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March 23, 2011

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Elizabeth M. Murphy, Secretary

Re: Comments on Definition of "Asset-Backed Security" Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

Ladies and Gentlemen:

As noted in our previous letter to the Securities and Exchange Commission (the "Commission") dated November 16, 2010, we appreciate the receptiveness of the staff of the Commission (the "Staff") to our comments on upcoming rulemaking required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). In that previous letter, our comments focused on the importance of improved underwriting and asset quality in facilitating the recovery of the securitization markets and helping to protect investors in asset-backed securities ("ABS").

Section 941(a) of the Dodd-Frank Act added to the Securities Exchange Act of 1934, as amended (the "Exchange Act"), a new Section 3(a)(77), defining the term "asset-backed security" ("Exchange Act ABS"). Several sections of the Dodd-Frank Act relating to ABS specifically apply to all instruments within the scope of Exchange Act ABS, including those dealing with credit risk retention in ABS transactions (Section 941), disclosure requirements for ABS (Section 942(b)), representations and warranties in offerings of ABS (Section 943), due diligence and related disclosure in offerings of ABS (Section 945), and conflicts of interest with respect to ABS (Section 621).

The definition of Exchange Act ABS is substantially similar to the definition of the term "structured finance products" recently included in the Commission's proposed comprehensive revisions to Regulation AB and other rules relating to ABS (the "2010 ABS Proposing Release").[1] As such, Exchange Act ABS includes any "fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset," including collateralized mortgage obligations, collateralized debt obligations ("CDOs"), collateralized bond obligations, CDOs of

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[1] Asset Backed Securities, SEC Release Nos. 33-9117, 34-61858, 75 Fed. Reg. 23328, 23347 (May 3, 2010).

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other Exchange Act ABS, and CDOs of CDOs. It also includes any other "security that the Commission, by rule, determines to be an asset-backed security for purposes of this [definition]."

Prior to the enactment of the Dodd-Frank Act, the term "asset-backed security" had been defined only in regulations promulgated under the Securities Act of 1933, as amended (the "Securities Act"), and other federal securities laws – most notably, Item 1101 of Regulation AB. Contrast the more limited basic definition of ABS in that item, as it exists currently: "a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders; provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases."

We understand that these two disparate definitions of "asset-backed security" serve different functions. For example, the definition in Regulation AB serves partially as a limitation on the types of ABS that may be registered for the shelf on Form S-3 (or, as proposed, new Form SF-3),[2] whereas the definition of Exchange Act ABS is more expansive, serving to delineate additional types of securities with respect to which Congress intended to impose several new regulatory requirements. Notwithstanding the expansiveness of the definition of Exchange Act ABS, we still do not believe that Congress intended to capture every type of security that is secured by cash flows from a designated source. In our view, the definition of Exchange Act ABS should be interpreted in light of the policy rationales that drove the need for the increased regulation mandated by the Dodd-Frank Act, and many products that theoretically could fall within the scope of that definition are not the type of products that we believe Congress had in mind. Therefore, we discuss in this letter some of the fundamental characteristics (some of which are explicitly set forth in the Dodd-Frank Act and others which are not) that distinguish ABS from other securities.

Characteristics of ABS That Should be Reflected in Exchange Act ABS

In our view, the following are the fundamental characteristics that should be required for an instrument to constitute Exchange Act ABS:[3]

- Fixed income or other security;

[2] 2010 ABS Proposing Release, at 23389 ("the definition of 'asset-backed security' outlines the parameters for the types of securities that are appropriate for the alternate disclosure and regulatory regime provided by Regulation AB").

[3] As noted above, we acknowledge that the definition of Exchange Act ABS serves different functions than the definition of "asset-backed security" in Regulation AB. We address only Exchange Act ABS here, and unless specifically noted below, we do not mean to suggest that we believe that each of these characteristics also should be required for Regulation AB purposes.

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- Collateralized by any type of self-liquidating financial asset;
- Allows the holder to receive payments that depend primarily on the cash flow from the asset;
- Issued by a special purpose entity (an "SPE");
- Pool consists of multiple assets with multiple obligors;
- Securities are structured into multiple tranches; and
- Securities are sold to non-affiliates of the sponsor.

The first three characteristics listed above are explicitly set forth in the statutory definition of Exchange Act ABS. However, applying only those characteristics could produce anomalous results that we believe were not intended by Congress. For example, shares in a money market mutual fund or other fixed-income oriented mutual fund could fit this definition. The assets are self-liquidating, the holder has the right to redeem the securities, and those redemption proceeds can only come from cash flows or sale proceeds. We do not believe that Congress intended to include such shares as Exchange Act ABS. Therefore, we believe that the four additional characteristics described above, which are commonly found in ABS transactions, are central characteristics of ABS.

The Commission has the statutory power to determine that additional types of securities, not specifically referenced in the definition of Exchange Act ABS, are in fact Exchange Act ABS. We urge the Commission to exercise this power judiciously, and in this and all other respects to interpret the statutory definition in a manner that ensures that only securities with all of the foregoing fundamental characteristics are regulated by the Commission as Exchange Act ABS.[4] Without clear guidance from the Commission, the breadth of the statutory language is likely to result in a lack of industry consensus as to which products fall within the scope of the definition and to capture transactions that were not intended to be captured (such as money market mutual funds).

Fixed Income or Other Security

In order for an instrument to constitute an Exchange Act ABS, it must, first and foremost, constitute a "fixed income or other *security*," so an instrument that is not a security for purposes of the federal securities laws is not within the scope of Exchange Act ABS. We believe it would be helpful for the Commission to acknowledge, in this context, that general partnership interests[5]

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[4] We are of the same view regarding the definition of "structured finance products" as set forth in the 2010 ABS Proposing Release.

[5] *See, e.g.*, *Williamson v. Tucker*, 645 F.2d 404, 421-23 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981) (while "a general partnership or joint venture interest generally cannot be an investment contract under the federal securities acts," "a general partnership in which some agreement among the partners places the controlling power in the hands of certain managing partners may be an investment contract with respect to the other partners").

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and similarly structured limited liability company membership interests[6] are not securities and, therefore, not Exchange Act ABS.

Collateralized By Any Type of Self-Liquidating Financial Asset

This characteristic is set forth in the statutory definition of Exchange Act ABS. Since the first days of Regulation AB, the Commission has placed "an emphasis on the self-liquidating nature of pool assets that by their own terms convert into cash."[7] In our view, a self-liquidating financial asset generally consists of a contractual obligation that pays in full in accordance with its terms, which is not contingent on any future event or action. Receipt of payments on assets that require additional actions is contingent on those actions, and therefore such assets are not self-liquidating. Therefore, in our view, the following should not be considered to be self-liquidating for purposes of Exchange Act ABS: royalty and license payments that require future sales; stranded costs, which require sales by the utility; timber, which requires sales of the timber; and credit default swaps, where payment is triggered only upon the occurrence of a contingency (*i.e.*, default).

Payments That Depend Primarily On the Cash Flow From the Assets

This characteristic is set forth in the statutory definition of Exchange Act ABS. The question is, what constitutes "primarily"?

In the context of the definition of "asset-backed security" in Item 1101(c) under Regulation AB, the Commission noted that this is a "core principle," and limited any deviations to defined limited exceptions.[8] Therefore, for purposes of Regulation AB, less than 50% of the value of the pool may be attributable to the residual values of the pool assets (or, for automobile leases, less than 65%). We believe that these guidelines are just as workable in the context of Exchange Act ABS. Therefore, a security where at least 50% of the payments do not depend primarily on the cash flows from self-liquidating financial assets generally should not be considered Exchange Act ABS. Common examples of such transactions would be transactions involving cell tower, aircraft and equipment leases, where the residual value of the leased assets is significantly greater than the expected payments on the securitized lease. In our view, none of these should be regulated as Exchange Act ABS.

Issued By an SPE

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[6] *See, e.g.*, *Keith v. Black Diamond Advisors, Inc.*, 48 F. Supp. 326, 332-34 (S.D.N.Y. 1999) (contrasting "member-managed" LLCs, membership interests in which are not likely to be securities, with "manager-managed" LLCs, membership interests in which are more likely to be securities).

[7] Asset-Backed Securities; Final Rule, SEC Release No. 33–8518, 34–50905, 70 Fed. Reg. 1506, 1513 (Jan. 7, 2005) (the "2005 ABS Adopting Release").

[8] *Id.* at 1519.

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One of the hallmarks of ABS is that the assets producing the cash flows for investors are isolated from the seller of the assets into the trust, in a manner designed to minimize the risk that those assets will be consolidated with the estate of that seller in the event that it becomes bankrupt or insolvent. Without this legal isolation into a special purpose entity, the securities offered are, in our view, no more than secured corporate debt of an operating company. As discussed above, we do not believe securities that are, in substance, corporate debt present risks of the kind contemplated by the Dodd-Frank Act. Therefore, segregation of the assets from the risk of other creditors of the sponsor should be a key element of Exchange Act ABS.

Pool Consists of Multiple Assets with Multiple Obligors

Another hallmark of ABS is the importance of diversification of assets and cash flows.

Some transactions depend primarily on the performance of a single obligor, often under a single asset. For example, some lease transactions depend upon the performance of a single lessor, where the lease can often be cancelled upon the bankruptcy or default of the lessor. In other transactions, the cash flow servicing the instruments derives from a single corporate entity, and any assets involved are merely security for the obligations of the corporate obligor. In our view, these transactions should not be considered Exchange Act ABS.

We believe that, prior to the credit crisis, investors perceived safety in reliance on multiple cash flow streams from different obligors to make payments on the offered security. Although for certain products, such as CDOs, some of the perceived diversification turned out to be less helpful than was hoped for, we believe that investors still place great value on having multiple obligors. In our view, where the payments on a security depend primarily on the credit of a single obligor, the security is more akin to a corporate bond than ABS, and should not be considered Exchange Act ABS. If diversification of assets and obligors were not such an important reasons for investors to invest in most ABS, detailed disclosure regarding significant obligor risk would not be so important under Regulation AB.[9]

We acknowledge that some commercial mortgage-backed securities ("CMBS"), which we do not dispute should be considered to be Exchange Act ABS, are backed by a single loan. In our view, single-loan CMBS can be distinguished in that, even though the obligor on the loan is a single entity, the cash flows used to pay the offered securities generally come from multiple tenants and sources.

Securities Are Structured Into Multiple Tranches

Absent tranching, a transaction is, in substance, merely a sale of an undivided interest in the entire pool of underlying assets, albeit in the form of a security. One example of this type of

[9] Regulation AB Item 1112.

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transaction is To Be Announced, or TBA, transactions, which we discuss in more detail below. In our view, these transactions do not share a risk and reward profile similar enough to ABS to bring them within the scope of Exchange Act ABS. Their lack of complexity means that these transactions simply do not require the protections afforded by the securitization provisions of the Dodd-Frank Act (or, for that matter, Regulation AB).

Securities Are Sold to Non-Affiliates of the Sponsor

Unless and until ABS are sold to third parties, their holders do not need the protections of the securitization provisions of the Dodd-Frank Act. Therefore, a sale to a non-affiliate of the sponsor should be required before a security is considered Exchange Act ABS.

Corporate Credit Transactions

In our view, when payments on a security depend primarily on payments by a single obligor, and not on segregated cash flows from a pool of assets with multiple obligors, investors typically view this product as a corporate credit. If there are assets involved in such a transaction, they effectively serve as security for a corporate obligation, and the transaction is (in substance if not form) secured corporate debt. Corporate credit transactions lack one or more of the characteristics we believe are important for Exchange Act ABS – typically, that the payments on the securities do not depend primarily on the cash flow from a pool of assets, the assets and cash flows are not segregated by means of an SPE, or the pool does not consist of multiple assets with multiple obligors.

In securitization transactions that we believe are more akin to corporate credits, the securitizer (usually a corporate entity) typically is either the original owner of the asset and either the primary user of the asset or the guarantor of performance. An example of a transaction structure where the securitizer is the primary user of the asset is the enhanced equipment trust certificate, or EETC, where an airline buys an airplane and leases it back to itself. An example of a transaction structure where the securitizer is the guarantor of performance is a cell tower securitization, where a lease to the telephony company generally is backed by a guarantee from the owner of the cell tower. A whole business securitization reflects both elements, in that the securitizer both uses the asset and guarantees performance. Rail container and rail car transactions can have either of these two elements, depending on their structure. Royalty transactions are similar, in that payments for intellectual property and licenses generally constitute the bulk of the securitized assets.

In transactions structured in this manner, if the securitizer or other corporate entity backing the payment stream is unable to pay or perform, this seriously impairs the value of the securitized asset and, as a result, the security. For example, problems with the airline in an enhanced equipment or pass through trust certificate transactions, with the licensee in a royalty transaction, with the lessor in a leasing transaction (where the underlying lease permits the lessee to terminate the lease in the event of a default, bankruptcy or other adverse event with respect to the lessor), or with the bank sponsor in a covered bond transaction, would almost inevitably have serious adverse consequences for the holders of the securities.

Compare this type of product to typical ABS, where the cash flows derive from numerous obligors and the failure of the securitizer has little impact on the value of the securities. Even in a CMBS transaction with a single property, the cash flows used to pay the offered securities generally come from multiple tenants and, in any event, do not come from the securitizer.

Securities Issued by Municipalities or Their Instrumentalities

In the Commission's recent final rule release regarding disclosure of repurchase requests related to representations and warranties, it stated its belief that the Dodd-Frank Act "does not expressly provide the Commission the authority to provide exemptions for particular classes of securitizers, including municipal securitizers."[10] However, we still generally support the points made in the comment letter dated November 15, 2010 from the National Council of State Housing Agencies regarding this issue, and believe subjecting exempt municipal transactions to the Dodd-Frank Act provisions governing Exchange Act ABS is inappropriate.

To do so would, in our view, be inconsistent with general tenets of federalism, as well as with the specific regulatory scheme established by Section 15B(d) of the Exchange Act, commonly known as the Tower Amendment. Section 15B(d)(2) limits the power of the Commission with respect to municipal securities by prohibiting the Commission from requiring any issuer of municipal securities to file any document as a condition to accessing the capital markets. Municipal securities generally are exempt from the registration requirements of the Securities Act by virtue of Section 3(a)(2) of the Securities Act. Currently, municipal securities are subject to a separate regulatory scheme focusing on regulation of broker-dealers, as regulated by the Municipal Securities Rulemaking Board – including the requirement of Rule 15c2-12 under the Exchange Act that broker-dealers participating in an underwriting of municipal securities require that the issuer meet specified continuing disclosure requirements.[11]

The Dodd-Frank Act itself acknowledges that municipal issues should not be automatically subject to the same regulatory scheme as other issuers. For example, Section 941(a), dealing with credit risk retention requirements for securitizations, specifically requires

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[10] Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, SEC Rel. Nos. 33-9175, 34-63741, 76 Fed. Reg. 4489, 4493 (Jan. 26, 2011) (the "Section 943 Proposing Release").

[11] We acknowledge that the Dodd-Frank Act mandates several studies regarding municipal securities, including a study regarding increased disclosure by issuers of municipal securities and the potential repeal of the Tower Amendment (Section 976). Our comments here express no views on current or future regulation specifically addressing municipal securities, but address only our views on the appropriateness of regulating municipal securities under current law by means of their inclusion as Exchange Act ABS.

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the Commission and other rulemaking agencies to provide for a total or partial exemption for any Exchange Act ABS issued by an exempt municipal issuer.

In particular, tender option bond programs ("TOBs") should not be considered to be Exchange Act ABS. These securities are exempt municipal products which should be excluded for the policy reasons discussed above. In addition, the typical TOB structure does not contain all of the elements we believe should be necessary to make up Exchange Act ABS. TOB programs are merely an efficient financing means for effectively converting long term, fixed rate, investment grade municipal securities into floating rate securities. Because the bonds generally can be put back on the date the rate changes, from the holder's standpoint they are the equivalent of short term debt. The original bonds are deposited into a trust, which then issues floating rate trust instruments (known as variable rate debt obligations, "VRDOs" or "lower floaters"). The underlying assets remain static for the life of the transaction. The floating rate instruments issued by the trust are assigned a credit rating equivalent to that of the underlying bonds. Usually, there is also an embedded credit facility with a highly rated financial institution that provides liquidity support, and sometimes also credit support - effectively, a guarantor of the repurchase obligation and, possibly, of the bonds. However, investors look primarily to the creditworthiness of the underlying municipal security when performing their credit analysis. In other words, there is effectively only a single obligor. It is rare for the different underlying bonds to be pooled – generally, each series contains bonds of a single CUSIP or, if multiple CUSIPS, the bonds have the same obligor. Thus, there is no credit risk diversification. Finally, the bonds generally are issued in a single tranche. As described above, VRDOs are merely a sale of an undivided interest in the underlying asset(s), which are solely municipal bonds.

In any event, if the Commission maintains its view that it is only the Dodd-Frank Act that requires the application to municipal securitizers of any rules mandated for Exchange Act ABS, the lack of a similar statutory requirement outside the scope of the Dodd-Frank Act means that there is no reason to apply Regulation AB or other regulations not mandated by the Dodd-Frank Act to municipal securities or securitizers.

Securities Guaranteed by Government-Sponsored Enterprises

In the Commission's recent final rule release regarding disclosure of repurchase requests related to representations and warranties, it stated its belief that "[t]he definition of an Exchange Act-ABS includes . . . securities issued or guaranteed by a government sponsored entity . . . such as Fannie Mae and Freddie Mac." [12] However, we believe that subjecting exempt GSE-sponsored transactions to the Dodd-Frank Act provisions governing Exchange Act ABS is inappropriate.

[12] Section 943 Proposing Release, at 4491.

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Since the disruption in the credit markets began in 2007, Americans have increasingly relied on the federal government when buying new homes or refinancing existing mortgage loans– -in large part because private enterprises were unable to meet their housing needs. Accordingly, maintaining a functioning government-guaranteed mortgage-backed securities ("MBS") market has become vital in the absence of a private market alternative. More than nine out of every ten new mortgages are insured or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae (a "GSE")[13] and most of these mortgage loans are packaged into "agency" MBS and sold to a wide variety of investors, including pension funds, mutual funds and the Federal Reserve.

The housing market remains severely weakened, and funding from the GSEs is still essential to the availability of mortgage credit to American homeowners. Any restrictions on or requirements for the issuance of agency MBS that would increase the GSEs' costs of funding would limit the availability of otherwise scarce mortgage credit to consumers.

Due to the sheer size of the portfolios of mortgage loans owned or guaranteed by the GSEs, compliance with the requirements of the Dodd-Frank Act applicable to Exchange Act ABS would be prohibitively expensive and/or difficult. Because the GSEs guarantee, but do not originate, mortgages, it may be impractical for them to collect and provide detailed asset-level data in the same manner as the Commission has proposed to require for private-label MBS issuers. The GSEs likely would not hold the substantial capital necessary to comply if they were subjected to risk retention requirements. Therefore, in light of the importance of the GSEs to the struggling housing market, we urge the Commission to carefully consider these potential effects when determining whether to include agency MBS within the scope of Exchange Act ABS.

Defining agency MBS as Exchange Act MBS would not promote improved disclosure or protect investors. Investors analyze agency MBS by focusing on interest rate risk, not the credit risk of the loans underlying the securities, because the GSE guarantee effectively eliminates any such credit risk. We believe that investors view agency MBS of a particular coupon and maturity as essentially fungible, as they trade frequently without regard to the particular underlying mortgage assets. Agency MBS typically are not rated, and trade at prices that approach those of U.S. Treasury securities and other government-backed debt. The imposition of regulatory requirements related to the underlying mortgage loans, such as disclosure requirements or credit risk retention, would be pointless, since the availability of cash flows from those loans is irrelevant to investors. Therefore, defining agency MBS as Exchange Act ABS would provide little or no benefit investors, but we believe that it would severely hamper or even close the market for agency MBS.

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[13] Dep't of the Treasury and U.S. Dep't of Hous. and Urban Dev., Reforming America's Housing Finance Market: A Report to Congress, at 12 (Feb. 2011).

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Finally, the GSEs are subject to direct supervision by the Federal Housing Finance Administration in its role as conservator, and are likely to be substantially reformed in the years to come. Any governmental effort to regulate the activities of the GSEs, promote credit quality of GSE-backed assets or mandate disclosure requirements relating to agency MBS should be accomplished through this direct supervisory relationship, not through rules that apply generally to all types of Exchange Act ABS. We believe that it is important for the GSEs to maintain as much flexibility as possible, as the role of government in the housing markets is reassessed. The inclusion of agency MBS within the scope of Exchange Act ABS would severely hamper GSE operations, reduce the availability of credit to American homeowners, and handcuff ongoing reform of the GSEs.

To Be Announced Securities

Agency pass-through certificates typically trade on a generic or to-be-announced ("TBA") basis. In a TBA trade, the seller and buyer agree to the type of security, coupon, face value, price, and settlement date at the time of the trade, but do not specify the actual mortgages to be included in the underlying pool or pools. Before settlement, the seller identifies the specific mortgages to be included in the pools to satisfy the commitment. In essence, TBAs are forward contracts to buy or sell agency MBS with particular criteria. TBAs, like agency MBS, are fungible – they are traded without regard to the specific credit risk involved with the particular mortgage pools that are eventually selected upon settlement of the trade.

The purpose of TBA trades is to add liquidity to the mortgage markets. By facilitating TBA trades, the GSEs enable mortgage lenders to hedge or fund their origination pipelines for months before the TBAs' settlement dates and to lock in pricing for the mortgages they originate.

For all of the reasons discussed above with respect to agency MBS generally, we do not believe that TBA securities should be included within the scope of Exchange Act ABS. More specifically and perhaps most importantly, TBA securities lack one of the fundamental characteristics that we believe should apply to all Exchange Act ABS. TBA securities are not collateralized by specific self-liquidating financial assets, as the identity of the mortgages that ultimately will serve as collateral is unknown at the time of the TBA trade.

If TBAs were to be included within the definition of Exchange Act ABS, we believe that the usefulness of this valuable method for providing liquidity to mortgage originators would be severely compromised. Therefore, we ask that the Commission clarify that TBA securities do not fall within the scope of Exchange Act ABS.

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Synthetic ABS

Synthetic ABS replicate the economic effect of the securitization of an asset pool without actually collateralizing the security with the asset itself, generally through the use of derivatives such as a credit default swap or total return swap. The "pool" assets are not being sold or securitized by the sponsor; they are only "reference assets" whose payment performance and economic characteristics are referenced through the derivative.

It is clear that the statutory definition of Exchange Act ABS does not include synthetic securitizations. The securities simply do not "depend primarily on cash flow" from assets which "collateralize'" those securities – rather, the investment performance depends on the cash flow from reference assets which are identified in the derivative but not securitized or sold. Based on substantially similar language in the definition of ABS under Regulation AB, the Commission has declined to include synthetic ABS within that definition: "[s]ynthetic securitizations do not meet the basic concepts embodied in our definition of asset-backed security . . ." because "[p]ayments on the securities in a synthetic securitization can primarily or entirely comprise or include payments based on the value of a reference asset which is unrelated to the value of or payments on any actual assets in the pool."[14]

Also, when Congress intended for the Dodd-Frank Act to address synthetic securitizations, it said so explicitly. Section 621 of the Dodd-Frank Act, dealing with conflicts of interest with respect to ABS, states specifically that Exchange Act ABS "for the purposes of this section shall include a synthetic asset-backed security." Were synthetic ABS to be included within the definition of Exchange Act ABS generally, this statement would have been unnecessary.

Moreover, there is a large category of synthetic ABS that do not raise the policy concerns that we believe motivate the Dodd-Frank Act's requirements for Exchange Act ABS. In this category of transactions, which might be labeled "secondary" synthetic ABS, payments on the synthetic ABS depend on a derivative which is linked to already existing reference assets where the sponsor of the synthetic ABS transaction has no agreement or arrangement with the obligor of the reference assets with respect to the synthetic ABS transaction. Secondary synthetic ABS transactions thus are economically equivalent to a secondary market sale transaction in the underlying ABS. In this context, the securitizer has no better access to information regarding the reference assets than does the buyer of the synthetic ABS. In fact, the reference assets may be quite numerous and even interchangeable, as with (for example) a credit swap that is effectively linked to all present or future bonds or loans of the reference entity.

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[14] 2005 ABS Adopting Release, 70 Fed. Reg. at 1514.

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In this context, imposing the requirements of the Dodd-Frank Act on synthetic ABS would be misplaced. Consider for example, the credit risk retention requirements of Section 941 of the Dodd-Frank Act. Requiring risk retention is meant to create an incentive for the underwriters of the securitized assets to impose better practices or higher standards at the point of origination. But where the securitizer has no access to or relationship with the originator of the reference assets in relation to the synthetic ABS transaction, this goal will not be served.

The Commission has recognized this concept in Rule 190 under the Securities Act. Under Rule 190, an issuer registering asset-backed securities that are backed by securities of another underlying issuer need not obtain that underlying issuer's participation in the underwriting and registration of the asset-backed securities, so long as "neither the issuer of the underlying securities nor any of its affiliates has a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the underlying securities and the asset-backed securities transaction," "the offering of the asset-backed security does not constitute part of a distribution of the underlying securities," and certain other requirements are met. This standard may be met even where the relevant underlying asset was underwritten by an affiliate of the ABS issuer, so long as the underlying asset is purchased at least 90 days after the underwriter completed its sale from the initial distribution of the underlying asset.[15] Secondary synthetic securitizations meet this same standard, and therefore do not raise the same concerns as other Exchange Act ABS. Thus, even if the Commission does not concur with Congress' evident intent to exclude synthetic securitizations from the definition of Exchange Act ABS, secondary synthetic securitization meeting requirements similar to those of Rule 190 should nevertheless not constitute Exchange Act ABS.

"Collateralized Debt Obligations"

Collateralized Debt Obligations of ABS and of other Collateralized Debt Obligations

Explicitly mentioned as being included in the Dodd-Frank Act's definition of Exchange Act ABS are several commonly used, though undefined, terms, including "collateralized debt obligation[s]," "collateralized debt obligation[s] of asset-backed securities" and "collateralized debt obligation[s] of collateralized debt obligations." CDOs are securities backed by portfolios, typically actively managed, of a variety of assets, often including ABS. As discussed in our previous letter to the Commission dated November 16, 2010, CDOs collateralized by ABS (particularly mezzanine and subordinate ABS backed by subprime residential mortgage loans) suffered severe and sometimes catastrophic losses during the financial crisis, though other securities with similar structures have performed relatively well despite the crisis. Therefore, we

[15] Subparagraph (a)(4) of Rule 190.

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believe it is important for the Commission to clearly delineate what types of securities were meant to be included in the scope of Exchange Act ABS as CDOs.

Most common references to CDOs really refer to CDOs of ABS or CDOs of CDOs (so-called "CDOs-squared"). The fundamental characteristic of these structures is the application of leverage to an already-leveraged product, by issuing several classes of tranched securities. Also, unlike other ABS, which are generally backed by static collateral pools or revolving collateral pools of similar assets, CDO collateral is typically actively managed. The asset pools of CDOs of ABS generally contain subordinate tranches of other ABS transactions, and so expose investors to two levels of credit risk. CDO-squared transactions aggregate subordinate classes of other CDOs, adding a third level of risk concentration. This amplification of risk is the primary reason why CDOs of ABS and CDO-squared transactions suffered catastrophic losses once housing delinquencies began increasing. For these reasons, we acknowledge that it is appropriate for CDOs of ABS and CDOs-squared to be regulated as Exchange Act ABS for purposes of the Dodd-Frank Act and Regulation AB.

Single Credit Resecuritizations

Resecuritization transactions (sometimes referred to as "Re-REMICs") might at first glance thought to be similar to CDOs of ABS, as the collateral historically consisted of one or more previously-issued ABS securities. However, recent resecuritizations have utilized very simple structures involving a static "pool" consisting of a single underlying security (i.e., a single credit resecuritization). These resecuritizations use overcollateralization to produce a higher quality senior security that can be marketed and traded more easily. The senior class of the resecuritization has enhanced credit quality due to the credit support provided by the subordinate class. These valuable "de-risking" transactions provide liquidity to the holders of the otherwise illiquid underlying assets, and do not apply multiple levels of leverage to risky assets that CDOs did.

There are other reasons why we do not believe that the policy rationale for regulating Exchange Act ABS extends to resecuritizations. Again, consider the example of the credit risk retention requirements of Section 941 of the Dodd-Frank Act. Because payments on resecuritizations (like synthetic ABS) generally depend on financial assets that were not originated by the securitizer, requiring risk retention will not serve as any incentive to underwrite those assets to higher standards. In most cases, the securitizer has no better access to information regarding the assets underlying the resecuritized ABS than the ultimate investor.

For all of these reasons, we believe that single credit resecuritizations should not be grouped together with CDOs. Although the technology is similar, they are used for very different purposes. CDOs were actively managed trusts that applied leverage on leveraged ABS

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that led to adverse outcomes. Resecuritizations generally are static and used to tranche existing risk. As the financial crisis has illustrated, when ABS face periods of illiquidity, resecuritization can be a valuable tool to provide liquidity in an otherwise illiquid market. We ask the Commission to be mindful of differences between single credit resecuritizations and CDOs when interpreting and promulgating regulations under the Dodd-Frank Act and otherwise.

Collateralized Loan Obligations

Collateralized loan obligations ("CLOs") are an important source of financing to the corporate lending market for small- and medium-sized companies. A typical CLO transaction is similar to a standard ABS transaction, except that its collateral is corporate loans rather than mortgage-related or other consumer loans. Unlike CDOs of ABS or CDOs-squared, CLOs are "first generation" securitizations, and do not feature the application of leverage to already-leveraged assets. Therefore, as described in our previous letter dated November 16, 2010, the CLO market has not experienced the severe losses seen in the market for CDOs of ABS or of CDOs-squared. Also, the underlying corporate loans are actively traded by market participants, who use CLOs to tailor loan exposures to varied investor needs. Therefore, there is a degree of transparency as to the underlying assets that is not present in the case of ABS.

We believe that CLOs should not be grouped together with CDOs. Although the two products share some similar characteristics, they are used for very different purposes. CDOs were actively managed trusts that applied leverage on leveraged ABS that led to adverse outcomes, whereas CLOs are used to finance the corporate loan market for small and medium sized companies. We ask the Commission to be mindful of differences between resecuritizations and CDOs when interpreting and promulgating regulations under the Dodd-Frank Act and otherwise.

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We greatly appreciate your consideration of the views set forth in this letter, and we would be pleased to have the opportunity to discuss these matters further with you or with any member of the Commission staff. Please feel free to contact the undersigned at 212-761-2080, or James Lee at 212-762-6148.

Very truly yours,

Stephen D'Antonio
Managing Director
Morgan Stanley