October 4, 2011

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

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

Re: Asset-Backed Securities, Release Nos. 33-9117; 34-61858; File No. S7-08-10

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is pleased to respond to the request for comment by the Securities and Exchange Commission (the "SEC" or the "Commission") on the Commission's Release Nos. 33-9244, 34-64968, Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities (the "Re-Proposing Release").[2] The Re-Proposing Release revises and re-proposes certain rules that originally were proposed in April 2010 (the "April 2010 Proposals") in Release Nos. 33-9117, 34-61858, Asset-Backed Securities; Proposed Rule (the "April 2010 Proposing Release"),[3] in light of the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and comments received in response to the April 2010 Proposing Release. SIFMA provided extensive comments to the Commission on the April 2010 Proposing Release (the "Prior Comment Letter").[4]

SIFMA is a diverse organization whose membership includes many of the largest and most significant participants in the United States capital markets. Our members and their affiliates include financial institutions that sponsor securitization transactions; special-purpose companies that issue asset-backed securities ("ABS") and other structured finance products; broker-dealers that act as underwriters, placement agents or initial purchasers in offerings of structured finance products; and asset managers that include some of the largest, most experienced investors in ABS and other structured finance products. This letter represents the

[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

[2] Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, 76 Fed. Reg. 47948 (Aug. 5, 2011).

[3] Asset-Backed Securities; Proposed Rule, 75 Fed. Reg. 23328 (May 3, 2010).

[4] The Prior Comment Letter is available at http://sec.gov/comments/s7-08-10/s70810-79.pdf.

views of our member financial institutions that act as securitization sponsors, issuers and underwriters ("dealer and sponsor members").[5]

We wish to extend our thanks to the Commission for its obvious efforts to get these important new regulations right, and for the care involved in responding both to the mandates of the Dodd-Frank Act and to comments received on the April 2010 Proposals. While we believe that modification of some of the re-proposals is appropriate, we have endeavored to offer constructive recommendations that will make the markets for asset-backed securities ("ABS") and other structured finance products more transparent, more stable and more efficient. We also have endeavored to provide thoughtful and useful responses to many of the Commission's additional requests for comment. We appreciate your consideration of our views.

I. Securities Act Registration

A. <u>Re-Proposed Conditions to Shelf Eligibility</u>

As a substitute for the current requirement of Form S-3 that each class of registered ABS have an investment grade credit rating from at least one nationally recognized statistical rating organization ("NRSRO"), in the April 2010 Proposals the Commission proposed four new shelf eligibility criteria that would apply to all asset-backed securities offered on proposed Form SF-3. Those criteria included an officer certification requirement with regard to the pool assets and a requirement for a third-party opinion, at least quarterly, regarding pool assets not repurchased or substituted for after a demand was made. The re-proposed rules would modify these requirements substantially, and also would add a requirement that transaction documents contain provisions intended to facilitate investor communications. To the extent that the Commission continues to believe that it is no longer appropriate to condition shelf eligibility on an investment grade credit rating, we continue to agree (as we noted in the Prior Comment Letter) that other criteria could potentially provide for "a certain quality and character" of the offered securities.[6] However, we believe that the re-proposed conditions can be further improved, and we set forth our recommendations below.

1. Certification Requirement

The Commission originally proposed a new Item 601(b)(36) under Regulation S-K, which would require the issuer to file an exhibit to the registration statement consisting of a certification of the chief executive officer of the depositor that, to his or her knowledge, "the securitized assets backing the issue have characteristics that provide a reasonable basis to believe that they will produce, taking into account internal credit enhancements, cash flows at times and in amounts necessary to service any payments of the securities as described in the prospectus," and that he or she had reviewed the prospectus and necessary documents for the certification.

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[5] Terms such as "we," "our" and the like, as used in this letter, refer solely to SIFMA's dealer and sponsor members, rather than SIFMA's asset manager members ("investor members"), unless we state otherwise.
[6] April 2010 Proposing Release, 75 Fed. Reg. at 23338.

In response to the April 2010 Proposals, many commenters (including SIFMA's dealer and sponsor members, in the Prior Comment Letter) expressed concern about the breadth of the proposed certification and suggested that it relate solely to the disclosure in the prospectus, rather than the credit quality of the securities being offered.[7] In particular, we suggested that the certification be revised to read, "Based on my knowledge, the prospectus 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 such statements were made, not misleading." The Commission stated in the Re-Proposing Release that it "preliminarily believe[s] the certification should not be limited to disclosure,"[8] so it did not altogether remove the portion of the certification dealing with the credit quality of the securities. However, the re-proposed rules would add several components to the certification related to the quality of the disclosure in the prospectus.

As described in the Prior Comment letter, we continue to believe that any required certification should only address the disclosure included in the prospectus, rather than a belief as to future cash flows from the pool assets or as to the quality of the ABS. In our view, it is not the role of the depositor or its officers to undertake any sort of credit analysis. NRSROs and their personnel are experts at this type of credit analysis, and subordination and enhancement levels are driven by their requirements – or, in unrated transactions, the specific requirements of the investors purchasing the securities. The depositor and its officers do not perform and are not trained to perform this type of credit analysis. Moreover, any conflict of interest inherent in rating agency credit analysis would be magnified exponentially were such an analysis to be effectively required to be undertaken by an affiliate of the issuer. Given the Commission's express intent to reduce reliance on credit analyses by NRSROs,[9] we continue to find it troublesome that shelf eligibility would instead be conditioned on a credit analysis by an officer of the depositor.

In our view, no officer of the depositor should be required to directly predict, or express any specific view as to, the future performance of a discrete pool of receivables or any securities backed by those receivables. Numerous factors that cannot be appropriately assessed by an officer of the depositor may influence whether the design of a securitization will successfully "produce . . . cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities . . . ." These may include, for example, changes in prevailing interest rates, national or regional economic downturns, overall declines in collateral values, legislative or regulatory changes, and many others. Disclosure regarding these risks is appropriately required in the prospectus, and readers will have the opportunity to examine the disclosure and to weigh whether the potential return is sufficient to compensate for these risks. The purpose of providing detailed disclosure regarding the receivables and the ABS is to "give investors better tools to evaluate the underlying assets and to determine whether or not to invest in the instrument

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[7] *See* Re-Proposing Release, 76 Fed. Reg. at 47951.
[8] Re-Proposing Release, 76 Fed. Reg. at 47951-52.
[9] *See* April 2010 Proposing Release, 75 Fed. Reg. at 23415.

and at what price."[10] An opinion of an officer of the depositor cannot and should not substitute for this kind of analysis.

We believe that any certification that requires the certifying officer to express a view as to the future performance of the receivables is likely to cause serious harm to the public ABS markets. Depositors will be unable to effectively price ABS for the possibility of liability under such a broad certification, so their officers will be very reluctant to sign the certification. To the extent they are willing to sign it, they will be likely to do so only in the most conservative circumstances, when the offered ABS are the very highest quality (*i.e.*, rated AAA/Aaa). Investors who desire securities with different credit and risk profiles will be precluded from purchasing registered securities meeting their needs.

In sum, we believe that the re-proposed form of certification still would impose an unreasonable burden on the signatory, and would increase the costs of securitization with little commensurate benefit – and, in fact, much additional harm – to investors.

Among the Commission's requests for comment is whether a certification limited to the disclosure in the prospectus would be appropriate.[11] For all of the reasons set forth above, we continue to believe that the only certification that should be required is the first portion of clause 1 of the re-proposed certification stating that the certifying officer has reviewed the prospectus, a standard that is consistent with the required certification for periodic Exchange Act reports under Section 302 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), together with clause 2 of the re-proposed certification dealing with the lack of material misstatements and omissions in the prospectus. This certification would confirm that the certifying officer has taken steps to verify the disclosure specific to the offering, but would not place the signatory in the position of making even a qualified prediction as to future performance of the ABS. We urge the Commission, as strongly as possible, to adopt this form of certification. SIFMA's investor members agree with us that a certification addressing only prospectus disclosure would be acceptable.

We do not believe that it is possible to effectively address our significant, overall concerns within the scope of a form of certification that extends beyond disclosure. However, to the extent that the Commission continues to disagree with us and believe that a more comprehensive certification is necessary, we have a variety of specific comments concerning the remainder of the proposed certification. We discuss those concerns, and wording changes that we believe would help address those concerns, below. An integrated blackline from the Commission's proposal, showing all of our suggested wording changes, is attached to this letter as Exhibit A.

Clause 1 of the re-proposed form of certification would require the certifying officer to state that he or she has reviewed the prospectus. As noted above, this standard is consistent with

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[10] April 2010 Proposing Release, 75 Fed. Reg. at 23416.
[11] Re-Proposing Release, 76 Fed. Reg. at 47954.

the required certification for periodic Exchange Act reports under Section 302 of Sarbanes-Oxley, and we have no objection to this aspect of clause 1. Clause 1 goes on to state that the certifying officer is familiar with "the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements and the material terms of all contracts and other arrangements entered in to the effect [sic] the securitization." The last part of this clause appears to be garbled, so we suggest that it should read, "all contracts and other arrangements entered into in order to effect the securitization." Also, we note that this portion of the re-proposed certification would be limited to the "material" terms of the transaction contracts and arrangements. We believe it would be similarly appropriate for the certification also to be limited to the material transaction contracts and arrangements, the material characteristics of the underlying assets and the material terms of credit enhancements. Depending upon the type of asset that is securitized, there can be thousands of assets in the pool, and no individual can be expected to be familiar with all characteristics of those assets. Because credit enhancements are a matter of contract, it is appropriate for the certification to be limited to the material terms of the credit enhancements, which would be consistent with limiting the certification to the material terms of the material transaction contracts.

Clause 3 of the re-proposed form of certification would require the certifying officer to state that, based on his or her knowledge, the "the prospectus and other information included in the registration statement of which it is a part, fairly present in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein, including all credit enhancements and all risk factors relating to the securitized assets underlying the offering that would affect the cash flows sufficient to service payments on the asset-backed securities as described in the prospectus." The concept of "fair presentation" is one that historically has applied only to a company's financial statements and other financial information under United States generally accepted accounting principles ("GAAP"), though it has been used in other related contexts by the Commission. For example, Section 302 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") required the Commission to adopt rules regarding the certification of the information contained in an issuer's periodic Exchange Act reports. The Commission implemented this requirement by adopting Rules 13a-14 and 15d-14, which require, among other things, a statement that "the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented by the report."[12]

According to the Commission, "fair presentation" in the context of the Sarbanes-Oxley Section 302 certification "is not limited to a representation that the financial statements and other financial information have been presented in accordance with [GAAP] and is not otherwise limited by [GAAP]" and "is broader than financial reporting requirements under [GAAP]."[13]

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[12] Similarly, the certification required by Section 906 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), as codified in 18 U.S.C. § 1350, requires a certification that the information contained in an Exchange Act periodic report "fairly presents, in all material respects, the financial condition and results of operations of the issuer."

[13] Certification of Disclosure in Companies' Quarterly and Annual Reports, SEC Release Nos. 33-8124, 34-46427, IC-24722 (Aug. 29, 2002) (hereinafter, the "Certification Release").

However, even for purposes of those certifications, "'fair presentation' of an issuer's financial condition, results of operations and cash flows encompasses the selection of appropriate accounting policies, proper application of appropriate accounting policies, disclosure of financial information that is informative and reasonably reflects the underlying transactions and events and the inclusion of any additional disclosure necessary to provide investors with a materially accurate and complete picture of an issuer's financial condition, results of operations and cash flows."[14] The concept of "fair presentation" here is still closely related to the issuer's overall financial condition. However, clause 3 of the re-proposed form of certification deals with something entirely different – the characteristics of securitized assets and the risks of ownership of related ABS. We do not believe that the "fair presentation" standard is cognizable in this context.

The inapplicability of the "fair presentation" standard to ABS has been implicitly acknowledged by the Commission previously. In determining how to apply the requirements of Section 302 of Sarbanes-Oxley to ABS transactions, the staff of the Commission noted that financial statements are not required in periodic reports of asset-backed issuers.[15] "Because the reported information for asset-backed issuers differs significantly from that for other issuers," the Commission concluded that "the certification requirement . . . must be specifically tailored for asset-backed issuers."[16] As so tailored for ABS issuers, the required certification did not include any "fair presentation" concept, but was limited primarily to the certifying officer's review of the report in question and the absence of any material misstatement or omission in that report,[17] essentially the same standard we believe to be appropriate here.

To the extent that the Commission determines that it is necessary to retain some form of this certification, we ask that the Commission delete the words "fairly present" and instead use the term "disclose." A statement that the prospectus and registration statement "discloses in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein" would avoid the difficulty of applying the concept of "fair presentation" in this context, while retaining a statement about the overall content of the prospectus (appropriately modified by the well-understood concept of materiality).

Clause 4 of the re-proposed form of certification would require the certifying officer to state that, based on his or her knowledge, taking into account the characteristics of the pool assets, the structure of the securitization (including internal credit enhancements) and any other material features of the transaction, the securitization is designed (but not guaranteed) to produce cash flows at times and in amounts sufficient to service expected payments on the offered ABS.

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[14] *Id.*

[15] Staff of the Division of Corporation Finance, Revised Statement: Compliance by Asset-Backed Issuers with Exchange Act Rules 14a-14 and 15d-15 (Feb. 21, 2003) (hereinafter, the "Revised Statement").

[16] Certification Release; *see also* the Revised Statement.

[17] As well as the inclusion of financial information required to be provided to the trustee under the terms of the transaction documents and compliance by the servicer with its servicing obligations and minimum servicing standards.

According to the April 2010 Proposing Release, the certification requirement was not intended to serve as a guarantee of payment of the securities,[18] but commentators were concerned that the originally proposed text of the certification could be viewed as a guarantee of future performance. In an effort to address these comments, the Commission revised this portion of the certification to explicitly state that it is not a guarantee, and to focus on the design of the securitization to produce cash flows sufficient to pay the offered securities, rather than a statement that the assets "will produce" cash flows sufficient to pay the offered securities.[19] While we appreciate the Commission's efforts to address commenters' concerns, we still believe that any certification dealing with the credit quality of the ABS would still impose an unreasonable burden on the signatory, so we urge that clause 4 of the re-proposed certification be eliminated. To the extent that the Commission determines that it is necessary to retain some form of proposed clause 4, we ask for the following changes.

The meaning of the term "designed" is not clear to us in this context, whereas the term "structured" is well understood in the industry. Therefore, we ask that the term "designed" be replaced with the word "structured."

The Commission specifically requests comment on whether the re-proposed language clarifies that the certification does not constitute a guarantee.[20] The Commission further requests comment as to whether it would be appropriate for the certification to state that it "is only an expression of the executive officer's current belief and is not a guarantee that those assets will generate such cash flows, and there may be current facts not known to the executive officer and there may be future developments that would cause his or her opinion to change or that would result in those assets not generating such cash flows."[21] We believe that the language suggested by the Commission in this request for comment is appropriate, and further clarifies the intended meaning of the certification.

By their very nature, ABS are dependent upon the performance of the underlying asset pool, and developments that adversely affect the performance of the asset pool can adversely affect performance of the ABS. As we noted in the Prior Comment Letter, the April 2010 Proposing Release states that "any issues in providing the certification would need to be addressed through disclosure in the prospectus. For instance, if the prospectus describes . . . risks that [the] cash flows will not be produced or . . . payments will not be made, then those disclosures would be taken into account in signing the certification."[22] However, because the language of the proposed certification "could not be altered"[23] and does not provide that the signatory may rely on the disclosure in the prospectus, it is not clear how the disclosure would be "taken into account" by the signatory. We continue to believe that this uncertainty is unfair to ABS issuers and potentially misleading to investors. If a prospectus were, for example, to

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[18] April 2010 Proposing Release, 75 Fed. Reg. at 23346.
[19] Re-Proposing Release, 76 Fed. Reg. at 47952.
[20] *Id.* at 47953.
[21] *Id.* at 47954.
[22] April 2010 Proposing Release, 75 Fed. Reg. at 23346.
[23] *Id.*, 75 Fed. Reg. at 23346.

include risk factor disclosure delineating various reasons that cash flows on the pool assets may not be sufficient to service payments on the securities, the extent to which the certification relies on that cautionary disclosure would be unclear. Therefore, in addition to stating that there may be current facts not known to the certifying officer and there may be future developments that would cause his or her opinion to change or that would result in those assets not generating such cash flows, it is important that the certification specifically state that its conclusion takes into account any assumptions described in the prospectus, and also that it state that cash flows may vary if and to the extent that any of the risk factors described in the prospectus comes to pass.

As re-proposed, clause 4 of the certification refers to cash flows to service "expected payments" on the registered ABS. Most classes of ABS are pass-through securities, which do not have scheduled payments of principal. The structures of some types of ABS, such as interest only securities (or "IOs") and "inverse floaters," can magnify the effect of changes in prepayment speeds and interest rates. In response to Item 1113(g) of Regulation AB, prospectuses for ABS offerings generally disclose information about the amount and timing of returns that an investor might receive based on various prepayment and other assumptions which are then used to produce yield and decrement tables. These tables show multiple possible results. However, there is no single schedule of "expected" payments. Even for securities structured in an effort to bring greater certainty to cash flows, such as planned amortization class (or "PAC") and targeted amortization class (or "TAC") tranches, principal payments will vary if prepayment speeds fall outside of the range or targeted rate, and the disclosure describes this possibility.

According to the Re-Proposing Release, commenters also were concerned that the form of certification in the April 2010 Proposals would apply to junior tranches that are offered at steep discounts to par, precisely because investors know they bear the risk that the assets will not produce sufficient cash flows to service all payments on those securities. In response, the Commission said that "lower tranches typically have not been sold in registered transactions because they did not satisfy the . . . investment grade ratings . . . requirement"[24] and revised the text of the certification to clarify that it would only apply to the securities offered and sold under the registration statement. We appreciate the Commission's efforts to address these concerns. However, the investment grade rating currently required of ABS that are permitted to be registered on Form S-3 generally is required to be only in one of the "four highest rating categories,"[25] which could entail anything from minimal to moderate credit risk. A certification that the securitization is structured to produce cash flows sufficient to service "expected" payments on the securities does not appear to contemplate the possibility that more junior tranches of registered ABS may bear a moderate credit risk somewhere in between the most senior registered tranches and the most subordinated unregistered tranches.

For all of these reasons, we urge that clause 4 of the re-proposed form of certification be revised to delete the concept of "expected" payments on the securities, and instead state that the

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[24] Re-Proposing Release, 76 Fed. Reg. at 47953.
[25] General Instructions I.B.2. and I.B.5. of Form S-3.

assets will produce cash flows at times and in amounts sufficient to service payments on the offered securities in accordance with the terms described in the prospectus.

As proposed, the certification would allow the certifying officer to take into account only internal credit enhancement. According to the Re-Proposing Release, internal credit enhancement includes guarantees on the underlying loans, such as federal government guarantees applicable to student loans,[26] while external credit enhancements, such as "third party insurance to reimburse losses on the pool assets or the securities," could not be taken into account.[27] We do not understand this distinction, and urge that it be eliminated. Investors in ABS with external credit enhancement (and NRSROs rating such ABS) rely on and give credit for external credit enhancement just as they do for internal credit enhancement. External credit enhancement is part of a transaction's structure. In our view, therefore, it would be inappropriate – perhaps even misleading – for a certifying officer to artificially exclude external credit enhancement when giving this certification. If the Commission nevertheless determines to distinguish between "internal" and "external" credit enhancement, then we do not believe that those types of credit enhancement are adequately defined by the proposed rule. Insofar as we understand the Commission's position, we believe that the best example of an "external credit enhancement" would be a credit wrap of offered ABS provided by a monoline insurance company, but otherwise the boundary between these two types of credit enhancement is unclear. Among the types of credit enhancement that we believe should be considered "internal" is mortgage insurance on the individual mortgage loans in an asset pool, even if paid for by the sponsor or originator, since we believe it is more akin to a "guarantee on the underlying loans." We ask that the Commission clarify the meaning of "internal" and "external" credit enhancements, in particular in relation to mortgage insurance.

The information contained in clause 4 of the re-proposed form of certification is forward-looking information. We believe that this information should be covered by the safe harbor provided in Section 27A of the Securities Act. To the extent that the Commission retains any version of its proposed clause 4, we request that the adopted rules specify that the safe harbor provided in Section 27A of the Securities Act shall apply to forward-looking information provided pursuant to clause 4, that clause 4 is deemed to be a "forward looking statement" as that term is defined in the statutory safe harbor; and that the meaningful cautionary statements element of the statutory safe harbors will be satisfied if the prospectus contains risk factor disclosures pursuant to Rule 501(c) of Regulation S-K and, if applicable, Item 1103(b) of Regulation AB.[28]

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[26] Re-Proposing Release, 76 Fed. Reg. at 47951 n. 33.
[27] *Id.*, 76 Fed. Reg. at 47952 n. 55.
[28] Our proposal is similar to the approach taken by Item 303(c) of Regulation S-K with respect to certain required forward-looking statements in management's discussion and analysis of financial condition and results of operations. Alternatively, the form of certification adopted could contain language stating that clause 4 is a forward-looking statement subject to the safe harbor of Section 27A of the Securities Act, and is subject to the risks and uncertainties described in the prospectus.

Some commenters on the April 2010 Proposals (including SIFMA's dealer and sponsor members, in the Prior Comment Letter) opposed the requirement that the certification be required to be signed by the depositor's CEO, on the basis that he or she could not be expected to have the knowledge necessary to certify the performance of the securities. In the Re-Proposing Release, the Commission acknowledged that the CEO of the depositor "may rely on the work of other parties to assist him or her with structuring" the securitization, but stated that it "believe[s] . . . that the [CEO] of a depositor should provide appropriate oversight so that he or she would be able to make the certification."[29] The Commission also revised the proposed requirement to alternatively permit the certification to be made by the executive officer in charge of securitization of the depositor.[30] We support the proposal to permit the required certification to be made by the executive officer in charge of securitization of the depositor. However, the chief executive officer of the depositor – or even the executive officer in charge of securitization of the depositor – may not be directly involved in the structuring of a particular securitization transaction. We remain concerned that the Commission has not given sufficient guidance regarding the ability of the certifying officer to rely on the work of others performed under his or her supervision.

In making the certifications of Exchange Act periodic reports currently required of officers of corporate issuers under Exchange Act Rules 13a-14 and 15d-14, those issuers have developed a variety of internal procedures to afford their senior officers with the requisite degree of factual support for their required certifications. They include the use of disclosure committees,[31] as well as requiring sub-certifications of disclosure committee members and other employees who are knowledgeable about or helped to prepare the disclosure in question and on whom the certifying officers believe that they can reasonably rely. In that context, the Commission has expressly acknowledged that it "expect[s] each issuer to develop a process that is consistent with its business and internal management and supervisory practices."[32] We believe that, while there is no one-size-fits-all solution for ABS, any or all of these same mechanisms may be appropriate for a particular ABS issuer, and we request that the Commission expressly acknowledge that sub-certifications and other measures could "provide appropriate oversight" sufficient to allow the certifying officer to make the required certification.

2. Credit Risk Manager and Repurchase Request Dispute Resolution

The April 2010 Proposals would have required a third-party opinion, at least quarterly, regarding pool assets not repurchased or substituted after a demand was made and whether the failure to repurchase was consistent with the transaction documents. Many commenters thought

[29] Re-Proposing Release, 76 Fed. Reg. at 47952.
[30] The April 2010 Proposals already would have required the senior officer in charge of securitization for the depositor to sign the registration statement for ABS issuers, in lieu of the principal accounting officer or controller, but according to the Re-Proposing Release, the Commission believes that the officer signing the certification should be an "executive officer" with the meaning of Rule 405 under the Securities Act of 1933, as amended (the "Securities Act"). Re-Proposing Release, 76 Fed. Reg. at 47952-53.
[31] As suggested by the Commission. Certification Release, 67 Fed. Reg. at 57280.
[32] *Id.*

that this proposal was unduly complex, costly, and would not achieve its goals of strengthening the enforceability of representations and warranties regarding the pool assets. Instead, commenters (including both SIFMA's dealer and sponsor member and investor members) suggested that a better way to achieve this goal would be to require a review of the pool assets by an independent credit risk manager (a "CRM"),[33] a concept accepted by the Commission in the re-proposed rules. Re-proposed Item 601(b)(36) of Regulation S-K would require that the transaction documents contain a mandate for the trustee to appoint a CRM to review the pool assets when certain trigger events occur. The CRM would be unaffiliated with the sponsor, depositor and servicer, and would have access to copies of the underlying loan documents for the asset pool.

We greatly appreciate the Commission's responsiveness to our concerns on this topic, and in general, we believe that the requirement to appoint a CRM will be much more likely to produce positive results than the opinion requirement of the April 2010 Proposals. However, we still believe that the details of the CRM manager proposal supported by both SIFMA's investor members and its dealer and sponsor members in the Prior Comment Letter are superior to the version proposed by the Commission, and we urge the Commission to modify its proposal accordingly. Therefore, we recap the salient aspects of proposal from the Prior Comment Letter, and contrast where they differ significantly from the Commission's proposal and we believe that our proposal should be adopted.

We proposed that the transaction documents provide that an independent CRM would be appointed to represent the interests of the securityholders,[34] but would leave the manner of that appointment up to the parties. Based upon our discussions with entities that regularly serve as trustee for securitizations, we do not believe that trustees would accept the responsibility of selecting the CRM. In our view, the Commission's goal of addressing potential conflicts between the CRM and the obligated party may be sufficiently addressed through the independence requirements of the rule, as well as by a requirement that a simple majority vote of investors, by interest, could terminate the CRM and appoint a successor. The Commission proposes that the CRM could be the same party serving another role in the transaction (including the trustee, custodian or an operating advisor), so long as it is not affiliated with the sponsor,

[33] Re-Proposing Release, 76 Fed. Reg. at 47956.

[34] We believe that this requirement should apply for each shelf offering of residential mortgage-backed securities in which there are asset-level representations and warranties. However, we do not believe that this requirement should apply to transactions without asset-level representations and warranties, and we also ask the Commission to consider whether this requirement should apply to transactions in which the ABS are backed by assets other than residential mortgage loans. If there are no asset-level representations, there is no need to require the cost and complexity of engaging an independent third party to police breaches of such representations and warranties. As a practical matter and in our experience, serious and contentious issues primarily have arisen with respect to the repurchase or substitution of assets in connection with residential mortgage-backed securities transactions. These issues generally have not arisen where the individual underlying assets are significantly larger (*e.g.,* commercial mortgages), primarily because there is greater transparency as to the assets, or where the underlying assets are significantly smaller (*e.g.,* automobile loans and credit cards), primarily because it has not proven cost-effective to drill down into asset-specific issues. Finally, we note that Rule 15Ga-1, which recently was adopted to implement the requirements of Section 943 of the Dodd-Frank Act, already will required much greater transparency surrounding requests to repurchase assets for breaches of representations and warranties.

depositor or servicer. We agree, and would add a requirement that the CRM not be the same institution hired by the sponsor or underwriter to perform pre-closing due diligence work on the pool assets.

We agree with the Commission that the CRM should have authorization to access the underlying loan documents. We would go further, and require that the CRM have authorization to electronically access all loan and credit underwriting files as well as access to all underwriting guidelines and any other documents necessary to investigate compliance with representations and warranties, whether on the basis of asset performance or otherwise, in each case to the extent that they are in the possession of any transaction party. We envision that the CRM's risk management fee generally would be paid to the CRM alongside other service providers, before investors are paid, through the cash flow waterfall, though we do not believe that this needs to be specified in the rules.

The Commission proposes that there be trigger events mandating that the CRM review the pool assets for compliance with representations and warranties would be required to include, at a minimum, when credit enhancement requirements (such as required reserve amounts and target overcollateralization percentages) are not met, or upon the direction of investors pursuant to processes described in the transaction documents and the prospectus. The Commission requests comment on whether these proposed triggers are appropriate, and whether there are asset classes or structures where no target credit enhancement is specified.[35]

Neither we, nor SIFMA's investor members, believe that it is appropriate to require fixed triggers for CRM review of the assets. The specific triggers proposed by the Commission are far too sensitive. For example, the Commission's proposed triggers do not appear to contemplate structures in which credit enhancement, such as a reserve fund or overcollateralization, is at its target level on the closing date, but builds toward a target level over time as funds are applied from excess cash flow. Even where credit enhancement is at its target level, the re-proposed rules would appear to trigger credit risk manager review whenever the enhancement is used to fund a temporary shortfall in collections and falls below the target level, even if it is replenished quickly. We do not believe that it is appropriate for either of these circumstances to trigger credit risk manager review of the assets. To be effective, fixed triggers would have to be narrowly tailored to the asset type and asset-specific factors such as collateral default, timing of default or cumulative default, a very difficult task that would result in an overly complex rule.

Even if the triggers themselves could be more appropriately tailored, any trip of a trigger should not indiscriminately mandate a review of each and every asset. Asset review by the CRM will entail costs, which in an indiscriminate trigger model would most appropriately be paid out of the trust assets, further reducing the cash available to make payments on the securities. This is not in the best interests of any party, including investors. We believe that all of these concerns would be addressed by our proposal, which would give the CRM the discretion to initiate a claim

[35] *Id.*, 76 Fed. Reg. at 47958.

in certain circumstances, as well as giving investors themselves the ability to require the CRM to initiate a claim when they meet appropriate requirements.

In general, we believe that it should be the responsibility of the CRM to determine whether it is appropriate to assert against the sponsor or other obligated party (each a "seller") a claim of a material breach of a representation or warranty with respect to any pool asset, and if so, to assert that claim on behalf of the securitization trust. The transaction documents should be required to provide that claims may be made by the CRM either on its own initiative in the interests of all investors in the aggregate.[36] Further, the Commission proposes that the transaction documents provide a process whereby investors can direct the credit risk manager to review assets for potential breaches of representations and warranties, but does not propose any specific procedures because the Commission "preliminarily believe[s] transaction parties should have the flexibility to tailor the procedures to each ABS transaction."[37] The Commission does request comment on whether several particular mechanisms proposed by commenters should be required.[38] We urge the Commission to adopt the mechanisms we proposed in the Prior Comment Letter.

- A claim may be initiated by the CRM if it has a good faith reasonable belief that:
  - On the basis of documented and verifiable evidence (other than the performance of the pool asset alone, except in the case of a violation of an early payment default condition), a representation or warranty has been breached,
  - The breach has materially and adversely affected the interests of investors with respect to the affected pool asset,[39] and
  - Seeking repurchase or replacement of the pool asset or a cure of the breached representation or warranty is in the best interests of all investors in the transaction, in the aggregate.

- A claim may be initiated by the CRM on behalf of the trust upon the direction of an investor or group of investors if those investors' interests represent at least 25 percent (by principal balance) of the total interest in the entire pool of securitized assets. This criterion is designed to reduce the likelihood of claims brought by investors that may acquire small interests in ABS in the secondary market in order to assert claims for the purpose of securing settlement payments outside of the trust that do not benefit

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[36] In order to facilitate the assertion of appropriate claims for material breaches of representations and warranties, the transaction documents should require that the securitization sponsor or any other party obligated on representations and warranties notify the CRM after any public disclosure of a settlement between such obligated party and any governmental body or regulatory agency regarding violations of predatory lending or other laws specifically relating to the pool assets.
[37] Re-Proposing Release, 76 Fed. Reg. at 47956.
[38] *Id.*, 76 Fed. Reg. at 47958.
[39] The transaction documents may specify that the breach of certain representations and warranties, such as representations related to predatory lending and compliance with law, would be deemed to be material.

other investors. As in the case of claims brought by the CRM on its own initiative on behalf of the trust, investor claims for material breaches of representations and warranties must be based on a good faith reasonable belief that:

- On the basis of documented and verifiable evidence (other than the performance of the pool asset alone, except in the case of a violation of an early payment default condition), a representation or warranty has been breached, and
- The breach has materially and adversely affected the interests of investors with respect to the affected pool asset.[40]

- Investors representing at least five percent of the total interest in the pool may ask the CRM to initiate a claim. The CRM must then poll investors to determine whether investors representing a total of 25 percent of the interest in the pool assets agree.
    - In order to enable investors to determine whether five percent or more of securityholders want to make such a request, the transaction documents would provide a mechanism for securityholders, acting through the CRM and/or the trustee, to determine whether other securityholders share their view.
- Investors whose interests in the ABS do not represent at least 25 percent of the interest in the entire pool of securitized assets would be entitled to direct the CRM to pursue a claim for material breach of a representation or warranty only if they agree to pay directly any costs associated with pursuit of the claim, including arbitration costs and costs of investigating compliance with representations and warranties that were incurred after the date of the request.

The Commission has proposed that the transaction documents be required to include unspecified dispute resolution procedures. If an asset is subject to a repurchase request made pursuant to the terms of the transaction documents but is not repurchased within 180 days after notice is received of the repurchase request, the party submitting the repurchase request could refer the matter to either mediation or arbitration. The party with repurchase obligations would be required to agree to the dispute resolution mechanism selected by the party requesting the repurchase. We agree with some aspects of the Commission's proposal regarding dispute resolution procedures, but would modify it as follows, in part to be consistent with our model of the CRM or investors determining whether to pursue a claim in lieu of fixed triggers for asset review.

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[40] The CRM would provide access to loan documentation, underwriting guidelines and other relevant documents to investors upon request, consistent with applicable privacy laws and the securities laws, for the purpose of investigating potential claims for material breaches of representations and warranties. Investors seeking this information would be required to sign standard confidentiality agreements in the form prescribed for each transaction. Any associated costs would be borne by the requesting investors.

The transaction documents would provide that the seller must either comply with the applicable remedy provisions of the transaction documents or respond with specificity as to the reasons why a material breach has not occurred. Remedies would include cure of the breach, repurchase of the affected pool asset for the purchase price specified in the transaction documents, or, if applicable and if provided in the transaction documents, substitution of a pool asset having substantially similar characteristics as the defective pool asset (exclusive of any defects). If after review the seller and the CRM agree that no material breach has occurred, the claim would be withdrawn with prejudice.

If the parties could not agree within 180 days following the date of notice of a claim for repurchase of a pool asset (or another remedy) due to an alleged material breach of a representation or warranty as to whether a material breach has occurred, the dispute could, at the option of either the CRM or the obligated party, be referred to a binding arbitration proceeding before an independent arbitrator (or panel of arbitrators).[41] The Commission requests comment on whether either mediation or binding arbitration should be specifically required,[42] and we believe firmly that binding arbitration should be required. In our view, the finality of the result is just as important as the result itself, and only binding arbitration would provide a final result. For this reason, we believe that the final rules should not permit the CRM to choose mediation, but should mandate binding arbitration. In order to avoid excessive costs, arbitration proceedings would take place semiannually. The arbitrators would either require performance of a remedy available under the transaction documents or determine that no material breach occurred. All arbitration decisions would be final and non-appealable.

The Commission also requests comment on whether the rules should specify who must pay for the expenses of dispute resolution. We continue to believe that the costs of arbitration should be borne by the losing party. In our view, if the arbitrators rule against the seller, the seller should be required to reimburse all costs of the arbitrators as well as reasonable costs, expenses and legal fees of the CRM or the asserting investor(s), as applicable, related to the arbitration proceedings. However, if the arbitrators rule in favor of the seller, then (i) if the claim was brought by the CRM on behalf of the trust, the arbitration costs and the seller's reasonable costs, expenses and legal fees should be required to be reimbursed by the trust, and (ii) if the claim was brought by the CRM on behalf of an investor or group of investors whose interests do not comprise 25 percent of the interests in the entire pool of securitized assets, the reasonable costs, expenses and legal fees of the seller should be required to be paid by that investor or group of investors. This method of cost allocation would permit the CRM or individual investors to pursue valid claims through binding arbitration, but would discourage baseless or frivolous claims made for the purpose of forcing settlements outside of the trust.

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[41] For a standard three-arbitrator panel, each of the CRM and the seller would appoint one arbitrator, with the third appointed by mutual agreement or, if the parties cannot agree, by the arbitration forum specified in the transaction documents. For a single arbitrator, the CRM and the seller would appoint the arbitrator by mutual agreement (or, if they cannot agree, the arbitration proceeding would default to a standard three-arbitrator panel).

[42] Re-Proposing Release, 76 Fed. Reg. at 47959.

The information to which the CRM would have access includes "personally identifiable financial information" and other "nonpublic personal information" within the meaning of Regulation S-P and the Gramm-Leach-Bliley Act (Pub. L. No. 106-102, 113 Stat. 1338 (1999) (the "GLBA"). We request that the Commission confirm that the disclosure of this information to and use of this information by a CRM, appointed as required by and acting in accordance with the Commission's rules, would fall within the exceptions to the notice and opt-out requirements of Regulation S-P, pursuant to Section 251.15 and other provisions of Regulation S-P. We also request that any rules requiring the appointment of a CRM specify that the CRM must execute an appropriate confidentiality agreement which, among other things, restricts the ability of the CRM to use personally identifiable financial information and other nonpublic personal information for purposes other than those for which it is appointed, and limiting the CRM's ability to disclose that information, consistent with consumers' privacy rights under the GLBA, Regulation S-P and other applicable laws and regulations.

3. Investor Communications

The Commission proposes that the transaction documents require the party responsible for making filings on Form 10-D to include in the filing for any period "any request received from an investor to communicate with other investors . . . related to investors exercising their rights under the terms of the [ABS]." We request that General Instruction I.B.(c) to proposed Form SF-3 be clarified to read that the party responsible for filing Form 10-D pursuant to the transaction documents only be required to include an investor request if it is received by that party, as opposed to any other transaction party.

B. Compliance with Shelf Eligibility Requirements

In the Prior Comment Letter, we noted our view that the combination of the originally proposed new shelf eligibility requirements and testing schedule would make maintenance of shelf eligibility extremely difficult for many issuers of ABS. While the re-proposed rules would address some of our concerns, we believe that there is still room for significant improvement.

1. Effect of Noncompliance on Shelf Eligibility

General Instruction I.A.1 to re-proposed Form SF-3 would provide that, to the extent that the depositor or any issuing entity previously established by the depositor or an affiliate of the depositor was required to comply with the transaction requirements of Form SF-3 during a twelve calendar month look-back period with respect to an offering of ABS involving the same asset class, the depositor and each such issuing entity must have timely filed all the required certifications and transaction documents containing the required provisions relating to the credit risk manager, repurchase request disputes and investor communications. In order to conduct a takedown off of an already-effective shelf registration statement, proposed Rule 401(g)(4) under the Securities Act (together with General Instruction I.A.1 to re-proposed Form SF-3) would require an ABS issuer to conduct a periodic evaluation as to whether it was in compliance with these registrant requirements, as of a date 90 days after the end of the depositor's previous fiscal year. The April 2010 Proposals would have required the issuer to evaluate its compliance with the analogous registrant requirements quarterly, but in response to comments on the April 2010 Proposals the Re-Proposed Rules would require only an annual evaluation. Commenters on the April 2010 Proposals also had raised concerns that a one year penalty for missing these requirements was too extreme, so the Re-Proposed Rules would allow a depositor or issuing entity to cure any deficiency by subsequently filing the missing information.[43] Pursuant to General Instruction I.A.1.(b) of re-proposed Form SF-3, the depositor and issuing entity would be deemed to have met the registrant requirements after the expiration of a 90 day waiting period from the actual filing date. We believe that the 90 day cure period proposed by the Commission is a significant step in the right direction, and support this change.

We also note that the Commission has not provided any cure period for the requirement imposed by proposed Rule 401(g)(4) under the Securities Act (together with General Instruction I.A.2 to re-proposed Form SF-3) that, in order to conduct a takedown off an effective shelf registration statement, would require an ABS issuer to evaluate, as of a date 90 days after the end of the depositor's previous fiscal year, whether the depositor or any affiliated issuing entity that was required to file periodic Exchange Act reports during the previous twelve months had filed those reports, and filed them in a timely manner (other than reports required only by certain specified items of Form 8-K). This requirement is unchanged from the April 2010 Proposals, including the one-year penalty for failure to comply. In our view, this penalty is extremely harsh and would make maintenance of shelf eligibility extremely difficult for many issuers of ABS. A single late Exchange Act filing would result in loss of shelf eligibility for a full year – not only for the depositor in question, but for any affiliated depositor with respect to the same class of underlying assets. This is quite a severe result, given that even an ABS issuer's best efforts sometimes cannot prevent a late filing. Even loss of use of a shelf registration statement for a quarter, much less an entire year, could have seriously adverse consequences for a sponsor's business by cutting off an important avenue for accessing the capital markets. Because the loss of use of a shelf registration statement could have such a material adverse effect on a bank or finance company, we continue to believe that it should not occur automatically, especially when the failure to comply could be caused by an act of god or other event completely outside the control of the issuer. For example, much of the information required to be included in ongoing Exchange Act reports is (and will be) required to be provided by third parties such as servicers. The new requirement for ongoing reporting by ABS issuers will exacerbate the issuer's burden, and the risk.

We reiterate our request that loss of shelf eligibility due to technical noncompliance with Exchange Act filing requirements not occur automatically, but rather occur only if the staff of the Commission determines – based upon the issuer's explanation for the compliance failure – that the issuer has not shown good cause why its shelf eligibility should not be suspended. As described below, we reiterate our request that the Commission provide limited relief from certain existing reporting burdens. In addition, we ask that the penalties for noncompliance be revised to be less severe and more consistent with the nature of an issuer's compliance failure. In our

[43] *Id.*, 76 Fed. Reg. at 47962.

view, shelf eligibility should be suspended only if (and only for the period) that the staff of the Commission determines is appropriate in the particular case, and for a full year only in the case of an egregious compliance failure. Proposed Item 1106(d) of Regulation AB already would require disclosure of the failure to timely file any Exchange Act reports, which would permit investors to weigh the frequency and materiality of such occurrences in making an investment decision even if shelf eligibility is not suspended. As we envision it, an ABS shelf issuer also would be required to report to the Commission staff promptly, at the conclusion of the required annual review of compliance, the specifics of any Exchange Act filing failure identified by the issuer, together with the reason for the failure and, if applicable, its arguments as to why shelf eligibility should not be suspended. Following receipt of that report, the Commission staff would notify the issuer as to whether the issuer may continue to utilize its shelf registration statement and, if not, for how long.

The proposed new deadline for filing transaction documents as exhibits to the registration statement, which we address below, takes on increased importance in view of its effect on shelf eligibility. Therefore, we continue to ask that the Commission clarify the meaning of the deadline for filing the transaction documents related to a shelf takedown in certain circumstances. In some cases, transaction documents must be corrected after filing in order to (for example) correct an error or conform the terms of the documents to the disclosure in the prospectus. We request that the Commission clarify that if the documents that are required to be filed as exhibits are timely filed in substantially final form, the fact that any such document is subsequently amended or otherwise corrected will not be viewed by the Commission as constituting a failure to have timely filed the corrected document, so long as the version of the document that was filed timely contains the required provisions regarding the credit risk manager, dispute resolution and investor communications

2. Certain Form 8-K Reporting Requirements

We again request that the Commission provide limited relief with respect to certain existing requirements for filing of Current Reports on Form 8-K. Some events that trigger a reporting requirement are completely outside the control of the issuer, and may not be known by the issuer prior to the reporting deadline. For these items, we request that the reporting obligation instead be triggered when the issuer knew of the occurrence, if outside the issuer's control, rather than upon occurrence of the event itself.

The first of these items is Item 6.02, Change of Servicer or Trustee. Currently, an issuer is required to file an 8-K within four business days after a servicer or trustee is removed, replaced or substituted. A transfer of servicing by a servicer or subservicer without notice to the issuer – even if in breach of the servicer's contractual agreements – would trigger a reporting requirement, even though the issuer would be unaware of the transfer and, even with the exercise of careful diligence, could not reasonably have known about it. Therefore, we request that the event triggering a reporting requirement under this item be the issuer's knowledge or receipt of notice of the removal, replacement or substitution of a trustee or servicer, so long as the transaction documents require the servicer to notify the issuer promptly in the event of such a removal, replacement or substitution.

The second of these items is Item 6.04, Failure to Make a Required Distribution. Failure of a trustee or securities administrator to make a distribution as and when required under the transaction documents could be (and often is) discovered weeks or months after the occurrence. This may occur because, for example, a trustee or securities administrator made a simple mathematical error in calculating the amount distributable on each class of ABS. Therefore, we request that the Commission clarify that the event triggering a reporting requirement under this item is the issuer's knowledge or receipt of notice of the failure to make a required distribution, so long as the transaction documents require the trustee or securities administrator to notify the issuer promptly in the event it discovers a failure to make a required distribution.

In neither case would the receipt of information by investors be materially delayed. So long as the transaction documents require the ABS issuer to be notified promptly by the party that has first knowledge of a reportable event, an ABS issuer can file a current report on Form 8-K only after the issuer receives notice of the event or otherwise becomes aware that such a report is required to be filed. The only result of the requested changes would be that issuers would not be penalized for events that are wholly outside their control.

II. Disclosure Requirements

A. <u>Filing of Transaction Documents</u>

As originally proposed, Item 1000(f) of Regulation AB would have required all exhibits, including substantially final forms of transaction documents and their attached schedules, to be filed by the date the final prospectus is required to be filed pursuant to Rule 424(h). In response to some comments that exhibits should be available for review before investors are required to make an investment decision,[44] re-proposed Item 1000(f) of Regulation AB would require the transaction documents, in substantially final form and including all attached schedules, to be filed by the date the preliminary prospectus is required to be filed. "[A]ny change to the agreements[s] could only be minor," and "a material change in the information, other than offering price, would require a new . . . filing."[45] If the re-proposed Rules are adopted as proposed, Rule 424(h) would require that a preliminary prospectus be required to be filed for each ABS shelf takedown at least five business days prior to first sale in the offering (*i.e.*, pricing).

Both SIFMA's investor members and its dealer and sponsor members supported the originally proposed requirement that the material transaction documents be filed on or prior to the date on which the final prospectus is required to be filed, subject to our comments related to the possible loss of Form SF-3 eligibility as a result of the failure to timely make that filing. We

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[44] *Id.*
[45] *Id.* at n. 120.

continue to support the Commission's original proposal. SIFMA's dealer and sponsor members believe that requiring the final transaction documents to be filed by the time the Rule 424(h) preliminary prospectus is filed, whether that time is five business days before pricing or a shorter period of time, would impose an additional hurdle on the capital formation process that is unwarranted, as it would provide limited additional benefits to investors and, in fact, would adversely affect their interests by limiting the ability of ABS issuers to structure securities to meet investors' needs.

The structuring of ABS often is a collaborative process with investors, in which the terms of the securities are structured directly in response to investor requests. This process already would be significantly impeded by the requirement that a complete preliminary prospectus be provided to investors significantly before the time of first sale, as the issuer will be required to conform the disclosure in the preliminary prospectus to the final negotiated terms of the securities significantly before the time that pricing can occur. Nevertheless, subject to our comments above, we supported (and continue to support) such a requirement, because we believe that the benefit to investors of having a complete, integrated preliminary disclosure document before they are required to make an investment decision would outweigh the adverse impact on the structuring process.

As a practical matter, it is often much less time consuming to revise a prospectus to include the final terms of the securities than it is to conform the underlying transaction documents to those terms – drafting contractual documents simply takes more time than drafting disclosure. If substantially final transaction documents are required to be filed by the time the Rule 424(h) preliminary prospectus is filed, we expect that final negotiated deal terms will need to be locked in several days earlier, in order to give issuers and their counsel sufficient time to reflect those terms in substantially final, integrated transaction documents. Material changes to these documents would require not only a new waiting period, but additional drafting time beyond that required to revise the preliminary prospectus. As a result of these rules, we believe that investors could expect issuers to have significantly reduced flexibility to design securities that meet their needs and to revise the terms of those securities in response to their concerns, with little commensurate benefit. Proposed Rule 424(h) already would require that investors have in their hands for the required time period a statutory preliminary prospectus, and that preliminary prospectus would be required to describe all material terms of the securities pursuant to Item 8 of proposed Form SF-3, which incorporates Item 202 of Regulation S-K (Description of Registrant's Securities) and the relevant disclosure requirements of Regulation AB, including Items 1113 (Structure of the Transaction), 1114 (Credit Enhancement and Other Support) and 1115 (certain Derivative Instruments). Therefore, in our opinion, substantially final transaction documents should not add anything material to the information that already will be available in the preliminary prospectus.

The Re-Proposing Release indicates that the Commission has not yet reached a conclusion on the issuer of whether five business days before the date of first sale is an appropriate time period for providing the proposed Rule 424(h) preliminary prospectus.[46] In the Prior Comment Letter, we (including SIFMA's investor members) strongly agreed with the premise that investors should be given sufficient time to review disclosure prior to the time of sale. Reflecting the concerns of both SIFMA's dealer and sponsor members and its investor members, SIFMA recommended that proposed Rules 424(h) and 430D be revised to require that the preliminary prospectus for a shelf offering of ABS be filed: at least two business days before the date of the first sale in the offering, in the case of ABS backed by bank credit card or charge card receivables; at least three business days before the date of the first sale in the offering, in the case of ABS backed by private label credit card or charge card receivables, motor vehicle loans or leases, student loans, or equipment loans or leases; and at least five business days before the date of the first sale in the offering, in the case of ABS backed by any other asset class, including residential or commercial mortgage loans. In lieu of the proposed additional five business day waiting period for any material change to the preliminary prospectus in a shelf offering of ABS backed by any asset class, we proposed that instead an additional two business days should be required in addition to the initial review period. We reiterate our continued support for these comments.

The Commission requests comment on, among other things, whether ABS issuers should be required to provide investors with a copy of the transaction's representations, warranties, remedies and exceptions marked to show how they compare to industry-developed model provisions. We have no objection to requiring that the prospectus set forth, in full, all of the transaction's representations, warranties, remedies and exceptions. However, we do not believe that it is practical for those provisions to be required to be marked against industry-developed model provisions. We fully support industry efforts to develop model provisions, but they do not currently exist for most asset classes. Identifying the industry group to be tasked with generating model provisions, undergoing that process in a fair and open manner and obtaining approval from the requisite industry participants would be an enormous challenge, and in our view would add little additional protection to investors. Such a requirement also would be somewhat duplicative of recently adopted Exchange Act Rule 17g-7, which will require every NRSRO rating ABS to include a description of the representations and warranties (including corporate representations and warranties) and enforcement mechanisms and how they differ from those applicable to issuances of similar securities.

B. <u>Asset-Level Data</u>

The Re-Proposing Release did not contain any revised proposals regarding the proposed asset-level data ("ALD")" disclosure requirements of Regulation AB, but we wish to take the opportunity to reiterate our concerns regarding these proposals, for which we refer you to the Prior Comment Letter. In particular, we wish to reiterate our support for a "provide-or-explain" regime, which would be an appropriate alternative to requiring disclosure of each proposed ALD field in every instance. To the extent that an issuer is not able to disclose any ALD field, the

[46] *Id.*, 76 Fed. Reg. at 47964.

issuer should be required to identify the undisclosed ALD field and explain why that ALD field was not provided.

Under our proposal, if an issuer omits disclosure of any ALD field, the issuer would be required to identify the omitted field and explain why the data was not disclosed. Investors would be able to determine whether the omitted disclosure is useful to them, whether or not to invest, and if so at what price. We believe that this approach would subject issuers to market forces that would compel them to provide the appropriate level of ALD disclosure, while at the same time increasing the standardization, utility and availability of those ALD fields. We do not believe that any particular financial asset, or pool of assets, should be permanently foreclosed from securitization in the public or Rule 144A markets simply because one ALD field is, or a few fields are, not available. Of course, issuers should provide clear disclosure as to what ALD will and will not be provided, so that an informed investment decision can be made based upon the information available.

Although we agree that ensuring that issuers provide the information needed to make an informed investment decision is an important objective, we also believe that the Commission should weigh the costs of compliance with those requirements against the benefits of increased disclosure. We emphasize the significance of the burden on originators and servicers that would be imposed by the ALD disclosure and reporting requirements as proposed. Originators and servicers may need to update their origination and servicing platforms because some of the proposed ALD requirements include information that is not currently collected by originators during the underwriting process or by servicers after origination. These updated platforms would also need to undergo extensive testing before the information could be relied upon for reporting purposes. Originators may need to revise their credit manuals and form contracts and retrain their loan origination personnel to ensure that the additional information is collected, and servicers may need to update their collection guidelines. Originators and servicers may also need to review whether collection of any additional information they are required to gather during the origination or servicing process or release of information they are required to disclose in connection with a securitization could violate applicable federal, state or local laws or regulations. These systems upgrades, training programs and legal reviews will impose a material financial burden and require significant time to implement.

We are particularly concerned about the effect of the proposed ALD requirements on smaller originators and servicers. As currently proposed, the ALD requirements would most likely prevent some securitizers, in particular smaller originators, from accessing capital through the securitization markets. Smaller originators and servicers may not be able to incur the costs of a potentially massive overhaul of their current systems and practices. Originators and servicers that are unable to comply with the proposed ALD requirements would not be able to directly access the securitization markets, and as a result, the value of their portfolio assets would likely be reduced due to lower liquidity.

In our view, the proposed ALD requirements could also significantly impede the "aggregator" securitization market. Aggregator securitizations involve a securitizer (an "aggregator") that acquires whole loans from originators for the purpose of securitizing the aggregated pool of loans. Aggregators may not have access to the expanded ALD from some originators, and would therefore be unable to purchase loans from those originators. We urge the Commission to recognize the importance of aggregators in facilitating access to the capital markets by smaller originators. Not only could smaller originators be foreclosed from participating directly in the securitization markets because they would no longer be able to conduct their own offerings of ABS, but the ALD disclosure requirements also could keep them from participating indirectly in the securitization markets because they would no longer be able to sell loans to aggregators.

We are concerned that, as a result, small originators may lose a significant source of funding and liquidity at a time when access to funds is at a premium. Furthermore, because whole loans potentially could not be sold by these small originators to be securitized by others, the value of these loans would be diminished in comparison to loans originated by large institutions able to comply with the ALD requirements. The loss of access to the securitization markets and the reduction in value of the assets may force some small originators out of business, resulting in fewer sources of credit available to consumers and businesses. Consumer and business financing could become concentrated in a few large institutions. In particular, the system of mortgage financing could become further concentrated in a few large institutions, or with government-sponsored entities.

We believe that utilizing the provide-or-explain approach would help to alleviate these concerns, while still facilitating a significant enhancement of disclosure in securitization transactions.

C. Privately Issued Structured Finance Products

The April 2010 Proposals would impose extensive new disclosure requirements for issuers and resellers of structured finance products, as broadly defined, to use the safe harbors from registration provided by Rule 506 of Regulation D and by Rule 144A under the Securities Act. The transaction documents for these offerings would be required to grant to any purchaser, holder or prospective purchaser from the original holder of the offered securities the right to request the same information that would be required if the offering were registered on Form S-1 or proposed Form SF-1, and the same ongoing information that would be required if the issuer were required to file ongoing periodic Exchange Act reports. This would include the proposed asset-level data disclosure requirements.

According to the Re-Proposing Release, many commenters, including SIFMA's dealer and sponsor members, expressed concerns that it is not clear what information would be required for types of structured finance products that are not typically offered in registered offerings under Regulation AB, such as collateralized debt obligations ("CDOs"), collateralized loan obligations ("CLOs"), asset-backed commercial paper and synthetic ABS, as well as other novel asset types and structures.[47] Recognizing these comments, the Commission requests comment on whether

[47] Re-Proposing Release,, 76 Fed. Reg. at 47970-71.

the rules should require ALD disclosure only where a privately offered structured finance product is backed by assets of an asset class for which there are prescribed asset-level data requirements in Regulation AB. [48] As currently proposed, this would include residential mortgages, automobile loans and leases, equipment loans and leases, student loans, floorplan financings, corporate debt and resecuritizations.[49]

Before we respond to the Commission's specific requests for comment, we would like to take this opportunity to reiterate our strong overall objection to the proposed new disclosure regime for privately offered structured finance products set forth in the April 2010 Proposals.

We continue to appreciate the concern expressed by the Commission regarding the adequacy of disclosure in some private offerings of structured finance products, including CDOs. We are acutely aware that during the financial crisis investors – as well as transaction sponsors – incurred large losses on certain structured securities that, as a result, may now be perceived as types of securities having a high level of risk. However, the proposed changes in regulations applicable to private offerings to institutional investors would, in almost all private offerings of ABS and other structured finance products as they are commonly conducted, substantially eliminate the principal distinctions between registered public offerings and private offerings to sophisticated institutional investors, by requiring issuers to covenant to provide initial disclosure consistent with that in an offering registered on Form SF-1 and ongoing reporting as if the issuer were required to report under Section 15(d) of the Exchange Act. This broad regulation of exempt private transactions would represent a historic shift in Federal regulation of the securities markets, requiring that every issuer of structured finance products provide the full, broad range of disclosure required to be provided in public offerings for the protection of every investor, including individuals and small institutions, to even the largest, most sophisticated institutional investors in a private offering.[50]

In our view, the scope of the proposal is unjustified, and the proposed changes could significantly impair the functioning of the private markets for structured finance products and reduce the availability of credit. We believe that there remains an important role for negotiated transactions in which securities are purchased by institutional investors that have the resources and experience to fend for themselves.

Intrusive regulation of the private markets is inconsistent with the history and purpose of the private placement exemptions from registration under the Securities Act. Section 4(2) was adopted to exempt transactions "where there is no practical need for [the Act's] application . . .

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[48] *Id.*, 76 Fed. Reg. at 47971.
[49] *Id.*
[50] We recognize, of course, that the April 2010 Proposals would condition reliance on the Rule 144A and Rule 506 safe harbors that the transaction documents provide that this disclosure be provided upon an investor's request. As a practical matter, however, this would mean that every issuer of structured finance products would need to compile and be prepared to provide all of the disclosure that would have been required in a registered public offering, whether or not any investor ultimately requests the information.

."[51] As expressed by the Supreme Court, the applicability of this exemption depends "on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'"[52] In the April 2010 Proposing Release, the Commission acknowledged that "[a]s the [financial] crisis unfolded, investors increasingly became unwilling to purchase [asset-backed] securities, and today, this sentiment remains, as new issuances of asset-backed securities, except for government-sponsored issuances, have recently dramatically decreased."[53] We believe this demonstrates that sophisticated investors are capable of acting in their own interests when they wish to do so. Sophisticated investors can request additional information, and if their request is not satisfied, they can decline to invest. This ability has been demonstrated by recent developments in the ABS markets, including transactions in which investors negotiated for improved disclosures and stronger representation and warranty mechanics, as well as updates to various shelf registration statements that suggest greater issuer and investor attention to these matters.

We acknowledge that the proposed rules address only Rule 144A and Rule 506 under Regulation D, two safe harbor exemptions from registration under the Securities Act, and that even if the proposals were adopted, the statutory private placement exemption of Section 4(2) (and the private resale exemption known as "Section 4(1½)") would remain available and unchanged. However, the private structured finance markets have grown to rely on these safe harbors, particularly on the ability to effect resales to qualified institutional buyers in reliance on Rule 144A, and the volume of securities sold in reliance on the safe harbors (especially those sold in the Rule 144A market) is enormous, dwarfing the amount sold in reliance on the statutory exemption. Chart 1 below indicates the historical volume of issuance in the Rule 144A market.

Drastically limiting the availability of the safe harbors, as has been proposed, could force many of these transactions into the less liquid, less transparent statutory private placement market. We believe this to be an undesirable result in view of the Commission's stated desire to increase the amount of information available about these securities.

The Commission has not proposed similar draconian changes to its private offering rules for other types of investments that may be perceived as having relatively greater risk but whose issuers also rely on the regulatory safe harbor exemptions from registration, such as small company stock (often sold in reliance on Regulation D) and high yield debt (often sold in transactions relying on Rule 144A). It is very difficult to distinguish, on policy grounds, ABS and other structured finance products from these types of securities, but the Commission has not proposed to impose such onerous new requirements on anything other than structured finance products. We do not agree with the Commission's unsupported statement that "the costs of information asymmetry for ABS issuances can differ significantly from those incurred in the issuances of most other securities. . . . [, u]nlike the securities of other companies where information needed to value the securities might be able to be gleaned from a review of basic

[51] H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933).
[52] *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953).
[53] April 2010 Proposing Release, 75 Fed. Reg. at 23330.

summary information and discussions with management . . . ."[54] In order to fully assess the risk of investing in, for example, stock of a small company, an investor might want to review much of the information that would be included in a Securities Act registration statement and ongoing Exchange Act reports, such as current GAAP financial statements and management's discussion and analysis of financial condition and results of operations. But the Commission is not proposing that these items be required in order for a small company to take advantage of the exemption provided by Rule 506 when making an offering solely to accredited investors. The rules would still rely on the ability of sophisticated investors to fend for themselves in acquiring the information they deem important.

Chart I: U.S. Rule 144A Issuance of Securitized Products, 2001-2011YTD

$ Millions

	Auto	Credit Card	Equipment	RMBS Related	Commercial Mortgages	Insurance Linked Securities*	Other**	Student Loan	CDO	Grand Total
2001	7,340.4	7,991.2	4,901.2	4,698.2	15,513.5	2,938.9	12,447.0	207.5	36,433.4	92,471.2
2002	5,374.8	3,255.6	1,073.6	20,970.1	18,106.6	1,559.5	20,414.5	801.5	48,892.8	120,449.0
2003	7,616.5	356.3	4,052.8	4,231.2	15,844.1	3,644.2	12,222.1	7,959.4	67,930.3	123,856.7
2004	7,430.0	4,240.2	1,422.9	7,212.3	20,421.5	4,258.8	50,983.8	5,949.9	108,127.7	210,046.9
2005	19,103.7	2,782.4	341.8	16,941.3	38,210.3	5,411.1	53,812.0	2,678.9	158,233.4	297,515.0
2006	10,199.0	4,282.4	3,903.4	30,534.1	37,478.4	11,544.8	42,893.9	3,579.9	315,924.0	460,339.9
2007	6,832.4	4,092.6	882.9	16,255.9	53,676.7	15,949.3	38,801.5	7,030.6	257,948.8	401,470.5
2008	4,347.8	849.9	0.0	3,782.4	0.0	3,391.7	4,934.7	436.0	27,129.6	44,872.0
2009	19,739.3	9,694.8	2,646.0	28,696.7	3,239.0	4,703.8	6,657.3	10,502.4	196.8	86,076.1
2010	23,899.0	1,002.7	2,449.7	46,234.0	23,319.7	6,794.6	9,212.3	10,349.0	3,880.6	127,141.4
2011	9,788.3	386.6	3,870.7	17,428.6	22,007.7	2,461.7	6,562.4	4,502.7	5,169.5	72,178.1
Total	121,671.3	38,934.5	25,544.9	196,984.7	247,817.4	62,658.2	258,941.3	53,997.6	1,029,866.9	2,036,416.8

*ILS data sources do not differentiate nature of issuance. SIFMA believes nearly all ILS are issued 144A; a small portion may have been issued as 4(2) private placements which we estimate to be less than $1 billion.

**Other includes: Account Receivable, Aircraft Receivable, Consumer Loans, Corporate Loans, Diversified Payment Rights, Financial Guaranty Insurance Policy, Healthcare Receivables, Home Equity Loans, Lease Receivables, Loans, Manufacturing Housing, Oils Receivables, Other Assets, Property Lease Receivables, Retail Receivables, Trade Receivables, Undisclosed, Utility Receivables

Data Sources: Dealogic, Goldman Sachs, SIFMA analysis

To impose such stringent regulation on the private ABS markets – while leaving the private markets for other securities that may be perceived as risky untouched – would impose an unfair burden on the structured finance markets that could disadvantage structured finance issuers to the detriment of the credit markets. We do not mean to suggest that similar rules

[54] *Id.*, 75 Fed. Reg. at 23394.

should be imposed in other market sectors. To the contrary, we note the danger of a slippery slope into unwarranted regulation, as we believe that there should always remain an important place for negotiated transactions between issuers and large institutional investors.

Among our concerns about the proposed new disclosure requirements are just the concerns raised by the Commission in the Re-Proposing Release We are concerned that the imposition of the proposed disclosure requirements in private transactions may make it impossible, as a practical matter, to execute certain types of transactions in any markets other than the Section 4(2) markets. Securities that do not fall within the definition of "asset-backed security" under Regulation AB would be eligible to be offered publicly only through a full registration on Form S-1. While the April 2010 Proposals would not impose specific disclosure requirements with respect to such securities, the April 2010 Proposing Release makes it clear that the review of an S-1 filing would afford the Staff the opportunity to comment on the disclosure it believes to be appropriate.[55] To the extent that such securities fall within the proposed definition of "structured finance product" but not within the narrower definition of "asset-backed security," in an offering undertaken in reliance on Rule 144A or Rule 506 under Regulation D, Form S-1 level disclosure would be required to be made available to investors upon request – but, as implicitly acknowledged by the Commission in the April 2010 Proposing Release, it is not clear what the content of that disclosure would be.[56] The result would be a set of disclosure requirements that are extensive while at the same time vague – raising a high bar to compliance, and exposing issuers to potential liability for failure to provide required information.

While the Commission's concerns appear to be focused on the amount of information available to investors in private offerings of certain types of structured finance products, such as managed CDOs and synthetic CDOs,[57] the proposed changes to the safe harbors would affect every security within the broad definition of "structured finance product." One example is collateralized loan obligations, or CLOs. The Commission acknowledges that CLOs are very similar in structure to CDOs, except that instead of the types of "underlying assets including subprime mortgage-backed securities and derivatives, such as credit default swaps referencing subprime mortgage-backed securities, and even tranches of other CDOs" that became common for CDOs, they hold "corporate loans, loan participations or credit default swaps tied to corporate liabilities."[58] CLOs increase the amount of money available for lending to companies and reduce the costs of those loans to the borrowers. The uncertainty of the disclosure required for a Rule 144A offering of a CLO could make such offerings impossible, and drastically diminish a valuable source of cost-effective financing.

Other types of structured transactions that have come to be relied upon by market participants for capital raising, financing or risk management purposes would be difficult or even impossible to execute in the Rule 144A market under the proposed rules. As noted in the Prior

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[55] *Id.*, 75 Fed. Reg. at 23389 (footnote 413).
[56] *Id.*, 75 Fed. Reg. at 23396.
[57] *Id.*, 75 Fed. Reg. at 23396.
[58] *Id.*, 75 Fed. Reg. at 23330 (footnote 28).

Comment Letter and acknowledged by the Commission in the Re-Proposing Release,[59] some types of transactions that could be left in this disclosure limbo include, by way of example,[60] insurance-linked securities, whole business securitizations, future flow securitizations, securitizations of film rights, securitizations of franchise fees, securitizations of patent royalties or other intellectual property licensing fees, securitizations of charged-off assets or assets more than 50 percent of which are delinquent in payment, securitizations of leases where the residual values being monetized exceed the limits specified by the Regulation AB definition of "asset-backed security," and securitizations of non-revolving assets where the revolving period exceeds one year. Some of these types of transactions were once thought to be exotic, but have since become staples of the structured finance markets and perform a valuable capital-raising function. Nevertheless, uncertainty over what disclosure would be required under the April 2010 Proposals could have the practical effect of closing the Rule 144A market to these transactions.

Any securitization that pools a novel asset type or uses a novel structure could confront the same uncertainty. We do not believe that it was the Commission's intent to unduly stifle innovation or to virtually close the Rule 144A market to a broad swath of types of structured finance transactions, both commonplace and innovative. We urge the Commission to consider the potential unintended consequences of an overly broad disclosure mandate and to reconsider the breadth of the proposed information requirements. We believe that the Commission should carefully consider, in addition to the needs of investors, the importance of fostering – or at least not stifling – credit creation and appropriate productive innovation in the capital markets.

While we do not seek to minimize the importance of adequate disclosure to investors, we note that many of the institutions that suffered large financial losses on holdings of structured finance products had sponsored the issuance of those products and therefore had access to detailed information regarding the pool assets and other aspects of the transactions. More extensive disclosure requirements would not have prevented or even mitigated those losses. Unfortunately, there may be future occasions when macroeconomic events once again result in losses on investments, even where extensive transaction-specific disclosure has been provided – and no amount of required disclosure can fully mitigate the risk of these events.

For all of these reasons, we continue to object to the April 2010 Proposal's new requirements regarding privately-offered structured finance products, and we urge the Commission to reconsider. We believe that, if adopted, these rules would make it difficult, and in some cases impossible, to offer structured finance products other than in reliance on the statutory private offering exemption. We believe it is evident that sophisticated investors in these products, such as institutional investors, are capable of acting in their own interests when they wish to do so. Sophisticated investors can request additional information, and if their

[59] Re-Proposing Release, 76 Fed. Reg. at 47971 n. 178).
[60] We wish to emphasize that we have cited certain types of transactions as examples only. It is not our intent to list every type of transaction that may serve a valuable function in the capital markets, and we ask that the omission of any transaction type from this brief list of examples not be viewed as implying that other types of transactions do not also fill important roles.

request is not satisfied they can decline to invest. We urge the Commission not to adopt these proposed changes.

If the Commission nevertheless determines to adopt these changes, we urge the Commission to adopt the specific changes set forth in the Prior Comment Letter, including but not limited to the following:

- Unless assets originated or issued prior to the effective date of the new rules are grandfathered, these assets would be forever foreclosed from being pooled into products sold in not only the public market, but also the Rule 144A market, thereby creating a class of assets that can never be efficiently financed and whose value would be permanently reduced. Therefore, we request that assets originated or issued prior to the effective date of the new rules be grandfathered.

- Because the proposed disclosure requirements would be impossible to meet for resecuritizations if the underlying securities were issued prior to effectiveness of the proposed rules, and potentially unduly burdensome thereafter, we (along with SIFMA's investor members) request that resecuritizations of ABS that occur not less than one year after issuance of the underlying ABS[61] be excepted from the proposed expanded information requirements of Rule 144A and Regulation D.

- We request that, if the information requirements of Rule 144A and Regulation D as they are proposed to be revised apply to resecuritizations, these rules apply only to underlying securities that are issued on or after the effective date of the proposed rules.

- If the information requirements of the proposed rules apply to resecuritizations, we believe that it would be appropriate for those rules to apply only to a class of underlying securities that represents at least some minimum percentage of the asset pool. We would support 10 percent or more of the asset pool – the same concentration level at which disclosure would be required with respect to a significant obligor under Item 1112 of Regulation AB.

- We continue to support our proposal to amend Rule 144A to permit resales to be made to a new class of "qualified institutional buyers/structured finance," or "QIB/SF," without compliance with the proposed additional disclosure requirements. We believe that this would preserve the availability of the Rule 144A market for transactions involving the largest, most sophisticated institutional investors.

In response to the Commission's specific request for comment, if the Commission adopts its proposal to require extensive new disclosures in the Rule 144A and Regulation D markets for structured finance products, we urge the Commission to require that the transaction agreements

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[61] The one-year seasoning requirement would ensure that a resecuritization is a *bona fide* transaction rather than a mere device to circumvent the information requirements.

underlying structured finance products sold in reliance on Rule 144A or sold pursuant to Rule 506 be required to provide ALD disclosures if the particular asset class of the securities is an asset class where ALD disclosures are prescribed in Regulation AB. Securities in asset classes for which Regulation AB does not prescribe ALD disclosures should be exempted from providing ALD disclosure in Rule 144A and Rule 506 transactions.

Conclusion

SIFMA supports proposed changes in SEC rules that will increase transparency and help to restore investor confidence in the ABS markets, and our dealer and sponsor members supported (and continue to support) many of the specific changes sought by the Commission. We wish to extend our thanks to the Commission for its obvious efforts to get these important new regulations right, and we hope that the Commission finds our comments on the re-proposed rules and our responses to the Commission's request for comments useful and constructive. We continue to urge the Commission to take care to avoid adopting unnecessarily onerous regulations that could impede the recovery of the fragile structured finance markets.

We greatly appreciate your consideration of the views set forth in this letter, and we would be pleased to have the opportunity to discuss these matters further with you or with any member of the Commission staff. Please feel free to contact the undersigned at 212-313-1359, for Richard Dorfman, or 212-313-1126, for Christopher Killian.

Sincerely yours,

Richard A. Dorfman
Managing Director
Head of Securitization

Christopher B. Killian
Vice President

Exhibit A to Comment Letter

Certification

I, [identify the certifying individual,] certify as of [the date of the final prospectus under Securities Act Rule 424 (17 CFR 239.424)] that:

1. I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] and am familiar with the structure of the securitization, including without limitation the <material >characteristics of the securitized assets underlying the offering, the <material >terms of any ~~internal~~ credit enhancements and the material terms of all <material >contracts and other arrangements entered in <order >to ~~the~~ effect the securitization;

2. Based on my knowledge, the prospectus 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 such statements were made, not misleading;

3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, ~~fairly present~~<disclose> in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein, including all <material >credit enhancements and all <material >risk factors relating to the securitized assets underlying the offering that would affect <whether >the cash flows< are> sufficient to service payments on the asset-backed securities as described in the prospectus; and

4. Based on my knowledge, <it is my current belief that, >taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including ~~internal~~<any> credit enhancements~~,~~ and any other material features of the transaction, in each instance~~, as~~< as described in the prospectus, as well as any assumptions> described in the prospectus, the securitization is ~~designed~~<structured> to produce, but is not guaranteed by this certification to produce, cash flows at times and in amounts sufficient to service ~~expected~~ payments on the asset-backed securities offered and sold pursuant to the registration statement< in accordance with their terms as described in the prospectus; provided that the risk factors described in the prospectus may materially and adversely affect those cash flows, and that there may be current facts not known to me and there may be future developments that would cause my opinion to change or that would result in the securitized assets not generating those cash flows>.

< This certification does not address any portion of the prospectus that constitutes a quotation from or summary of a report or opinion of an expert, or any portion of the prospectus that has been reviewed or passed upon by an expert and is set forth in the registration statement upon the authority of or in reliance upon such person as an expert, which person is named an expert in the registration statement and consents to that status under Section 7 of the Securities Act and Securities Act Rule 436 (17 CFR 239.426).>