Bank of America

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VIA E-MAIL: rule-comments@sec.gov

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

Re: File Number S7-08-10
Release Nos. 33-9117, 34-61858
RIN 3235-AK37
Asset-Backed Securities Proposed Rule

Dear Ms. Murphy:

Bank of America Corporation ("Bank of America") appreciates the opportunity to submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding its proposed rule regulating asset-backed securities ("ABS") including revisions to Regulation AB and other rules regarding the offering process, disclosure and reporting for ABS (the "Proposed Rule").

Bank of America is one of the world's largest financial institutions, and is actively engaged in facilitating the provision of credit to individual consumers, small and middle market businesses, and large corporations. Bank of America continues to act as a leader in the securitization market, having served as issuer of the first publicly registered offering of non-agency residential mortgage pass-through certificates in 1977. We believe that securitization helps Main Street by supporting lending and allowing for an efficient redeployment of capital and new credit creation. Accordingly, we understand

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the significant impact that the Proposed Rule will have on the securitization market and could have on the provision of credit generally in the primary consumer market.

We thank the Commission and its staff for their significant efforts in crafting the Proposed Rule. While we suggest changes to some of its approaches, nevertheless we concur with the Commission that changes are needed to market regulation in order to restore investor confidence. Our goal with this comment letter is to provide constructive recommendations that reflect business needs and market efficiency.

We welcome and support many aspects of the Proposed Rule and the Commission's emphasis on modernizing the offering process, building more robust disclosure standards, increasing market confidence, and restarting the securitization markets. However, we believe that the Proposed Rule could result in unintended negative consequences concerning credit availability, duplicative (and conflicting) regulatory regimes, and excessive transaction costs. Regulatory uncertainty and the prospect of significant compliance costs threaten the viability of an active and efficient non-agency securitization market. We believe that measured changes, which incorporate market views, will more likely result in solutions that are both workable and prudent. The Proposed Rule will require significant up-front expenditure and an increased liability risk profile for issuers and other participants with little assurance that these markets will resume in any meaningful scale.

Additionally, many aspects of the Proposed Rule, including the proposals concerning risk retention and privately-issued structured finance products, suffer from a "one size fits all" approach that should be recalibrated towards solutions that recognize the significant risk differences among various consumer and commercial credit products. Many of the requirements of the Proposed Rule are neither flexible nor principles-based, but rather are highly prescriptive, and potentially punitive in nature. We believe that unless the Proposed Rule is revised to provide more flexibility, it may be difficult for large institutions that play a central role in restarting and sustaining the credit markets to rationalize continued participation, especially in light of other options available to satisfy their funding and capital needs. If the Proposed Rule is adopted without adjustment, and in a manner that is not sufficiently mindful of harmonization with other proposed regulatory changes, it may also discourage appropriate risk mitigation transactions and reduce credit availability to homeowners, consumers, and Main Street. The alternative to securitization is a banking market funded, to a larger degree, by deposits and wholesale funding – an outcome that would not best facilitate the restoration of credit or the efficient management of bank assets and liabilities. Reversion to such a model, in which banking organizations would increasingly finance long term assets (such as mortgage loans) with shorter term liabilities (such as deposits), creates duration mismatching that has been viewed as a contributing factor to the savings and loan crisis of the 1980s. One lesson of that financial crisis is that a prudent and efficient non-agency securitization marketplace is an important component to assure the availability of consumer and commercial credit.

Unless banks and other business organizations return to more normalized volumes of non-agency securitization activity, we suspect that high concentrations of credit risk will continue to reside with the Federal Housing Administration and the Government National Mortgage Association, institutions regulated by the Federal Housing Finance Agency (Fannie Mae and Freddie Mac) and, in some cases, supported by the United States Treasury, and on the balance sheet of the Federal Reserve. Responsible, efficient, and transparent non-agency securitization markets should be viewed as a powerful tool to help gradually reduce concentrations of these risks in governmental agencies.[1] For this reduction to be effected in scale, workable modernization to market regulation should be developed in a consistent, coordinated way that balances the needs and desires of issuers, investors, financial intermediaries, supervisory authorities, and the public at large. A variety of regulatory perspectives should be addressed in harmony, and one-off prescriptions creating regulatory fragmentation should be resisted in order to avoid, among other things, regulator forum-shopping.

While we provide detailed comments and responses to many of the issues raised by the Commission in the Proposed Rule in ***Schedule A*** annexed to this letter, our principal concerns are outlined in the following summary:

- **Privately-Issued Structured Finance Products**

  The Proposed Rule's requirements concerning unregistered offerings and resales of structured finance products give us the highest degree of concern. In our judgment, some of these proposals contravene important regulatory principles, are at odds with the Commission's historical practices, and risk disruption of existing private financing markets. The Proposed Rule's definition of "structured finance product" requires greater clarity. Many products, including covered bonds, hybrid capital instruments, structured notes, pooled investment vehicles, REIT securities, syndicated financings, municipal tender option bonds, and others could arguably be captured in this definition unintentionally. Unlike the Basel II definition of a "securitization risk exposure," this definition does not appear to require multiple credit tranches, which would be a sensible addition to the definition.

  Safe harbors, including Regulation D and Rule 144A, were established to provide issuers predictability regarding access to statutory registration exemptions. Consistent principles have been established to guide the process of determining if such a safe harbor is appropriate, including the absence of a general solicitation or advertising. The exemption is also limited to an investor base that consists of organizations with an appropriate degree of sophistication and resources such that they can reasonably be expected to bear the risks of an otherwise illiquid security. These safe harbors take great care to define the

[1] The Proposed Rule's suggestions concerning both public registration and privately issued structured finance products, working together, will significantly increase the relative value of the Securities Act's statutory exemptions from registration, including, without limitation, Section 3(a)(2). This proposed evolution may, or may not, be consistent with broader concerns associated with federal housing finance policy objectives.

appropriate characteristics of investors (*i.e.*, qualified institutional buyers, qualified purchasers, and accredited investors) that are able to fend for themselves to serve as a bright line test. In all cases, the antifraud provisions of the federal securities law remain applicable. However, there are minimal prescribed disclosure requirements for these safe harbor transactions. By merging the public and private markets for these products from a disclosure perspective, the Proposed Rule is a fundamental departure from the Commission's precedent of dealing with sophisticated investors. Because of this, the Proposed Rule has the potential for destabilizing certain private financing markets by undermining established exemptive safe harbors. We request that this be reconsidered.

It is not clear that the more expansive disclosure requirements mandated in the Proposed Rule for offerings of Regulation D and Rule 144A structured finance products are likely to produce the intended result. Issuers and underwriters cannot disclose what they themselves do not know. Many of the investors that suffered the most from these products in recent years organized structured finance products as issuers or underwriters, and, in such capacities, had access to all relevant information. This suggests that losses were not caused by information asymmetries that could be cured by additional disclosure, but rather were caused by macroeconomic events or other market corrections outside of the scope of disclosure.

We recommend that the Commission reassess the Proposed Rule's "one size fits all" approach to Regulation D and Rule 144A regulation of structured finance products, and consider a finer risk-adjusted calibration approach to the regulation of these markets. One approach, which is outlined in ***Schedule A and Schedule B*** annexed to this letter, would reserve the extremely burdensome requirements of the proposed rule to the products perceived to contain the greatest amount of risk, apply a new "SQIB" standard for many other traditional securitization products opting for Rule 144A resale, and exempt from coverage those products that should not be covered at all.

- **Conflicting Legal and Regulatory Regimes Should be Avoided**

We support the sentiment underlying the Proposed Rule that securitization markets will benefit from more robust disclosure standards and regulatory modernization. However, we are concerned that a lack of coordination of rulemaking across all federal agencies is likely to lead to, regulatory fragmentation and duplicative requirements, frustrating normal market activity.

The best public policy outcome would be to have regulations addressing disclosure, risk-retention standards, and other matters in a consistent manner. The creation of duplicative and potentially contradictory sets of regulations will unnecessarily frustrate the restoration of the secondary market, and will create unnecessary potential for conflict with other regulators and rules. While a limited number of conflicts regarding operational detail might be workable, the culmination of so many new requirements would likely produce dynamic, unforeseen consequences that could make the entire process unworkable, rather than improving the infrastructure.

The newly passed Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Financial Reform Act") legislation addresses many of the market regulation issues contemplated by the Proposed Rule, but in a somewhat different way. For example, the federal legislation provides for exemptions from risk retention for securitizations of certain high quality residential mortgage loans and for securitizations of certain government insured loans. Rulemaking arising out of this legislation not only is mandated to be performed on an interagency basis, but is also required to be centrally coordinated by the Chairperson of the Financial Stability Oversight Council. Additionally, this legislation wisely mandates two separate studies in order to determine how best to approach risk retention, as well as a review of its potential macroeconomic effects. Likewise, the FDIC is in the process of changing its securitization safe harbor rule for banks, which also contains provisions concerning the market regulation issues contemplated by the Proposed Rule. Additionally, other ongoing regulatory initiatives will influence securitization, including proposals put forth by the Basel Committee. In light of the ongoing evolution of the regulatory environment, we believe that joint rulemaking by all affected federal regulatory agencies is needed, which should be conducted in light of the mandates of the Financial Reform Act.

Risk retention standards illustrate this situation. The Proposed Rule's risk retention requirement is similar to, but not the same as, the risk retention thresholds contemplated in the Financial Reform Act, the FDIC securitization safe harbor rule, the European Union Capital Requirements Directive amendments, and other proposals. It is also unclear what the cumulative, aggregate effects of SEC, FDIC, legislative, and other risk retention requirements, in addition to the FDIC's proposed 5% repurchase reserve, may have on GAAP true sale and non-consolidation analysis. Additionally, the disclosure standards proposed by each of the SEC, the FDIC, and the Financial Reform Act, while similar, are not consistent. It is essential that risk retention regulatory requirements are consistent given the resulting impacts on capital and balance sheet usage.

In addition to regulatory harmonization, in the case of risk retention (together with related issues, including the FDIC's proposed 5% repurchase reserve and certain proposed standards that may have elements of recourse), coordination and evaluation by the accounting community and other professionals should be obtained to ensure that proposed market regulatory standards, working together, do not unintentionally frustrate the ability of securitizers to obtain true sale and off-balance sheet accounting treatment. For example, the Proposed Rule's risk retention requirements do not appear to provide for a sunset. The cumulative impact of all applicable risk retention and other recourse requirements under the various rules upon GAAP sale, GAAP consolidation, and legal true sale conclusions needs to be evaluated together, in a joint, coordinated manner.

While virtually every element of each proposal has merit, when viewed in isolation, we are significantly concerned that harmonization and rationalization across all initiatives and constituencies have not occurred. Accordingly, we urge that joint federal rulemaking be initiated to address these important concerns in a coordinated way that maximizes efficiency and minimizes unintended consequences and regulatory fragmentation.

We agree with the Commission that better rules are needed. We hope that the Commission can agree with us that just one set of better rules will be best.

- **Grandfathering for Legacy Assets**

The unprecedented nature of the recent economic turmoil and its consequences for many financial institutions illustrate the importance of liquidity risk management. Many recent regulatory initiatives have responded by placing a renewed focus on liquidity risk management practices. The importance of preserving reasonable liquidity and funding options for banking organizations requires that the final rule be modified to grandfather not only existing securitization transactions, but also vintage loans and other financial assets originated or acquired prior to the effective date of the Proposed Rule. It may not be possible to satisfy many of the Proposed Rule's requirements for such legacy assets, including those associated with origination loan level data. This impracticability of performance (and, in some cases, impossibility) is exacerbated by the fact that many banks and other organizations own loans that were originated by third parties that may no longer be in business. Accordingly, absent appropriate adjustment, the Proposed Rule would cause otherwise reasonably liquid assets to be illiquid. This result should be disfavored.[2]

- **Expansion of Incidental and Implied Recourse**

One of the core features of securitization is that it structurally bifurcates the credit risk associated with the transferring business organization from the credit risk associated with the transferred loans or assets. This is true even for on-balance sheet transactions in the wake of SFAS 166 and 167. We are concerned that certain aspects of the Proposed Rule do not adequately respect this bifurcation, and unnecessarily create features that might be viewed as credit enhancing representations and warranties or other forms of recourse. Generally speaking, credit enhancing representations and warranties include promises provided to external parties regarding the value or future performance of the collateral transferred. These features could place meaningful stress on legal true sale conclusions, which would result in increased capital costs in transactions that otherwise qualify for off-balance sheet accounting results.

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[2] We also note that the Proposed Rule would subject institutions to unnecessary liquidity and funding risks through significantly increasing the possibility of losing Form SF-3 shelf eligibility, even by virtue of the action or inaction of unrelated third parties, which this letter will address in ***Schedule A***.

One example of this imbalance arises in the proposed certification of the depositor's CEO suggested for Form SF-3 offerings. This would require the depositor's CEO to certify that the securitized assets "have characteristics" that will produce certain results beneficial to the investors. In many, if not most circumstances, the depositor is a common control affiliate of the transferor, and its CEO will also serve as an officer of the transferor. We believe this certification is highly inappropriate for standard securitization transfers. Instead, the CEO certification should be adjusted to speak solely to adequacy of the disclosure of the collateral, structure and other elements of the transaction in question. Likewise, the Proposed Rule would require disclosure concerning the "value" of the underlying collateral in auto and equipment transactions. For the same reasons, this standard will need to be adjusted to specify that such information is not the collateral "value" *per se*, but rather the appraised value or the value as determined by some other commercially reasonable method.

The Proposed Rule also creates greater recourse risks on transferors with the proposed treatment of repurchase obligations. Representations and warranties, working together with repurchase remedies, are a tool used by buyers of goods (including financial instruments) to mitigate the inherent informational asymmetries that exist between buyers and sellers. Representations and warranties allow the buyer to obtain necessary information concerning the goods being purchased, and along with repurchase remedies, provide the buyer with a certain level of contingent recourse against the seller, which compensates the buyer for this irreducible informational imbalance.[3]

The Proposed Rule conditions eligibility for Form SF-3 upon the provision of a third party opinion or certificate that would (i) confirm that a particular event has *not* occurred (*i.e.*, a breach), and (ii) impose the burden of proof on the defendant (the seller), not the alleging party (the investor). The proposed standard turns bedrock common law principles upside down.[4] We believe that the securitization parties should have the flexibility to adopt alternative procedures to resolve disputes related to repurchases, and we recommend a more workable approach in ***Schedule A***.

Additionally, there is no market precedent for third party opinions of this nature, and it remains very unclear what type of professional or organization could provide it, suggesting that its provision should not constitute an absolute requirement for Form SF-3

[3] While not addressed in the Proposed Rule, commentators, investors, or other parties may note in response to your invitation for comment regarding representations and warranties that early payment default repurchase covenants or similar warranties should be made part of the final rule. In anticipation of that request, we note that the interagency Risk-Based Capital Guidelines treat early payment default clauses as credit-enhancing representations and warranties unless they are very narrowly defined and limited.

[4] We note that in footnote 356 and elsewhere, the Proposed Rule refers to the representing/warranting party as the "obligated party." While this characterization may be true for certain purposes, it is not a fair characterization for many other important purposes. In any situation concerning an alleged breach of contract, it is the obligation of the plaintiff, in this case the investor/purchaser, to prove their allegation, and it is not the obligation of the other side to prove that the allegation is improper.

eligibility. The Proposed Rule requires that disclosure of material financial information of certain parties obligated to repurchase assets be provided. We believe this disclosure is inappropriate because the repurchase remedy is merely incidental recourse that addresses operational risks, and is not meant to serve, and investors should not be encouraged to rely upon it, as direct credit support to the transaction.

- **Cash Flow Waterfall Computer Program**

We believe that the Proposed Rule's requirement that the disclosure contain a flow of funds waterfall computer program in the Python language creates many difficulties and uncertainties, both conceptual and technical. At a fundamental level, we believe that it is unprecedented for the Commission to require that disclosure include modeling tools, which are irreducibly subjective, subject to misapplication, require significant judgment concerning assumptions, and may suggest a level of precision that could be inherently misleading. The waterfall computer program, together with a related cash flow engine, would result in mandated disclosure not merely of factual information, and not merely of sensible predictions, but also of an issuer supplied analytical tool that could be used for purposes either wise or unwise. Accordingly, we urge the Commission to reconsider this approach. We will attempt to address our principal concerns here, our conceptual concerns in ***Schedule A*** and our technical concerns in ***Schedule C***.

First, requiring investor disclosure to include modeling tools may produce results that are misleading and inappropriately relied upon by investors.[5] A model can never be perfect. A model is just a mathematical construct which, with the addition of certain variables, describes observed (or expected) phenomena. Models often cover predictions concerning the future, which are inherently subjective. Many statistical models "can suffer from data limitations, erroneous assumptions, inability to sufficiently quantify risks, and potential misuse or misunderstanding of model outputs."[6] With any model, management judgment is fundamental to establish scenarios, determine assumptions, and evaluate courses of action. The Proposed Rule states that the cash flow waterfall program should give effect to all rules (including contingencies) by which available funds are distributed to each tranche of securities, and would produce an output of all cash flows to each party entitled to distributions for the life of the securities. We further understand that at least some investor constituencies believe that this requirement would not permit simplifying

5 During a SIFMA TARP conference in New York during November of 2008, Senator Schumer noted a perceived overreliance on technology and model-based risk management practices as a root cause of the current economic crisis and cited examples of such over-reliance, including rating agency financial models, financial institution risk management models, and automated underwriting models for the extension of credit. Also, on December 8, 2008, then Federal Reserve Governor Kroszner hinted at similar issues concerning adding secondary or "knock-on" effects to computer risk modeling that are often difficult to model with standard techniques.

6 http://www.fdic.gov/regulations/examinations/supervisory/insights/siwin04/economic_capital.html

assumptions. Fundamentally, the model can be made more complex and thus more reflective of reality, or it can be made simpler and easier to handle.

Second, modeling is inherently non-standard and unique and requires specialization to interpret results. We do not believe a one-size-fits-all approach works here. Standardized models may seem appealing, but risk models need to be customized sufficiently to appreciate important differences. Further, we believe the standardization the Commission is targeting will be limited by the wide range of collateral, structures and investors covered by the Proposed Rule. These limitations and detrimental effects of the waterfall model outweigh the perceived benefits.

Third, modeling is generally used as an internal analytical tool for managing risk. Many public companies currently utilize models to assist them in managing important metrics such as value at risk and capital levels (whether economic capital, regulatory capital, rating agency capital, or otherwise). To our knowledge, no operating company is required to include these models in their SEC reporting, to allow investors to utilize them, or to assume Securities Act liability for them. These tools are neither well-suited for broad distribution nor appropriate for Securities Act liability given their potential to be misunderstood.

Finally, if the Commission nevertheless proceeds with this requirement, it is not clear how the application of the federal securities laws will apply to this tool, or how issuers will mitigate the associated risks. The market is not confident how programming errors or omissions can best be determined or how comfort could be provided (and by whom). It appears to be questionable policy to dictate this requirement when there is no precedent or clarity on how to confirm accuracy, or how professional third parties can provide comfort. The liability profile for this proposed disclosure requires a calibrated approach, perhaps with a Rule 10b-5 liability standard only associated with the waterfall program, in a manner akin to the liability standard for certain static pool disclosure under the original Regulation AB Item 1105. Such an accommodation is particularly appropriate in a case such as this, where there is no market, legal, or technical precedent for Securities Act disclosure of this nature, and no other market is encumbered with this burden. Additionally, the outputs of the waterfall computer model, like the textual description of the waterfall in the prospectus, must be qualified in their entirety by the disclosure in the rest of the offering document.

- **Disclosure Modernization**

The Proposed Rule correctly places a high importance on increasing the quantity and quality of disclosure in the securitization markets. We are supportive of many of these elements of the Proposed Rule, and provide detailed comments to the particular data elements on ***Schedule A*** annexed to this letter. However, many of the data fields in the Proposed Rule call for information that has not been disclosed previously, and lenders may not have adequate systems in place to capture this data. In some cases, capturing the new data requirements will be difficult and costly, possibly driving some issuers out of these markets. The uncertainty associated with the costs and other burdens of building the infrastructure to capture all of this information will need to be rationalized in an environment where the non-agency securitization markets are not currently robust. Additionally, unlike the original Regulation AB, the Proposed Rule's requirements concerning data disclosure are highly prescriptive, which creates a standard of inflexibility that will make them quickly outdated. We also note that many of the required data fields are not, and have not been, captured by lending organizations and other portfolio lenders, suggesting that while some investors may suspect that the information would be helpful, the lack of any historic reliance on some of this data suggests that it may be *per se* immaterial. Additionally, excessive quantitative data requirements carry risks of their own. For example, the total mix of disclosure should clearly and simply emphasize the most material elements of disclosure, which can be buried in detail where too much extraneous material is mandated.

- **Implementation Time Frame**

The SEC should establish a workable implementation time frame for compliance with the Proposed Rule that is mindful of the ongoing process concerning other related developments. A significant implementation time frame will be required to put operational processes into place to comply with the Proposed Rule. Solely by way of example, we believe few, if any, organizations are currently capable of supporting the asset level disclosure requirements in the Proposed Rule. The time and expense required to build the infrastructure to support these mandates will be significant. We also note that the SEC requirements may differ from similar FDIC requirements, and that each of these sets of requirements may differ from other regulatory requirements. This works together to complicate speedy practical movement towards compliance. Original Regulation AB required about 12 months for implementation, and that regulatory burden was substantially less significant. We also note that the Financial Reform Act's provisions concerning credit risk retention call for regulations to be jointly prescribed within 270 days after enactment, with effectiveness one year after publication of final rules for residential mortgage backed securities, and two years after publication for other asset types. We request that the staff accommodate broad harmonization concerning the various implementation time frames and other process concerns, as well as with more substantive elements.

Securitization, when used prudently, can serve a very important function in providing liquidity to the credit markets. We urge the Commission to act in concert with Congress, the federal banking agencies, and other regulators to strike the right balance between appropriate regulation of structured finance products, including the Commission's role in assuring adequate investor disclosure, and maintaining efficient and sustainable capital markets for securitization and structured products necessary to ensure adequate consumer and commercial credit availability and to promote economic growth.

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We appreciate the opportunity to comment on the Proposed Rule. If the Commission or its staff has questions regarding the comments contained herein, you may contact David B. Rich III, Associate General Counsel and Managing Director – Corporate Law at (980) 388-7449 or at david.rich@bankofamerica.com, or the undersigned and we would be happy to address them.

Respectfully submitted,

Gregory A. Baer / by [illegible]

Gregory A. Baer
Deputy General Counsel – Corporate Law

Schedule A

Enclosed are our specific comments and answers to many of the questions posed by the Commission in its request for comments.

I. Securities Act Registration

A. New Registration Procedures and Forms for Asset-Backed Securities

1. New Shelf Registration Procedures

a) Rule 424(h) Filing

We generally support the Commission's stated goal of allowing investors more time to review transaction-specific information in order to make informed investment decisions. We appreciate that the Commission is attempting to balance the need of investors with the interest of ABS issuers to have quick access to the capital markets by requiring that the preliminary prospectus be filed five business days before the first sale of securities in the offering. However, the proposed five business days (which in practice can translate into eight calendar days in some instances) does not strike the appropriate balance because it provides more time than investors need to consider the preliminary prospectus and has the potential of causing significant disruptions to transaction timing. Two business days should be adequate for investors to review information contained in the preliminary prospectus. Additionally, in practice, substantial information regarding transaction structure and pool assets may be provided to investors during marketing, including discussions to tailor characteristics of securities to investor preferences. The proposed Rule 424(h) will eliminate this type of capacity since the entire structure will need to be established five business days prior to the first sale of securities. In the case of a material change in the information provided in the Rule 424(h) filing, we suggest that no additional mandatory waiting period be imposed. Rather, we suggest that Securities Act Rule 159 would continue to provide adequate protections by promoting the delivery of updated information in a manner that provides investors with an opportunity to evaluate the disclosure prior to entering into a contract of sale.

b) New Rule 430D

We support the aspects of proposed Rule 430D that require all information for the specific asset-backed securities takedown to be included in the preliminary prospectus except certain price dependent information. It is practical and necessary for pricing information to be excluded since the preliminary prospectus must be delivered prior to the first sale.

However, we disagree with the Commission's proposal in Rule 430D to restart the five business days waiting period when there is a material change to the preliminary prospectus. In most cases, a material change can be easily identified and reviewed and will not take investors the same amount of time to consider as compared to the review of the entire preliminary prospectus. An additional one business day should be adequate time for investors to review material changes. Additionally, we would suggest that the Commission take into account the effect of the change to the disclosure and the resulting time it would take investors to consider that change rather than the economic impact or materiality of the change. For example, a change in payment priority may be significant, but can be easily described in the preliminary prospectus whereas a change in the asset pool may affect tabular information and references throughout the preliminary prospectus, which may require the investor more time to digest.

In addition, we suggest that an accommodation is required for transactions involving derivative contracts, such as interest rate or currency swaps. In these cases, the preliminary prospectus or free writing prospectus could not include information relating to a specific swap counterparty or other information dependent on the pricing of the derivative because, as a protection for market risk associated with the offered securities, the optimal pricing of the derivative and the counterparty with the most competitive bid cannot be determined by the issuer until the time of pricing for the offered securities. As a result, for transactions involving derivative instruments, Rule 430D should be modified to permit an issuer to omit a limited amount of information relating to the specific derivative counterparty and information dependent on the pricing of the derivative instrument from the Rule 424(h) filing, as long as this information is conveyed to investors by the time they enter into contracts of sale.

2. Proposed Forms SF-1 and SF-3

We support the use of newly proposed SF-1 and SF-3 registration forms, which will be more specifically tailored to ABS transactions. We also support the proposed requirement to file one integrated prospectus rather than a base prospectus and a prospectus supplement for each takedown. However, we would recommend that the SEC not repeal, as proposed, the existing exemption for Item 6.05 Form 8-K reports from loss of shelf eligibility for untimely filings. Since the Commission is proposing to lower the threshold amount of change that would trigger the filing of an Item 6.05 Form 8-K report from 5% of any material pool characteristic to 1%, loss of shelf use for one year for an untimely filing of such a report would be an unduly harsh result.

3. Shelf Eligibility for Delayed Offerings

We generally support the Commission's goals to enhance the quality of assets included in asset pools by proposing new shelf eligibility standards. However, we are uncertain that replacing the investment grade credit rating standard with the four newly-proposed criteria is the most appropriate way to accomplish this goal.

a) Risk Retention

We generally support the Commission's aim to encourage the securitization of higher quality assets by aligning incentives of sponsors with investors. However, the Proposed Rule's requirements concerning risk retention should be reevaluated from the perspectives of both process and substance. While we understand that the future of the securitization markets will include risk retention, the contours of this obligation would benefit from further refinement.

Process. In light of the various principles set forth in the Financial Reform Act, the Commission should harmonize any proposed risk retention requirements with the federal legislation and the initiatives of other federal regulatory agencies, including the FDIC, to avoid duplicative and conflicting requirements. Market regulation of securitization transactions should be done in a collaborative and coordinated way, which facilitates the core credit intermediation functions of banking organizations. A single, national standard arising out of the Financial Reform Act, and implemented by joint interagency regulatory rulemaking will best achieve the Commission's goals. For example, the Commission's goal of promoting higher quality assets is addressed in the Financial Reform Act, which, unlike the Proposed Rule, does not require securitizers to retain credit risk in transactions involving certain high quality qualified residential mortgage loans. The Financial Reform Act also accounts for the variability in asset types, like commercial mortgage-backed securities ("CMBS") where retention may be potentially satisfied through a third-party purchaser's (*i.e.,* B-piece buyer's) retention of the first-loss piece, consistent with current CMBS market practice. A fragmented approach to regulating these markets, in which various regulatory bodies codify slightly different rules governing the exact same subject matter, is likely to produce inefficient results for the securitization markets.

Substance. Risk retention standards need to be practical and flexible, and should recognize that there are many paths to the mountaintop. Various policy proposals have been advanced by Congress, the FDIC, the Commission, and others. While each proposal addresses the same subject matter and each share certain elements, these proposed standards all differ in varying degrees. When securitization risk retention standards are finally codified, regulators should resist applying rigid mandates and allow for a variety of forms of compliance. We believe the objective of aligning incentives can be accomplished with a flexible approach that allows for:

1. Vertical Slice: Retention of a minimum of 5% of the nominal amount of each of the tranches sold or transferred to investors, net of credit hedge positions directly related to the securities or exposures taken by the sponsor or an affiliate.

2. Horizontal Slice: Retention of a portion of the nominal amount of a specified tranche or tranches that represent a minimum of 5% of the aggregate nominal amount of all tranches, net of credit hedge positions directly related to the securities or exposures taken by the sponsor or an affiliate.

3. Originator's Interest: In the case of revolving asset master trusts, retention of the originator's interest of a minimum of 5% of the nominal amount of the securitized exposures, net of credit hedge positions directly related to the securities or exposures taken by the sponsor or an affiliate; provided that the originator's interest and securities held by investors are collectively backed by the same pool of receivables and the originator's interest ranks pari passu with the investors' interest in the pool of receivables.

4. Random Exposures: Retention of randomly selected exposures that represent the same credit risk as the securitized exposures and that represent a minimum of 5% of the nominal amount of the securitized exposures, net of credit hedge positions directly related to the

exposures retained by the sponsor or an affiliate. For example, randomly select and retain $5 million of a pool of $105 million in loans and then securitize the remaining $100 million in loans.

5. Third Party Purchaser: Retention of the first loss position by a third party purchaser that specifically negotiates for it and performs diligence on the entire pool of assets, in a manner similar to the existing practice in the CMBS market.

6. Representations and Warranties: Provision of robust representations and warranties and related enforcement mechanisms.

7. Qualified Residential Mortgages: Securitization of high quality qualified residential mortgage loans in a manner consistent with the standards established in the Financial Reform Act should be exempt to the same degree as called for under the legislation and related rulemaking. This approach empowers the Commission to remain mindful of the importance of coordination with the larger issues associated with national housing finance policy objectives.

8. Government Credit: Securitization of loans or securities issued or guaranteed by the United States government or an agency of the government, in a manner consistent with the standards established in the Financial Reform Act should be exempt to the same degree as called for under the legislation and related rulemaking.

9. Other Options: The final rule should also accommodate other exceptions, calibrations, and qualifications to required risk retention to comport with developments that become established during the rulemaking that will occur under the Financial Reform Act. Additionally, risk retention should be permitted to occur through some combination of the various methods described above working together.

A "one-size-fits-all" approach will not produce the best results.

Other Concerns. It is presently not clear how risk retention requirements will affect financial and regulatory accounting treatment (including application of the Basel standards) and legal true sale analysis, which affect a sponsor's regulatory capital requirements and FDIC safe harbor protections. Although the Commission states that it does not believe that the risk retention in itself will require the consolidation of the securitization entity onto the sponsor's balance sheet, it concludes that final determinations are facts-and-circumstances-based, leaving open the question of whether a sponsor may have increased capital costs as a result of the required retention requirement. Further study is needed, and is mandated by the Financial Reform Act, concerning risk retention, its consequences to balance sheets and bank capital, as well as its potential macroeconomic effects.

b) <u>Third Party Review of Repurchase Obligations</u>

We generally support the Commission's desire to provide investors with stronger enforcement mechanisms for representations and warranties. However, the third-party repurchase opinion will not adequately address investor concerns in this respect because it will not resolve the issue of enforcement when parties disagree on the legitimacy of a breach claim. For instance, if the obligated party obtains a legal opinion that a breach has not occurred, but the trustee for the transaction disagrees and would like to continue to pursue the repurchase, the proposed rules do not address how to resolve this situation.

From a practical perspective, it is uncertain a third-party repurchase opinion is a workable standard because it is doubtful that a third party would be able to provide such an opinion. The third party would not only need to make a technical assessment that the representation or warranty has been breached, but also must assess the less objective determination of whether the breach is material and adverse. It is not likely that such an opinion will be forthcoming given the research, due diligence and other steps a third party would need to undertake to determine this.

A better approach is to consider the current imperfections in the enforcement mechanisms and determine how these can be addressed. These imperfections include the lack of a party tasked with investigating whether a breach has occurred, the absence of an obligated party to provide relevant information with respect to the underwriting files and the absence of an effective mechanism for resolving disputes. To address these concerns, we generally support SIFMA's proposed approach to have an independent third party, which would have access to all information related to the underwriting of the assets, intermediate repurchase requests, determine whether an assertion of breach is appropriate, process repurchase claims, and, when impasse situations arise, have the ability to refer such claims to binding arbitration. Claims that reach binding arbitration would be subject to a "loser pays" standard concerning all costs and expenses.

c) Certification of the Depositor's Chief Executive Officer

The proposed certification from the depositor's chief executive officer is not appropriate, as a trigger for shelf eligibility criteria or as any other eligibility requirement. The Proposed Rule would require that the depositor's CEO certify that the securitized assets "have characteristics" that will produce certain results beneficial to the investors. We believe this certification is highly inappropriate for standard securitization transfers. This aspect of the Proposed Rule does not adequately respect the bifurcation between company credit and asset credit that lies at the heart of securitization. Accordingly, it will unnecessarily create features that might be viewed as credit enhancing representations and warranties or other form of recourse because this certification provides assurances to investors concerning the future performance of the collateral transferred. These features will also place meaningful stress on legal true sale conclusions, which can result in increased capital costs in transactions that otherwise qualify for off-balance sheet accounting results. The Commission's commentary that this certification is not intended to serve as a guarantee does not assuage these concerns, as credit enhancing representations and warranties or other direct credit substitutes need not be guarantees.

Moreover, this proposed requirement is inconsistent with the Commission's intent that investors be given the appropriate tools to make their own investment decisions rather than rely on third-party assessments. Accordingly, the proposed certification is not necessary since the comprehensive disclosure regime proposed by the Commission will enable investors to analyze cash flow and other information regarding the underlying pool assets.

Additionally, it is unreasonable for the Commission to expect an officer of the depositor to predict or express a view as to the performance of a discrete pool of receivables. Numerous subjective factors that are inherent with ownership of the assets may influence cash flows. While most securitization transactions enjoy debt characterization for federal income tax purposes, and are treated as fixed income securities in the markets, the Commission should remain mindful that most structures, from a legal perspective, pass through equity ownership interests in discrete or revolving pools of assets. As is the case with other equity or ownership investments, it would not be appropriate or sensible for the seller to provide certified assurances to the investor concerning investment results.

Therefore, to the extent the Commission deems a certification is necessary, we request the Commission consider a certification tailored to the required disclosures and not the performance of the assets. The officer of the depositor could certify that based on the officer's knowledge, the prospectus and the other information in the registration statement fairly present in all material respects the characteristics of the securitized assets backing the securities and the risks of ownership attendant to the securities, and that the prospectus and the other information in the registration statement does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading. The due diligence defense should be available to the depositor's officer certifying these matters. There should also be an express disclaimer that the certification does not guarantee future performance of pooled assets.

d) <u>Undertaking to File Ongoing Reports</u>

We generally support the Commission's desire to provide investors with more access to information on an ongoing basis. However, it is important that the reporting burden be manageable and not routinely result in shelf ineligibility. We believe that the proposal to require issuers in delayed shelf offerings to continue to file reports required under Section 15(d) of the Exchange Act as long as non-affiliates of the depositor hold any of the issued securities will create an undue burden on issuers without significantly enhancing protections already available to investors in these transactions.

Since one or more classes of an ABS security may be held by non-affiliates of the depositor, linking the ongoing Section 15(d) reporting requirements to this condition effectively requires Section 15(d) reporting for the life of the transaction. We believe the better approach is to modify the current rules permitting Section 15(d) reporting to be terminated after one year by extending this time period to a practical intermediate period such as three years. This will strike a balance between protecting the interests of the investor, on the one hand, and the burden on, and expense to, issuers in preparing and filing such reports on the other hand.

We also suggest a degree of reconsideration concerning the consequences from delays in filing, or failures to file, Exchange Act reports that result from circumstances beyond a registrant's control. If legitimate efforts are made to file Exchange Act reports, but imperfections result due to circumstances beyond the registrant's control (or the control of its common control affiliates), these events should be viewed as involuntary and, accordingly, should not affect Form SF-3 eligibility. We believe this approach is fully consistent with existing informal positions taken by the staff. This clarification has heightened importance because under the Proposed Rule Exchange Act reporting will continue without suspension, and Form SF-3 eligibility will continue to be based on timely Exchange Act compliance.

e) Other Proposed Form SF-3 Requirements

Generally, we reiterate the same comments and concerns with respect to the substance of the Form SF-3 registrant requirements as those set forth above for the shelf eligibility requirements. In order for securitization products to be eligible for shelf offerings, there is already an eligibility review at the time of a takedown. It appears that having registrant requirements in addition to the shelf eligibility requirements permits the Commission to conduct more frequent testing of eligibility.

Currently, a registrant's eligibility to use an ABS shelf is only measured at the time that a new shelf is filed. The Commission is proposing to change the timing by requiring an annual check on the registrant's compliance with Exchange Act periodic reporting requirements and quarterly checks on the registrant's compliance with the four new eligibility requirements as discussed above. A registrant would not be permitted to use an existing shelf in a particular fiscal year or quarter if it had failed to comply with the required items during the prior corresponding period. The imposition of this more frequent testing will create unnecessary and duplicative requirements.

The proposed penalties for compliance failures will also be extremely harsh. Loss of shelf use for a full year due to a single late Exchange Act filing or a single late filing of a CEO certification or transaction document will produce a draconian result. Therefore, we assert that loss of shelf use should not be an automatic occurrence but rather upon a determination by the Commission following a mechanism whereby the issuer may explain the reason for the compliance failure. A one-year loss of shelf use should be imposed only for the most egregious compliance failures. As noted above, there exists a strong public policy goal concerning preserving reasonable liquidity and funding options for banking organizations. These liquidity and funding options may experience a high, or at least highly increased, risk of uncertainty because of the proposed expansion of Form SF-3 eligibility standards. The Commission's concerns regarding sensible compliance with shelf eligibility criteria need to be balanced against this and other competing public policy goals. In our judgment, this balance will be better satisfied through a more calibrated, and less punitive, approach.

We also request the Commission clarify the filing deadline for transaction documents. In some cases, transaction documents must be corrected after filing in order to rectify an error or to conform the terms to the prospectus. The Commission should clarify that such revised documents should not be viewed as untimely filed.

Additionally, we request that the Commission provide limited relief with respect to certain existing requirements for the filing of current reports on Form 8-K. Some events that trigger reporting are outside the control of the issuer and may not be known to the issuer prior to the reporting deadline.

Therefore, we request that an event triggering such reporting be predicated upon the issuer's knowledge or receipt of notice of such occurrences.

B. <u>Exchange Act Rule 15c2-8(b)</u>

We support the Proposed Rule's standards concerning changes to Exchange Act Rule 15c2-8(b).

C. <u>Including Information in the Form of Prospectus in the Registration Statement</u>

We support the Proposed Rule's standards concerning the requirement to file a single prospectus for each transaction that would include all required information.

With respect to the proposed requirement for the issuer to file any information that relates to new structural features or credit enhancement by post-effective amendment, we request that the Commission be more specific as to what are considered "structural features." We are concerned that the term "structural feature" is too broad and vague to use as a trigger for a post-effective amendment requirement. While some new structural features are important enough to justify that step, the term could also be read as encompassing some minor adjustments that clearly would not have required a post-effective amendment under the current standard.

D. <u>Pay-As-You-Go Registration Fees</u>

We support the "pay-as-you-go" feature for registration fees. This proposal will provide additional flexibility for issuers. Additionally, unused fees should be applied to future registration statements by the depositor or affiliates of the depositor.

E. <u>Signature Pages</u>

We support the exemption of ABS issuers from the requirement that the depositor's principal accounting officer or controller sign the registration statement since ABS issuers are not required to file financial statements. Having the senior officer in charge of the securitization of the depositor sign the registration statement for ABS issuers seems appropriate.

II. <u>Disclosure Requirements</u>

We support the Commission's desire to provide investors with additional disclosure regarding pool asset characteristics and performance. However, the Proposed Rules will greatly expand the amount of information regarding the securitized asset pool that is made available to investors, both at the time of the initial offering and on an ongoing basis. Issuers of most types of ABS would be required to provide the applicable standardized asset-level data points listed on Schedule L of the Proposed Rule. Our primary issues of concern for residential mortgage-backed securities ("<u>RMBS</u>"), auto loan or auto lease-backed securities ("<u>Auto ABS</u>"), commercial mortgage-backed securities ("<u>CMBS</u>") and credit card receivables-backed securities ("<u>Card ABS</u>") are addressed below. Due to the significant quantity and detail of the asset level data requirements contained in the Proposed Rule, as a general matter we recommend, consistent with Securities Act Rule 409, a "comply-or-explain" regime in which data would either be disclosed, or, if not disclosed, the basis for refraining from providing disclosure would be provided. Additionally, as noted previously, loans and other assets originated prior to the effective date of the final rule should grandfathered.

A. Asset-Level Information

1. RMBS

The Proposed Rule provides for asset-level disclosure of underwriting exceptions that are defined in Item 1(a)(19) of Schedule L. The definition for the data to be provided in response to Item 1(a)(19) requires disclosure of "whether the loan or asset made was an exception to a defined and/or standardized set of underwriting criteria." While we are aware of the Commission's views regarding the importance of disclosing such exceptions, we believe that the substantial expenditure of time and resources for system changes required to enable issuers to provide such disclosures are not necessary or desired. However, to the extent the Commission feels such disclosures are warranted, we request the Commission more precisely define what is considered "defined and/or standardized set of underwriting criteria" to avoid confusion in the marketplace. We believe that the Commission is seeking to have issuers provide asset-level disclosure regarding the existence of underwriting exceptions that correlates with the pool-level disclosure regarding exceptions from the disclosed underwriting criteria amendment to Item 1111 and request that the Commission either confirm or correct that understanding in the final rule. The issues and uncertainties with respect to the pool-level disclosure of underwriting exceptions proposed in the amendment to Item 1111 are discussed below in our comments to the pool-level information requirements.

The Commission has requested comment on several issues relating to its proposal to amend Item 1111 to specify that disclosure regarding the underwriting of assets that deviate from the disclosed origination standards must be accompanied by specific data about the amount and characteristics of those assets that did not meet the disclosed standards. This proposed disclosure requirement, if implemented, will be one of the most difficult and expensive new requirements in the Proposed Rule. Most originators have not historically captured data regarding the existence of exceptions to guidelines or the related compensating factors and do not currently have systems in place to do so. For most originators, to capture this data currently would require a manual review of each credit file that in many cases would not reveal the existence of the compensating factor used to support the exception because that compensating factor was not required to be documented at the time the asset was originated. While originators should have an opportunity to build data capture systems to meet the underwriting exception disclosure requirements in the final rule, they must know what specific underwriting exception and compensating factor data must be captured.

It is not clear to us whether "disclosed origination standards" mean the material underwriting criteria that are summarized in the prospectus or the complete underwriting manual used by originators to administer the origination of financial assets (which are typically hundreds of pages long and freely intersperse operational requirements with credit and collateral requirements) or something else altogether. Since underwriting manuals are not provided to investors and are too detailed for purposes of determining which criteria must be captured for disclosure as exceptions or compensating factors, we assume that the Commission is seeking to have issuers provide disclosure regarding the existence of exceptions to the underwriting criteria disclosed in the prospectus and any related compensating factors. We request that the Commission clarify this issue in the final rule.

The Commission also has requested comment on whether the disclosure requirement regarding an originator's risk layering practices under Item 1111 is clear. We believe the disclosure requirement is somewhat ambiguous. The text of the commentary to the Proposed Rule suggests that the risk-layering practices that should be disclosed are limited to the existence of multiple non-traditional features of a loan that are present in one instrument but Footnote 333 suggests that other characteristics of that instrument, such as the geographic location of the collateral, would also need to be considered in the disclosure of risk-layering practices. Because there is no indication of what makes a geographic location a non-traditional feature, or, for that matter, what asset features are "non-traditional," it is not clear what combination of features needs to be disclosed under Item 1111 regarding an originator's risk-layering practices. We believe the Commission should either specify the criteria that it believes to be non-traditional or provide that such disclosure obligation relates solely to single-family residential mortgage loans and the determination of non-traditional criteria shall be made in accordance with current guidance provided by federal banking regulators.

Further, several of the proposed disclosure items in Schedule L requires further consideration. For instance, Item 2(a)(9) of Schedule L requires disclosure of whether a broker was involved in the origination of a loan. We do not believe that it is possible to consistently and reliably capture whether a broker filled out an application for a borrower and are concerned that this disclosure field will be unreliable and potentially misleading. Investors would be better served by analyzing the channel field (Item 2(a)(10)) and making conservative assumptions regarding the involvement of brokers for loans originated by correspondents than relying on potentially inconsistent or unreliable data regarding broker involvement in the origination of a loan.

The asset-level disclosures in Item 2 of the Proposed Rule contain several fields relating to borrower information without identifying the disclosure convention to be followed when there are multiple borrowers. We propose that those fields, which include Items 2(c)(1) – 2(c)(12), 2(c)(22), 2(c)(23) and 2(c)(26) – 2(c)(31), use a uniform convention for disclosure in such fields. We recommend that if there are multiple borrowers and the required data can be aggregated (*ie.,* income or assets), the aggregated data be disclosed. If the data cannot be aggregated (*ie.,* month of bankruptcy or foreclosure, debt-to-income), the most conservative value for any of the borrowers should be disclosed.

Additionally, numerous disclosure items in Schedule L relate to information that is obtained from borrowers, and verified to the extent provided by an originator's underwriting policies and procedures in the application and underwriting process. Such information is not subsequently updated or verified by originators or servicers in the normal course of business. We believe that the titles and definitions for the fields that contain such data should include a clarifying phrase such as "used for underwriting" to eliminate ambiguity regarding the data that is being disclosed. This comment would apply to Items 2(a)(16), 2(b)(15), 2(c)(13), 2(c)(14), 2(c)(18), 2(c)(21) and 2(c)(26) – 2(c)(31).

2. Auto ABS

The data requirements in the Proposed Rule present data availability, legal and applicability concerns for auto ABS. Generally, we are concerned that the requirements will result in more disclosure than investors require; and in certain cases, disclosure that is inconsistent with the way the asset class is underwritten, rated and serviced. While we feel the Commission effectively identified enhancements that would improve investor transparency, we present below five areas of concern.

First, loan level data is not appropriate for prime auto securitizations and investors have not broadly requested it. Issuers in prime auto securitizations typically provide rating agencies and investors with pool stratifications and rep lines rather than individual loan tapes. A typical $1 billion auto issuance may include between 50,000 and 70,000 individual loan records and providing such data would prove unwieldy for the issuer and end users. Aggregated data is easier to digest, and does not advantage larger and more sophisticated investors who may have more data processing capabilities to analyze granular loan data. Furthermore, loan level data exposes issuers to disclosing proprietary information on underwriting scorecards and business strategies. The ability to link a vehicle model, make and dealership information to an obligor's financial data, location and credit score creates a robust dataset for competitors to utilize in reverse engineering issuer strategies. For example, if there is only one dealership that operates within a zip code (dealer zip code is a new required field), it would now be possible to ascertain pricing and underwriting strategies applied to that dealership. We recommend that the Commission consider treating auto loans more like credit cards by allowing issuers to disclose pool level data and rep lines. The Commission should focus on standardizing the stratification categories to provide the consistency and transparency that investors desire. In support of promoting increased transparency based on market feedback, our auto securitizations to date have included more pool level stratification than is generally provided for similar auto securitizations across the market.

Second, certain disclosure requirements are not applicable to prime auto issuers. We ask that the Commission reconsider the applicability of certain data requirements which appear to have been drafted utilizing a residential mortgage template. In certain cases, an issuer will be unable to comply with the Proposed Rule if it is unchanged. We provide the following two examples. Verification of income, employment or assets (Items 4(c)(7) through 4(c)(14)) is not commonly conducted for prime auto loans which are most often either approved automatically or declined based on comparing the loan application and credit file to internal underwriting scorecards. Issuers generally would not be able to comprehensively provide information on a loan level to support this request. Additionally, MSA (Item 4(c)(21)) is a mortgage based construct that is not considered by investors or rating agencies when rating or assessing auto ABS. MSA level information is simply not captured or reported in this sector. More broadly, the Commission should consider customizing disclosure requirements to better fit specific asset classes, and potentially may want to consider distinguishing between prime and non-prime issuers (*e.g.*, a non-prime issuer require income verification while a prime issuer may not). We do not believe it is the

Commission's intent to require the prime auto sector to change underwriting policy (*e.g.*, the capture of income verification) to meet securitization requirements.

Third, certain disclosure requirements proposed would require significant system re-programming and technological investment. Throughout the proposed disclosure changes, the Commission requests data that is either not currently available in the servicing system or would require significant efforts to extract at a loan level. For example, current payment status (Item 4(b)(7)) is not currently calculated in the manner discussed in the Proposed Rule. Additionally, obligor wage income fields (Items 4(c)(15) through 4(c)(20)) are not currently provided in the servicing system. The Commission should consider the programming efforts and costs required to extract data into the appropriate reporting systems when contemplating implementation timeframes. It may also be prudent to allow issuers (with approval from the Commission) to report exceptions or deferrals in cases where non-crucial data cannot be provided in the exact manner contemplated by the Proposed Rule. Such latitude would ease transition concerns and is consistent with Regulation AB which permits concessions when data requests require significant cost or effort.

Fourth, we would request further clarity to certain disclosure requirements. We want to confirm that "Originator" as defined in Item 1(a)(4) is the bank or finance company that underwrites the loan and not the dealership where the loan is originated. Additionally, it is unclear if "Asset Maturity Date" in Item 1(a)(8) is current or original. There is also uncertainty around the calculation for Items 1(b)(4) through 1(b)(6), specifically whether "Current Payment Due" and "Full Scheduled Payment" include past dues or fees. This may require significant programming if all such fees are included. The Commission should be mindful that the "Vehicle Type" designation may be interpreted differently by different issuers. Lastly, the categories stated in the Proposed Rule are not fully consistent with our categorizations and we request the Commission provide flexibility in this regard.

Finally, with respect to the underwriting exception disclosure (Item 1(a)(19)), we ask the Commission to consider permitting issuers to disclose their general exception experience and if the securitized pool deviates materially from such experience. Underwriting exceptions are not uncommon in the auto sector; however "normal" exception behavior for issuers may vary depending on their general underwriting guidelines (*e.g.,* tighter underwriting with more exceptions versus looser underwriting with fewer exceptions.)

3. CMBS

Most CMBS transactions include asset-level information as part of the prospectus, typically referred to as "Annex A" in the CMBS transaction disclosure package. Therefore, it is appropriate to require asset-level information at the time of disclosure.

The CMBS industry currently provides extensive reporting of asset-level data at the time of issuance in Annex A to the prospectus based on the specific types of commercial loans in the transaction. As the commercial assets are unique, and are not generally as uniform as many other asset types, the type of asset-level information provided in Annex A may vary based on the properties and loans offered in the transaction, however the vast majority of the relevant data points in Schedule L are already provided for in Annex A. Additionally, the issuer will provide further spreadsheets and disclosure to augment the general asset-level data in Annex A to highlight unique attributes of the transaction, including for example, information on the debt service payment schedule for the largest loans, detailed reserve account information, detailed characteristics of the commercial mortgage loans and/or information at the pool level on the loans (including cut-off balances, mortgage rates, terms to maturity, debt service coverage ratio, cut-off and maturity date, and LTV). CMBS typically will also provide significant details, including asset-level data, on the top ten loans (by unpaid principal balance) in the prospectus. We believe it is preferable that the Commission require asset-level disclosure generally, but allow the industry to set the requirements for disclosure in the prospectus. Requiring a separate Schedule L would be repetitive of the relevant information already provided in Annex A. To the extent there are specific additional data points investors or the Commission believe should be required, they can be added to Annex A.

With respect to asset-level monthly reporting, the CMBS industry has already independently established a strong foundation for monthly reporting on asset performance via the Investor Reporting Package (the "IRP"). The IRP is a consensus standard that encompasses the culmination of viewpoints from all CMBS industry participants, including servicers, trustees and investors, and has been widely adopted. Further, the IRP is an evolving document, where the industry dictates changes to reflect the current market standards in reporting, and has been revised numerous times over the years to meet the needs of the changing market. The CMBS industry has and will continue to modify the IRP when data points and other information become more or less relevant to investors. Thus, the IRP is the most appropriate reporting standard for CMBS transactions.

If the Commission elects not to require reporting under the revisions to Regulation AB, the CMBS industry will continue to provide the extensive IRP for its investors. Therefore, we believe the CMBS industry does not require regulation to increase disclosure. CMBS investors will continue to look to the IRP and its third party data providers for information on asset performance. The Commission's proposed data points significantly overlap with the IRP, but the IRP generally offers more information and gives investors a more robust look at the assets.

Further, the CMBS industry, based on the contractual obligations in the pooling and servicing agreements, typically provides the IRP to the CMBS investors on the same day as the monthly distribution to investor. Therefore, based on the submission timing (with the Form 10-D filing) of the information suggested by the Commission, the investors will receive the IRP 15 days prior to the receipt of the SEC reports.

Based on the overlap of the data suggested by the Commission, coupled with the Schedule L-D reporting timing, the IRP should continue to be the CMBS industry standard and is the most appropriate vehicle for reporting asset-level performance information to CMBS investors. Thus, we recommend that the Commission not require the delivery of Schedule L-D when the information is already being provided in an industry agreed upon format.

If the Commission nevertheless requires the CMBS industry to provide Schedule L-D, we request that the Commission consider using the standard codes and definitions established by the IRP. As the IRP has already defined many of the same or similar terms used by the Commission in the Proposed Rule, we recommend the Commission adoption of the IRP definition of terms, especially when considering CMBS specific data requirements that do not impact other asset types. The IRP codes are used on multiple IRP data files, reports and templates; thereby creating consistency across the entire IRP. To use separate or different codes for the Commission requested data points on Schedule L-D would interrupt that consistency of the information on the IRP and could create confusion for the CMBS investor. Further, the use of new or different codes will not allow the CMBS investor to compare its past deals (with IRP codes) to its future deals (with the new Commission suggested codes). Ultimately, there is concern about the inconsistency and lack of comparable data that will be created by adopting the Commission's suggestion to introduce new terms on Schedule L-D.

Additionally, we believe that the Commission should not define delinquency across all asset classes. The term delinquency can vary based on asset types and we believe the Commission should not attempt to redefine delinquency to meet the requirements of all assets. The term would simply end up being defined broadly and generally, which will not tie into any asset type definition, or as identified already in the Commission's question, could potentially be defined in a manner not congruent with the current servicing systems of record. The CMBS industry has already developed a definition of delinquency for its reporting requirements under the IRP that is agreed upon across this industry.

4. Credit Card ABS

The level of detailed disclosure in the Proposed Rules would require issuers of credit card ABS to disclose proprietary information about origination, underwriting and pricing models that are central to the profitability of the credit card business. The disclosure requirement may potentially eliminate securitization issuance as a funding source for the credit card business. Larger institutions may migrate away from this market due to the availability of other funding and liquidity options, while smaller institutions could be pushed away by the Proposed Rule's mandate to provide data that is deemed proprietary and sensitive. Moreover, compiling the extensive information and developing the required infrastructure to comply with the Proposed Rules would significantly increase the cost of securitization versus other available funding sources. As a result, credit card ABS securitization volume will likely decrease and it will be difficult to rationalize securitization as a funding source for banks, which could result in less consumer credit availability.

As an alternative, we ask that the Commission consider a proposal on additional disclosure from the American Securitization Forum which was jointly created and agreed upon by both the Credit Card Issuer Subforum and the Credit Card Investor Subforum. The proposal recommends that issuers provide additional collateral pool disclosure, tables detailing the composition of charged-off accounts and a representation line report. The additional collateral pool disclosure is based on the collateral report from the American Securitization Forum's Credit Card Project Restart. The tables detailing the composition of charge-off accounts is new and will give investors valuable insight into these accounts. The representation line report is a smaller version of the report originally requested in the Proposed Rules which gives investors a significant amount of data without disclosing proprietary information. Ongoing updates would be conducted quarterly rather than monthly. Given the size and seasoning of credit card portfolios, the portfolio characteristics do not change often enough to require monthly disclosure. We believe this approach will provide investors with enhanced disclosure and avoid disclosure of proprietary information

B. Flow of Funds

1. Waterfall Computer Program

The Proposed Rules would require the issuer to prepare and file on EDGAR as an exhibit to Form 8-K, at the time the 424(h) prospectus is filed, a waterfall computer program ("Waterfall Program") in the Python open-source programming language that gives effect to the payment provisions contained in the transaction documents. The downloaded files would allow an investor to enter his own assumptions about future performance of the collateral and then generate a bond cash flow output that is driven by the payment rules in the Waterfall Program. The Proposed Rule's policy objective is to provide the potential investor a sound basis for making an informed decision on whether to participate in the offering.

While the Waterfall Program has theoretical appeal, many significant difficulties lurk below the surface. In reality, a *functioning* Waterfall Program is not only impractical to provide to investors in any form, but it also would make the investor's decision more difficult and time-consuming. To put it simply, the waterfall section of a bond model would only be the tip of the iceberg. The Waterfall Program would be required to cover each class of securities in the transaction and take into account all of the payment provisions and other cash flows. The Waterfall Program would need to provide investors with the ability to input their own assumptions regarding the cash flows from the pool assets, including interest rates, default rates and prepayment speeds and to vary the amount payable by various credit enhancement or derivative providers. A complex system of modules and sub-modules must exist to support the Waterfall Program for most ABS transactions. The time required for an investor to install, maintain, and support the *infrastructure* required to run the Waterfall Program, combined with issues such as coding standards, code obfuscation, version control, platform dependency, software bugs, and unintentional issuer or underwriter miscommunication would likely cause most investors to retreat to their own established programs or to well-known third-party vendors.

For the reasons summarized below and in ***Schedule C***, we disagree with the Commission's proposed approach to the Waterfall Program in its current form. Instead, we propose a simpler solution, one which provides the investor with a better understanding of the waterfall (via the offering document alone) without the unnecessary and unmanageable complexity of a functioning computer program.

We believe that the Waterfall Program requirement in the Proposed Rule creates unworkable difficulties and uncertainties.

First, because the Waterfall Program is required to be filed and incorporated by reference into the registration statement, programming errors or omissions in the program itself, at least those which produce materially misstated or misleading results, would carry the same liability as any other material misstatement or omission in the registration statement. Applying the same standard to the Waterfall Program that the Commission currently applies to disclosure is not a workable approach. Liability under Sections 11 and 12(a)(2) of the Securities Act is not appropriate for a computer program as complex as the proposed Waterfall Program. Instead, we propose that the Commission consider applying a Rule 10b-5 liability standard. Moreover, given the inherent complexities described above, we do not believe that the Waterfall Program should be deemed to be a prospectus or part of a prospectus or part of the registration statement. In all events, the outputs of any Waterfall Program, like the textual description of the waterfall in the prospectus, must be qualified in their entirety by the disclosure in the rest of the entire, integrated offering document.

Second, it is also not clear that all investors are equipped to be able to understand and evaluate the Waterfall Program model. While every effort would be made to ensure that the Waterfall Program, the indenture and the prospectus are consistent, we do not believe that any Waterfall Program will be able to capture all possible interpretations of contractual provisions or all events that will arise during the real life experience of many transactions.[7] It is not clear whether the Waterfall Program is more helpful or harmful to the investment decision making process. We have significant concerns that the Waterfall Program will cast a false veneer of objectivity over a process – predicting the future – that is necessarily and inherently subjective. This should not be encouraged.

Third, the Waterfall Program may not be able to model all structures and scenarios. For example, for revolving master trusts, senior bonds may be issued before junior bonds, early amortization scenarios will need to be modeled, not just the current transaction, and every outstanding security may potentially need to be modeled. These variables among different ABS structures will pose challenges for the issuers who will need to create the Waterfall Program and the investors who will need to interpret the Waterfall Program. The Waterfall Program cannot address unknown variables like future regulatory and legal developments (*e.g.*, the HAMP program, or future changes to tax law[8]) and interpretative ambiguities that must be adjudicated in court. Contractual provisions will from time to time contain interpretive ambiguities (intentional or not), but computer programming code cannot. This asymmetry will force the programming code to treat as clear certain aspects of transactions that allow a degree of interpretation. Accordingly, neither strict liability nor the encouragement of overreliance on these tools is appropriate.

7 Such low probability, high severity events would include servicer or sponsor insolvency, not reasonably foreseeable changes to law or regulation, or meaningful macro-economic events.

8 For example, we note that in early 2009 certain policy making bodies investigated the possibility of amending the REMIC provisions of the Internal Revenue Code and the residential mortgage "cram-down" provisions of the Bankruptcy Code. The status of qualified financial contracts and Bankruptcy Code safe harbor contracts, such as derivatives contracts, continues to be the subject of analysis and evolution.

2. Presentation of the Narrative Description of the Waterfall

We support the proposal to require that the narrative description of the waterfall be presented in one location in the prospectus. However, we request that the Proposed Rule accommodate more latitude concerning the location of the related defined terms. While many defined terms directly related to the waterfall flow of funds would likely be included in this location, there will be instances where certain terms are best defined elsewhere in the prospectus, and there will be instances where defined terms that are used within certain other defined terms need to be defined elsewhere in the disclosure. In our judgment, an accommodation of this nature strikes the right balance between providing investors with concise topical disclosure that is more easily accessible, while at the same time respecting the fact that the prospectus must be prepared, received, and approached as a document that must be understood as an integrated whole. Approaches to disclosure that suggest the adequacy of reliance on a partial or piecemeal review should not be favored.

C. Transaction Parties

1. Identification of Originator

We support the Proposed Rule's recommendation to require more expansive disclosure standards concerning the identification of originators that are not affiliated with the sponsor. We suggest, however, that the existing proposal be supplemented with a very low quantitative threshold (perhaps 2% of original pool assets) under which identification of loan originators that are not affiliated with the sponsor would not be required.

2. Obligation to Repurchase Assets

Respectfully, we are forced to disagree with the Proposed Rule's approach to require disclosure of historic loan repurchase activity in the strongest possible terms. The Proposed Rule should abandon the proposed requirements in its entirety. The Proposed Rule should instead address repurchase claim concerns through the establishment of a process to resolve repurchase claim disputes by ensuring that transaction documents contain balanced and fair mechanisms to govern repurchase claim enforcement.

Representations and warranties, along with repurchase remedies, are not unique to securitization and structured finance. Generally speaking, contractual representations and warranties, working together with associated remedies, are a common tool used by buyers of goods (including financial instruments) to mitigate the inherent informational asymmetries that exist between buyers and sellers. Representations and warranties allow the buyer to obtain necessary information concerning the goods being purchased, and along with repurchase or other remedies, provide the buyer with a certain level of contingent or incidental recourse against the seller, which compensates the buyer for this irreducible informational imbalance. The repurchase remedy, however, should not constitute a direct credit substitute or credit enhancement. The suggestion that contractual representations and warranties, with associated remedies, operate as a type of transactional direct credit substitute or credit enhancement directly contravenes existing legal, accounting, and regulatory standards. They merely serve as a tool to addresses the operational risk that the seller inadvertently has made a representation or warranty that later proves inaccurate and causes the buyer material harm.

The Proposed Rule's standards concerning disclosure of asset repurchase history suffer from multiple issues. Disclosure generally would be mandated, on a pool-by-pool basis, concerning the amount of an originator's or the sponsor's publicly securitized assets that were the subject of a demand to repurchase for a breach within the last three years, as well as a corresponding disclosure obligation regarding the percentage that were actually repurchased. Among other things, the Proposed Rule does not require that repurchase demands themselves be credible or legitimate or that the corresponding breach allegation be made with specificity or otherwise satisfy any minimal evidentiary requirements. Accordingly, so-called "shotgun" repurchase requests, filed without evidence of breach and upon the mere delinquency or default of one or more loans, would result in disclosure requirements which, in the words of the Proposed Rule, are intended to "allow investors to better assess practices of the originator or sponsor." In practice, the amount of repurchase claims, which may include frivolous claims, could have no correlation to an originator's or sponsor's practices. Further, the Proposed Rule does not even require that the mandated disclosure concerning asset repurchase history be circumscribed to the experience in the same asset class.

Additionally, the Proposed Rule requires a three year look back period for repurchase experience without a grace period. We believe that many issuers, who previously have not had an obligation to track or maintain this data to a securities law strict liability level of confidence, will have difficulty recreating such data to this level. The existence, or lack of existence, of a breach of a representation or warranty that results in a valid repurchase claim is not a simple, binary exercise, and the appropriate disposition of claims often is not clear. For example, it is generally the case that in order for a valid repurchase remedy to attach, a two-part test must be satisfied: the occurrence of a breach, plus loss causation (with the further requirement that the loss be both material and adverse to the claimant). This analysis often requires subjective determinations, and allows for well informed and well intentioned parties to arrive at different conclusions. Due to these features, the disclosure of oversimplified quantitative metrics of the volume of total claims and corresponding repurchases results in arguably misleading information being provided, and thus would be bad policy.

We also believe that the Proposed Rule's requirement that certain parties with obligations to repurchase assets upon breaches of representations and warranties provide financial information disclosure should be reconsidered. This standard is not appropriate because the repurchase remedy, as identified above, is merely incidental recourse that addresses operational risks, and does not provide credit or liquidity support to the transaction. Investors should not be encouraged, even indirectly, to rely on any perception of financial backing of an asset-backed securities transaction by the sponsor or another party merely due to the provisions of representations and warranties. Additionally, from a broader policy perspective, financial information disclosure should not be established as a barrier to entry for participation in the securitization markets and enjoyment of the resulting liquidity benefits. This is an unreasonably high bar for assuring liquidity in loan assets, particularly for smaller, private companies whose securities are not publicly traded.

A better approach for addressing perceived shortcomings in existing repurchase remedy mechanics, governance, and enforcement, and the resulting backlog of impasse situations, would be to establish a fair and transparent process to resolve disputes, and to ensure that transaction documents contain these provisions. While many sensible approaches exist, we believe a workable approach must have the following elements. An independent third party would have access to loan files for review, with its fees paid out of transaction proceeds. This third party would be given the power to intermediate repurchase requests, review the legitimacy of claims, and provide a final determination to proceed with the request (or to refrain from proceeding). All allegations would be required to be made with an adequate degree of specificity and evidence of breach. Claims that the independent third party proceeds with, but that are rejected by the sponsor or other originator would be submitted to binding arbitration. Following submission of the repurchase claim to binding arbitration, all costs and expenses will be paid for by the non-prevailing party. In our judgment, a process with these elements provides a path towards a more sensible and fair framework for resolution of repurchase claim disputes. To the extent that disclosure of repurchase experience is mandated, it should exclude time periods prior to the codification of the Proposed Rule, be limited to the expense of the depositor and its common control affiliates, be limited by asset class, include only actual repurchases satisfied or at least those repurchase demands that are alleged with a sufficient degree of specificity, and narrow the scope of repurchase demands to those with a reasonable degree of legitimacy and credibility.

3. Economic Interest in the Transaction

We support the Proposed Rule's standards to include disclosure concerning retained interests in the ABS transactions purchased by the sponsor, the servicer and certain originators. We believe this disclosure is appropriate in the prospectus during the initial offering process. Disclosure concerning the evolving levels of retained risk held by the sponsor, the servicer and certain originators in Exchange Act reporting, however, should not be mandated. For example, the level of a retained seller's interest in credit card master trust transactions migrates from time to time, and the Proposed Rule elsewhere mandates certifications concerning compliance with ongoing risk retention standards. Reporting concerning pledging of retained interests to obtain funding, either through repurchase financings or otherwise, should not be required. If reporting concerning retained exposures is ultimately required in Exchange Act reports, it should be limited to an obligation to report any failure to comply with mandated risk retention levels, rather than other changes in retained holdings.

4. Servicer

We support the Proposed Rule's standards to require disclosure in the prospectus concerning material instances of noncompliance that are noted in servicers' Item 1122 or Item 1123 reporting, as well as disclosure of measures taken to remedy these instances of noncompliance. However, we believe any such reporting obligation itself would be subject to standards of materiality relative to the transaction for which such disclosure is proposed. For example, in a transaction where a separate bond administrator or master servicer is undertaking the investor payments function and the servicer has one instance of material noncompliance related to the investor payments function, we believe such instance of noncompliance could be immaterial and may not need to be disclosed.

D. Prospectus Summary

We support the Proposed Rule's standards to include, when material, disclosure in the prospectus summary concerning statistical information regarding underwriting and origination programs, underwriting exceptions, and the modification experience of securitized loans.

E. Static Pool Information

1. Disclosure Required

We support the general direction of the Proposed Rule's standards concerning required disclosure of static pool information. Narrative disclosure describing the static pool information presented in summary fashion could be provided, as long as the sponsor or originator has such information (which it may not have for older vintage transactions). The proposal to describe the methodology used in calculations and to define terms and abbreviations may also assist in making the disclosure more accessible. A short summary description concerning how the static legacy pool's assets may differ from the assets in the pool being securitized may also work to facilitate understanding. However, we suggest a reconsideration of the proposal concerning graphical presentation of certain static pool information, which is not market practice, has highly questionable utility, and has the potential to be misleading under many circumstances. Additionally, we also interpret the proposal to require an explanation of why static pool information is not provided in certain cases as capable of being satisfied through summary disclosure that the data is not available, or that such static pool disclosure is immaterial, which is often the case in the CMBS markets. However, we would recommend reconsideration of any standard that requires disclosure of a detailed analysis of materiality. Materiality is inherently subject to judgment, based on all relevant circumstances, including sometimes highly qualitative factors. An analysis of an issuer's methodology for making materiality determinations is not a proper subject of prospectus disclosure.

2. Amortizing Asset Pools

We support the Proposed Rule's standards concerning standardization of static pool information for amortizing asset pools, and the provision of graphical presentations of delinquency, loss and prepayment information.

3. Revolving Asset Master Trusts

We support the Proposed Rule's specific standards concerning static pool data for revolving asset master trusts.

4. Filing Static Pool Data

We support the Proposed Rule's standards concerning the filing of static pool data.

F. Exhibit Filing Requirements

We support the Proposed Rule's proposals that would adjust the exhibit filing requirement in Regulation AB Item 1100(f). We note for the staff, however, that in our view filing such documents any earlier would not be achievable from a practical market perspective (for example, it would not be workable to have these transaction documents ready and filed at the time of the Rule 424(h) filing).

G. Other Disclosure Requirements that Rely on Credit Ratings

We support the Proposed Rule's proposal on this point, and recognize it as a component portion of an ongoing regulatory evolution away from exceptions that are based on satisfaction of rating agency criteria.

III. Definition of an Asset-Backed Security

Regulation AB's definition of asset-backed security should be designed to strike a delicate balance. On the one hand, the definition should be tight enough to restrict access to Form SF-3 to only those securities in respect of which robust disclosure, including collateral pool disclosure, can be provided during the initial offering process. On the other hand, the definition should be calibrated to permit a reasonable degree of flexibility to accommodate innovation and new product development, the contours of which might not yet be fully conceived. While we are sympathetic to the policy motivations behind the Proposed Rule's suggestions concerning the definition of asset-backed security, in our judgment these restrictions should not be adopted because they contain a meaningful potential to stifle innovation, and they do not appear to be narrowly targeted to correct identified systemic market weaknesses that have contributed to market disruption.

The first proposal would remove from the definition of master trust those asset-backed securities backed by non-revolving assets (for example, residential first mortgage loans). We believe this proposal should be resisted on two grounds. First, some existing non-revolving asset types, including trade receivables ABS and rental car receivables ABS, rely on structures of this nature. We are unaware of instances of securities of this nature being offered on Form S-3 causing undue alarm. Additionally, we suspect that new product evolution has a foreseeable potential to move in this direction. For example, while current tax law, market practice, and other influences result in a domestic RMBS market that does not currently utilize a master trust structure, not only is this technique prevalent in the United Kingdom, but also many academic and regulatory commentators continue to evaluate options for modernizing the domestic consumer mortgage finance framework. Covered bonds (while not fitting into the Regulation AB definition of asset-backed security for other reasons) and other scalable, flexible, and standardized structures continue to be evaluated with some degree of optimism. Accordingly, we suggest that

Regulation AB retain a degree of flexibility on this point. For the same reasons, we also believe that the Proposed Rule's suggestion to reduce the permissible duration of the revolving period for non-revolving assets from three years to one year from the date of issuance of the securities should be resisted.

The Proposed Rule also would decrease the limit of the amount of prefunding permitted from 50% of the offering proceeds, or, in the case of master trusts, 50% of the aggregate principal balance of the total pool, to 10% in each case. We are sensitive to the observation that a perceived aggressive use of ABS prefunding techniques, in some cases in transactions collateralized by subprime consumer mortgages, has resulted in a degree of investor dissatisfaction. We believe that the legitimate desire to maintain the integrity of the discrete pool requirement for asset-backed securities under Regulation AB can be addressed by reducing the limit on prefunding from 50% to 25% in these cases, rather than 10%. We suggest this level because it would result in the absolute quantitative prefunding limit under Regulation AB being consistent with the limitation on prefunding that is applicable to ABS that are eligible for sale to ERISA plans in reliance on the Department of Labor Underwriter Exemptions, and for particular products where the 25% limit would be deemed insufficient, the SEC staff would have the opportunity to review and comment on the disclosure during the registration process.

IV. Exchange Act Reporting Proposals

We support the goal of enhanced transparency and recognize that the requirement that the issuer provide an undertaking to file Exchange Act reports with the Commission on an ongoing basis can help achieve this goal. However, we ask that the Commission consider the additional burdens that the proposed requirements will impose on ABS issuers. Under current law, most publicly registered term securitizations cease filing periodic reports under the Exchange Act after the calendar year in which the securities were issued. As a result, most issuers in the securitization market (other than revolving master trusts) will need time to build processes and infrastructure necessary to ensure compliance with the new ongoing reporting requirements. We ask that the Commission consider building in an additional transition period for issuers to allow sufficient time to gather the new asset-level performance data and grouped account data that will be required for each distribution report on Form 10-D.

Under the Proposed Rule, we understand that issuers will need to disclose the impact of any changes in the pool composition between the Rule 424(h) prospectus and the final pool at initial issuance, as well as changes in the asset level information. The Commission has proposed that a report on Form 8-K be filed if any material pool characteristic of the actual pool at initial issuance differs by 1% or more from the description of the asset pool in the prospectus filed under Rule 424(h). There are many factors that could impact a variance in the pool characteristics; not every variance necessarily should require disclosure. For instance, it may often be necessary to make a change in asset-level information after the date of the Rule 424(h) prospectus, given the length of time between that date and the date of initial issuance. For instance, in an RMBS transaction, changes in asset level information may occur because of missing documentation or a breach of a representation or warranty. Currently, if any material characteristic of the asset pool at the time of issuance of the ABS differs by 5% or more from the description of the asset pool in the prospectus, the issuer must file certain disclosures regarding the actual asset pool under Item 6.05 of Form 8-K. We propose that pool characteristic changes in the range of 3% or more be disclosed.[9] Additionally, the proposed 1% threshold is so small that there is a foreseeable risk that a pool characteristic might change by more than 1%, but still to an immaterial degree, without the sponsor becoming aware soon enough to timely file the Form 8-K. While issuers will need to be mindful of the impact of any changes in the pool composition between the Rule 424(h) prospectus and the final pool at initial issuance, we believe that any changes below 3% should be considered to be *de minimis* changes.

As proposed, the requirement that a current report on Form 8-K be filed to report any material change in the sponsor's interest in the securities of any ABS issuer is inappropriately broad. Please refer to our comments above in the section entitled "*Economic Interest in the Transaction.*" Such changes can be impacted by a variety of factors, including, but not limited to, the amount of securities that are initially retained by the sponsor or the successful execution of the securities offering. We do not believe that ongoing monitoring of a sponsor's interest is material to investors. Rather, this requirement should be limited to monitoring a sponsor's retention of risk to the extent required as a condition to shelf eligibility or otherwise required by law or regulation.

We believe the proposal to require CIK numbers for the depositor, the issuing entity, and the sponsor (if applicable) on the cover pages of Forms 10-K, 10-D and 8-K for ABS issuers is appropriate. We also believe that the proposal to require CIK numbers for the depositor and the sponsor (if applicable) on the cover pages of the proposed Forms SF-1 and SF-3 will help investors locate materials related to an ABS offering or ABS issuer.

V. <u>Privately-Issued Structured Finance Products</u>

We understand the concern expressed by the Commission regarding disclosure requirements for private offerings of structured finance products. However, we believe that the proposals relating to such private offerings are a fundamental departure from the Commission's precedent for dealing with sophisticated investors, and are too broad and overreaching. The rationale for the existing Rule 144A safe harbor, which is informed by both the policy underpinnings of the Securities Act[10] and associated judicial precedent[11], has been that QIBs are sufficiently sophisticated and experienced investors, capable of

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9 In historic practice, many issuers generally treated pool characteristics changes in the range of 5% as material, as between the time of sale information and the final pool, for purposes of determining whether to reform a trade in accordance with Rule 159.

10 James Landis, a principal draftsman of the Securities Act and the second Chairman of the Commission observed that the draftsmen believed that "[t]he sale of an issue of securities to insurance companies or to a limited group of experienced investors, was certainly not a matter of concern to the Federal government." See Release No. 33-6806 (Oct. 25, 1988) [53 FR 44016] at 44023 (citing Landis, The Legislative History of the Securities Act of 1933, 28 Geo. Wash. L. Rev. 29, 37 (1959)).

11 See SEC v. Ralston Purina Co., 346 U.S. 119 (1953). In this case, the Court noted that "[s]ince exempt transactions are those as to which there is no practical need for [the registration provisions'] application, the applicability of section 4(2) should turn on whether the particular class of persons affected needs the protection of the [Securities] Act. An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering." Id. at 125. Subsequently, other courts followed this precedent, including in the case of resales of privately-placed securities to institutional investors, ruling that an offering is private where all of the offerees are sophisticated, knowledgeable, experienced institutional investors with great resources, and are plainly "able to fend for themselves." See, e.g., The Value Line Fund, Inc. v. Marcus, (1964-1966 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶¶ 91,523, 94,970 (S.D.N.Y. 1956) (MacMahon, J.).

evaluating potential securities investments without relying on SEC mandated disclosure. Accordingly, the safe harbor was appropriately crafted to define the characteristics of investors (*i.e.,* qualified institutional buyers, qualified purchasers, accredited investors) that are able to make their own investment decisions. This enabled the market for negotiated transactions in which securities could be structured and purchased by large institutional investors who are equipped to make informed investment decisions. We continue to believe that this underlying policy principle is sound, and there is no need to expand the Regulation AB disclosure requirements to most structured finance products that are privately placed with experienced and sophisticated institutional investors.

Moreover, it is not clear that the experience during the recent structured finance market disruptions supports the Proposed Rule's suggested remedy concerning these matters. To remedy perceived shortcomings in market regulation the Proposed Rule would require that most privately placed structured finance transactions provide investor disclosure that is equivalent to what would be required in a public offering. However, there is little to suggest that inadequate disclosures resulted in investor losses. Rather, many of the investors that suffered the most from these products were also issuers or underwriters, who in turn had access to all information that was available, material or not. This suggests that losses were not caused by information asymmetries that could be cured by enhanced disclosure.

The Proposed Rule would meaningfully constrict the private market for structured finance products. Many of the structured finance products to which the Regulation AB disclosure and reporting requirements may apply under the Proposed Rules are securities, such as traditional resecuritizations, bank sponsored asset-backed commercial paper ("ABCP") or traditional bank collateralized loan obligations ("CLOs"), which are revolving in nature and have generally not been registered under the Securities Act in the past. Therefore, neither the requirements of Regulation AB nor of the corporate disclosure regime take into account many transactional features of these securities. For example, existing assets in traditional resecuritizations, and bank CLOs have not been originated with Regulation AB reporting requirements in mind, and may not entitle lenders or issuers to obtain the necessary information. Additionally, loan and other private placement documents often contain confidentiality requirements, which may make disclosures impermissible or impractical.

The same issues apply to bank sponsored customer-related ABCP. Most programs are exempt from registration under Section 4(2). However, resales of ABCP in the secondary market rely on exemptions under Regulation D and Rule 144A. Bank sponsored ABCP is typically collateralized by discrete and diverse portfolios of client-originated assets in transactions structured solely on the basis of pool level information. Obligor or loan level data is typically unavailable and even the portfolio level information is subject to confidentiality provisions under the transaction documents.

The Proposed Rules are particularly challenging to meet for any structured finance product that has been repackaged or resecuritized. All of these factors may render the public or 144A securitization of existing ABS unfeasible. The pure private, Section 4(2) market is not likely to provide adequate scale or liquidity for these products.

We recommend that the Commission reassess the Proposed Rule's "one size fits all" approach to Regulation D and Rule 144A regulation of structured finance products, and consider a risk-adjusted calibration approach to the regulation of this market. As noted in ***Schedule B***, we propose that the Commission consider a three-tiered approach to modernizing market regulation for privately placed structured finance products.

First, certain products will be completely excluded from the market regulation provisions of the Proposed Rule relating to privately placed structured finance products, even though the Proposed Rule's definition may (inadvertently) encompass them. This population would include covered bonds, structured notes, hybrid capital instruments, REIT securities, mutual fund shares, enhanced equipment trust certificates ("EETCs"), loan participations, municipal tender option bonds, and other similar products (described as "Type III" securities in ***Schedule B)*** that are not treated by the market as structured finance products. In our judgment, such exclusion is consistent with both the spirit and substance of the Proposed Rule, and merely clarifies the intended boundaries of the regulation.

Second, for most traditional structured products, such as ABS, RMBS, CMBS, insurance risk-linked securities, traditional CLOs, ABCP, re-REMIC transactions, synthetic ABS, and other esoteric ABS asset classes, (described as "Type II" securities in ***Schedule B)***, we concur with the proposals advanced by the American Securitization Issuer Forums that the Commission define a new category of sophisticated investors of structured finance products ("SQIBs") to which resales could be made in reliance on a slightly modified 144A safe harbor without compliance with the extensive new disclosure requirements. Consequently, a SQIB would be in a better position than a QIB, due to its relative size and experience investing in structured finance products to insist on receiving information it needs to make an informed investment decision. SQIB investors could elect to choose to require more extensive disclosure (and factor in the additional costs associated with providing such disclosure) or choose to make its investment decision based on information it determines is necessary to evaluate the investment. We recommend that the Commission adopt this more balanced approach that allows the most highly sophisticated institutional investors to make their own evaluations, judgments and ultimately, its investment decision, particularly when many of the investors themselves may indeed have participated in the structuring of the transaction and have full access to detailed information regarding the transaction structure, collateral and pool level data. To the extent the SEC nevertheless believes that expanded disclosure is necessary, we would request that the SEC work with industry participants to determine an appropriate disclosure standard for products that are currently not offered publicly (like ABCP or CLOs) since the public ABS disclosure standard may not be appropriate or workable.

Third, the proscribed, detailed disclosure requirements mandated by the Proposed Rule for privately placed structured finance products should be reserved solely for the most complex and highly leveraged structured credit products, such as collateralized debt obligations ("CDO"), CDOs of ABS or MBS, CDO-squareds, structured investment vehicles, and similar products (described as "Type I" securities in ***Schedule B***). In our estimation, this risk-adjusted, more finely calibrated approach to market regulation of the private placement standards for structured finance products addresses the concerns raised by the Commission in the Proposed Rule, but also balances those demands with a more workable approach for less complex, traditional securitization products that finance consumer lending and provide banks with liquidity and funding options.

We do not believe it was the Commission's intent to close the 144A market for structured finance transactions. We urge the Commission to reconsider the potential unintended consequences of overly broad, mandated disclosure standards being imposed on the private placement markets. The text of the release of the Proposed Rule focuses on CDO practices as an example of a particular target of these regulatory changes. While we recognize that there have been issues with some private ABS transactions of certain asset classes, we do not believe that these justify the removal of the safe harbors for all structured finance products. The Proposed Rule is a dramatic departure from the Commission's historic recognition of exemptions for experienced and sophisticated investors and undercuts the purpose of Rule 144A. We do not believe it is appropriate to treat the structured finance market starkly differently than other types of privately placed securities. Moreover, perceived problems with disclosure related to CDO products should not be used as the basis for revising disclosure rules for all structured finance products.

We also request that the approach to proposed Rule 192 be reconsidered. We support the principle of requiring issuers to provide required information. However, failures to do this are not, per se, fraudulent. This approach of "defining fraud down" is potentially troubling and has a foreseeable potential to cause issuers to refrain from entering this market. Accordingly, we suggest that any final rule clarify that failure to provide this information will only be deemed a fraud if and to the extent that the information that was required to be, but was not, provided, contained a material fact necessary in order to make statements made by the issuer, in the light of the circumstances under which they were made, not misleading.

Additionally, we request that private transactions of structured finance products closed prior to the effective date of any final rule be grandfathered. Absent a grandfathering provision, investors in these securities would suffer from undue uncertainty concerning liquidity and resales, and existing disclosure provisions and contractual requirements would not accommodate the new regulatory regime.

Finally, we do not believe that it would be appropriate to require a notice of sales under Regulation S or to require mandated disclosure for sales under Regulation S. The policy behind Regulation S is that the Commission need not regulate offshore sales to non-U.S. persons. Imposing such notice requirements with respect to ABS issuances would be inconsistent with this policy.

VI. Codification of Staff Interpretations Relating to Securities Act Registration

We support the proposals of the Commission to codify certain staff positions relating to the registration of asset-backed securities, and concur that the codifications described in the Proposed Rule will simplify the rules by making the standards more transparent and readily available to the public. We support the Commission's proposed codification of the fee requirements for collateral certificates or special units of beneficial interest as described in the Proposed Rule and concur with the articulated rationale for this change. In addition, we also support the proposed codification of the existing staff position relating to standards for incorporation by reference of subsequently filed Exchange Act periodic reports by asset-backed securities issuers. The Proposed Rule strikes the right balance on this point by allowing issuers to incorporate by reference only Form 8-K filings rather than requiring issuers in all cases to incorporate all subsequently filed Exchange Act reports, consistent with existing practice.

VII. Transition Period

The Commission should establish a workable implementation time frame for compliance with the Proposed Rule that is mindful of the ongoing process concerning other related developments. A significant implementation time frame will be required to put operational processes into place to comply with the Proposed Rule. Solely by way of example, we believe few, if any, organizations are currently capable of supporting the asset level disclosure requirements of the Proposed Rule or the requirements concerning the filing of a waterfall computer program in Python open source code. The time and expense required to build infrastructure to support these mandates will be significant. We also note that the Commission's proposed requirements may differ from similar FDIC requirements, which both in turn differ from similar requirements under the Financial Reform Act, and that each of these sets of requirements may differ from other regulatory and statutory proposals. This works together to complicate speedy practical movement towards compliance. Harmonization of the transition periods, as well as the substance of a modernized regulatory structure, needs to be a paramount concern. Original Regulation AB required about 12 months for implementation, and that regulatory burden was meaningfully less significant. We also note that the provisions in the Financial Reform Act concerning credit risk retention calls for regulations to be jointly prescribed within 270 days after enactment, with an effectiveness one year after publication of final rules in the Federal Register for residential mortgage backed securities, and two years after publication for other asset types. Accordingly, while the Proposed Rule notes a general reluctance to extent a transition period beyond one year after adoption of any final rule, we suggest that indeed such a longer transition time frame should be accommodated.

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Schedule B

	CDOs, CDOs of ABS or MBS, CDO-squared, SIVs, other similar highly leveraged structured credit products	ABS, RMBS, CMBS, ABCP, Insurance Risk-Linked Securities, CLOs, traditional re-REMICs, other ABS asset classes	Covered Bonds, Structured Notes, Hybrid Capital Instruments, REIT Securities, Mutual Fund shares, EETCs, loan participations, municipal tender option bonds, etc.[12]
Proposed Rule Higher Disclosure and Reporting Standards	Yes	No	No
New "SQIB" Standard[13]	No	Yes	No

12 These products are completely out of scope.

13 These investors would have a higher discretionary investment portfolio requirement, with dedicated structured products expertise; and exclude public employee pension plans.

Schedule C

I. REQUIREMENTS OF A FUNCTIONING WATERFALL MODEL

A. Background

A structured finance product's securities waterfall typically represents less than 1% of the computer code in any given ABS model. This section describes important additional detail that must be contemplated when providing a waterfall program to a potential investor.

ABS transactions are modeled using a computer program or *model*. A robust standalone ABS model is created over several years by an IT staff (for the issuer, underwriter, and/or investor); others are purchased off of the shelf at significant cost. Simple transactions can be modeled using a spreadsheet. Complex models can be written in a spreadsheet but they are typically plagued by problems with change control, version control, data capacity, and execution speed. For these reasons, a standalone model is often preferred.

The bond waterfall is typically implemented in the ABS model as a script that mirrors the priority of payments shown in an offering document. The waterfall script is a key driver of the model, but it is only a small fraction of the computer code required to simulate the entire transaction.

An ABS model implements the key components of an ABS offering: collateral (assets), bonds (liabilities), supporting accounts (such as a reserve account), and a residual. The model requires certain assumptions made by the user (interest rate paths, prepayment speeds, default rates, loss rates, and similar variables) and combines them with the collateral data (loan or lease payment schedules, balances, terms, interest rates, and similar variables) to generate collateral cash flow ("CCF"). The CCF is applied over time through a series of logical steps called the *waterfall* which determines the priority and amount of payments to the bonds. The bonds are paid their required interest and principal subject to the waterfall. The output from a waterfall is typically referred to as bond cash flow ("BCF"). The BCF is then used to compute various summary values which might include weighted average life ("WAL"), price, yield, discount margin, modified duration, convexity, dollar value of one basis point ("dvo1"), spot spread, principal and payment windows, and maturity date.

Every functioning ABS model has its own unique implementation but a few sample program modules that are required to implement an ABS model are listed below.

B. Data

A data module controls persistence of the model's various data elements. It implements the loading and saving of the various data structures of the model, including:

- *Collateral* – Information about each loan or rep-line required to model its cash flow
- *Bonds* – Balance, coupon, index, and spread inputs

- *Vectors* – Arrays of periodic data such as interest rates, prepayment speeds, default rates, yield curves, and loan or lease payment schedules
- *Scenarios* – Groups of assumptions under a common label that can be re-used
- *Globals* – Standard or user-defined global constants and variables
- *Outputs* – Generated cash flow and summary output
- *Scripts* – User-defined or user-viewable scripts that are not a permanent part of the program

The data module includes functions or sub-modules that do the following:

- *File Operations* – If the program is file-based, these are functions that provide the ability to find, open, save, and close files that are stored on the user's computer or network
- *Database Operations* – If the program is server based, these are functions that provide the ability to open and close databases; and to query, retrieve, manipulate, and store data sets
- *Version Control* – Verification that a given data file or database format matches the current version of the program, sometimes with the ability to convert older file formats
- *Import/Export* – Functions that open and save in data files or databases in non-native formats

C. User Interface

The user interface includes the menus, windows, dialogs, grids, selection boxes, and other elements that allow human interaction with the ABS model. Models usually include the ability to customize various parts of the user interface, especially with regard to data format (including numeric vs. percentage vs. basis points, precision, alignment, and visibility).

For any given model the user interface module is the most platform-dependent component. It is also the best place to control, correct, and limit the user to prevent invalid input. This module is typically the largest part of any standalone program.

D. Analytic Engine

The waterfall script represents a programming *hook* into a larger analytic program, sometimes referred to as the analytic engine. The user hits a "run" or "generate" button in the user interface and the analytic engine is invoked. The engine initializes the necessary data structures, determines current assumptions, loads vectors, and generates collateral cash flow. It runs the waterfall script once per payment period until the CCF is fully applied to either the bonds or the residual. The resulting bond cash flow is then used to compute summary bond metrics and values.

E. Reporting

Reports are crucial for the user to understand and evaluate the output of an ABS model. The program must provide a way to generate legible reports for the user to "take away" in one or more formats. The number, kind, and format of a model's reports are unlimited, but some typical reports include:

- *Deal Summary* – A combined summary of the core assumptions, collateral, bonds, and bond summary outputs
- *Collateral Cash Flow* – Can be displayed per asset, per pool, per rep-line, or a full aggregate. Columns include quantities such as balance, capitalized interest, gross interest, net interest, servicing fees, other fees, expected principal, prepay principal, subsidies, yield maintenance, penalties, etc.
- *Bond Cash Flow* – Balance, principal, interest due, interest paid, interest shortfall, etc.
- *Summary Cash Flow* – An aggregate "sources and uses" view of the flow-of-funds for the deal. including total receipts, total bond payments, net account payments, fee payments, and the residual
- *Account Cash Flow* – Detailed view of cash flowing in and out of any given account (*e.g.*, a reserve account)
- *Assumptions* – A list of assumptions made for a given run
- *Vectors* – Input vectors used for a given run
- *Collateral Inputs* – A listing of the assets of the deal
- *Bond Inputs* – A listing of the various tranches of the deal

Advanced modeling functions might require additional reports such as price-to-yield, break-evens, decrements, prepayment sensitivities, and others.

When the entire ABS model is considered, rather than only the waterfall piece, it becomes obvious that posting the computer code for the model and guaranteeing its function on any given investor's machine will be nonstandard and monumental. We believe that the task is impractical to attempt, and the risks and burdens of this proposal far outweigh the suspected benefits.

II. IMPLEMENTING THE WATERFALL MODEL

As described in the previous section, a waterfall script posted to the EDGAR site alone would not be sufficient to generate bond cash flows that could be analyzed by an investor. A series of modules need to be included in order to handle the data, perform the collateral and other non-waterfall analytics, control and direct the user, and report the results.

The number of lines of code to implement all of the modules would certainly reach into the tens of thousands. The investor could easily become lost in the pages and pages of complex source code, which would defeat the original point of the proposal. At the very least, the investor would need dedicated IT staff to support the loading and execution of the Python code and to help the investor understand how to run it and examine the waterfall portion. This section explores some of the issues involved with implementation of the proposed waterfall model.

A. Python Programming Language

The Proposed Rule requires that the computer program be made available on EDGAR as "downloadable source code in Python." On the surface it seems like a simple thing: download a file, run it through a Python interpreter, and evaluate the resulting cash flows. Unfortunately the task is not simple.

The Python language is controlled by the "Python Software Foundation", a non-profit corporation. The language may have many followers in the development world, but is largely unheard of in the structured finance world. There have been five releases of the language since January 31, 2010 (2.5.5, 2.6.5, 2.7, 3.01, and 3.1.2). The Python 3.x versions are not backward compatible with the 2.x versions. While there are many Python development sites that provide forum-style support, there is no standard "help line" that a non-technical user could call to get language support.

There are multiple versions of the Python interpreter (Windows, Mac, UNIX, and LINUX, for example). Various small tweaks need to be made to any full-featured program in order to make it platform independent. The issuer might only have one operating system on which to test their program. If the investor uses a different operating system and a problem occurs, there is no obvious place to turn if something does not work.

Python is an "interpreted" language. Each line of code is validated and interpreted one at a time for the underlying computer system to execute. Interpreted languages are generally much slower than "compiled" languages (where the source code is validated and translated into a single binary code file that can be directly read by the underlying computer system). Accordingly, if an investor is provided with an auto deal file with a half million loans, the waterfall program would take a significant amount of unnecessary time to generate useful output.

Issuers would need to hire IT staff to carry the load of translating their existing models into the publishable Python version. Investors would need to hire IT staff to help translate the Python language and understand the structure of each issuer's supporting program and modules.

We contend that if a language is selected for the waterfall script it should be something more recognizable to the industry such as C++, which also has the benefit of being a compiled language. Regardless of which language is employed, in our estimation it remains unclear how an issuer would install and maintain the infrastructure to produce cross-platform models that work on any machine; and the investors would have no obvious avenue of support when the program does not function due to cross-platform incompatibilities in the interpreter (or compiler).

B. Potential for User Interference

If the user downloads the program from EDGAR, he will have full access to the source code provided in the waterfall program and in its complex supporting modules. There is nothing to stop the investor from innocently tweaking some part of the source code. In such a case, the program could generate erroneous results. Similar to version control, the issuer would have to verify in some way that the source code that the investor is looking at is the same as what was filed on EDGAR.

C. Source Code Obfuscation

There is no *coding standard* specified by the Commission for the Python program and there is no apparent way to establish one. Each issuer could conceivably use a different waterfall program supported by an entirely different set of program modules (or hire a different vendor to create it, if there were a vendor who would surrender the source code). Within each issuer's program there would be completely different sets of modules, functions, calling prototypes, and variable names.

Because the supporting modules would all be different, the same waterfall script could be written in the Python language in an unlimited number of ways, all with different variable, object, and method names. Each object could be organized with different data structures, data access methodologies, and method parameters. It is likely that IT staff would be required to help interpret some of the waterfall scripts. Even with IT staff present, the script may still not be clear without a manual describing the objects, methods, and parameters that are being used.

For example, here is a small snippet of a sample Python script that pays a bond interest and principal:

```
pool.pay(Acct.ANY_AND_ALL, Acct.INTEREST, Limit.CURRENT_AND_DEFERRED, [ model.getBondset("A1") ])
pool.pay(Acct.ANY_AND_ALL, Acct.PRINCIPAL, srPda, [ model.getBondset("A1") ])
```

Another snippet that performs similar payments might look like this:

```
Engine.PayInterestDue(nCollections, "A1")
Engine.PayPrincipalSequential(nCollections, nSeniorPda, "A1")
```

Here is another snippet that is more efficient but much less clear:

```
E.PI(C, "A1")
E.PP(C, P, "A1")
```

Furthermore, there is no reason a programmer would feel the need to pay interest and principal to the senior bond with two lines of code. It could be done with one line of code:

```
Eng.PayPdaAndInt("A1", Cxns, Pda);
```

It could also be accomplished with five lines of code:

```
A = GetBondObject("Seniors")
Model.SetIntDueAmt(A, TRUE, TRUE);
Model.PayIntDue(A);
Model.SetPrinPda(A, Pda);
Model.PayPrinPdaSeq(A);
```

The possibilities are endless. If comments are included with the source code, it would be helpful, but their content would be at the discretion of each waterfall programmer. The investor would be faced with a new learning curve every time a different issuer (or different programmer for the same issuer) produced a waterfall script.

We contend that when faced with the above issues the reasonable investor would want nothing to do with installing, debugging, decoding, and understanding thousands of lines of Python code from many different issuers and programmers. On the other hand, the only obvious place for the investor to turn if any of the above issues occur is the issuer. Even if an issuer wanted to add a help desk for investors, there would be myriad and complex liability arising from the provision by an issuer to an investor of IT support. We believe that issuers would refrain from adding a help desk to support hundreds of Python models of different versions on different platforms as they proliferate through the investor community on current and past transactions. The cost and complexity of issuing a public ABS offering might become prohibitive.

If the waterfall program requirement is approved, then we then propose that a standard "bond payment" language be established by the Commission that would specify how the functions should be named and constructed. Without consistency across models, the waterfall program will be unhelpful. The creation and maintenance of such a standard, both from a cost and a timing point of view, would not be trivial.

D. Data Format Standards

The waterfall model proposed by the Commission is required to provide the ability for the user to enter various inputs (assumptions) that direct the expected behavior of the collateral. There are dozens of asset types with hundreds of different input possibilities. There are dollar amounts, rates, percentages, spreads, and vectors of various quantities.

Either a standard must be declared and maintained in order for the inputs to be limited to reasonable values, or the program's user interface needs to guide the user in some way. One issuer might prepare a waterfall program that uses text files for inputs and outputs rather than a traditional user interface. Another programmer could use generic grids with simple labels for the inputs. Neither of these cases would provide a method for controlling the inputs.

Here are three simple, representative example problems that could occur without input format standards:

1. An issuer's analytic engine expected interest rates to be entered in pure numeric format, such as 0.08. Without a published standard or help from the user interface, an investor might enter 8.0 to represent the 8% interest rate rather than 0.08. An interest rate of 800% might be easily noticed, but perhaps not if the problem is reversed and the rate was 0.08%. That might not get noticed as quickly, especially in the context of many different loans and bond tranches. The output would be incorrect but the offending input could be difficult to find.

2. Additionally, suppose that a forward curve is required for a LIBOR-based index and the user enters a 50-rate vector (for 50 months). What happens when the cash flow needs to continue past 50 months? Many models might assume that the last rate in the vector is used for every month past 50. But what if that scenario did not occur in the issuer's program testing and they assumed the value to be zero? This is a potentially dangerous disconnect between the programmer's intention and the user's implementation.

3. Finally, the issuer may need to implement a rate shock of 50 basis points across the model's LIBOR curve. It might seem obvious that a value of "50" would need to be entered. However, many systems assume that all rate-related variables are entered in percentage format, so the correct input would be 0.50 instead. It depends upon how the issuer (or his programmer) designed the model. The investor could potentially make a significant error in such a case.

As we noted above, declaring data formatting standards for the many possible input assumptions and output columns is not a simple task. Standards would need to be formulated by the Commission in support of a functioning waterfall program. Development of such standards should be undertaken with issuer, investor and industry support and input, probably by asset-type and security structure. Any such standards development we believe would be a lengthy and costly process for useful standards to result.

E. Data Identification

There is nothing specified by the Commission to indicate how data inputs and outputs are to be presented to the investor. One issuer might produce a sophisticated user interface that is intuitive and easy to understand and manipulate. In that case, each input and output would be labeled in some obvious and intuitive way.

However, another issuer might produce a model that takes text files as inputs and produces text files as outputs. In this case, nothing is stated by the Commission to indicate how the issuer should label the data. Balances in the output cash flows might be labeled as "B", "Bal", "End Bal", "Begin Bal", "Beginning Performing Balance", "Tot End Bal", or "Bal Incl Capi Due". Interest quantities might be labeled as "I", "Int", "Interest", "Net Interest", "Gross Interest", or "Gross Int Due". Principal might be labeled as "P", "Prin", "Expected Principal", "Prepay Principal", or "Tot Prin". The potential for a misread of the data in these cases would be significant. The inconsistencies would be frustrating for an investor, whether he was simply looking at the data or trying to import it into some other system.

The potential lack of clear data identification is a serious problem for an investor who wishes to use a cash flow model.

F. Synchronization

A useful model will also require that the Commission specify a method of synchronization between the data file and the computer program (and its modules if they are posted separately). Each data file must be tagged with origin, type, and version identifiers so that if a user tries to execute a program against the wrong data file it can detect a problem and inform the user. The Commission will need to create and enforce a "version control standard" to help prevent mismatches between data and program. Each program and data file must adhere to the standard or otherwise the results will be misleading.

III. VERIFICATION AND ENFORCEMENT

The SEC proposes that the issuer must verify that the model can generate a sample data set that is filed with the offering document. It is assumed that any tables displayed in the document must also be verified using the model. The issuer can do this testing, but there is no guarantee that the testing will go beyond what is strictly required.

Accounting firms will independently verify the sample outputs, but it may be impractical for them to provide accounting comfort on the computer program.

The proposal indicates that the user should be able to enter various inputs such as interest rates, prepayment speeds, defaults, and losses, and then generate outputs that enable them to make sound investment decisions. These inputs can vary widely and it is possible that the issuer could inadvertently refrain from testing a combination of inputs that will confuse the investor. If the investor does not discover the programming bug, he could make a bad decision. If the investor does discover the incorrect output, the issuer could be exposed to unnecessary litigation. Neither of these situations would be as likely to occur if the issuer and investor each used a well tested proprietary or third party model instead of a non-standard, unsupported stand-alone model.

IV. LOSS OF PROPRIETARY MATERIAL AND COMPETITIVE ADVANTAGE

Underwriters spend a great deal of time creating proprietary models for first-time issuers or first-time asset types. If these models are required to be filed publicly, then the underwriter is giving away its proprietary advantage to all competitors.

Many times the ability to perform a task quickly and efficiently is a proprietary advantage. If a program has these attributes and it has to be published, then the advantage, which has been acquired at great cost and over a long time period, is lost.

V. ALTERNATIVES TO CONSIDER

There are several third party software systems that are frequently used by investors to understand ABS transactions and models. We have seen examples where a third-party provides a pre-pricing CDI file in order for investors to make their investment decision. Issuers (or underwriters) either create the CDI file using the third party's structuring program, or they contract with the third party to create the model for a one-time fee. The CDI file represents the data, inputs, and waterfall for a given offering. The third-party's program is used to view the deal, apply assumptions, generate cash flows, and perform advanced scenario analysis. The program is licensed for a monthly fee. We have also seen examples where a third-party's analysts will model simple deals post-pricing and complex deals using contributed cash flows. While this system is not as robust as the structuring model previously described, we understand that investors find it useful for making investment decisions. Both types of examples have the ability to track deals forward in time after settlement and both usually do so when provided with the required data by the parties to the deal.

VI. TRANSITION PERIOD

If the decision is made to mandate the use of the waterfall program as outlined in the Proposed Rule, then we propose a "transition period" in which the issuers can work through the technical issues that will certainly arise. After the transition period, the investors should be polled to determine whether they find the waterfall model to be useful. If a majority of those polled state that it is not useful, then the rule should modified.

VII. CONCLUSION

Considering the many complex issues discussed above, we believe that creating a beneficial and functioning computer waterfall program of a "one-size-fits-all" variety is difficult at best and potentially impossible to implement. The waterfall program requirement will increase the amount of time and effort required for an investor to analyze the information in an offering document. It will lead to potential errors in analysis. The program will increase the front-end cost of issuing a deal. The back-office (IT staff) expenses for all parties involved will increase significantly. Even if all of the costs are deemed acceptable, absent enforced standards, there can be no way to assure any investor that the use of a waterfall program will produce understandable, meaningful or correct results.

The market impact of the waterfall program would be negative across the board. Issuers may feel the cost of the program is not worth engaging in the transaction. Investors will likely find the complexity of the waterfall programs not worth the purported benefit and will probably revert to whatever systems they currently use to make their decisions.

We propose that the Commission simplify Section III B, "Flow of Funds," to require a waterfall written in computer code that is not required to function on the investor's computer. The Commission should specify a common computer language, such as C++ or Java, and publish a style and standards manual containing sample objects and methods. It should provide a representative set of sample programs (asset and bond types) that would indicate how the script should be constructed.