

## MEMORANDUM

**To:** Commission File No. S7-08-10  
**From:** David Beaning  
Special Counsel  
Office of Structured Finance  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
**Date:** May 25, 2011  
**Re:** Proposing Release on Asset-Backed Securities (Release Nos. 33-9117; 34-61858)

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On May 24, 2011, Paula Dubberly, Katherine Hsu, Rolaine Bancroft, Michael Coco, Jay Knight, David Beaning and Robert Errett of the Division of Corporation Finance; and Emre Carr and Stanislava Nikolova from the Division of Risk, Strategy and Financial Innovation met with representatives of the American Securitization Forum (ASF) and several of its members, listed below. The meeting participants discussed topics relating to the Commission's April 7, 2010 proposals regarding asset-backed securities. The following is a list of external attendees and the institutions they represent.

Tom Deutsch from ASF Staff  
Evan Siegert from ASF Staff  
Jim Johnson from ASF staff  
Cory Wishengrad from Barclays  
Peter Walgren from Barclays  
Sandy Szakach from PPM America  
Scott Seewald from New York Life Investment Management  
Michael Mitchell from Orrick



**ASF DISCUSSION POINTS RE SEC PROPOSED RULES FOR  
PRIVATELY ISSUED STRUCTURED FINANCE PRODUCTS  
MAY 24, 2011  
AGENDA**

- I. Overview of Proposed Rules for Privately Issued Structured Finance Products*
- II. Detrimental Effects of Proposed Rules on the Private Placement Market*
- III. Types of Asset Classes Predominantly Issued in the Private Placement Market*
- IV. ASF Alternative Proposal – “Qualified Institutional Buyer of Structured Finance Products”*
- V. Conforming Changes and Transition*

***Overview of Proposed Rules for Privately Issued Structured Finance Products: The Commission proposes to condition the availability of the safe harbors for privately-issued structured finance products on an issuer's undertaking to provide to investors, in connection with initial offers or sales and on an ongoing basis, the same information as would be required in a registered transaction.***

- We recognize that CDOs and other structured securities in the private markets are complex financial instruments and we support the Commission's goal of revising the safe harbors to ensure that sophisticated investors are able to consider and understand the risks of their investments. We have, however, a number of significant concerns with a proposal to require issuers in private transactions to stand ready to deliver the same information as would be required in registered transactions.
- The proposed information requirements, if adopted, would be tantamount to a determination by the Commission that a class of investors that are able to fend for themselves in the purchase of structured finance products does not exist and, therefore, that issuers must be regulated to the "lowest common denominator."
- We believe that the more appropriate course of action to achieve that goal – a course that is consistent with the historical treatment of institutions and institutional sales under the federal securities laws – is to base the availability of the safe harbors on private transactions with a class of institutional investors that possess a level of knowledge and experience in the purchase and surveillance of structured finance products such that they are able to identify and request the information that they need to make informed investment decisions relating to those products without the protections mandated by the registration provisions of the Securities Act.

***Detrimental Effects of Proposed Rules on the Private Placement Market: The Commission's proposed information requirements for structured finance products would effectively eliminate the regulatory distinction between public and private offerings, and risks compromising the essential function of the private placement market as a means of efficient capital formation.***

- The U.S. private placement market is one of the world's largest securities markets and functions as a vital means of efficient capital formation, which in turn is vital to support economic recovery, job creation and long-term economic growth in the U.S. But the size and stature of the private placement market is due, in large part, to a statutory scheme that offers an alternative to the more heavily-regulated public offering process.
- Issuers operate in the private placement market for a variety of valid and important reasons:
  - Many have no choice but to operate in the private placement market, and others operating in the private placement market have been impeded from migrating to the registered market, because they do not meet the technical requirements of the Regulation AB definition of an asset-backed security and would be relegated to the Commission's corporate regime if they were offered and sold publicly.
  - An issuer may not have access to all of the information required for a registered transaction or the underlying assets or transaction structure may not lend themselves to the delivery of the rigid information disclosure requirements for registered transactions.
  - An issuer's issuances may not be on a sufficient scale or the market for a particular product may be sufficiently limited that the costs and difficulties of compliance with the disclosure standards for a registered transaction make the private placement market the only viable alternative.
- We believe that the application of public disclosure requirements to private transactions will effectively extinguish the market for certain types of products and will severely constrain the development of new, innovative financing techniques. We also firmly believe that these deleterious consequences can be averted by our alternative "SQIB" proposal outlined below.

*Types of Asset Classes Predominantly Issued in the Private Placement Market: A non-exhaustive but illustrative list of products or underlying collateral that are offered and sold predominantly or exclusively in the private market for one or more of the reasons detailed above includes the following products and underlying collateral:*

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| <ul style="list-style-type: none"> <li>• Asset-Backed Commercial Paper</li> <li>• Equipment-related assets: <ul style="list-style-type: none"> <li>- Micro/Small Ticket Leases</li> <li>- Mid-Ticket Leases</li> </ul> </li> <li>• Future Flow Contracts</li> <li>• Insurance-related assets: <ul style="list-style-type: none"> <li>- Catastrophe (CAT) Insurance</li> <li>- Insurance Premium Loans</li> <li>- Life Insurance Premiums</li> <li>- Structured Settlements</li> <li>- XXX</li> </ul> </li> <li>• Intellectual Property: <ul style="list-style-type: none"> <li>- Film Receivables</li> <li>- Franchise Royalties</li> <li>- Music Publishing Royalties</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>- Patent Licensing Royalties</li> <li>- Pharmaceutical Royalties</li> <li>- Trademark Licensing Fees</li> <li>• Middle Market Loans</li> <li>• Municipal Bonds</li> <li>• Mutual Fund Fees</li> <li>• Non-Traditional Real Estate Assets: <ul style="list-style-type: none"> <li>- Church Loans</li> <li>- CRE Net Lease</li> <li>- Mobile Home Parks</li> <li>- Servicing Advances</li> <li>- Timber</li> </ul> </li> <li>• Pay Day Loans</li> <li>• Rental Cars</li> <li>• Security Alarm Payment Streams</li> </ul> | <ul style="list-style-type: none"> <li>• Storm Cost Recovery Bonds/Transition Bonds</li> <li>• Tax Liens</li> <li>• Telecommunication Assets: <ul style="list-style-type: none"> <li>- Cell Towers</li> </ul> </li> <li>• Time Share Receivables</li> <li>• Transportation Assets: <ul style="list-style-type: none"> <li>- Corporate and Truck Fleet Leases</li> <li>- Railcars</li> <li>- Shipping Containers</li> <li>- Shipping Vessels</li> </ul> </li> <li>• Whole Business</li> </ul> |
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- The purpose of this list is solely to illustrate the depth and range of products in the private markets and does not represent any view on whether or not a particular product would be a structured finance product under the SEC's proposed definition.
  - So-called "pure private placements" are not a viable alternative for these types of offerings because they do not provide the necessary liquidity, mainly because a safe harbor for resales is not available and such offerings require the use of physical certificates.

***ASF Alternative Proposal: We have proposed a class of investor that can be presumed to fend for themselves in the investment of structured finance products based on a quantitative invested-assets test and a qualitative-standards test relating to the investor's knowledge and experience in the purchase and surveillance of structured finance products and compliance with investment approval procedures in connection with those purchases.***

- Rule 144A should be amended to permit resales of any structured finance products of any issuer to “qualified institutional buyers of structured finance products” (“SQIBs”), or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a SQIB.
- A SQIB would be required to satisfy a quantitative invested-assets test, similar to the test for a QIB, except that a SQIB would have to own and invest on a discretionary basis a substantial amount of structured finance products.
  - Our membership’s views on the level of invested assets at which an investor can be assumed to satisfy these measures varied both within and across constituencies. While some members believed the level should be lower and others higher, the predominant view was a level between \$100 and \$200 million in structured finance products, and so we used the mid-point figure of \$150 million for purposes of our proposal.
  - An institution that owns and invests on a discretionary basis a sufficient amount of structured finance products can be expected to have (i) personnel dedicated to evaluating for purchase, and monitoring the performance of, structured finance products; (ii) an understanding of, and access to, such modeling and other analytical tools as may be relevant to the purchase and monitoring of its investments in structured finance products; and (iii) investment approval procedures in connection with the purchase of structured finance products.
- A SQIB would be required to satisfy certain qualitative standards relating to the investor’s knowledge and experience in the purchase and surveillance of structured finance products and compliance with investment approval procedures in connection with those purchases, including a certification by the CFO or another executive officer of the purchaser as of a date no more than one year prior to the subject purchase.
- If the securities offered or sold are structured finance products that, by their terms, may be offered or sold only to SQIBs, then an issuer undertaking comparable to that required today – to provide, upon request, only basic, material information – would continue to be required.

- If the securities offered or sold are structured finance products that, by their terms, may be offered or sold to both SQIBs and QIBs, then an issuer undertaking comparable to that proposed by the Commission – to provide, upon request, substantially the same information as would be required in a registered transaction – would be required.<sup>1</sup>

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<sup>1</sup> This approach is substantially similar to the approach taken by the Commission in current Rule 506 of Regulation D, which does not require any undertaking to provide information to accredited investors but requires that information comparable to that required in a registered transaction be delivered to non-accredited investors.

***ASF Alternative Proposal: Conforming Changes & Transition***

- We recognize that the Commission's proposed information requirements would also apply to Rule 506 of Regulation D and Rule 144. Accordingly, we request and recommend that the Commission conform the requirements of Rule 506 of Regulation D and Rule 144 to our recommended changes to Rule 144A.
- As a matter of transition, we think it is imperative that the amendments to the safe harbors apply only prospectively, to issuances of structured finance products, and to resales of structured finance products initially issued, on and after a specified effective date for the amendments. Conversely, structured finance products that are initially issued before the specified effective date, and resales of those products at any time, should be grandfathered in their entirety from the amendments and such transactions should continue to be exempt from the registration provisions of the Securities Act so long as they are undertaken in compliance with the exemptive framework as in effect at the time those products were initially issued.