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NC1-027-20-05
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October 4, 2011

VIA EMAIL: rule-comments@sec.gov

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

Re: Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities
File No. S7-08-10
Release Nos. 33-9244, 34-64968
RIN 3235-AK37

Dear Ms. Murphy:

Bank of America Corporation ("Bank of America") appreciates the opportunity to submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding its re-proposal of rules relating to shelf eligibility conditions for asset-backed securities ("ABS"), and for additional comments regarding the Commission's proposal to require asset-level information about the pool of securitized assets (the "Revised Proposal").

The topics covered by the Revised Proposal were originally addressed in the sweeping set of proposed rules regarding the disclosure, reporting and offering process for ABS (the "Initial Proposal") issued by the Commission in April 2010.[1] On August 2, 2010, Bank of America submitted its comments on the Initial Proposal to the Commission (the "2010 BAC Comments").[2] To the extent that this letter does not respond to requests by the Commission for comments on specific aspects of the Revised Proposal, Bank of America generally opposes any changes suggested by such requests, if such changes are inconsistent with the 2010 BAC Comments or the comments contained in this letter.

Bank of America is one of the world's largest financial institutions and is actively engaged in facilitating the provision of credit to individual consumers, small and middle market businesses, and corporations. Since acting as the issuer of the first publicly registered offering of

[1] *See Asset-Backed Securities*, Commission Release No. 33-9117, 75 Fed. Reg. 23328 (April 7, 2010).
[2] The 2010 BAC Comments are available at http://www.sec.gov/comments/s7-08-10/s70810-108.pdf.

non-agency residential mortgage pass-through certificates in 1977, Bank of America has continued to act as a leader in the securitization market as an issuer itself and by providing underwriting, distribution, and advisory capabilities to clients. We believe that securitization helps individual consumers, small and middle market businesses, and corporations by supporting lending and allowing for an efficient redeployment of capital and new credit creation. Accordingly, we understand the significant impact that the Revised Proposal will have on the securitization market and, as a result, on the provision of credit generally in both the primary consumer market and the commercial market.

We thank the Commission and its staff for their significant efforts in crafting the Revised Proposal. We concur with the Commission that changes to the regulation of the ABS market are appropriate. Nevertheless, we are concerned that many aspects of the Revised Proposal are unnecessary and will have adverse unintended consequences for ABS markets that outweigh the anticipated benefits. The goal of this comment letter is to provide constructive recommendations that will help the Commission accomplish its goals without unduly and adversely affecting the ABS market and, thus, the cost and availability of credit to consumers and businesses.

I. Executive Summary

This comment letter is divided into two main parts. The first part addresses the eligibility conditions for shelf registration statements as set out in the Revised Proposal. The second part addresses other aspects of the Revised Proposal.

With respect to the eligibility conditions for shelf registration statements, our primary comments are:

- No additional conditions are necessary as replacements for the investment grade rating condition to shelf eligibility;
- The depositor certification will not achieve its intended purpose;
- The depositor certification is flawed in the details of its substantive provisions;
- The credit risk manager concept is generally sound, and we agree with the Commission that a "one size fits all" approach would not be workable and recommend certain changes to ensure that appropriate flexibility is preserved; and
- The investor communication provision should be revised in a manner that is consistent with the Commission's Request for Comment 43.

With respect to other aspects of the Revised Proposal, our primary comments are:

- Asset-level disclosure requirements should be phased in;
- Public-style disclosure should not be required for private offerings;

- Asset-level disclosure should not be required for ABS backed by assets not listed on Schedule L; and

- The cash flow waterfall program requirement should be abandoned.

II. Comments Relating to Eligibility Conditions for ABS Shelf Registration Statements

A. No Additional Conditions are Necessary as Replacements for the Investment Grade Rating Condition to Shelf Eligibility

In its commentary to the Revised Proposal, the Commission requested comment as to whether risk retention and continued reporting under the Securities Exchange Act of 1934 (the "Exchange Act") are sufficient replacements for the investment grade rating condition to eligibility for shelf offerings, such that no additional conditions are necessary or appropriate. For the reasons stated below, Bank of America believes that no additional conditions are necessary or appropriate.

As noted by the Commission, the purpose of the investment grade rating condition, and any substitute set of conditions, is to "ensure a certain quality and character for [ABS] that are eligible for delayed shelf registrations given the speed of these offerings."[3] In our view, the Commission's important regulatory interest in ensuring a minimum quality and character for ABS offered under shelf registration statements has been subsumed by, and will be effectively accomplished by, the various sweeping reforms already finalized or in progress, including pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

The reforms under the Dodd-Frank Act are intended to transform all sectors of the securitization market by seeking to ensure that all ABS have a minimum quality and character. Among the many regulatory reforms in this regard are:

- <u>Risk Retention</u> – proposed rule under Section 941(b) of the Dodd Frank Act intended by the Commission and other participating regulatory agencies to ensure that sponsors and issuers bear some minimum risk of loss on ABS and thus have sufficient incentive to monitor and control the quality of the assets being securitized and to help align the interests of the sponsor with those of investors in the ABS;

- <u>Securitizer Disclosures about Representations and Warranties</u> – final rule under Section 943 of the Dodd-Frank Act intended by the Commission to permit investors to identify originators with clear underwriting deficiencies;

- <u>Rating Agency Disclosures about Representations and Warranties</u> – final rule under Section 943 of the Dodd-Frank Act intended by the Commission to allow investors to compare the representations, warranties and enforcement

[3] *See Re-Proposal of Shelf Eligibility Conditions*, Commission Release Nos. 33-9244 and 34-64968, 76 Fed. Reg.47948 (August 5, 2011), at 47950.

mechanisms for a particular rated ABS transaction with those contained in similar ABS transactions;

- Issuer Due Diligence Review of Securitized Assets – final rule under Section 945 of the Dodd-Frank Act intended by the Commission to address a perceived erosion in due diligence practices in registered ABS offerings by imposing a minimum level of review of the securitized assets and requiring disclosure about the nature of such review;

- Disclosure of Third-Party Due Diligence Reviews – proposed rule under Section 932 of the Dodd-Frank Act intended by the Commission to make available to investors third-party due diligence reports obtained by issuers or underwriters from specialized providers of due diligence services that are relevant to the determination of a credit rating for the ABS; and

- Continuing Exchange Act Reporting by ABS Issuers – final rule under Section 942 of the Dodd-Frank Act intended by the Commission to provide investors and the market with transparency regarding many aspects of the ongoing performance of registered ABS and the related servicer(s).

In addition, significant reforms have been undertaken with respect to the rating agency process. Rule 17g-5 provides a mechanism to permit rating agencies who have not been paid by the issuer, the sponsor or the underwriter to provide unsolicited ratings on ABS. The Commission has also proposed a variety of rules intended to enhance the effectiveness and transparency of the rating process.[4]

Bank of America and other market participants have commented extensively on many aspects of the aforementioned rules. We continue to urge the Commission to adopt rules that enhance investor protection without imposing disproportionate economic and compliance costs that could cripple the ability of securitization to make affordable credit available to consumers and businesses. Although there is much work left to be done, Bank of America believes that when the Commission’s various rulemaking initiatives described above are complete, the resulting regulatory safeguards will be more than adequate to ensure that both publicly-offered and privately-offered ABS will meet any reasonable benchmark for quality and character that can be achieved through cost-effective regulation.

We also note that proposed Rule 424(h) contained in the Initial Proposal contemplates a meaningful reduction in the speed of shelf offerings by requiring that the preliminary prospectus be filed at least five business days prior to the date of the first sale in the offering. While we

[4] See SEC Release No. 34-64514, proposing, among other things, (i) enhanced requirements for registration as an NRSRO under Rule 17g-1, (ii) additional recordkeeping requirements under Rule 17g-2, (iii) financial and other reporting under Rule 17g-3, (iv) additional conflicts of interest provisions under Rule 17g-5, (v) extensive disclosure requirements in connection with rating actions under Rule 17g-7, (vi) requirements as to ratings policies and procedures under Rule 17g-8, (vii) new standards of training, experience and competence for credit analysts under Rule 17g-9 and (viii) certification requirements for due diligence reports provided to rating agencies under Rule 17g-10.

object to this five business day requirement,[5] we note that any reduction in speed of ABS shelf execution should commensurately reduce the underlying regulatory concern that the investment grade rating condition, and the replacement conditions now being contemplated by the Commission, are meant to address.[6]

B. The Depositor Certification Condition Will Not Achieve its Intended Purpose

The depositor certification is not necessary and will not meaningfully advance the Commission's stated goal of increasing senior officer oversight and accountability for ABS transactions. The Securities Act and Regulation AB already require significant oversight by senior officers and already hold senior officers accountable for ABS transactions. The most notable features of the existing regulatory framework in this regard are:

- Section 11(a) of the Securities Act of 1933 (the "Securities Act"), which imposes personal securities law liability for faulty disclosure on each of the senior officers who sign the registration statement;

- Item 601(b)(31) of Regulation S-K, which requires either the senior officer in charge of securitization of the depositor, if the depositor is signing the report on Form 10-K, or the senior officer in charge of the servicing function of the servicer, if the servicer is signing the report on Form 10-K on behalf of the issuing entity, to certify, among other things, that:

    - The Exchange Act periodic reports, taken as a whole, do 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; and

    - All of the reports on assessment of compliance with servicing criteria for asset-backed securities and their related attestation reports have been included as exhibits to the Form 10-K and that any material instances of noncompliance described in such reports have been disclosed in the Form 10-K; and

- Item 1123 of Regulation AB, which requires a compliance statement signed by an authorized officer of the servicer stating that:

[5] As noted on p. 13 of the 2010 BAC Comments, Bank of America generally supports the Commission's stated goal of allowing investors more time to review transaction-specific information in order to make informed investment decisions. However, five business days (which could stretch into eight calendar days in some instances) provides more time than investors need to consider the preliminary prospectus. Moreover, such a protracted period for consideration has the potential to cause significant disruptions to transaction timing. In addition, as noted on pages 13 and 14 of the 2010 BAC Comments, the Commission should not require an additional five business day period for investors to review a material change to the preliminary prospectus. In many instances, the changes made to a preliminary prospectus are very targeted and specific (e.g., changes to reflect an increase or decrease in the amount of securities being offered) and, though perhaps material, simply do not require multiple business days for investors to review and analyze. The requirements of Securities Act Rule 159 are sufficient to ensure delivery of updated information in a manner that provides investors with an adequate opportunity to evaluate the disclosure prior to entering into a contract of sale.

[6] See text accompanying footnote 3, noting "speed of [shelf-registered ABS] offerings" as the rationale for requiring a minimum "quality and character" for such ABS.

- A review of the servicer's activities during the reporting period and of its performance under the applicable servicing agreement has been made under such officer's supervision; and

- To the best of such officer's knowledge, based on such review, the servicer has fulfilled all of its obligations under the servicing agreement in all material respects throughout the reporting period or, if there has been a failure to fulfill any such obligation in any material respect, specifying each such failure known to such officer and the nature and status thereof.

In its current state, the regulatory framework for ABS is simply not characterized by a lack of robust accountability and oversight standards for senior officers. If there is a senior officer among ABS issuers who is not already exercising the high degree of oversight that the existing rules require and who does not already feel accountable to investors despite being specifically identified by statute as a potential defendant in a lawsuit under Section 11 of the Securities Act, then further certifications by such an officer as to disclosure matters and expected ABS cash flows are likely to be of little value to investors or the regulatory regime for ABS.[7] However, because, as discussed below, the proposed certification adds to the potential liability of the certifying officer (and thus to the issuer), a responsible officer will be discouraged from signing the officer's certificate.[8] In other words, although there will be little or no benefit, there will be cost. The proposed officer's certification requirement will tend to suppress ABS market activity without meaningfully enhancing accountability and oversight.

C. The Depositor Certification Condition is Flawed in the Details

In addition to the basic conceptual shortcomings of the depositor certification as described above, the depositor certification is significantly flawed within the details of its substantive provisions, as highlighted below.

1. <u>Certification of Sufficiency of Cash Flows</u>

Paragraph 4 of the depositor certification requires that the certifying officer state that:

> "[b]ased on my knowledge, taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, the securitization is designed to produce, but is not guaranteed by this certification to produce, cash flows at times and in amounts sufficient

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[7] Such "value" could arguably come in the form of greater potential liability (and thus a greater opportunity for investors to recoup losses from ABS issuers) if securities perform poorly. However, the Revised Proposal strongly (and, in our view, appropriately) suggests that this was not the type of "accountability" sought by the Commission when proposing the officer's certification. Nevertheless, if this is the market's understanding of the purpose of the certification, the chilling effect on ABS issuance described in this comment letter would certainly result.

[8] As discussed below, the proposed depositor certification is forward-looking and requires a certification to the effect that all risk factors are included in the prospectus. Thus, the potential liability of the certifying officer is particularly significant in that no amount of due diligence can ensure that forward-looking statements are borne out by actual events or that no risks materialize other than the risks identified in the prospectus.

to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement."

(a) Expected Payments on ABS is an Imprecise and Subjective Concept

The fundamental and sound principles of the Federal securities laws favor precise and objective disclosure and require that the disclosure and other statements included in prospectuses and registration statements not be misleading. In the case of forward-looking statements, the Federal securities laws require that such statements be qualified by an appropriate disclaimer to discourage undue reliance by investors.[9]

In its current form, Paragraph 4 is inconsistent with these fundamental disclosure principles, giving us serious concerns about the appropriateness of the proposed language and the potential for attendant liability.[10] As explained below, the concept of expected payments on ABS is too imprecise and subjective to make it the direct object of a certification included in the registration statement. Moreover, the imprecise and subjective nature of the expected payment concept would cause the certification to be potentially misleading to investors who will almost certainly be analyzing the ABS with differing sets of underlying assumptions in mind.

It is unclear what the Commission means by "expected payments" with respect to ABS. One of the key features of ABS that distinguishes most ABS from other types of fixed income securities is that most ABS generate payments to investors that are irregular in amount and frequency. The irregular nature of payments on ABS is due to the fact that the amount and timing of payments to ABS investors generally corresponds with the rate at which the obligors on the underlying securitized assets make payments on those assets.

The amount and frequency with which obligors make payments is irregular, and often highly so. Many factors influence the rate at which (or whether) obligors make payments, including:

- Fluctuations in interest rates (falling interest rates tend to result in rising levels of obligor prepayments whereas rising interest rates tend to result in falling levels of obligor prepayments);

- Fluctuations in macroeconomic conditions (rising unemployment tends to result in rising levels of payment delinquencies and defaults whereas falling unemployment tends to lead to falling levels of payment delinquencies and defaults);

- Fluctuations in microeconomic conditions (improving results of business operations in particular sectors of the economy (e.g., multi-family housing, hotels and resorts, retail, etc.) can enhance the ability of commercial obligors to make

[9] *See* Section 27A(c)(1)(A)(i) of the Securities Act and Section 21E(c)(1)(A)(i) of the Exchange Act.

[10] While it is helpful that Paragraph 4 as set forth in the Revised Proposal states that the cash flow certification in Paragraph 4 is not a guarantee, that qualification does not eliminate the substantial remaining securities law liability and other concerns with certification as described below.

payments on commercial loans whereas deteriorating results of business operations can diminish the ability of commercial obligors to make payments on commercial loans); and

- Effects of consumer laws (periods of increased levels of personnel on active military duty could result in delays in payments due to the Servicemembers Civil Relief Act and similar statutes).

Like other fixed income investments, the credit quality of ABS of the type traditionally offered under shelf registration statements is measured by the relative likelihood that noteholders will receive interest on a timely basis and principal by the legal final maturity date. However, even for the most highly rated ABS, as to which this likelihood is the greatest, the cash flows that investors receive on their ABS can be "lumpy" for the reasons described above. Put another way, for most ABS, there are many different cash flow scenarios that could be consistent with the desired credit quality of that ABS.

Although particular investors or analysts form expectations about the future cash flow profile of a particular ABS, each party's expectations are necessarily and appropriately a product of the myriad assumptions that the investor or analyst, in the exercise of his or her own business judgment, decided to utilize in the cash flow analysis.[11] Accordingly, it is both undesirable and potentially misleading for an officer of the issuer to certify to "expected payments." There is no common "expectation" shared by all transaction participants. Furthermore, although the certifying officer might form an expectation based on a statistical model that utilizes assumptions considered reasonable by the certifying officer, the certifying officer's expectation is (and should be) of little relevance to investors or analysts, each of whom should apply their own well-considered assumptions to the cash flow analysis.

(b) Forward-Looking Nature of Certification of Cash Flows

The disclosure challenges created by the imprecise and subjective nature of the certification as to expected cash flows are compounded by the fact that such certification is fundamentally a forward-looking statement.[12] In recognition of the disclosure issues inherent in forward-looking statements, the Securities Act and the Exchange Act contain a safe harbor for forward-looking statements if, among other things, such statements are:

- identified as forward-looking statements; and

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[11] Indeed, the inherent uncertainty of future events, including the performance of the underlying assets, is why ABS prospectuses often feature multiple potential payment scenarios, including the assumptions used in making any calculations with regard to the potential performance of the underlying assets and the securities. Investors' divergent expectations and divergent views on the reasonableness of these various assumptions actually drive investment decisions on the securities, and it is critical to a well-functioning ABS market that investors independently develop their own views separate and apart from issuers.

[12] The certification that a securitization is designed to produce expected cash flows in the future is "a statement containing a projection of revenues, income … or other financial items" and "a statement of future economic performance" and therefore is a forward-looking statement as that term is defined under Section 27A(i)(1) of the Securities Act and Section 21E(i)(1) of the Exchange Act.

- accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.[13]

In its current form, the depositor certification does not identify Paragraph 4 as a forward-looking statement and does not permit the requisite cautionary statements that accompany forward-looking statements to be included in the depositor certification.[14] A rule that requires a forward-looking statement to be included in the registration statement without offering the benefit of the safe harbor for forward-looking statements is not reasonable, especially given the imprecise and subjective nature of the forward-looking statement that is required to be made in Paragraph 4.[15]

Paragraph 4, if adopted in its current form, could place excessive liability on certifying officers and lead to registration statement disclosure that is potentially misleading. As a result, Bank of America believes that Paragraph 4, if adopted in its current form, would create a chilling effect on the ability of ABS issuers to utilize shelf registration statements, rendering the ABS market less attractive to both issuers and investors and thus hindering the provision of credit to consumers and businesses.

(c) An Alternative Approach to Paragraph 4

For the reasons explained above, Bank of America urges the Commission to eliminate Paragraph 4 in its entirety. If the Commission decides not to eliminate Paragraph 4, then Paragraph 4 should be revised to read as follows:

> "Based on my knowledge, taking into account the material characteristics of the securitized assets underlying the offering, together with the internal credit enhancements

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[13] *See* Section 27A(c)(1) of the Securities Act and Section 21E(c)(1) of the Exchange Act.

[14] Issuers have historically been reluctant to include projections and other forward-looking statements in registration statements and prospectuses due to the risk of securities law litigation if a projection or other forward-looking statement turned out to be incorrect. Indeed, the desire to elicit forward-looking statements regarding matters considered material by investors has motivated a number of Commission rulemakings designed to clarify the potential securities law liability for forward-looking statements (e.g., Rule 175 and Rule 3b-6). A statutory safe harbor for forward-looking statements was created under the Private Securities Litigation Reform Act of 1995.

[15] In its commentary to the Revised Proposal, the Commission suggests that Paragraph 4 is merely an "explicit representation by the certifying person of what is implicit in what should already be disclosed in the registration statement." *See* 76 Fed. Reg. 47953. The Commission goes on to state that "[i]f the certifying person did not believe the securitization was designed to produce cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities being registered, disclosure about such insufficiency would be required under Securities Act Rule 408 and Exchange Act Rule 10b-5." *Id.* Bank of America disagrees with this characterization of Paragraph 4. First, as noted above, unlike most other fixed income securities, there is no universally "expected" payment stream for a particular ABS transaction. Second, the Commission's characterization of Paragraph 4 fails to consider the disclosure of risk factors and other variables and assumptions in ABS prospectuses that help issuers and their counsel to conclude that they have satisfied the disclosure standard under Exchange Act Rule 10b-5. These significant disclosures are absent from the proposed form of Paragraph 4. By contrast, prospectuses for most ABS prominently disclose that the amount and frequency of payments to investors are subject to future events that are highly unpredictable, such as changes in interest rates and macroeconomic conditions. Indeed, these disclosures are typically made in the "risk factors" section of the prospectus which, as Item 503(c) of Regulation S-K requires, must contain "the most significant factors that make the offering speculative or risky."

and other material features of the securitization transaction described in the prospectus, the securitization is structured to produce cash flows at times and in amounts sufficient to service payments on the offered securities in accordance with their terms as described in the prospectus. The foregoing statement is:

(i) not a guarantee;

(ii) made on the basis of the material characteristics of the securitized assets, the internal credit enhancements and other material features of the securitization transaction, each as described in the prospectus;

(iii) made on the basis of what I believe to be reasonable assumptions about future economic and other conditions, none of which assumptions are inconsistent with the disclosures contained in the prospectus; and

(iv) subject to the risks and uncertainties described in the prospectus.

The foregoing sentences comprise a forward-looking statement within the meaning of the Private Securities Litigation Reform Act of 1995. Forward-looking statements speak only as of the date they are made, and the undersigned undertakes no obligation to update any forward-looking statement to reflect the impact of circumstances or events that arise after the date the forward-looking statement was made. No person should place undue reliance on any forward-looking statement and should consider the "risk factors" and other risks and uncertainties described herein and in the prospectus, which could adversely and materially affect the timing and sufficiency of cash flows."

2. Certification of Characteristics and Risks

Paragraph 3 of the depositor certification requires that the certifying officer state that:

"[b]ased on my knowledge, 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."

(a) Paragraph 3 is Redundant and Unnecessary

Under Item 1111(b) of Regulation AB, the prospectus is required to contain a description of the material characteristics of the securitized assets. Regulation AB also requires that the prospectus contain extensive disclosure about any significant obligors under the pool assets (Item 1112), the structure of the ABS transaction (Item 1113) and the credit enhancement and other support for the ABS (Item 1114). Thus, Paragraph 3 is redundant because the existing disclosure requirements under Regulation AB are more than adequate to elicit sufficient disclosure about the characteristics of the securitized assets.

Section 11 of the Securities Act imposes securities law liability on the senior officers who sign the registration statement if the disclosure omits to state a material fact required to be stated therein or omits to state a material fact necessary to make the statements in the disclosure not misleading. Thus, in addition to being redundant, Paragraph 3 is also unnecessary because existing provisions of the Securities Act already hold senior officers accountable if the disclosure about the securitized assets does not meet the standards set forth in Regulation AB or if the disclosure otherwise omits to include a material fact about the securitized assets if that omission causes the disclosure to be misleading.

(b) Paragraph 3 is Inconsistent with Existing Risk Factor Disclosure Principles

Paragraph 3 requires that the certifying officer state that the registration statement includes "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." This standard conflicts with the standard for risk factor disclosure in Regulation AB and Regulation S-K and will lead to "kitchen sink" risk factor disclosure by prudent ABS issuers that could obscure the most significant risks in an ABS transaction.[16]

Item 1103(b) of Regulation AB requires that the disclosure include the risk factor information required by Item 503(c) of Regulation S-K. That item requires "a discussion of the *most significant factors* that make the offering speculative or risky" (emphasis supplied). The "all risk factors" standard in Paragraph 3 would inevitably lead to disclosure of risks that are not significant to the ABS transaction.

The inclusion of insignificant risk factors is more than simply unnecessary. Such disclosure can also be misleading because it can obscure the disclosure about an ABS transaction's most significant risks. Indeed, not only does Item 503(c) of Regulation S-K require that only the most significant risk factors be discussed, it also states that risks that could apply to any issuer or any offering should not be included.

Perhaps more significantly, if adopted in its current form (requiring the certifying officer to attest that "all risk factors" have been identified in the prospectus), Paragraph 3 could expose certifying officers to liability in the event that circumstances arise and cause significant losses on ABS even though those circumstances could not reasonably have been anticipated at the time the officer signed the certificate and thus were not included in the list of all risk factors. Such risk of liability for any and all future circumstances is an unwarranted risk, since no level of due diligence or analysis could be performed that would assure a certifying officer that all possible future events that could adversely affect cash flows on the securitized assets have been identified and disclosed. This risk of excessive liability could be expected to create a chilling effect on registered ABS issuance.

[16] We acknowledge that the Commission may have intended the "all material respects" modifier in its proposed Paragraph 3 to apply to the later-appearing "all risk factors" requirement. However, the application of such modifier to the risk factors requirement is not clear in Paragraph 3 and, in any event, is not consistent with the existing standards for risk factor disclosure as described below.

(c) An Alternative Approach to Paragraph 3

For the reasons explained above, Bank of America urges the Commission to eliminate Paragraph 3 in its entirety. If the Commission decides not to eliminate Paragraph 3, then Paragraph 3 should be substantially revised to read as follows:

> "Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, describe in all material respects the following items with respect to the offering described in the prospectus:
>
> (i) the material characteristics of the securitized assets;
>
> (ii) the material terms of the structure of the transaction and the credit enhancement for the transaction; and
>
> (iii) the most significant risks relating to the securitized assets underlying the offering that would affect the cash flows used to make payments on the asset-backed securities as described in the prospectus."[17]

3. <u>Certification as to Scope of the Review</u>

Paragraph 1 of the depositor certification requires that the certifying officer state that he or she has reviewed the prospectus and is familiar with the structure of the securitization, including the material terms of all of the transaction documents. We believe Paragraph 1 should be revised to contemplate a review of the prospectus and other aspects of the ABS transaction conducted under the supervision of the certifying officer.[18] Accordingly, Paragraph 1 should read as follows:

> "A review of the prospectus relating to [title of securities the offer and sale of which are registered] and the structure of the securitization, including the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements and the material terms of the material contracts[19] and other arrangements entered in to effect the securitization, has been made under my supervision."

4. <u>Depositor Certification Should Be Limited to Disclosure</u>

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[17] Paragraph 3 should be accompanied by a note that clause (iii) of such paragraph is not intended to change the standard for risk factor disclosure contained in Item 1103(b) of Regulation AB and Item 503(c) of Regulation S-K.

[18] *See, e.g.*, the servicer compliance statement under Item 1123 of Regulation AB. A review under the supervision of the certifying officer will preserve the Commission's interest that a review be performed for which the senior officer is responsible, while at the same time recognize the reality that a review of all of the principal aspects of a securitization transaction may require the participation of many persons in order to be sufficiently robust.

[19] The Revised Proposal specifies that "all contracts" must be included in the scope of the review. We think that this is an overly-broad requirement and that an "all material contracts" standard strikes the appropriate balance between the interests of the Commission in ensuring a comprehensive review and the interests of market participants in clarity and efficiency arising from a focus on those contracts that are material to the ABS transaction.

If, notwithstanding the various considerations discussed above, the Commission concludes that some form of officer's certification should be a condition for ABS shelf eligibility, the certification should be limited to the statement concerning the disclosure as set forth in Paragraph 2 of the depositor certification.[20] The prospectus is required to include, among other things, summaries of the material structural elements of the transaction and the material terms of any credit enhancement. Attempting to isolate portions of this content in an officer's certificate, separate and apart from the discussion of the risk factors required by Item 503(c) of Regulation S-K and the numerous assumptions and qualifications included in the prospectus, could expose the certifying officer and the depositor to potential liability that exceeds the potential liability inherent in the officer's execution of the registration statement. As indicated above, such exposure would have a chilling effect on registered ABS issuance. Limiting any required officer's certification to Paragraph 2 of the form of certification included in the Revised Proposal would achieve any enhanced accountability benefits that might result from requiring a particular officer of the depositor to execute a certificate as a condition to ABS shelf eligibility, but would not increase the certifying officer's or depositor's liability exposure, and thus would avoid this chilling effect.

D. The Credit Risk Manager Concept is Generally Sound for Certain Asset Classes, but the Commission Should Not Impose a "One Size Fits All" Approach

Bank of America shares the Commission's desire to create effective mechanisms for enforcing breaches of representations and warranties concerning securitized assets. Bank of America has worked closely with other issuers and with investors through the American Securitization Forum to develop a model set of repurchase provisions for RMBS transactions (the "ASF Model Provisions").[21] The ASF Model Provisions were published on August 30, 2011, and set forth detailed provisions for the appointment of an independent reviewer that are similar to the credit risk manager provisions contained in the Revised Proposal. The ASF Model Provisions represent a market-based consensus among issuers and investors as to how to implement rigorous standards for a particular asset class within a framework that can be tailored to suit the circumstances of a particular ABS transaction.

Similarly, in March 2011, the CRE Finance Council (the "CREFC") published model representations and warranties and model remediation language as part of its "CMBS 2.0" initiative to provide new and comprehensive market standards for CMBS.[22] The rating agencies

[20] Paragraph 2 states that "[b]ased 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 they were made, not misleading." This certification matches the standard for prospectus liability under Section 12(a)(2) of the Securities Act. For the reasons set forth above, the shortened form of certification included by the Commission in Request for Comment #7 goes well beyond the prospectus disclosure requirements of Section 12(a)(2) of the Securities Act.

[21] *See* American Securitization Forum, ASF Project RESTART, *ASF Model RMBS Repurchase Principles Release* (August 30, 2011) (available at: http://www.americansecuritization.com/uploadedFiles/ASF_Model_RMBS_Repurchase_Principles.pdf).

[22] *See* CRE Finance Council, *CMBS 2.0 Market Standards* (available at: http://www.crefc.org/Committees.aspx?id=19381&terms=representations). We note that CMBS transactions already include the functional equivalent of a credit risk manager and that the terms of the Revised Proposal are not only unnecessary, as discussed below, but in their proposed form are not workable for CMBS transactions. *See* the

have also substantially revised their criteria for the representations, warranties and enforcement mechanisms that are expected to be included in the securitization transactions that they rate.[23]

In short, private market participants have already made significant progress in adopting new standards regarding representations, warranties and enforcement mechanisms. New Exchange Act Rule 17g-7, which took effect on September 26, 2011, will accelerate the spread of new, more robust, market standards because the benchmark comparisons required by that rule will enable investors to readily determine whether the representations, warranties and enforcement mechanisms for a particular ABS transaction fall short of those in comparable transactions.[24] Similarly, new Exchange Act Rule 15Ga-1 will maintain a consistent spotlight on representations, warranties and enforcement mechanisms by requiring securitizers to provide extensive disclosure of demands to repurchase and the extent to which those demands are contested or fulfilled.

Due to the wide variety of securitization structures and asset types, the trigger events, scope and other aspects of the independent review mechanism for any particular ABS transaction need to be tailored to suit the circumstances of that particular transaction and the preferences of investors.[25] In addition, we agree with the comments of the American Securitization Forum (the "ASF") in its comment letter dated October 4, 2011 (the "ASF Comment Letter") that (i) a third-party review and opinion alternative, as contemplated by the Initial Proposal, should be available and (ii) neither requirement should apply in transactions where the related securitizer's Form ABS-15G filings show no more than a *de minimis* amount of repurchase activity for the related asset class.

Given the market's recognition of the significant value, for certain asset classes, of a credit risk manager requirement, and of the need for flexibility to appropriately tailor the terms of this requirement for a particular transaction or series of transactions, we urge the Commission to allow the ABS market to continue to implement this requirement where appropriate rather than impose a credit risk manager condition to shelf eligibility. If the Commission nevertheless decides to move forward with the credit risk manager condition, then that condition should be revised as described below.

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comment letter of the CREFC regarding the Revised Proposal, dated on or about October 4, 2011 (the "CREFC Comment Letter").

[23] *See, e.g,* Fitch Ratings, *U.S. Residential Mortgage Loan Representations and Warranties Criteria* (June 30, 2011) (available at: http://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=639992); Moody's Investors Service, *Moody's Criteria for Evaluating Representations and Warranties in U.S. Residential Mortgage Backed Securitizations (RMBS)* (September 22, 2009) (available at: http://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBS_SF148641); and Standard & Poor's Revised Representations and Warranties Criteria for U.S. RMBS Transactions (September 28, 2009).

[24] In its commentary to the Revised Proposal, the Commission seeks comment as to whether issuers should be required to file as an exhibit a copy of the representations, warranties, remedies and exceptions marked to show how it compares to industry developed model provisions. Bank of America opposes such a requirement. First, this comparison would be duplicative of the comparison that rating agencies are required to present pursuant to Exchange Act Rule 17g-7. Second, some asset classes may not have a corresponding industry developed model. Finally, investors should be well able to compare for themselves the representation and warranty provisions in a particular ABS transaction to any model that they deem appropriate in the exercise of their own business judgment.

[25] The preferences of investors are the product of many factors, including the perceived credit quality of the securitized assets, the track record of the sponsor and the servicer and the scope of the diligence performed on the securitized assets.

1. Trigger Events

The Revised Proposal specifies that, at a minimum, the transaction agreements must require the credit risk manager to review the pool assets (1) when the credit enhancement requirements, such as required reserve account amounts or overcollateralization percentages, as specified in the underlying transaction agreements, are not met; and (2) at the direction of investors pursuant to the processes provided in the transaction agreements and disclosed in the prospectus. In its commentary to the Revised Proposal, the Commission indicates that market participants are free to include additional trigger events tailored to the needs of each particular ABS transaction.

(a) Mandatory Credit Enhancement Trigger

We appreciate the Commission's recognition that the appropriate set of trigger events in an ABS transaction is very much dependent on the facts and circumstances of that transaction. This approach is embodied in the ASF Model Provisions discussed above. Under the ASF Model Provisions, a trigger event should be based on objective factors and take into consideration collateral attributes, collateral performance and transaction features.[26]

The mandatory credit enhancement trigger, in the form proposed, will not work as intended by the Commission. For example, many transactions include mechanisms that, while related to the level of credit enhancement, are not designed to maintain a required level of credit enhancement.[27] In such transactions, it is unclear what is meant by "required credit enhancement."

Another example in which the credit enhancement trigger proposed by the Commission will not work as intended is in transactions that feature a relatively small amount of credit enhancement on the closing date but which build credit enhancement over time using excess spread until the required target level of credit enhancement is achieved.[28] By design, securitization transactions containing such a feature spend most of their early lives with credit enhancement levels that do not yet meet the required target level of credit enhancement. In this case, the "less than target" status of credit enhancement has nothing at all to do with the performance of the securitized assets and does not in any way call into question whether the securitized assets met the representations and warranties in the underlying transaction documents.

These examples demonstrate that it will be not only undesirable but highly impractical for the Commission to attempt to define a credit risk manager review standard that will be workable for all ABS transactions, much less to specify a credit enhancement review trigger for all ABS transactions. In some transactions, investors may require a trigger event based on the

[26] The ASF Model Provisions cite cumulative losses, delinquencies and severity of losses as objective factors that might be included in a set of trigger events for an RMBS transaction.
[27] For example, in the shifting interest structure used in many securitizations of prime residential mortgages, credit enhancement is measured for the purpose of allocating prepayments. In such transactions, however, credit enhancement is set at closing with no mechanism to build or restore credit enhancement. Even one dollar of loss (which all parties anticipate will occur at some point and will generally not serve as an indicator that the transaction is not performing well) will result in credit enhancement falling below the initial level.
[28] Many auto securitization transactions utilize this credit enhancement feature.

performance of the securitized assets, such as cumulative loss triggers or delinquency triggers. In most if not all cases, trigger events designed by market participants (both as to the data elements to be tested and the threshold levels) will be much more relevant than a mandated trigger event based on required credit enhancement. For many transactions, a mandatory credit enhancement trigger, or any other trigger prescribed by rule, will discourage the registered offering of ABS, or will result in unnecessary changes to transaction documents and structures in an attempt to fashion a trigger that satisfies the language of the rule but will not serve the interests of the parties. We believe a mandatory credit enhancement trigger will impose a compliance burden on issuers without providing meaningful benefit to investors. The Commission should not impose any mandatory trigger event, based on credit enhancement or otherwise. Rather, the conditions upon which a required credit risk manager review must occur should be left to market participants to determine, and such conditions should be required to be disclosed in the prospectus.

(b) Mandatory Investor-Directed Trigger

The Revised Proposal also contains a mandatory trigger event upon the direction of investors pursuant to the processes specified in the transaction documents and disclosed in the prospectus. Bank of America believes that this mandatory trigger is unnecessary and inappropriate. This trigger is unnecessary because robust market standards for trigger events are rapidly developing, and investors will have the ability to review the trigger events for a particular ABS transaction before making the investment decision and press for additional trigger events if the trigger events that are offered are not adequate. This trigger is inappropriate because it imposes an undue burden on issuers and could result in actions taken by a minority of investors that are inconsistent with the interests of the majority of investors.

We are concerned about the potential for unintended consequences or even abuse resulting from this mandatory trigger option. In its current form, the mandatory investor-directed trigger represents a riskless and cost-free option for investors. Any option that is riskless and cost-free will tend to be exercised more often than any reasonable costs and benefits analysis would deem justified.[29]

A mandatory investor-directed trigger will also create the potential for conflict among investors within the same ABS transaction. Many investors may oppose a review of the securitized assets, particularly if the securitized assets are performing well. For example, a review of assets followed by a repurchase creates reinvestment risk for investors, particularly if the investors are satisfied with the performance of the ABS but are not satisfied with the yield

[29]The benefits of an asset review are likely to be particularly attenuated in circumstances where none of the objective trigger events has occurred. We urge the Commission to consider that the appropriate scope and procedures for any such investor-directed review will be uniquely burdensome to negotiate because the parties will not know, at the time the relevant contractual provisions are negotiated, what concerns might ultimately precipitate the investor-directed review. If defaults and delinquencies are low, what assets will be selected for review? A random sampling may be appropriate in some circumstances but may not serve investor interests in others. What manner of review is appropriate? Investors would presumably prefer to have significant latitude to resolve such questions at the time of the review, but permitting such flexibility would necessarily and meaningfully increase the expense associated with retaining a credit risk manager and adversely impact the economics of the transaction. The potential benefits of a subjective, investor-directed review, at a time when no objective trigger event has occurred, do not justify this burden.

that they could earn on the investment of the principal prepayments that typically follow repurchases of assets. In addition, the adverse results of a review could reduce the market value of the ABS, even if the ABS is performing well, and the costs of any review, if not borne by the requesting investors, could reduce the amount of funds otherwise payable to holders of the securities.

In the end, costs and inefficiencies imposed on the ABS market that do not result in meaningful corresponding benefits to the operation of the ABS market are ultimately passed along to consumers and businesses in the form of a higher cost of credit. If the Commission decides to retain the mandatory investor-directed trigger, then we urge the Commission to mitigate the distortions described above by requiring, or at least clearly permitting the transaction documents to provide, that any investor who exercises this option must pay the reasonable costs and expenses associated with the review triggered by that investor in circumstances that do not lead to the identification of material breaches of representations and warranties made concerning the underlying assets. Furthermore, to minimize, over the long-term, the risk that a minority of investors will require a credit risk manager review that other investors oppose, the threshold for the classes and amounts of securities required to be held by one or more investors to exercise the trigger should not be specified by rule. The disclosures of the terms of the trigger will allow each investor to make an informed decision regarding the potential advantages and disadvantages of the particular threshold(s) specified for a particular transaction. This will allow market standards to develop that reflect both the interests of particular investors for particular transactions and the collective experience of market participants gained over time.

2. Review Process

We agree with the Commission's decision not to propose that transaction parties follow specific procedures related to the review process. As noted by the Commission, transaction parties should have the flexibility to tailor the procedures to each ABS transaction, taking into account the specific features of the transaction and the underlying asset class.[30]

In its commentary to the Revised Proposal, the Commission seeks comment as to whether the final rules should specify some or all of the procedures related to the review or repurchase process. Appropriate market practices and standards concerning the scope of the credit risk manager's review and the myriad details of the review and reporting process are rapidly developing and will, appropriately, vary significantly from one issuer to the next (and perhaps even from one transaction to the next). The Commission's judgment on this point as expressed in the Revised Proposal is correct and therefore we urge the Commission not to specify review scope or procedures in the final rules.

3. Appointment and Replacement of the Credit Risk Manager

The Revised Proposal requires that the credit risk manager be appointed by the trustee upon the occurrence of a trigger event. This requirement poses two issues. First, the trustee may be unwilling or unable to exercise the discretion inherent in identifying and appointing a suitable credit risk manager, particularly on a post-closing basis. Second, we believe that, for

[30] *See* 76 Fed. Reg. 47956.

transactions involving assets classes for which investors have insisted on a credit risk manager, the parties to an ABS transaction would generally prefer the certainty that accompanies the appointment of the credit risk manager at closing. This would allow investors that are concerned about the credit risk manager to determine their comfort level with the credit risk manager prior to making an investment decision. Therefore, the credit risk manager requirement should permit (but not require) the transaction documents to specify the credit risk manager at the time of closing.

In its commentary to the Revised Proposal, the Commission seeks comment as to whether the final rules should specify the terms for removal or re-appointment of the credit risk manager. We think the granular contractual provisions governing the removal or re-appointment of the credit risk manager are best left for the transaction parties. A uniform standard or set of provisions may unnecessarily limit flexibility and create delays that are prejudicial to the interests of investors in those rare cases when a credit risk manager must be quickly removed or re-appointed. As noted by the Commission in discussing the review procedures, "transaction parties should have the flexibility to tailor the procedures to each ABS transaction, taking into account the specific features of the transaction and/or asset class."[31] We agree with the Commission's conclusion and believe that the same rationale for flexibility in review procedures is equally applicable to the other aspects of the credit risk manager mechanism.

4. <u>Dispute Resolution</u>

Bank of America agrees with the Commission that a sound repurchase dispute resolution mechanism would benefit both investors and issuers because it would facilitate a timely resolution of repurchase claims. We generally support the approach taken by the Commission in the Revised Proposal with the modifications described below.

(a) Timely Resolution of Claims Requires Binding Arbitration

Under the Revised Proposal, the transaction documents must provide that if an asset is not repurchased by the end of the 180-day period beginning when notice is received, then the party submitting the repurchase request shall have the right to refer the matter, at its discretion, to either mediation or arbitration.[32] The party obligated to repurchase must agree to the method of resolution selected by the party seeking repurchase.

In its commentary to the Revised Proposal, the Commission seeks comment as to whether the final rules should specify a particular form of dispute resolution. In light of the Commission's stated policy purpose of facilitating the timely resolution of repurchase claims, Bank of America urges the Commission to adopt binding arbitration as the method of resolving requests for repurchase. Bank of America believes that the timely and final resolution of disputes about

[31] See Revised Proposal at 47956.

[32] We note that under General Instruction I.B.1.(b)(E) of proposed Form SF-3 as set forth in the Revised Rule, the party submitting the repurchase request may submit the matter to mediation or arbitration "if an asset subject to a repurchase request … is not repurchased by the end of the 180-day period beginning when notice is received." We request a technical correction to this provision to permit initiation of the dispute resolution process if a repurchase request remains unresolved as of the end of the 180-day period, rather than permitting initiating based on a target date of repurchase.

representations, warranties and repurchase demands is in the interest of all parties to a securitization transaction.

While mediation can be appropriate in circumstances not requiring final resolution of a matter within a short period of time, mediation, in contrast to arbitration, does not provide the same assurance that disputes about representations, warranties and repurchase demands will be quickly resolved. The ineffectiveness of mediation in resolving such disputes is particularly likely given the failure of the parties to have reached agreement during the proposed 180-day period.

(b) Investors Should Bear the Costs of Arbitration or Mediation if a Repurchase is Not Required

In its commentary to the Revised Proposal, the Commission seeks comment as to whether the final rules should specify who must pay the cost of arbitration or mediation of the repurchase request. Bank of America believes that the investors who invoke the dispute resolution process should pay the costs associated with that process if that process concludes that a repurchase is not required.

As noted in the discussion above concerning the ability of investors to trigger a credit risk manager review of the assets, a riskless option will lead to overuse of that option. We are concerned that the ability on the part of investors to make unlimited repurchase demands and to invoke, at the cost of others, a formal dispute resolution mechanism if those repurchase demands are not fulfilled would introduce significant and unnecessary costs to the process of offering ABS under shelf registration statements.

Bank of America recognizes that in some contexts, a "loser pays" rule can impose an undue burden on an aggrieved party. The risk of an undue burden is not present here. Under the new regulatory regime for ABS, investors will not only have the benefits of transparency and greater clarity regarding the enforcement of repurchase claims but also multiple layers of protection when it comes to representations, warranties and repurchases. Prior to making an investment decision, investors will have the benefit of:

- A comparison of the representations, warranties and enforcement mechanisms with those contained in similar transactions (Rule 17g-7);

- A review by the issuer of the securitized assets designed and effected to, at a minimum, provide reasonable assurance that the disclosure regarding the pool assets in the prospectus is accurate in all material respects (Rule 193 under the Securities Act) and prospectus disclosure about the nature, findings and conclusions of such review (Item 1111(a)(7) of Regulation AB);

- Exchange Act filings by the securitizer providing a comprehensive accounting of the securitizer's past repurchase activities, including the extent to which demands for repurchase were accepted, disputed or rejected (Exchange Act Rule 15Ga-1); and

- Prospectus disclosure about the credit risk manager and the events that trigger a review by the credit risk manager (proposed Item 1109(b) of Regulation AB). This disclosure would also indicate who is responsible for paying for an arbitration or other proceeding. Investors will be able to make an informed decision regarding the suitability of the enforcement mechanisms prior to making an investment decision.

The additional protections afforded to investors do not end with enhanced disclosure requirements. As discussed above, if a trigger event does occur, then the credit risk manager will undertake the review required by the transaction documents. If investors still have concerns, the Revised Proposal contains mechanisms that enhance the ability of investors to communicate and coordinate with each other in order to resolve those concerns.[33]

(c) Bundling of Unresolved Repurchase Requests Should be Permitted

Under the Revised Proposal, an unresolved dispute concerning a repurchase request involving even a single securitized asset could lead to the initiation of the dispute resolution mechanism. For the sake of cost and efficiency, the final rules should permit a semi-annual arbitration of disputed repurchase requests. For example, the final rules should be formulated to permit (but not require) an arrangement such as the following:

- On the first business day of January of each calendar year, investors would be permitted to invoke arbitration proceedings with respect to any repurchase request that (a) is made between April 1 and October 1 of the prior calendar year and (b) remains unresolved as of the first business day of January; and

- On the first business day of July of each calendar year, investors would be permitted to invoke arbitration proceedings with respect to any repurchase request that (a) is made between October 1 of the prior calendar year and April 1 of such calendar year and (b) remains unresolved as of the first business day of July.

E. The Investor Communication Provision Should be Revised

Bank of America supports the Commission’s goal of enhancing the ability of investors to communicate with one another. We appreciate the Commission’s careful balancing of interests in crafting this aspect of the Revised Proposal. In particular, we agree that the use of the investor communication mechanism should be limited to its intended purpose; namely, to facilitate communication among investors concerning the exercise of their rights under the terms of the ABS.

In its commentary to the Revised Proposal, the Commission seeks comment as to whether the final rules should prescribe a pre-set list of objective categories from which an investor could choose to indicate why it is requesting communication with other investors. Bank of America supports this modification and agrees with the list of objective categories suggested by the

[33] This aspect of the Revised Proposal is discussed in further detail below.

Commission (i.e., servicing, trustee, representations and warranties, voting matters, pool assets and other matters relating to the exercise of investor rights under the ABS). Identification of the applicable subject matter will both serve the interests of investors by providing information about the nature of the request as well as help ensure that the nature of the communication is limited to the exercise of investor rights under the ABS.

The Revised Proposal should make clear that an investor's communication request need not be included on Form 10-D if the investor has failed to provide any of the information required to be included in the communication request under Item 1121(g) of Regulation AB. This clarification would not impose an undue burden on investors because the fields of information that are required by Item 1121(g) are modest in scope and objective in nature. More importantly, the dissemination of an incomplete communication request has the potential to create confusion among investors and to limit the ability of transaction parties and the Commission to effectively monitor whether the communication mechanism is being used for its intended purpose.

The Commission should also provide the flexibility for market participants to utilize established forms of investor communication other than Exchange Act filings. For example, internet websites are commonly used in CMBS transactions to facilitate communication with and among investors.[34] Thus, the Revised Proposal should be modified to permit ABS transaction documents to select Form 10-D filings or any other reasonable method for transmitting investor communication requests.

Finally, the Commission seeks comment as to whether the final rules should require that investor communication requests be filed on Form 8-K rather than on Form 10-D. We agree with the Commission's judgment in the Revised Proposal if the Commission decides to require the use of Exchange Act reports to facilitate investor communication, that Form 10-D is the appropriate form. As noted by the Commission when it adopted Form 10-D, post-closing filings on Form 8-K are generally limited to reports of extraordinary events that require current reporting.[35] The filing of a Form 8-K for each investor communication request would be burdensome. More importantly, the use of Form 8-K for communication requests would obscure the Exchange Act filing record of ABS issuers by mixing reports about extraordinary and highly material events with the various communication requests of individual investors. We believe that the use of Form 10-D or other reasonable methods for investor communication strikes the right balance between the interests of investors who wish to initiate communication and the interests of all ABS market participants in clear and efficient reporting under the Exchange Act.

III. Comments Related to Other Aspects of the Revised Proposal

A. Asset-Level Disclosure Requirements Should be Phased In

In its commentary to the Revised Proposal, the Commission indicated that it is considering the appropriate compliance date for the rules under the Initial Proposal and the Revised Proposal. The Commission also stated its belief that the compliance date should occur

[34] *See* the CREFC Comment Letter for a detailed discussion about existing practices in the CMBS market.
[35] *See Asset Backed Securities; Final Rule*, 70 Fed. Reg. 1510 (January 7, 2005).

within a year after the adoption of final rules. However, the Commission has requested comment as to whether the requirements under the Initial Proposal and the Revised Proposal should be phased in.

As we noted in the 2010 BAC Comments, original Regulation AB required about twelve months for implementation.[36] The time, effort and resources that were required to achieve compliance with original Regulation AB pale in comparison with the time, effort and resources that will be required to achieve compliance with the rules contemplated by the Initial Proposal and the Revised Proposal. Needless to say, the ABS market's efforts to comply with those rules will be happening alongside the ABS market's efforts to comply with the vast set of new requirements under the Dodd-Frank Act.[37] Without realistic compliance dates and phase-in periods, the ABS market will simply be crushed under the weight of the regulations designed to strengthen it.

Bank of America believes that, at a minimum, the asset-level disclosure requirements should be phased in such that asset-level disclosure would not be required for assets originated prior to the effective date of the final rule. In general, compliance with other aspects of the Initial Proposal and the Revised Proposal should not be required until compliance with the credit risk retention requirements is required.

B. Public-Style Disclosure Should Not be Required for Private Offerings

As noted in detail in the 2010 BAC Comments, the Commission should abandon the requirement under the Initial Proposal that public-style disclosure be required for offerings of structured finance products that are privately offered under Rule 144A or Regulation D.[38] Like the markets for other types of securities, the market for ABS needs an outlet which permits offerings to sophisticated investors to be conducted with disclosure that is tailored to the demands of those investors.

A staggering array of debt and equity securities can, and have been, offered under Rule 144A. Most high yield debt is issued in transactions exempt from registration under Rule 144A. Foreign issuers of all types of securities rely heavily on the safe harbor provided by Rule 144A. Even internet startup companies have conducted IPOs under Rule 144A. In all of these cases, few would argue that even sophisticated investors do not need adequate disclosure. Yet, in all of these cases, the disclosure requirements of Rule 144A consist of:

- "a very brief statement of the nature of the business of the issuer and the products and services it offers" and

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[36] *See* p. 39 of the 2010 BAC Comments.

[37] Bank of America acknowledges with deep appreciation the Herculean efforts of the Commission and its staff in the various ABS rulemaking initiatives undertaken during the past several years. When one considers the amount of time required to simply write all of the new rules impacting securitization, the prospect of preparing for and ensuring compliance with those new rules is truly daunting even under the most generous set of transition periods and compliance dates.

[38] *See* pages 35-38 of the 2010 BAC Comments. Bank of America also agrees with the discussion of this topic in the "Privately Issued Structured Finance Products" section of the comment letter of the Securities Industry and Financial Markets Association, dated on or about October 4, 2011, regarding the Revised Proposal.

- "the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available)."[39]

When it adopted Rule 144A, the Commission explained its decision to include only minimal disclosure requirements in Rule 144A by noting that other provisions of applicable securities law, contract provisions and industry practice would lead to additional, more complete, disclosure to investors.[40] Bank of America believes the Commission was exactly right and notes that, as a general rule, disclosures in Rule 144A ABS transactions have consistently been very robust relative to the level of disclosure that Rule 144A itself requires. This robust level of disclosure can be attributed to the considerable sophistication and market power of ABS investors in the Rule 144A market and to the existing disclosure principles already embedded in the securities laws, particularly Rule 10b-5 under the Exchange Act.

Bank of America fully expects that, if adopted, many of the disclosure principles and requirements for registered ABS transactions contained in the Initial Proposal and in the Revised Proposal will quickly be adopted, line item by line item, in the Rule 144A market. We also expect that other disclosure principles contained in the Initial Proposal and in the Revised Proposal will be tailored by market participants in the Rule 144A market to suit the often unique nature of the ABS offered in that market. Indeed, a quick, voluntary and tailored integration of disclosure standards for registered ABS is exactly what occurred in the Rule 144A market shortly after Regulation AB was adopted in January 2005. Nevertheless, to require such disclosures needlessly risks stifling innovation for certain asset classes and potentially severely impairing the liquidity of any assets that may not lend themselves to public-style disclosures.[41] Lending to affected borrowers would be discouraged by such illiquidity.

If the Commission nevertheless decides to move forward with its proposal to amend Rule 144A and Regulation D, we urge the Commission to eliminate Rule 192 in order to remove the risk that an issuer could be held liable for per se fraud if, in hindsight, it is alleged that such issuer's disclosure did not meet any principles-based requirements. Finally, the Commission should make clear that any amendments to Rule 144A or Regulation D would be prospective in nature and applicable only to ABS offered on and after a specified effectiveness date.

C. Asset-Level Disclosure Should Not be Required for ABS Backed By Assets Not Listed on Schedule L

In the Revised Proposal, the Commission seeks comment as to whether ABS should be exempted from the asset-level disclosure requirement contemplated by the Initial Proposal if the

[39] *See* Rule144A(d)(4)(i).

[40] *See* Part II.D. of SEC Release No. 6862 (April 23, 1990).

[41] For example, a securitizer might consider buying a portfolio of assets, originated by a non-affiliate, that the seller may not have intended to securitize. The requisite data may not be available for such a portfolio. Alternatively, certain CMBS or small-business borrowers may not wish for information concerning their loans to be publicly available and may be unwilling to agree to contractual terms that would permit such disclosures. Any proposal allowing "exceptions" for these and other circumstances could be helpful but will invariably discourage issuance due to the burden of establishing compliance with the terms of any such exception and the risks of non-compliance.

underlying asset class is not an asset class for which asset-level disclosures are prescribed in Schedule L of the Initial Proposal.[42] The Commission also seeks comment on the narrower question of whether only ABS sold in private offerings should be exempted from the asset-level disclosure requirement if the underlying asset class is not an asset class for which asset-level disclosures are prescribed in Schedule L.

Bank of America believes that asset-level disclosure should not be required for any ABS backed by assets that are not included in Schedule L.[43] By any reasonable standard, the asset-classes that are not included in Schedule L are esoteric in nature and do not lend themselves well to prescriptive line item asset-level disclosure requirements. Requiring such disclosures, even when investors have not required them, could discourage issuance (and thus lending) if such information cannot be readily generated and disclosed. Further, the Commission's requiring particular disclosures could create a false sense of security among future investors as to what information is most relevant for such asset classes. Moreover, as explained above, for private offerings under Rule 144A and Regulation D, none of the disclosure requirements proposed in the Initial Proposal or the Revised Proposal should apply.

D. The Cash Flow Waterfall Program Requirement Should be Abandoned

In the Revised Proposal, the Commission indicated that it plans to re-propose the cash flow waterfall program requirement separately from its project to enact final rules relating to ABS shelf eligibility, the offering process and asset-level disclosure. For the reasons stated in the 2010 BAC Comments,[44] we urge the commission to abandon the cash flow waterfall program requirement.

IV. Conclusion

The rules contemplated by the Initial Proposal, the Revised Proposal and the Dodd-Frank Act will have a transformative effect on the ABS market and will contribute to, and prolong, the tightening of credit by lenders in many of the most troubled sectors of the American economy. While Bank of America supports many aspects of the Commission's current rulemaking initiatives required by Dodd-Frank, these proposed requirements for ABS shelf eligibility are unnecessary for the protection of investors and will discourage securitization by imposing substantial compliance costs and increased exposure to liability. We urge the Commission to consider these costs and downside risks, and whether the perceived benefits are compelling, within the context of the various other rulemakings and ABS market reforms that have been implemented or proposed.

[42] The Initial Proposal prescribes asset-level disclosures for RMBS, CMBS, automobile loans and leases, equipment loans and leases, student loans, floorplan financings, corporate debt and resecuritizations.
[43] *See* pages 21-27 of the 2010 BAC Comments for our comments concerning the specific provisions of the asset-level disclosure proposal.
[44] *See* pages 27-28 of the 2010 BAC Comments.

We thank the Commission for the opportunity to provide the foregoing comments on the Revised Proposal. We also thank the Commission and its staff for their significant and continuing efforts in reviewing and carefully considering the many comments they have received on the various proposed rules relating to securitization.

If there are any questions arising from our comments or any other aspect of the Revised Proposal, we welcome the opportunity to provide assistance in any way helpful. Please feel free to contact Isvara Wilson (isvara.wilson@bankofamerica.com, 980-387-3567) or the undersigned (kenneth.l.miller@bankofamerica.com, 980-386-6669) at any time.

Respectfully submitted,

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