August 31, 2010

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

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy, Secretary

Re: Release Nos. 33-9117; 34-61858 (File No. S7-08-10)
Supplemental Comment Letter – Waterfall Computer Program

Ladies and Gentlemen:

On August 2, 2010, the American Securitization Forum ("ASF")[1] submitted a letter (the "Original Letter") in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding Release Nos. 33-9117; 34-61858; File No. S7-08-10, dated April 7, 2010 (the "Proposing Release"), relating to offering, disclosure and reporting requirements for asset-backed securities ("ABS") under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"). As indicated in our Original Letter, ASF now submits this supplemental letter addressing the Commission's proposal concerning the filing of a waterfall computer program that gives effect to the flow of funds provisions of an ABS transaction.

The ASF Reg AB II Taskforce (the "Taskforce") organized by ASF to respond to the Proposing Release recognized from the outset that the Commission's proposal regarding the filing of a waterfall computer program raised significant concerns and issues that required considerable, focused attention. As a result, in addition to discussing the proposal in the Taskforce's Disclosure Committee and in each of the subcommittees established for different asset classes, we also established a Waterfall Committee, the sole focus of which was the Commission's proposal regarding the waterfall computer program. While participation in this comment process was open to all ASF members, a concerted effort was made to enlist participation by market

[1] The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 340 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

participants, including issuers, investors and third-party data and analytics providers,[2] with substantial experience in a variety of asset sectors.

The views and recommendations presented in this letter, therefore, are the product of an intense effort by representatives of all segments of the securitization market to offer the Commission an industry response to the proposed waterfall computer program. During the process, members of the Taskforce advocated their respective interests which, in many cases, were competing. Despite special efforts to find common ground and to reach practical compromises that addressed these competing interests, consensus could not be reached on the Commission's proposal. As a result, we set forth the competing views of the relevant constituent interests in this letter. We urge the Commission to carefully consider each of the views set forth in this letter before imposing changes to the existing regulatory framework.

WATERFALL COMPUTER PROGRAM PROPOSAL

PROPOSED ITEM 1113(h)(1) OF REGULATION AB

The Commission proposes to require that most ABS issuers file a computer program on EDGAR, in the form of downloadable source code in the Python programming language, that gives effect to the flow of funds, or "waterfall," provisions of each ABS transaction. Proposed Item 1113(h)(1) of Regulation AB identifies several functional elements of this "waterfall computer program," referring to it as a computer program that:

(i) gives effect to the priority of payment provisions in the transaction agreements that determine the funds available for payments or distributions to the holders of each class of securities, and each other person or account entitled to payments or distributions, from the pool assets, pool cash flows, credit enhancement or other support, and the timing and amount of such payments or distributions;

(ii) provides the user with the ability to programmatically input (A) the user's own assumptions regarding the future performance and cash flows from the pool assets, including but not limited to assumptions about future interest rates, default rates, prepayment speeds, loss-given-default rates and any other necessary assumptions required to be described under Item 1113, and (B) the current state and performance of the pool assets by uploading the proposed asset-level data file that is to be filed at the time of the offering and on a periodic basis thereafter; and

(iii) produces a programmatic output, in machine-readable form, of all resulting cash flows associated with the ABS, including the amount and timing of principal and interest payments payable or distributable to a holder of each class of securities, and each other person or account entitled to payments or distributions in connection with the securities, until the final legal maturity date, as a function of the inputs into the waterfall computer program.

[2] For purposes of this letter, we refer to third-party data and analytics providers as "analytics providers."

The Commission also proposes to include an instruction to proposed Item 1113(h)(1) to make clear that the provisions captured in the waterfall computer program should be all-encompassing, meaning that the program should give effect to the priority of payment provisions (and any contingencies affecting such priorities) and any other provisions that are used to determine the value of the inputs to the waterfall computer program.

All of our members appreciate the Commission's interest in providing investors with adequate information to make an investment decision relating to ABS and to monitor ongoing performance of purchased ABS, but investors and issuers have divergent views on a number of important aspects of the Commission's waterfall computer program proposal, and analytics providers have identified additional complexities and issues that the Commission should consider.

A. Nature and Scope of Proposed Waterfall Computer Program is Unclear

At the outset, there is significant confusion throughout the market regarding the nature and scope of the proposed waterfall computer program. At times, the Commission seems to contemplate that the waterfall computer program would be only one element of a complete cash flow and valuation model, and that investors would build or acquire from a vendor the other elements to complete the model, including a collateral engine that takes the pool-asset data file and user-input assumptions about market conditions and pool performance metrics and generates "vectors" of projected cash flow for each month of the transaction's life.[3] At other times, however, the Commission seems to contemplate that the waterfall computer program would be a more fully-integrated cash flow and valuation model, or would require at least some sort of rudimentary collateral engine.[4] As a result, it is not clear whether, on the one hand, the Commission intended to require only a basic cash flow waterfall program that describes how projected monthly cash flows from the pool assets (derived from external programs) would be

---

[3] For example, the Commission indicates:

> The waterfall computer program is a necessary but not a sufficient tool for carrying out quantitative analysis of an ABS. We recognize that investors will still have to build or acquire from a vendor other elements of a complete cash flow and valuation model. However, requiring the issuer to supply the waterfall computer program should make the investor's task easier, and is an appropriate subject of a filing requirement as it consists of information that is specific to the particular ABS being offered. *See* Proposing Release, note 339, at 23378.

Similarly, the Commission indicates:

> By running the waterfall computer program in combination with other internally-developed or commercially available vendor interest rate, prepayment, default and loss-given-default models, cash flow engines or computational services, investors should be able to promptly run cash flow simulations and generate present value estimates for ABS tranches. *See* Proposing Release at 23379.

[4] For example, the Commission indicates:

> Under the proposed requirement, the filed source code…must provide the user with the ability to programmatically input the user's own assumptions regarding the future performance and cash flows from the pool assets, including but not limited to assumptions about future interest rates, default rates, prepayment speeds, loss-given-default rates, and any other necessary assumptions required to be described under Item 1113 of Regulation AB. *See* Proposing Release at 23379.

Similarly, clause (ii) and portions of clause (iii) of Item 1113(h)(1) seem to contemplate that an issuer include a collateral engine and valuation model in its waterfall computer program.

applied in the payment waterfall or, on the other hand, the Commission intended to require that the waterfall computer program operate as a more integrated and complete cash flow and valuation model.

B. ASF Member Views on the Waterfall Computer Program Proposal

1. Views of Issuer Members

Our issuer members have a number of significant concerns with the Commission's proposed waterfall computer program. First and perhaps most significantly, the Commission's proposed waterfall computer program represents an unprecedented, if not radical, departure from the disclosure paradigm that has served as the basis for the content of ABS prospectuses for decades. The Commission proposes that the waterfall computer program permit a user to produce any number of projections of the cash flows for the pool assets based on an unlimited number of user-selected (or even randomly-generated) assumptions about interest rates, prepayment speeds, loss rates and the like, and then to pass these simulated cash flows through the waterfall structure for the related ABS transaction in an effort to forecast the amount and timing of principal and interest payments throughout the life of the ABS. Such modeling programs are, therefore, by their very nature *predictive* programs that would place the ABS issuer in the unprecedented and extraordinarily precarious position of providing investors with tools to speculate on the future performance of ABS.

In contrast, the narrative description of the flow of funds waterfall included in the prospectus in accordance with current Item 1113 of Regulation AB – which serves as the foundation for the Commission's proposal – is intended to be a distribution algorithm, *not* a predictive model. Only clause (i) of the waterfall program proposed in Item 1113(h)(1) is consistent with the cash flow waterfall as described in the prospectus and the underlying transaction documents. A program that provides the functionality described in clauses (ii) and (iii) of Item 1113(h)(1) would not be the programmatic equivalent of the waterfall, but instead, a complex predictive model that goes far beyond the narrative description of the flow of funds waterfall included in the prospectus.

As a result, issuers are deeply troubled by, and fervently object to, Item 1113(h)(1) as proposed, which would significantly and inappropriately extend an issuer's liability under the federal securities laws by making the issuer responsible not only for the accuracy of the transaction structure but also for the integrity of a waterfall computer program that purports to predict, or to be an element of a broader model that predicts, future cash flows based on a limitless series of hypothetical future events and scenarios.

Second, the Commission's proposal frames a fundamental policy question regarding the extent to which predictive modeling tools should ever be the responsibility of issuers of securities. Issuers firmly believe that, while it is the prerogative of investors and the market to develop predictive modeling tools, it is another matter entirely and wholly inappropriate to mandate that issuers participate in, or otherwise take responsibility for, any part of such speculative exercises. Proponents of the Commission's proposal indicate that predictive models would be useful to investors. Issuers point out, however, that the simple fact that something may be useful to investors does not mean that it is feasible or appropriate for issuers to provide it. In the corporate context, there are a host of useful third-party resources available to investors, including valuation models, regression analyses and other predictive and forecasting tools, none of which are, or

should be, the responsibility of an issuer to produce or provide to investors. ABS issuers are not aware of any attempts by the Commission to mandate that corporate issuers participate in, much less take responsibility for, such predictive modeling tools and see no reason why a different standard should apply to ABS issuers.

Indeed, ABS issuers have forcefully challenged the notion that they should be responsible for such models or their output since the issue was first formally considered by the Commission staff in 1994.[5] Ultimately, the Commission took two important steps to address issuers' concerns:

(i) in connection with the adoption of Regulation AB in 2004, the Commission confirmed that, in cases where an investor or vendor model simply allows an investor to perform its own calculations based on collateral and structural inputs provided by the issuer or underwriter, *only* the inputs and other information provided by the issuer or underwriter would constitute offering materials for which the issuer or underwriter would be responsible;[6] and

(ii) in connection with the adoption of securities offering reform in 2005, the Commission confirmed that an issuer would not be responsible for information prepared by another offering participant on the basis of, or derived from, information provided by the issuer, including computational materials prepared by an underwriter or dealer.[7]

Issuers believe the Commission reached precisely the right results in 2004 and 2005 – apportioning responsibility for inputs, models and other information based on the sources of such information and tools. The Commission's current proposal would, in effect, reverse the actions taken by the Commission in 2004 and 2005 by thrusting issuers into the position of providing investors with tools to speculate on the future performance of ABS.

Third, virtually no ABS issuers have predictive waterfall computer programs, and modeling capabilities within the industry vary significantly by asset sector. Issuers are concerned that the Commission has based its proposal, in part, on the erroneous belief that in the course of structuring ABS transactions issuers already produce a source code detailing the cash flow waterfall.[8] We are not aware of any ABS issuer that prepares its own collateral engine or waterfall program, and developing such a program would be extraordinarily burdensome and costly for any ABS issuer.

For some (but by no means all) ABS transactions, underwriters do have some predictive modeling capabilities and, as noted by the Commission, a robust third-party, investor-oriented ABS modeling industry has developed over the past two decades that also provides investors with state-of-the-art modeling capabilities. Third-party vendors have spent many years and tens of millions of dollars developing and refining their predictive models. Even with that, however, the level of modeling capabilities varies significantly by asset sector, with RMBS and CMBS

---

[5] *See* Mortgage and Asset-Backed Securities (May 20, 1994) (response to no-action request on behalf of Kidder, Peabody Acceptance Corporation I and certain of its affiliates).
[6] *See* Securities Act Rel. No. 8518 (Dec. 22, 2004) [70 FR 1506, 1556].
[7] *See* Securities Act Rel. No. 8591 (Aug. 3, 2005) [70 FR 44722, 44751] at note 271.
[8] *See* Proposing Release at 23405.

having more developed capabilities and, as discussed in more detail below, credit card and dealer floorplan ABS (which employ master trust structures) having only rudimentary capabilities at best.

Fourth, none of these state-of-the-art modeling programs meets, or aspires to meet, the standards of precision specified by the Commission for the proposed waterfall computer program. Instead, these modeling programs are merely that – models that make simplifying assumptions and disregard a variety of contingencies that could affect the timing, amount or priority of payments. Indeed, it is by design that these models incorporate simplifying assumptions and eliminate such contingencies because a model that attempted to replicate all possible scenarios – which would be extraordinarily difficult, if not impossible – would become so detailed and riddled with complexity as to be useless or, at a minimum, would risk obfuscating the most important features of the model within that greater detail and complexity. Simply stated, and in the words of one of our issuer members, a waterfall computer program that embodied the standards of precision specified by the Commission would be the equivalent of a map as big as the city it seeks to depict.

Fifth, as noted above, master trusts, such as those that issue credit card and dealer floorplan ABS, raise particularly difficult modeling challenges. As noted above, predictive modeling capabilities for these transaction structures are rudimentary at best, despite the fact that these structures have been in place for more than two decades. The reasons for this lie in the fundamental, dynamic nature of a master trust.

As the Commission is aware, master trusts allow issuers to issue ABS that provide for the conveyance of additional pool assets in contemplation of future issuances of ABS backed by the same, revolving asset pool. The asset pool can also change as a result of the reconveyance or removal of receivables, which could arise in connection with charge-offs and account terminations or for other business reasons. In addition, in most cases, the pool assets supporting the ABS at any given time are themselves revolving assets, with account balances that fluctuate based on credit line usage and with each extension of credit based on then-current credit-granting or underwriting standards. As a consequence of this dynamic structure, the composition and characteristics of the asset pool change over time.[9] Similarly, the amount and terms of the ABS issued by the master trust and outstanding from time to time change as new series or classes of ABS are issued and previously-issued series or classes amortize and mature.[10]

In addition, most master trust structures provide for the sharing of collections on the pool assets across series of ABS to the extent that particular series have collection surpluses at a time when other series have collection deficits. This adds a further layer of complexity and challenge to the production of a meaningful predictive model.

---

[9] Master trust issuers note that, while the composition and characteristics of the asset pool change over time, these changes typically have no material impact on pool-level performance.

[10] In the case of de-linked master trust structures – where senior notes and subordinate notes of the same series are issued in tranches at different times and on different terms – scheduled maturities of subordinate notes could potentially lead to funding (cash collateralization) of senior notes in advance of their scheduled maturities, which would represent an unanticipated draw on available cash flows for which a model could not meaningfully account.

In a master trust structure, therefore, both the assets and liabilities of the issuing vehicle are in a continual state of flux and, practically speaking, it is not possible for the sponsor, much less an investor, to know or project the future composition and characteristics of the asset pool or the amount and terms of ABS that will be outstanding over time. As such, it is impracticable to produce a meaningful predictive model without significant simplifying assumptions around pool composition and outstanding ABS.

As should be evident from the comments above, the Commission's waterfall computer program proposal is among the most troubling rule proposals our issuer members have encountered over the past three decades. The nature and scope of the proposed waterfall computer program is unclear and the Commission's descriptions of the proposal conflict, making it extremely difficult for issuers to produce fully-developed comments. At the same time, issuers are deeply concerned that the Commission does not fully appreciate the scale and complexity of its proposal or the magnitude of the costs issuers would incur in their efforts to comply.

Equally troubling, the Commission appears poised to significantly extend the disclosure paradigm that has directed the content of ABS prospectuses for decades, exposing issuers to significantly greater liability, but with no tangible indication that investor protection would be advanced. The Commission appears to be motivated by a perception that investors currently are unable to conduct fulsome evaluations of ABS; yet, by all objective measures, investors have ready access to any and all state-of-the-art predictive modeling programs that the market has to offer.

Ultimately, the daunting challenges, staggering costs and inestimable risks associated with the Commission's proposal will be so burdensome and costly that securitization will no longer represent a rational or cost-effective alternative for many, if not most, issuers. Indeed, if the Commission proceeds with its proposal, issuers question whether a viable securitization market will exist at all.

In light of the significance of the issues implicated by the Commission's proposal, and the gravity of the consequences if the Commission were to proceed, issuers firmly believe that the waterfall computer program as proposed is not workable and that the Commission should abandon the proposal. If the Commission decides nevertheless to continue with a waterfall computer program proposal in some modified form, issuers believe the only responsible and appropriate course of action would be to initiate a constructive dialogue with industry representatives, to more fully identify and explore the issues and concerns of both investors and issuers. Issuers believe that an industry dialogue is an absolute prerequisite to further action, to ensure that any ultimate action taken by the Commission is well considered and balanced.

Finally, in light of the comments above, issuers believe it is premature to fully explore in this letter other issues and concerns that relate to implementation of the Commission's proposal. Nevertheless, we include the following general observations:

Liability Standard: Under the Commission's proposal, the waterfall computer program would form a part of the statutory prospectus and we presume, therefore, that the Commission intends that the waterfall computer program be assessed under the same liability standards as apply to the prospectus as a whole, including Securities Act Section 11 and Section 12(a)(2). Just as the

proposed waterfall computer program represents an unprecedented departure from the current disclosure paradigm under the federal securities laws, so too would be a proposal to impose Section 11 strict liability and Section 12(a)(2) liability standards to this information. Issuers believe the imposition of such liability standards would most certainly drive issuers to operate in the private markets.

In addition, while not entirely clear in the Proposing Release, the Commission appears to contemplate that the proposed waterfall computer program would include at least some form of collateral engine that permits a user to make its own assumptions about market conditions and pool performance metrics. Issuers are extremely concerned about the prospect of having liability for such a collateral engine. A more basic cash flow waterfall program – for instance, one describing how current monthly cash flows from the pool assets are applied in the current payment waterfall – can at least be mapped back to the operative transaction agreements governing the cash flow waterfall. A collateral engine, on the other hand, has no governing standards that control which variables an investor should be allowed to manipulate or the range of manipulation that is appropriate, leaving an issuer in an extraordinarily precarious position from a liability perspective.

Python: Issuers have significant concerns with a proposal to use Python, which is a programming language that is used by no one in the ABS industry and that has no industry coding standards. In the absence of such coding standards, variations in the form and functionality of waterfall computer programs across issuers would be inevitable, and investors would have to invest significant amounts of time and effort just to operate the programs, much less to read and evaluate their output. In contrast, third-party vendors offer standardized controls and formatting, thereby facilitating comprehension and comparison of ABS across issuers. As a result, the aggregate time needed to learn how to operate the programs produced by individual issuers would so exceed the time commitment necessary to operate a third-party vendor's platform that investors would naturally continue to gravitate towards the vendor models.

Issuers understand that the Commission seeks to use a programming language that is open enough for investors to view the formulas and modify them according to their own assumptions and concerns, but open source code is only useful to investors to the extent they possess the sophistication and resources to de-code the workings of the program. As a result, issuers and analytics providers believe the Commission should continue to allow the market to select the technology that is best suited for each asset class.

2. Views of Investor Members

Our investor members support the Commission's proposed waterfall computer program and believe it would promote transparency in the offering process and enable market participants to better evaluate ABS. Investors believe that, in order to produce accurate cash flow projections, a cash flow and valuation model would require each of the functional elements identified in proposed Item 1113(h)(1).[11]

[11] While investors agree that a collateral engine is necessary for a properly functioning waterfall computer program, some indicate that, for functionality, they may use their own collateral engine rather than one produced by the

Investors generally agree with the Commission that the waterfall computer program "would convey information to investors in a form that is both more accurate and more useful to them for data analysis than a textual description of the waterfall."[12] Ultimately, writing the waterfall provisions in code will likely be more precise than what is contained in the prospectus or the transaction documents and will provide clarity to investors where before there might have been ambiguity. However, investors are concerned with the possibility of a discrepancy between the waterfall computer program and the provisions of the transaction documents or the description in the prospectus and stress the importance of consistency across all. It is imperative that the same provisions that impact an investment decision are the ones ultimately controlling for the transaction.

The Commission is correct that ABS investors typically rely on a computer simulation of the cash flows of the pool assets under different assumptions to determine the timing of distributions on the ABS. However, the Commission incorrectly assumes that, currently, all investors are internally producing waterfall models based on the transaction documentation.[13] While many of our investor members do, in fact, produce waterfall models that are used in conjunction with more elaborate models produced by third parties, many others do not have the resources to accomplish this task and instead rely solely on the third party models. Investors acknowledge that, because issuer-developed waterfall computer programs would be filed for each deal, the usability and functionality of those programs likely will not compare favorably with third party programs, especially for comparison across asset classes or on a portfolio basis, and investors will continue to rely, at least in part, on third party models in making investment decisions. Still, our investor members see the waterfall computer program as a significant benefit to the market, one that will result in more precise pay rules as well as greater transparency in the offering process. Investors believe that the waterfall computer program would also aid their ability to internally perform cash flow analysis[14] and improve model quality among third-party providers.

While the waterfall computer program is to be filed as part of the prospectus, investors do not believe that the Commission intended that the waterfall computer program be limited to those items that are "material." Indeed, the Commission specifically indicated that provisions that are not material to the waterfall description in the prospectus would still have to be given effect by the waterfall computer program if they are used to determine the value of the inputs.[15] In

---

issuers. With regard to proposed Item 1113(h)(1)(iii), investors request that the waterfall computer program produce not only the amount and timing of principal and interest payments, but also the amount and timing of any losses.

[12] See Proposing Release at 23379.

[13] "Because prospective investors in ABS typically do not have access to the ABS issuer's computer models, under current conditions, an investor must create its own computer program. It does this by taking the priority of payment rules stated in the trust agreement, pooling and servicing agreement, indenture, or other operative document for the ABS and described in the prospectus, converting the English language statement of those provisions into one or more algorithms, and then expressing the algorithms as computer code in a programming language. As a practical matter, it is often not possible to complete these steps before making an investment decision." See Proposing Release at 23378.

[14] The Commission indicates its intention that an investor would be able to download the source code for the waterfall computer program and run the program on the investor's own computer. See Proposing Release at 23378.

[15] "But in the event that there are any provisions that are not required to be described under Item 1113 because they are not material to the description of the waterfall in the prospectus, but those provisions are used to determine the value of the inputs to the waterfall computer program, the waterfall computer program would be required to give effect to the provisions by which those inputs are determined." *See* Proposing Release at 23379.

addition, investors believe that the waterfall computer program should be capable of modeling virtually all cash flow scenarios[16] and should only be subject to a very limited number of assumptions. Permitting the scope of the program's projections to be limited by unnecessary assumptions would effectively limit the program's accuracy in predicting cash flows and, thus, its utility in aiding in investment decisions. Investors believe that the waterfall provisions in almost all transaction agreements are static and should remain accurate for the life of a deal. For this reason, the bond waterfall model should only be subject to a few basic assumptions, such as an assumption that there will be no changes in law that would have an impact on the distribution of cash flows.[17] For transactions in which the waterfall provisions are not static, such as in the case of revolving master trust structures, investors acknowledge that additional assumptions may be required, such as with respect to the issuance of a new series (which, as noted below, should require an update of the program). In the case of the collateral engine, investors acknowledge that certain additional assumptions may be required because collateral characteristics can change overtime due to a number of factors, including implementation of a regulatory initiative such as the Treasury Department's Home Affordable Modification Program or the various state initiatives to stave off foreclosures on mortgage loans. The greater potential for unanticipated changes in collateral characteristics may even justify the need for an issuer to represent that the collateral engine produces collateral cash flows that are accurate only as of the closing date of the transaction.

While investors acknowledge that certain specified assumptions for the waterfall computer program may be necessary to account for changes that occur after closing, they believe that the waterfall computer program should be updated to account for these changes. For instance, investors agree with the Commission that the revolving nature of credit card master trusts and the issuance of a new series within a master trust should prompt a filing of an updated waterfall computer program,[18] but investors also believe that issuers of other types of ABS should have a similar requirement. Amendments to the transaction documents or changes in law or in the characteristics of the collateral would result in incorrect or even incompatible data. It is important that changes affecting the collateral and bond cash flows be carried through to the waterfall computer program on an ongoing basis so that investors can continue to accurately model future cash flows of the ABS to make informed investment decisions and appropriately monitor a portfolio. In addition, investors believe the waterfall computer program would be a useful tool for trustees to confirm bond distributions during each pay period.

It appears that the Commission, through its proposal to incorporate the waterfall computer program into the registration statement and the prospectus, has intended to apply strict liability to issuers for material misstatements or omissions in the waterfall computer program. While investors believe that issuer liability for the waterfall computer program is ultimately necessary to ensure accuracy, investors question how such a liability scheme would work, especially given

---

[16] To the extent the cash flows of certain asset classes are so inordinately complicated that they cannot be modeled even with appropriate assumptions, some investors question whether these transactions should even occur.

[17] There have been recent examples of changes or proposed changes in law that would affect the pay rules in a given transaction, including court rulings resulting from the Lehman Brothers bankruptcy and proposed legislation relating to bankruptcy cram-down.

[18] "In addition, we are proposing to require credit card master trusts to report changes to the waterfall computer program on Form 8–K and file the updated waterfall computer program as an exhibit to the report." (23379)

that the Commission intends the waterfall computer program to include provisions that are not necessarily material.[19] In any event, investors are concerned that, in light of the different standards of liability imposed under the federal securities laws between the registered and private markets, issuers might operate in the private market to avoid a higher standard of liability.

Investors agree with the Commission that the waterfall computer program should not be written in a proprietary source code that is viewable only by the owner of the program. They believe it is important that the code be transparent so that investors can diligence the waterfall provisions written into the code. However, investors have varying views with respect to whether the waterfall computer program should be required to be written in Python. While some believe that an open-source program such as Python would be advantageous, there are others who believe that programs written in Excel, Java, C++ or another readily-useable format would be more appropriate. Others believe that a consistent language in the market could be valuable if it produced standardization, but they question whether this is possible given that programmers will likely create very individualized programs despite a common source code.

3. Views of Analytics Providers

Our analytics provider members remain committed to providing investors with tools for accurate analysis of bond cash flows. In the current marketplace, these providers compete vigorously with one another to provide solutions to many of the same issues that the Commission seeks to address. This competition has inspired robust modeling solutions and analytical packages that are utilized on a daily basis by investors seeking to perform due diligence on ABS.

First and foremost, the analytics providers suggest further clarification from the Commission on the scope of the proposal before any decision is rendered. As previously stated in this letter, the current proposal is vague, and sometimes contradictory, regarding its nature and scope. The scope, and resulting cost and liability of the program, would be reduced dramatically if the proposed program focused solely on the bond waterfall. As a comparison, a typical vendor deal model may consist of a few hundred to several thousand lines of code, but a cash flow engine, which is responsible for accepting user inputs and projecting collateral cash flows, can exceed a half million lines of complex programming code. Implementing both would require a significant investment by issuers, well beyond the estimations made by the Commission, and will greatly increase the complexity of the waterfall program. The Commission also needs to consider the cost of support and quality assurance for any such program. Commercial vendors devote significant resources to assist clients with their products. They maintain help desks and provide documentation to support a comprehensive understanding of their programs and the results that they yield. In addition to this, it is customary for vendors to subject their models to rigorous, quality assurance checks in a variety of different environments (Windows, Solaris, Linux, etc.) to ensure that the model consistently yields the same results it produced when it was first created.

[19] "But in the event that there are any provisions that are not required to be described under Item 1113 because they are not material to the description of the waterfall in the prospectus, but those provisions are used to determine the value of the inputs to the waterfall computer program, the waterfall computer program would be required to give effect to the provisions by which those inputs are determined." *See* Proposing Release at 23379.

Second, there should be no expectation by the Commission that the waterfall computer program would be used directly by investors as their primary source of analysis. Waterfall computer programs developed and maintained by a wide range of issuers would likely have very different inputs, outputs and calculation methods and would not necessarily provide usable tools for investors interested in portfolio-level analysis and reporting. Instead, analytics firms could use the waterfall computer program to develop more comprehensive modeling tools in their own format as they do now.

Third, the waterfall computer program should only be provided for use at issuance. The Commission's proposal assumes that the then-current collateral information and the waterfall program are sufficient to project bond cash flows on an ongoing basis. In fact, in certain transactions, the entire history of payment performance on the collateral and the bonds is required to provide updated cash flow projections. Analytics providers devote significant effort and resources to provide updated models to their clients and utilize complex internal programs to ensure that they are updated accurately.

Fourth, our analytics provider members have differing views on whether developers of the waterfall computer program should be permitted to use any standard programming language. Many of our analytics provider members support the use of any programming language that is transparent enough for market participants to examine the coding and assumptions used, such as Excel, C, C++, Perl and Java, and even the use of proprietary deal modeling scripts if they meet the transparency standard of an open source code.[20] They note that many of these programming languages are widely used by the market today, are highly developed to already handle the nuances of structured finance, and have the benefit of years of testing. Mandating the use of a single, relatively unproven language like Python would dispose of decades of innovation and development of modeling languages with proven track records of success. These analytics providers believe that use of a single programming language would not likely result in standardization, because programmers will inevitably create very individualized programs despite the common source code. Further, they indicate that selecting a single computer language would not eliminate problems of standardization, since languages change and evolve over time, and incompatibilities can exist between versions of a language.[21] Other of our analytics provider members believe that, while mandating a single programming language for waterfall computer models cannot guarantee standardization, a mandate is a constructive step in that direction. These analytics providers believe that specifying a general-purpose language like Python promotes convergence in both style and inter-operability and ensures equal access.

---

[20] Our data and analytics provider members note that it is unclear whether the open-source requirement proposed by the Commission is also meant to apply to the collateral engine.

[21] It is also unclear whether different versions of Python will be compatible across, or even within, operating systems, and analytics providers believe that this will further inhibit any standardization that is sought by the Commission. Analytics providers point to the following question and answer included on the Python website:

> Q: "I decided to write something in [version] 3.x but now someone wants to use it who only has 2.x. What do I do?"
>
> A: "In addition to the 2to3 tool which allows 3.x code to be generated from 2.x source code, there's also the 3to2 tool, which aims to convert 3.x code back to 2.x code….However, code which makes heavy use of 3.x only features (such as function annotations or extended tuple unpacking) is unlikely to be converted successfully."

Fifth, standards for input and output data would need to be developed with sufficient flexibility to allow for new deal structures. Different asset classes and different structures may require different approaches, so the requirements should be flexible enough to encompass the variety of instruments that are in the market, especially with respect to issuances of new series, classes or tranches by a master trust. It may also be necessary to address resecuritization transactions more directly as they pose unique problems, particularly with integrating the waterfall programs on underlying deals which may have been modeled by different issuers and/or programmers. The proposal is also silent on an issuer's obligation to provide models on deals issued prior to the proposed regulations, which might be included in a resecuritization subject to the proposed rule.

Finally, analytical tools that are currently used by the market are provided with disclaimers indicating that errors are possible and that they are accepted by the user "as is." Analytics providers believe that it may be inappropriate to impose a higher standard of liability on issuers and that third-party vendors are not likely to provide issuers with tools to meet the proposed requirement if there is a risk that the vendor will be liable for any errors beyond current standards.

CONCLUSION

As detailed above, issuers and investors have divergent views on a number of important aspects of the Commission's waterfall computer program proposal, and analytics providers have identified additional complexities and issues that the Commission should consider. We urge the Commission to carefully consider each of the views set forth in this letter before imposing changes to the existing regulatory framework. If, as put forth by our issuer members, the Commission agrees that a constructive dialogue with industry representatives is an appropriate course of action, ASF is uniquely positioned to facilitate such a dialogue and stands ready to do so.

* * *

ASF very much appreciates the opportunity to provide the foregoing comments in response to the Commission's Proposing Release. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at 212.412.7107 or at tdeutsch@americansecuritization.com, Evan Siegert, ASF Associate Director, at 212.412.7109 or at esiegert@americansecuritization.com or ASF's outside counsel on these matters, Michael Mitchell of Orrick, Herrington & Sutcliffe LLP, at 202.339.8479 or at mhmitchell@orrick.com.

Sincerely,

Tom Deutsch
Executive Director
American Securitization Forum

cc: Via Hand Delivery
The Honorable Mary L. Schapiro, Chairman
The Honorable Luis A. Aguilar, Commissioner
The Honorable Kathleen L. Casey, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
Paula Dubberly, Deputy Director, Division of Corporation Finance
Katherine W. Hsu, Senior Special Counsel, Office of Rulemaking
Rolaine S. Bancroft, Special Counsel, Office of Structured Finance, Transportation and Leisure