclude such outputs from the definition of “free writing prospectus.”

4. Issuer Web Sites. In Proposed Rule 433(e), the Commission permits the publication of a free writing prospectus on an issuer’s web site, but requires such free writing prospectus to be filed with the Commission. While we agree that materials that would otherwise constitute a free writing prospectus should continue to have that status if published on an issuer’s web site, we respectfully suggest that the Commission eliminate the filing requirement for the reasons, and subject to the conditions, set forth below.

EDGAR filing creates unique challenges for ABS-related information. Such information often includes an extensive amount of financial and statistical material, and also typically includes graphic materials, such as photographs, tables, charts and maps. ABS information also often includes bulky and cumbersome materials. While such materials could easily be made available on an issuer’s web site, EDGAR filing of such materials is often a difficult and time-consuming process, which is likely to result in delay of availability of information to

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investors (since under the Proposed Rules filing of a free writing prospectus must be made no later than the business day of first use). Moreover, any document filed on EDGAR must be checked before filing to ensure accuracy to the original document, introducing further delays. We therefore propose that the Commission revise Proposed Rule 433(e) to provide that in lieu of filing a free writing prospectus contained on an issuer's web site, an issuer shall instead be permitted to file with the Commission (either in its statutory prospectus or in a separate filing) a notice referring investors to such information and containing the URL for the specific portion of the issuer's web site that contains a free writing prospectus (such filing, a "Notice Filing"). The issuer would acknowledge in the Notice Filing that such information constitutes a "free writing prospectus" for purposes of Proposed Rule 433.

We believe that permitting an issuer's web site to be used to publish a free writing prospectus based upon a Notice Filing with the Commission would facilitate the fast, accurate and efficient dissemination of information to investors without compromising investor protection, and would promote the Commission's goals of using technology to maximize timely and efficient dissemination of information to the market.

5. Conflict of Proposed Rules 164 and 433 with ABS Proposed Rules 167 and 426.

The ABS Proposing Release included ABS Proposed Rules 167 and 426, which codify the series of no-action letters regarding the delivery of term sheets and computational materials to investors in ABS prior to the delivery of a Section 10(a) prospectus. ABS Proposed Rule 167 created a new category, ABS informational and computational materials (defined in new Section 1101 of Regulation S-K) and included, with some modifications, the conditions set forth in the no-action

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letters. ABS Proposed Rule 426 sets forth requirements for filing such materials with the Commission. The Release includes Proposed Rules 164 and 433, which permit the use of a free writing prospectus and sets forth the applicable conditions thereto, including filing requirements. The Release also indicates that ABS informational and computational materials would be considered to be free writing prospectuses.<sup>17</sup> However, the ABS Final Release includes ABS Final Rule 167 and ABS Final Rule 426 and retains the concept of ABS informational and computational materials. We note that in the ABS Final Release, the Commission indicates that any further liberalization of the rules relating to ABS informational and computational materials would be addressed in connection with the Proposed Rules under the Release.<sup>18</sup>

We agree with the Commission that ABS informational and computational materials should be treated as free writing prospectuses. However, we note that there is a conflict between the required time of filing for free writing prospectuses under Proposed Rule 433 under the Release and the required time of filing of ABS informational and computational materials under ABS Final Rule 426 promulgated by the ABS Final Release. Under Proposed Rule 433(d), a free writing prospectus is generally required to be filed no later than the date of first use. On the other hand, under ABS Final Rule 426, ABS informational and computational materials are required to be filed by the later of (i) the due date for filing the final prospectus relating to such offering or (ii) two business days after first use. We respectfully request that the Commission revise Proposed Rule 433 to incorporate the timing scheme and filing requirements contemplated

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<sup>17</sup> See Section VIII of the Release.

<sup>18</sup> See Section III.C.1.b. of the ABS Final Release.

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by ABS Final Rule 426 with respect to free writing prospectuses that constitute or include ABS informational and computational materials.

The timing scheme contemplated by ABS Final Rule 426 represents a considered evaluation by the Commission of the appropriate filing time for ABS informational and computational materials. In particular, as the Commission notes, ABS Final Rule 426 streamlines the filing requirements set forth in the staff no-action letters which ABS Final Rule 167 and ABS Final Rule 426 are intended to codify.<sup>19</sup> Under those no-action letters, materials characterized as “Collateral Term Sheets” were required to be filed within two business days of first use. On the other hand, materials characterized as “Computational Materials” and “Structural Term Sheets” were generally required to be filed only by the time of filing of the final prospectus (except that Structural Term Sheets had to be filed within two business days of first use if the final prospectus was available but not yet delivered). The rationale for this later filing requirement for “Computational Materials” and “Structural Term Sheets” was that those materials are often provided to investors on a preliminary basis to enable the investors to evaluate the structure, cash flows and economic characteristics of a variety of proposed structures for a transaction. Such materials were not required to be filed if they related to abandoned structures, or if they were furnished to a prospective investor prior to the time the final terms were established for all classes of the offering and such prospective investor had not indicated to the issuer or an underwriter its intention to purchase any securities. The determination of whether materials fall within the traditional categories of “Computational

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<sup>19</sup> See Section III.C.1.e. of the ABS Final Release.

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Materials” or “Structural Terms Sheets” often cannot be made at the time of first use, since it is unclear at the time of first use whether the structure is final or whether the receiving investor will indicate an intention to purchase.

Recognizing that there is often an overlap among the traditional categories of “Computational Materials,” “Structural Terms Sheets” and “Collateral Terms Sheets,” and that such materials are often provided in combined form, creating confusion and unnecessary complexity as to the appropriate filing procedures, the Commission created the unified definition of “ABS informational and computational materials” to cover all such materials. In addition, in the ABS Final Release the Commission promulgated the above-cited unified filing time for ABS informational and computational materials, stating “we believe a unified filing requirement will result in a more consistent approach and ease compliance without a significant drop in investor protection.”<sup>20</sup>

Furthermore, as we noted above, ABS informational and computational materials present unique challenges in the context of EDGAR filings. These materials typically contain an extensive amount of financial and statistical information, which is difficult and time-consuming to input into the EDGAR system. Accordingly, requiring ABS informational and computational materials to be filed on the day of first use, in addition to conflicting with the goal of filing only final materials, is likely to delay the distribution of ABS informational and computational materials to investors, since materials that are otherwise available will have to wait for

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<sup>20</sup> See Section III.C.1.e. of the ABS Final Release.

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distribution until the EDGAR filing is accomplished. This will delay the offering process, which conflicts with the Commission's goal of facilitating the timely and efficient delivery of information to the securities markets.

Permitting a later time of filing as provided in ABS Final Rule 426 will not alter the liability of the issuer or underwriter for the filed materials. The same liability will attach to such information as for any other free writing prospectus. Indeed, the Commission itself has stated that permitting the later time of filing set forth under ABS Final Rule 426 will not significantly affect investor protection. There is therefore no policy rationale to require same day filing for free writing prospectuses that constitute or include ABS informational and computational materials. We therefore respectfully request that the Commission revise Proposed Rule 433 to make the required time of filing for a free writing prospectus that constitutes or includes ABS informational and computational materials consistent with ABS Final Rule 426. We also request that ABS Final Rule 426(c), which provides that certain ABS informational and computational material need not be filed, including without limitation materials that relate to abandoned structures, or that were furnished to a prospective investor prior to establishment of the final terms of all classes of the offering (where the prospective investor has not indicated an intention to purchase to the issuer or underwriter), be incorporated into Rule 433. Similarly, it should be clarified that such classes of materials should not constitute free writing prospectuses and should not give rise to liability under Section 12(a)(2).

We note that the use of free-writing prospectuses is conditioned on the user not being an ineligible issuer. As discussed in I. D. below, the definition of "ineligible issuer" currently

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includes an issuer that at any time has failed to file a required report under the Exchange Act. Even if the definition of ineligible issuer is revised as we have proposed below, this criterion imposes a condition to use of free writing prospectuses that constitute ABS informational and computational materials that is not imposed under ABS Final Rules 167 and 426, and was never imposed under the related no-action letters. Because ABS informational and computational materials are so critical to ABS offerings, a prohibition on such use would be the equivalent for ABS issuers of issuing a stop order. By contrast, under ABS Final Rules 167 and 426, if a depositor failed to file Exchange Act reports it would be precluded from registering a new shelf registration statement on Form S-3, but could continue to use ABS informational and computational materials for offerings on any existing shelf registration statement.

Several comment letters on the Proposed ABS Rules made comments to the effect that an ABS issuer with an effective registration statement should not be precluded from use of such registration statement due to a failure to file Exchange Act reports after the effective date of such registration statement. The Commission has clarified in the ABS Final Release that, for purposes of eligibility to use a Form S-3 registration statement, Exchange Act reporting compliance is determined only at the time of filing of the registration statement. The effect of the eligibility condition to Rule 433 would effectively undo this determination, by precluding ABS issuers from effecting offerings under an effective Registration Statement if they failed to file any Exchange Act report. We believe that the Exchange Act reporting eligibility requirements for using Form S-3 set forth a strong incentive for compliance, and that additional sanctions relating to the use of free writing prospectuses (which will include ABS informational and computational

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materials) are both draconian and unnecessary. Accordingly, we respectfully request that the use of free writing prospectuses by ABS issuers, at a minimum to the extent that such free writing prospectuses would qualify as ABS informational and computational materials under ABS Final Rule 167, not be conditioned on Exchange Act reporting compliance.

6. Proposed Exclusion from Issuer Information. We believe that certain types of third party information that may be included in a free-writing prospectus should not constitute issuer information that requires filing by the issuer or information for which the issuer is automatically liable as a seller under Rule 159A. These types of information include (i) information regarding third party service providers, such as trustees, servicers and credit enhancement or derivatives providers, and (ii) third party reports regarding the underlying assets, such as appraisals, environmental and property condition reports. In both cases, particularly with regard to third party reports, the information is useful to, and often requested by investors; however issuers are reluctant to provide or allow underwriters to provide such information for fear of being subject to liability for information they do not have the capacity to diligence. In the case of the first category, the issuer is necessarily dependent on the information provided by the applicable service providers, which are typically large companies well-known in the ABS markets, and it would be highly burdensome for an issuer to undertake its own investigation regarding such information. The information in the second category is likewise provided by respected professional experts; and it is unlikely that the issuer would have a greater capacity than such experts to diligence such information. Accordingly, we believe that underwriters should be able to provide such information to investors without the issuer or underwriter being

required to file such information or being subject to automatic liability as a seller under Rule 159A.

D. Ineligible Issuers. An ineligible issuer (as defined in Proposed Rule 405) is barred from a variety of benefits under the Release; for example it cannot use a free writing prospectus and cannot qualify as a well-known seasoned issuer. We have several concerns regarding the definition of “ineligible issuer” in Proposed Rule 405, in addition to the concerns discussed in Section I.C. above.

1. Clarify that Depositors and Issuing Entities are not Shell Companies. The definition of “ineligible issuer” includes a “shell company,” which in turn is defined in Proposed Rule 405 as a registrant with no or nominal operations and no or nominal assets or assets consisting solely of cash or cash equivalents. A depositor and an issuing entity are designed to constitute bankruptcy remote entities under applicable legal and rating agency criteria. A depositor is formed solely to acquire the assets for one or more ABS issuances from the seller of such assets, form an issuing entity for each issuance, and transfer the assets for each issuance to the related issuing entity. Therefore, a depositor will have assets only for the brief moment in time between its acquisition of the assets for a particular ABS issuance from the seller and its transfer of such assets to the related issuing entity. Each issuing entity is formed solely to acquire assets from the depositor and issue a series of ABS. Therefore, each issuing entity will have assets only at and after the time of issuance of its securities.

Accordingly, it is possible that a depositor that is the registrant on an ABS shelf registration statement, or its related issuing entities, could fall within the technical definition of a

“shell company.” However, the Release states that the Commission intends that an ABS issuer eligible to use Form S-3 will be considered a seasoned issuer and will be able to use a free writing prospectus upon filing of a statutory Section 10 prospectus.<sup>21</sup> Since Rule 433 states that ineligible issuers are excluded from this benefit, it is clear that the Commission did not intend depositors or issuing entities to fall within the definition of a shell company. We therefore request that the Commission state expressly within the definition of “shell company” in Proposed Rule 405 that a shell company does not include any ABS depositor or issuing entity.

2. Time Limit for Reporting Violations. The definition of “ineligible issuer” includes any issuer that is required to file reports pursuant to Section 13, 14 or 15(d) of the Exchange Act that has not filed all materials required by such sections, including any certifications required by any reports.<sup>22</sup> No time limit is set forth in this provision. Accordingly, this provision would have the draconian result that any issuer that has at any time in its history failed to file an Exchange Act report would be an ineligible issuer, and therefore would be precluded from using the liberalized free writing prospectus rules otherwise applicable to well-known seasoned issuers and seasoned issuers.

We note that the ABS Final Rules define the “issuer” of ABS as the depositor acting as depositor of the relevant issuing entity. Therefore, technically, in most cases at the time it makes an offering (which is the time it would be using a free writing prospectus), a given issuer would not be subject to Exchange Act reporting requirements and therefore could not be an ineligible

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<sup>21</sup> See Section VIII of the Release.

<sup>22</sup> See Proposed Rule 405.

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issuer. If that is the intent of the Commission, we request that the Commission make an express clarification to such effect. If, on the other hand, in this instance the Commission intends that “ineligible issuer” status be based on the depositor’s Exchange Act compliance, then we respectfully request that the Exchange Act reporting requirement of the definition be modified as described below.

We recognize that the language of the definition requires only that the reports be filed, not timely filed. However, we believe that without a reasonable time limit (such as 12 months, which would be consistent with the eligibility requirement for shelf registration of ABS), such requirement will impose a significant burden on issuers without creating a material benefit to investors. It may be difficult for an issuer to confirm whether filings due to have been filed years ago (particularly those filed by third parties) have indeed been filed. Even if the issuer is able to make such a determination, it may not be able to cure a failure to file that occurred in the past. For example, an issuer may not have or be able to obtain the necessary information to make a filing. Servicers or accountants whose services may be necessary to make such a filing may no longer be retained for the related transaction or may no longer be in business. Moreover, a report that an issuer failed to file more than 12 months ago would be unlikely to contain information that is relevant to investors. Therefore, requiring issuers to cure such a failure in order to avoid ineligible issuer status would require issuers to incur considerable effort and expense without conferring a benefit to investors.

Moreover, with respect to ABS issuance, which typically involves a single depositor issuing numerous series of ABS, for filing purposes each issuance creates separate reporting

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obligations. This increases the costs of curing a past failure to file, since the related depositor would be required to investigate the filing history of each separate issuance, and may need to coordinate the efforts of separate servicers, trustees, bond administrators and other entities to effect a cure. The separate nature of each issuance also makes any past failed filing even less meaningful, since even without taking into account the age of such report, information regarding any given issuance is likely to be irrelevant to investors in new issuances of ABS. Accordingly, we respectfully request that a depositor be deemed an ineligible issuer only if it has failed to file the required Exchange Act materials during the most recent 12 month period. We believe that our proposed change to this rule, together with the severe consequences of failure to timely file Exchange Act reports with respect to Form S-3 eligibility set forth in the ABS Final Release, will strike the proper balance and create appropriate incentives for compliance with filing requirements.

3. Reasonable Belief as to Eligibility. The only participant in an offering that knows for certain whether or not the issuer is an ineligible issuer is the issuer itself. The other participants in the offering have no way of independently making this determination. We therefore respectfully request that the Commission amend Proposed Rule 433(b)(4) to provide that participants in the offering other than the issuer be entitled to rely on Proposed Rule 433 based on a reasonable belief that the issuer is not an ineligible issuer.

4. Timing of Determination of Ineligibility. We are concerned that an issuer may be “eligible” at the time of the use of the free writing prospectus and subsequently become an ineligible issuer. We therefore respectfully request that the Commission clarify that the

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determination as to whether or not an issuer is an ineligible issuer should be made at the time the free writing prospectus is used.

E. Research Reports. Proposed Rules 137, 138 and 139 govern the distribution of research reports regarding general corporate securities. The ABS Final Rules include ABS Final Rule 139a, which codifies a no-action letter regarding the distribution of research reports with respect to ABS. Proposed Rules 137, 138 and 139 include several key changes, two of which we note with particular approval. First, current Rule 139 permits a broker or dealer participating in a distribution of securities to publish research concerning the issuer or any of its securities, if this research is in a publication distributed with reasonable regularity in the normal course of business. Proposed Rule 139 would eliminate the requirement of publication with reasonable regularity. Second, current Rule 139 prohibits the broker or dealer from making a recommendation in the current publication that is more favorable than the recommendation it made in the last publication. Proposed Rule 139 would remove this prohibition.

The Release indicates that to the extent the changes to Proposed Rules 137, 138 and 139 are adopted, the Commission will consider making similar changes to ABS Final Rule 139a.<sup>23</sup>

We applaud these changes and encourage the Commission to likewise amend ABS Final Rule 139a.

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<sup>23</sup> See Section VIII of the Release.

## II. Liability Issues

A. Timing of Contract of Sale. Proposed Rule 159 provides that for purposes of determining liability under Sections 12(a)(2) and 17(a)(2) of the Securities Act, any information conveyed to the investor only after the time of the contract of sale will not be taken into account. We are concerned that while Proposed Rule 159 reflects the ideal that each investor has all material information prior to making its commitment to purchase, the rule does not reflect the realities of the ABS market. We respectfully request that the Commission revisit this rule in the light of standard market practices for ABS issuances.

In contrast to the offering process for general corporate securities, the offering process in many ABS issuances usually involves a continuing dialogue between issuers and/or underwriters, on the one hand, and investors, on the other. Issuers and/or underwriters provide increasingly detailed information as the offering process unfolds (and in some cases change the securities' terms or structures based on investor feedback), and investors provide increasingly firm indications of interest in response to such increased information flow. The Commission has recognized this iterative process in the ABS Final Rules by permitting the delivery of ABS informational and computational materials prior to delivery of a statutory prospectus, and has also recognized such process in the long-standing series of no-action letters that predated and were codified in the ABS Final Rules. As described in the correspondence relating to such no-action letters, issuers and/or underwriters may present investors with a variety of preliminary cash flow structures to allocate credit and prepayment risk, and determine a final structure based on investors' responses to such preliminary structures. Issuers may also make changes to the

composition of the pool of assets relating to a transaction based on investors' concerns regarding certain assets.

Different types of ABS may utilize different offering procedures. For commercial mortgage-backed securities issuances, a detailed preliminary prospectus is typically provided prior to pricing, because these issuances often feature relatively larger and non-homogenous assets, unlike most ABS transactions, which often involve relatively smaller and more homogenous assets. However, given the fluid nature of ABS transactions, for many types of ABS issuances the parties often forego the preparation of a preliminary prospectus prior to pricing and pricing is based on a term sheet alone. Often a term sheet is used in ABS transactions where there is (1) a fairly standard expectation and practice either in the market generally or among issuances of the related depositor or its affiliates regarding the transaction terms that are not specified in the term sheet, (2) a need to price at a swift pace (for example, in some market sectors issuers typically buy large pools of assets on a forward basis and face burdensome capital consequences if the assets are held on balance sheet for too long) and/or (3) incomplete detail concerning certain specifics of the transaction, such as situations in which the identity of a servicer or swap counterparty have not been finalized at the time of pricing. A typical term sheet generally contains the information that is of primary importance to an investor's investment decision. Such information varies by asset type, but will typically include basic facts regarding the securities issued (principal amount, coupon, expected maturity, principal window, weighted average life, and the tax, ERISA and legal investment status of such securities). Term sheet information also typically includes basic parameters regarding the related

asset pool (such as parameters with respect to weighted average maturity, coupon, loan age and life, and geographic and other concentrations). However, the term sheet does not contain all material facts that are provided in the final prospectus. The type of information and level of detail provided to investors at pricing varies depending on a range of factors, including but not limited to the issuer/originator, the asset class and transaction structure involved in the offering, and the particular investor's familiarity, previous experience and comfort level with all of the above. Some investors may be prepared to make conditional investment decisions based upon relatively limited information supplied at the time of pricing, while other investors may require a greater level of detail.

There is therefore a general view in the ABS industry that performance by the purchaser under a contract entered into at pricing is subject to the condition, which can be satisfied only after the final prospectus has been completed, that the information contained in the final prospectus does not contain a material change from the information conveyed at the time such contract is entered into and is otherwise reasonably consistent with market customs and standards and/or the practice of the related depositor and/or its affiliates. Accordingly, the final condition to the contract of sale entered into at pricing for an ABS offering is only satisfied at the time of availability of the final prospectus.

At the time of pricing, investors often enter into a binding contract to purchase the securities, subject to the satisfaction of certain conditions. Such conditions typically include that there has been no untrue statement of a material fact, or omission to state a material fact necessary to make the statements made, in the light of the circumstances in which they were

made,<sup>24</sup> not misleading (a “Material Omission”), in the preliminary prospectus, term sheet or other disclosure document provided to investors at the time such contract was formed. For those ABS as to which only a term sheet is delivered, we believe that any contract with investors is also subject to the condition that the more detailed terms of the offering set forth in the final prospectus are reasonably consistent with market customs and standards (or with prior issuances by the related depositor or its affiliates). By the same token, since a term sheet is necessarily incomplete, we believe the view of the market is that failure to disclose information in a term sheet would not be a Material Omission if such information, as disclosed in the final prospectus, turns out to be reasonably consistent with market customs and standards (or with prior issuances by the related depositor or its affiliates). We note that a term sheet may contemplate that the final terms of the offering may vary to a certain extent from those in the term sheet or may vary within a set of parameters (for example, the term sheet may provide that the size of the pool may increase or decrease by 5% of its overall amount or may provide that the weighted average life of the pool will be within specified parameters), and the existence of such variation will not be considered a material change so long as the final pool characteristics are within the parameters described.

Individual investors may also impose their own conditions to closing. For example, investors may specify structural, collateral or other features of ABS offerings that must be incorporated into the transaction and disclosed in final offering documents as necessary

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<sup>24</sup> Such circumstances may include the nature of the disclosure document (a term sheet is necessarily a summary document), the type of issuer and transaction, the nature of the market, and market expectations regarding transaction terms based on market standards and customs or other issuances of the same or affiliated depositor.

conditions to their investment decisions. If underwriters agree to such conditions, such conditions then become part of any contract of sale entered into with the investor.

We believe issuers, underwriters and investors agree that any contract formed during the offering process, including at the time of pricing, will not be binding on the investor if there was an untrue statement of a material fact, or a Material Omission, in the information that was provided at the time such contract was entered into (including an untrue statement of a material fact or a Material Omission regarding the implied representation that the terms of the offering that have not yet been described will be reasonably consistent with market customs and standards or with prior issuances by the related depositor or its affiliates). By the same token, if at the time the final prospectus is delivered there has been no untrue statement of a material fact or Material Omission in the information provided at the time such contract was formed, and the remainder of the transaction is reasonably consistent with market customs and standards or with prior issuances by the related depositor or its affiliates, the final conditions to the contract formed at pricing will have been satisfied and the investor will be obligated to purchase the securities. If an individual investor has specified additional conditions to closing, those conditions must also be met.

For example, an ABS term sheet may omit to identify the entity that will act as servicer for the related issuance, or to provide detailed information about the servicer (information which the Commission, as demonstrated by the ABS Final Rules, believes may be material). However, if the servicer identified in the final prospectus is an institution that is known in the market and has a reasonably good reputation in servicing ABS assets of the applicable type, issuers,

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underwriters and investors will take the view that the term sheet did not contain a Material Omission and any contract with investors will be binding as of the time it was made. On the other hand, if the servicer identified in the final prospectus is an entity with a poor reputation in the market and/or minimal experience servicing the relevant asset type, issuers, underwriters and investors may take the view that the term sheet contained a Material Omission, the conditions to the contract were not satisfied and the investors have the right to elect not to purchase the securities, and/or to renegotiate the terms of purchase.

As noted above, investors may also specify their own conditions to closing. For example, a term sheet may state that a swap counterparty will be a party with a specified rating, rather than naming the counterparty, which may not be chosen at the time the term sheet is issued. So long as the swap counterparty that is chosen falls within the required rating category, it is unlikely there would be a misstatement of a material fact or Material Omission in the term sheet. However, if an investor desires that the transaction use, or not use, a specific counterparty, it can specify to the underwriter that the use, or non-use, as the case may be, of that counterparty be a condition to its obligation to close.

We believe that the time of contract of sale, and whether a contract of sale exists, are matters that are governed by state law, and not federal securities law. The parties should be free to define the time when a buyer becomes unconditionally obligated to purchase the securities. For example, the parties should be able to explicitly or implicitly condition consummation of the sale of the securities on there not being a material change from the preliminary information, as described above. Under such a contract, the buyer would not be unconditionally obligated to

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purchase until the final information was available, showing that the condition had been satisfied, and accordingly the time of availability of such final information should be the time of contract of sale for purposes of liability under Section 12(a)(2) or Section 17(a)(2). We believe that, as shown by other letters submitted to the Commission, the analysis above represents the views of many participants in the general corporate securities industry, as well as those in the ABS segment.

We recognize that for ABS issuances where the final prospectus is provided close in time to settlement of the related security, it is difficult for investors to review and digest revisions to the information previously delivered at the time of pricing. In such cases, industry participants generally will notify investors that there is a material change that investors should be aware of. The method and timing of such notice varies depending on the facts and circumstances, including the nature of the potential untrue statement or omission, the amount of additional information necessary to understand the matter as to which the potential untrue statement or omission was made, and the type of investor to which the applicable issuance is being marketed. Alternatively, if investors are given a reasonable time to review the final prospectus prior to settlement a separate notice may not be required.

Issuers are concerned that the Commission's current interpretation under Rule 159, which would appear to require all material information be conveyed prior to the initial, and conditional, commitment to purchase, would create undue delays in the offering process. In effect, Rule 159 may create an incentive for issuers and underwriters to avoid disseminating information until all information is in final form, in order to avoid a determination that an investor has made an

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investment decision based on incomplete information. Issuers and underwriters generally will not close securities transactions unless they receive a 10b-5 letter from counsel regarding the disclosure document that is used to sell the securities. We believe counsel would be unable to render a 10b-5 letter on a document such as a term sheet, which by nature is incomplete. For example, a term sheet typically does not contain “risk factors” disclosure and may not contain certain information regarding service providers required by Regulation AB. Although these may prove not to be Material Omissions if the final prospectus shows that risk factors and service providers are reasonably consistent with market customs and standards (or prior issuances of the related depositor or its affiliates), it would be difficult for counsel to deliver a legal opinion that there was no Material Omission solely on the basis of such term sheet. As a result, in lieu of providing term sheets to investors, issuers and underwriters may determine not to provide any information to investors until substantially all of the information that is in the final prospectus is available. As noted above, this would create delays in the offering process. Moreover, such delays may result in additional time pressure on investors to make an investment decision once the full package of information is available.

Such an effect would be counter to the Commission’s goal in the communications provisions of the Release to promote the fast and efficient dissemination of information. Moreover, issuers would not only be forced to delay ABS offerings for longer periods of time than under current market practice, but in certain cases would also be exposed to additional carrying costs and risks associated with market movements and volatility. For example, if mortgage bankers were required to hold assets for an additional 45 days or more as a result of

such delays, such change would result in massive capital costs and substantially higher hedge costs. These costs would likely be passed on to consumers in the form of higher credit card rates, higher mortgage rates, etc. Conversely, issuers may elect to offer securities privately to avoid such costs. Such a result would be contrary to the Commission's goal of providing more transparent information flow, as expressed in the ABS Final Release and the Release.

Investors share the Commission's concern that investors be supplied with more and better information at an earlier point in the offering process. Indeed, investors involved in ASF's discussions have expressed a general preference to obtain as complete and final information as early as possible in the offering process. Generally investors in transactions for which a preliminary prospectus is prepared prior to pricing have been satisfied with the information provided to them at the time of the initial contract of sale. However, the usage of preliminary prospectuses in the ABS markets is far from universal, reflecting both the unique dynamics of ABS deal structuring, and the evolution of market practice in numerous ABS market segments in which preliminary prospectuses are neither sought nor provided in connection with investment decision-making. Investors in many transactions for which only a term sheet is prepared prior to pricing have indicated that they are generally satisfied with the level of information provided in the term sheet, or that they make their investment decision based on the issuer's reputation and their prior course of dealing with the related depositor, or based on market customs and standards for the asset class and transaction structure involved in the offering. Other investors, however, would prefer that there be more detailed and complete information at the time the commitment to purchase is entered into. In light of these competing considerations, the ASF believes it

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important for the Commission's final rules to balance the goal of promoting circulation of materially accurate and complete offering information to investors in connection with their investment decision-making, with the equally important goal of facilitating efficient capital market access under reasonable, and responsible, standards of liability.

Investors in the ABS market generally acknowledge that their commitment to purchase is conditioned on the information in the final prospectus not containing a material change from the term sheet and being reasonably consistent with market customs and standards (or prior issuances by the depositor or its affiliates) and/or any specific terms required by investors as conditions to closing. Accordingly, such investors agree with issuers and underwriters that the disclosure process would be facilitated, and the interests of investors served, if issuers and underwriters are given an opportunity to cure and/or supplement the information that was provided prior to the making of the commitment to purchase in accordance with the standard practice in the ABS industry, and as necessary, reconfirm such investment commitment prior to settlement. Investors have informed us, however, that such supplemental information is not meaningful unless investors are given sufficient time to review and digest such information. Therefore, investors have told us that they believe they should receive either affirmative notice from issuers or underwriters of material changes or additions reflected in final disclosure documents or transaction terms, or at minimum constructive notice (receipt of final disclosure documents), in either case in sufficient time to facilitate reasonable review and opportunity to

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respond to significant changes or additions, either because such changes are material as a matter of law or because they do not conform to contractual terms expressly agreed to by the parties.<sup>25</sup>

Accordingly, we request that the Commission take note in its final Release and/or in an instruction to Rule 159 that the timing of a contract of sale is a facts and circumstances analysis, and that a contract of sale with respect to a security may be entered into with an investor under which it is agreed, explicitly or implicitly, that the investor's obligation to purchase is subject to the condition that there are no material changes between the preliminary information and the final prospectus (it being understood that it will not constitute a material change if information is omitted from a term sheet or other preliminary disclosure but is provided in the final prospectus and is reasonably consistent with market customs and standards or prior issuances by the depositor or its affiliates). With such an agreement, liability under Section 12(a)(2) and Section 17(a)(2) would be based on the totality of the information conveyed to the investor, including the information set forth in the final prospectus, and not solely on the information provided at the time such contract was formed.

In addition, we propose that Commission provide a safe harbor to Rule 159, permitting any material misstatement or Material Omission in disclosure provided at the time of sale (including contract of sale) to be deemed to have been cured provided that any of the following events occurred: 1) the issuer or underwriter specifically advised the investor about the material misstatement or Material Omission prior to settlement, and the settlement occurred, or 2) the

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<sup>25</sup> Investors have indicated a strong preference for receiving direct, affirmative notice of any material changes or additions to final transaction terms or disclosure documents, and the ASF believes such notification reflects both widespread current practice and best practice within the ABS industry.

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final prospectus or other disclosure document correcting such misstatement or omission was available at least 48 hours prior to settlement, and the settlement occurred, or 3) the investor did not notify the underwriter of an objection based upon such misstatement or omission within 48 hours after availability of the final prospectus or other disclosure document correcting such misstatement or omission. We also request that the Commission indicate definitionally or in an instruction to such safe harbor that information omitted from a term sheet or other preliminary disclosure but provided in the final prospectus and reasonably consistent with market customs and standards or prior issuances by the depositor or its affiliates would not constitute a Material Omission.

We note that, as has been previously discussed with the Commission, providing a final prospectus 48 hours prior to settlement may be extremely difficult in certain sectors of the industry, which need to settle on a faster pace in order to be economically efficient. Accordingly, the safe harbor includes two other methods (specifically advising investors of a material misstatement or omission or lack of investor objection within 48 hours after availability of the final prospectus) in order to permit such issuers to comply with the condition to their contract of sale in a manner that is meaningful to investors.

B. Application of Access Equals Delivery to Rule 159. In connection with proposed Rule 159 the Commission has taken the position that whether information has been “conveyed” at the time of contract of sale is a facts and circumstances test, and that information “conveyed” could include information in the registration statement, the issuer’s Exchange Act reports incorporated by reference, or information otherwise disseminated by means reasonably designed

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to convey such information to investors, including if the Commission's proposals are adopted, free writing prospectuses. For the reasons set forth below, we propose that the Commission adopt an "access equals delivery" rule for purposes of determining what information has been "conveyed" to investors under Section 12(a)(2) and Section 17(a)(2) of the Act.

1. EDGAR Filings. As discussed in more detail below,<sup>26</sup> Rule 172 permits the filing of a final prospectus to be deemed to constitute delivery of such final prospectus for purposes of delivering confirmations of sale and certain final pricing information and for purposes of delivering a security for settlement. The reasoning behind Proposed Rule 172 is described in the Release as "access equals delivery": *i.e.* investors' access to the final prospectus through its filing with the Commission is the equivalent of physical delivery.<sup>27</sup> Proposed Rule 433 (which permits the use of free writing prospectuses) implicitly contains an "access equals delivery" concept in that it requires issuers that are not well-known seasoned issuers or seasoned issuers to deliver the most recent statutory Section 10 prospectus prior to or together with the delivery of any free writing prospectus, but permits well-known seasoned issuers and seasoned issuers to use a free writing prospectus once they have filed a statutory Section 10 prospectus (which, for issuers using Proposed Rule 430B, may be a base prospectus). Accordingly, the Commission has implicitly recognized that for well-known seasoned issuers and seasoned issuers filing a base prospectus can constitute the equivalent of delivery of a base prospectus. We believe that it would be logically consistent to permit filing with the Commission to equal physical delivery for

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<sup>26</sup> See Section IV of this letter.

<sup>27</sup> See Section VI.B.1. of the Release.

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purposes of determining what has been “conveyed” to investors for purposes of determining liability under Section 12(a)(2) and Section 17(a)(2). We therefore request that the Commission amend Proposed Rule 159 to provide that with respect to an offering by a well-known seasoned issuer or a seasoned issuer the following documents and information filed on Edgar should be considered to have been “conveyed” to investors for purposes of Section 12(a)(2) and Section 17(a)(2) of the Act and such Proposed Rule 159:

1. the issuer’s registration statement;
2. any prospectus that the issuer files under Rule 424;
3. any Exchange Act report filed by the issuer and incorporated by reference in the issuer’s registration statement;
4. any free writing prospectus of the issuer that has been filed under Rule 433 or for which a Notice Filing has been made;
5. any information filed on EDGAR that is in any filing pertaining to the issuer or depositor, sponsor, trustee, or any servicer, significant obligor, credit enhancer or derivatives counterparty related to the ABS transaction; and

Any information not covered under paragraphs 1. through 5. above and filed on EDGAR, where the filing is specifically referred to the investor.

Promulgating an “access equals delivery” rule for Section 12(a)(2) and Section 17(a)(2) purposes would permit delivery of information through Internet access, which provides a swift, efficient and economical means of disseminating such information. The Release acknowledges that advances in technology have led to an increased ability of issuers to disseminate, and

investors to receive, information on a timely basis by means of the Internet.<sup>28</sup> An access equals delivery rule will encourage the efficient working of today's global and instantaneous marketplace, and support the Commission's goals of encouraging the use of technology to provide for the timely and effective dissemination of information to investors.

2. Web Sites. As we discussed above, we propose that an issuer be permitted to publish a free writing prospectus on its unrestricted web site without filing such free writing prospectus with the Commission, so long as it files with the Commission a Notice Filing that such materials are available.<sup>29</sup> We respectfully also request that the Commission revise Proposed Rule 159 to provide that any free writing prospectus published on an issuer's web site shall be deemed to be "conveyed" to investors for purposes of Section 12(a)(2) and 17(a)(2) of the Act, so long as the Notice Filing has been effected. As is the case with EDGAR filings, permitting Internet access to equal delivery with respect to information on an issuer's web site will promote the timely and efficient dissemination of information to investors.

For similar reasons we also support a rule that any information on any unrestricted web site (or applicable portion thereof) be deemed to be conveyed to an investor so long as the address of the web site (or applicable portion thereof) has been specifically referred to the investor. Such referral could be included in the related prospectus, by publication of notice on Bloomberg or other media commonly followed by investors of the type to which the applicable issuance is being marketed or by direct written or oral communication to the investor.

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<sup>28</sup> See Section I.B.1. of the Release.

<sup>29</sup> See Section I.C.4. of this letter.

3. Impact of Third Party Materials on Issuer and Underwriter Liability

We note that by requesting that third party materials filed on EDGAR or available on a third party's web site be deemed conveyed to investors for purposes of Section 12(a)(2) and Section 17(a)(2), we are suggesting that such information be deemed part of the mix of information available to investors. If information is available on EDGAR regarding third parties involved in a transaction or third party information is available on a web site that an investor has been specifically referred to, we believe it is reasonable to conclude that such information was available to the investor in making its investment decision. However, we do not believe that the issuer or underwriter should be liable for such third party information. The issuer and underwriter did not prepare such information, and therefore have no control over it. For example, if a credit provider to a transaction had misstated its financial condition in its Exchange Act filings, the issuer and underwriter should not be held liable for that credit provider's misstatement.

**III. Securities Act Registration Proposals.**

A. Three-year Shelf Renewal Rule. Proposed Rule 415(a)(4) provides that securities registered on Form S-3 may be offered and sold only if no more than three years have elapsed since the initial effective date of the registration statement. According to the Release, the reason for this rule is that "the precise contents of shelf registration statements may become difficult to

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identify over time, and that markets would benefit from a periodic updating and consolidation requirement.”<sup>30</sup>

We respectfully suggest that Proposed Rule 415(a)(4) may be desirable for an operating company which incorporates by reference from numerous Exchange Act reports over an extended period of time. We acknowledge that if an issuer incorporates information from Exchange Act reports on a regular basis and does not periodically consolidate the information, an investor looking at the registration statement may need to locate multiple Exchange Act reports before seeing the complete picture of the issuer and its securities.

However, we do not believe that this justification is applicable to a registration statement for ABS. ABS generally represent interests in a large, static pool of numerous assets. Once formed, the pool generally does not change. A designated party (typically the servicer or trustee for the securitization), under the modified Exchange Act reporting requirements applicable to ABS issuers, files monthly reports on Form 8-K (or, following the transition period set forth in the ABS Final Rules, Form 10-D) providing information on the performance of the underlying assets and distributions to investors. Neither the prospectus for the initial offering nor the monthly reports typically incorporate any other Exchange Act reports by reference. Thus, the goal of periodically assembling all relevant information about an issuer into a single, updated registration statement fostered by Proposed Rule 415(a)(4) is not applicable to ABS registration statements.

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<sup>30</sup> See Section V.B.1.b.iv.(A) of the Release.

Secondly, as described above, the filing of Exchange Act reports with respect to each issuance of ABS typically stops when the related reporting obligations are automatically suspended (generally the calendar year after issuance).<sup>31</sup> Even if the filings for a particular offering incorporate other Exchange Act filings by reference, the relatively short “reporting life” of the relevant transaction does not create the same difficulties associated with operating companies that file Exchange Act reports over an extended period of time.

Finally, since each issuance of ABS triggers a separate reporting requirement, even if the filings of one issuance incorporated numerous Exchange Act filings over an extended period of time, the circumstances giving rise to the incorporation by reference are unlikely to be relevant to any other issuance of ABS. Clearly, the distribution date statements filed under the Exchange Act for a particular issuance would not be relevant to other issuances. Similarly, if a depositor incorporated another party’s Exchange Act filings by reference (for example, to provide financial information about a significant obligor or a credit enhancement provider) with respect to one issuance, such information would not be relevant to an investor in any other issuance.

Accordingly, the contents of a shelf registration statement for ABS should not change over time due to incorporation by reference. Therefore, subjecting ABS issuers to the proposed three-year renewal requirement would only impose significant costs (for example, to obtain new T-1’s, legal opinions and experts’ consents) without providing any significant benefits to investors.

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<sup>31</sup> See Section I.A. of this letter.

B. Automatic Shelf Registration. The Release requests comment as to whether or not automatic shelf registration or other elements of the Proposed Rules that would be available to well-known seasoned issuers should also be made available to ABS issuers.<sup>32</sup> We respectfully suggest that the Commission extend the benefits of automatic shelf registration to all ABS issuers that are eligible to use Form S-3.

We believe that an ABS issuer that is eligible to use Form S-3 should have the right to use automatic shelf-registration for the same reasons set forth in the Release with respect to well-known seasoned issuers.<sup>33</sup> Since ABS issuers are eligible to register on Form S-3 pursuant to General Instruction I.B.5., such issuers can only register investment grade debt pursuant to the automatic shelf registration system. Moreover, such issuers will be required to comply with the Exchange Act reporting scheme now codified in the ABS Final Release, as well as the expanded disclosure requirements contained in the ABS Final Rules. Accordingly, such issuers communicate a significant amount of information regarding their ABS issuances and practices to the market, such as for example information regarding the related sponsors' underwriting standards and static pool data.

Moreover, certain features of ABS render ABS issuances more suited to automatic shelf registration than other securities. First, as noted, only investment grade ABS are entitled to be registered on Form S-3. In addition, an issuer eligible to register on Form S-3 will have complied with the timely filing requirements set forth in such form. Moreover, ABS issuances

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<sup>32</sup> See Section VIII of the Release.

<sup>33</sup> See Section V.B.2.a. of the Release.

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are no more complex than many of the corporate issuances that may qualify for the benefits of automatic shelf-registration, such as, for example, offerings of contingent convertible debt. Second, most of the variability among ABS transactions is based on specific attributes (i.e., underlying assets, bond structure, ratings, legal aspects) and market conditions at the time of pricing, and may be the result of significant interaction with investors. The differences among transactions of the same asset class are rarely based on facts in existence at the time the registration statement becomes effective, and as a result, most registration statements filed by different issuers for the same asset class are very similar to each other at the time of effectiveness. Accordingly, eliminating Commission review of ABS registration statements can be expected to have a minimal effect on investor protection, especially in light of the significant disclosure requirements and guidance set forth in the ABS Final Release.

As the Commission is aware, an efficient securitization industry lowers the cost of lending to consumers and businesses. Legal and regulatory constraints that do not increase investor protection unnecessarily reduce access to the capital markets and increase the costs of lending to consumers and businesses. Extending the benefits of automatic shelf registration to ABS issuers eligible to use Form S-3 will lower the cost of securitization by eliminating delay or risk of delay in accessing the markets. The extension of automatic shelf registration benefits to such ABS issuers will therefore increase the availability of credit in the marketplace, without compromising protection of investors.

Alternatively, if the Commission is unwilling to extend the benefits of automatic shelf registration and pay-as-you-go registration fees to all ABS issuers, we respectfully request that at

minimum the Commission extend such benefits to a specified category of “well-known ABS issuers.” The Commission’s definition of “well-known seasoned issuer” includes any issuer that has issued in the last three years at least \$1 billion of debt securities in registered offerings and will issue only debt securities.<sup>34</sup> We respectfully propose that the Commission create a category of well-known ABS issuer that mirrors the proposed requirements, or creates analogous requirements, applicable to well-known seasoned issuers. Specifically, a well-known ABS issuer would be any ABS issuer as to which :

- the eligibility requirements for filing a registration statement on Form S-3 for primary offerings of its securities relying on General Instruction I.B.5. thereto are satisfied with respect to the depositor of such ABS issuer,
- the depositor of such ABS issuer and/or affiliated depositors, have issued in the last three years, either directly or through issuing entities formed by such depositors, at least \$1 billion of asset-backed securities registered under the Securities Act and will only issue asset-backed securities,
- the depositor of such ABS issuer has filed all materials which it was required to file during the last 12 calendar months under Section 13, 14 or 15 of the Exchange Act,
- the depositor of such ABS issuer has filed in a timely manner all materials required to be filed during the 12 calendar months and any portion of a month immediately preceding

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<sup>34</sup> See Proposed Rule 405.

the date of determination, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02 (a), 6.01, 6.03 or 6.05 of Form 8-K, and if it has used (during the foregoing period) Rule 12b-25(b) of the Exchange Act with respect to a report or portion of a report, it has actually filed that report or portion within the time period prescribed by that section, and

- the depositor of such ABS issuer is not an ineligible issuer (as we propose to amend such definition).

An entity that qualifies as a well-known ABS issuer under the above definition will have issued the same amount of debt securities<sup>35</sup> as well-known seasoned issuers qualifying as such by virtue of debt issuance, and can be expected to have an analogous level of communication with, and scrutiny by, the market. For example, the related depositor would be likely to have its issuances modeled on Bloomberg. Accordingly, if the Commission is unwilling to grant automatic shelf registration benefits to all ABS issuers using Form S-3, we urge that at minimum a well-known ABS issuer should have the right to use automatic shelf-registration for the same reasons set forth in the Release with respect to well-known seasoned issuers.<sup>36</sup>

C. Pay-As-You-Go Registration Fees. As part of extending automatic shelf-registration to ABS depositors eligible to use Form S-3, we respectfully request that the Commission also extend to such depositors the corollary benefits of adding additional classes of securities to an effective automatic shelf registration statement, automatic effectiveness,

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<sup>35</sup> Although some asset-backed securities are issued in the form of pass-through securities, substantially all investment grade asset-backed securities are fixed income securities having characteristics similar to debt securities, and are colloquially referred to as “bonds.”

<sup>36</sup> See Section V.B.2.a. of the Release.

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presumption of correctness of the form used, and pay-as-you-go registration fees. These benefits are all related and integral to automatic shelf registration.

In particular, if the rationale for pay-as-you-go shelf registration is the lower cost to the Commission of automatic registration statements, then ABS issuers that qualify for automatic shelf registration should qualify for this benefit. On the other hand, if the rationale for pay-as-you-go shelf registration is that it is more equitable to require payment at the time the registered securities are actually issued, that rationale extends to all shelf-registered ABS issuances (and indeed to all shelf-registered securities).

D. Deletion of Rule 415(a)(1)(vii). The Release requests comment as to whether it would be appropriate to delete Securities Act Rule 415(a)(1)(vii)<sup>37</sup>. We respectfully submit that there is no reason to delete Securities Act Rule 415(a)(1)(vii), and urge that it be retained. This Rule was promulgated in connection with Secondary Mortgage Market Enhancement Act of 1984 (“SMMEA”) and serves the Congressionally mandated purposes of SMMEA of providing funding to the national housing market. Use of shelf registration for mortgage related securities, regardless of whether eligible to use Form S-3, strongly supports this goal. Indeed, rather than deleting Rule 415(a)(1)(vii), we urge the Commission to expand the definition of seasoned issuers to encompass issuers registering under this provision. This would be consistent with the prior practice of permitting separate shelf registration of mortgage related securities, and would

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<sup>37</sup> See Section VIII of the Release. The Release actually refers to Rule 415(a)(1)(viii), which relates to business combinations; we assume that is a typographical error and that the intended reference is to 415(a)(1)(vii), which relates to mortgage related securities.

similarly promote the goals of SMMEA by giving issuers more flexibility in offering their securities.

#### **IV. Prospectus Delivery Reforms**

A. Application of Access Equals Delivery Concept in Proposed Rules 172 and 433 to Traditional Free Writing The Commission's Proposed Rule 172 provides that, if the conditions of such Proposed Rule are satisfied, physical delivery of the final prospectus need no longer accompany the sending of confirms, the delivery of information regarding pricing, allocation and settlement ("Pricing Information") or the sale of a security. Proposed Rule 172 provides that delivery of confirms and Pricing Information is exempt from Securities Act Section 5(b)(1) so long as the conditions to the rule are met, including the condition that a prospectus meeting the requirements of Securities Act Section 10(a) (other than omitting price related information pursuant to Rule 430A) has been filed with the Commission, or, for offerings relying on Proposed Rule 430B or 430C, the issuer has filed or will file such a prospectus within the time period required by Proposed Rule 424. The reasoning behind Proposed Rule 172 is described in the Release as "access equals delivery": *i.e.* investors' access to the final prospectus through its filing with the Commission is the equivalent of physical delivery. Proposed Rules 173 and 174 also apply an "access equals delivery" concept by permitting underwriters, brokers, dealers and issuers to deliver a notice that a sale was made pursuant to a registration statement or final prospectus in lieu of delivering such prospectus, and by permitting dealers in the aftermarket to rely on Proposed Rule 172.

Likewise, Proposed Rule 433 allows well-known seasoned issuers and seasoned issuers to use a free writing prospectus after filing of the statutory Section 10 prospectus, unlike unseasoned reporting issuers and non-reporting issuers, which are permitted to use a free writing prospectus only if accompanied or preceded by the most recent statutory Section 10 prospectus. Therefore, in Proposed Rule 433, the Commission has implicitly acknowledged that filing of the statutory Section 10 prospectus (which may be the base prospectus) can be equivalent to delivery of such prospectus.

We applaud the Commission's adoption of the "access equals delivery" principle for the purposes set forth in Proposed Rules 172 through 174 and Proposed Rule 433. Moreover, we believe that the Commission should expand the benefits of Proposed Rule 172 for well-known seasoned issuers and seasoned issuers, to provide that access should also equal delivery with respect to the final statutory prospectus for purposes of the "traditional" free writing exception under Securities Act Section 2(a)(10)(a). Accordingly, any traditional free writing delivered after filing of the final Section 10(a) prospectus should be considered to have been preceded or accompanied by such final prospectus. This position would be consistent with the Commission's position in Proposed Rule 433, that for well-known seasoned issuers and seasoned issuers only access to, not physical delivery of, the statutory prospectus, is required in order to permit use of a free writing prospectus. That position implicitly acknowledges that, for well-known seasoned issuers and seasoned issuers, filing can substitute for delivery.

The rationale for requiring that the most recent statutory Section 10 prospectus accompany or precede a free writing prospectus is identical to the rationale for requiring that the

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final statutory prospectus accompany or precede a traditional free writing; that is, to ensure that if an investor is given the less complete information set forth in the free writing prospectus or traditional free writing, such investor also has access to the full complement of information required to be contained in the final statutory prospectus by the Securities Act and Commission rules. Yet for purposes of permitting use of a free writing prospectus under Proposed Rule 433, the Commission has permitted well-known seasoned issuers and seasoned issuers to withhold physical delivery of the statutory prospectus and be deemed to have made such delivery by filing. There is no reason to treat well-known seasoned issuers and seasoned issuers differently for purposes of traditional free writing.

We respectfully submit that if access (to the base prospectus) equals delivery (of the base prospectus) with respect to the delivery of a free writing prospectus when a final prospectus is not available, then access (to the final prospectus) must *a fortiori* equal delivery (of the final prospectus) with respect to the delivery of a traditional free writing when the final prospectus is available.

Our proposed access equals delivery regime for traditional free writing is supported by the Commission's determination in the Release that advances in technology have led to an increased ability of issuers to disseminate, and investors to receive, information on a timely basis by means of the Internet.<sup>38</sup> Creating an access equals delivery rule for traditional free writing will encourage the efficient working of today's global and instantaneous marketplace, and

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<sup>38</sup> See Section I.B.1. of the Release.

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support the Commission's goals of encouraging the use of technology to provide for the timely and effective dissemination of information to investors.

We recognize that the legal consequences of permitting access equals delivery to apply to a traditional free writing are somewhat different than for a free writing prospectus, as a traditional free writing does not create liability under Section 12(a)(2), but rather only under Rule 10b-5. However, the different liability standards can be justified by the availability of the final prospectus, which is a statutory prospectus containing the full information required by the Securities Act. By contrast, at the time a free writing prospectus is delivered, only the base prospectus may be available. Moreover, the primary rationale for permitting access to equal delivery (*i.e.* the ease of Internet access and the promotion of efficient dissemination of information) remains the same in both cases. Accordingly, well-known seasoned issuers and seasoned issuers should be permitted to substitute filing for the delivery of the final prospectus in order to qualify for the traditional free writing exception.

We also note that requiring physical delivery of the final prospectus is likely to create confusion among well-known seasoned issuers and seasoned issuers, since access would equal delivery for purposes of delivery of a confirm, sale of the security and delivery of the preliminary or base statutory prospectus (as a condition to use of free writing prospectuses), but would not equal delivery for purposes of delivery of the final statutory prospectus (and use of traditional free writing). We therefore respectfully request the Commission to provide by rule that for well-known seasoned issuers and seasoned issuers, filing of the final statutory prospectus

would constitute delivery of that prospectus for purposes of the free writing exception to the definition of prospectus set forth in clause (a) of Section 2(a)(10) of the Securities Act.

## **V. Additional Exchange Act Disclosure Proposals**

A. Risk Factor Disclosure. Proposed Item 1A of proposed Form 10-K would require each issuer to include in its Form 10-K the risk factors normally required in a registration statement, “including the most significant factors with respect to the registrant’s business, operations, industry or financial position that may have a negative impact on the registrant’s future performance.”<sup>39</sup>

According to the Release, this requirement would “enhance the contents of Exchange Act reports and their value in informing investors and the markets” and would enhance the ability of reporting issuers to incorporate risk factor disclosure from Exchange Act reports into Securities Act registration statements to satisfy risk factor disclosure requirements.

We respectfully suggest that, like Proposed Rule 415(a)(4), this requirement rightly applies to an operating company, but does not provide any benefit when applied to issuers of ABS. As set forth in the ABS Final Release, issuers of ABS do not file a typical Form 10-K. Unlike the operating company, under the modified reporting requirements now codified in the ABS Final Rules, the Form 10-K filed by an issuer of ABS typically includes information about the performance and servicing of the underlying assets and certain other limited items. A prospective investor in a particular ABS issuance currently filing Exchange Act reports will look

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<sup>39</sup> See Section VII.A. of the Release.

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to the performance of the assets, structure, rating and economic terms of such ABS, as reported in the monthly filings made in respect of the applicable issuance. Furthermore, as previously discussed, we expect there will be no more than one Form 10-K filed for each issuance for substantially all ABS offerings. Risk factors contained in a Form 10-K applicable to an issuance of ABS no longer subject to Exchange Act reporting are of limited usefulness to a prospective investor in a different issuance.

Moreover, each series of ABS issued pursuant to a shelf registration statement relates to a discrete pool of assets and structure and carries its own set of risks. Accordingly, an issuer of a series of ABS will include in its prospectus risk factors that are tailored to the offered securities, and will not incorporate risk factors from a Form 10-K relating to a previously-issued series that are backed by a separate pool of assets. We therefore submit that the addition of risk factors to the Form 10-K will not benefit investors and requiring inclusion of risk factors is impractical given the issuance and offering process for ABS.

We therefore respectfully request that the Commission amend proposed Form 10-K to provide that issuers of ABS are not required to include risk factors in the Form 10-Ks filed by such issuers.

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The ASF greatly appreciates the opportunity to provide the foregoing comments in response to the Commission's Release. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact George Miller, Executive Director of the ASF, at 646.637.9216.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Vernon H.C. Wright', with a long horizontal flourish extending to the right.

Vernon H.C. Wright  
Chairman  
American Securitization Forum