MORTGAGE BANKERS ASSOCIATION®
Investing in communities

October 4, 2011

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

Subject: **Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities File Number S7-08-10**

Dear Ms. Murphy:

The Mortgage Bankers Association ("MBA")[1] appreciates the opportunity to provide the perspectives of the commercial/multifamily and residential real estate finance sectors regarding the Securities and Exchange Commission's re-proposed revisions to the Shelf Eligibility Conditions under Regulation AB and other rules (the "Re-Proposal").[2]

As the leading voice of the entire real estate finance industry, MBA represents a broad and diverse range of member companies. MBA shares the Commission's goals to promote market efficiency, transparency and liquidity through increased disclosure of standards and practices that assist investors' ability to make informed investment decisions. We particularly appreciate

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] Federal Register, Vol. 76, No. 151, dated August 5, 2011.

the Commission's consideration of the recommendations in our August 2010 submission[3] in response to the Commission's prior rulemaking, as reflected in the Re-Proposal.

The two attachments to this letter present specific observations and recommendations of the **commercial/multifamily** and **residential** real estate finance sectors in response to the Re-Proposal. These attachments also address many of the Commission's questions posed in the Re-Proposal.

Importantly, MBA recommends that the Commission take into account the manner in which the Re-Proposal is interconnected with other regulations, including rules promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act.[4] Whether with regard to the Re-Proposal's certification requirements, credit risk manager concept, repurchase mechanism guidance or proposed implementation period — all should be examined in light of the cumulative impact that they, along with other regulatory regimes, would have on securitization as a capital source for real estate finance.

As market participants face increasing challenges in accessing the capital markets, MBA urges the Commission to carefully tailor the Re-Proposal and the regulation of asset-backed securitization generally to preserve the public policy benefits derived therefrom. MBA looks forward to working with the Commission as it finalizes the Re-Proposed Rule in a manner that protects investors and reinvigorates the securitization markets.

Sincerely,

David H. Stevens
President and Chief Executive Officer
Mortgage Bankers Association

Attachments:

- MBA's Comments on the Commercial/Multifamily Real Estate Finance Aspects of the Re-Proposal
- MBA's Comments on the Residential Real Estate Finance Aspects of the Re-Proposal

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[3] *See* MBA Letter to the Securities and Exchange Commission in response to Proposed Revision to Regulation AB, File Number S7-08-10, dated August 2, 2010.

[4] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

THE MORTGAGE BANKERS ASSOCIATION'S COMMENTS ON COMMERCIAL/MULTIFAMILY REAL ESTATE FINANCE ASPECTS OF THE COMMISSION'S RE-PROPOSAL OF REGULATION AB SHELF ELIGIBILITY CONDITIONS

(File Number S7–08–10; RIN 3235-AK37)

OCTOBER 4, 2011

The commercial/multifamily real estate finance side of the Mortgage Bankers Association[1] ("MBA") welcomes the opportunity to respond to the Securities and Exchange Commission's (the "Commission") request for comment on the re-proposed revisions to Regulation AB and other rules[2] (collectively, the "Re-Proposal") regarding shelf registration, disclosure and asset-level information for asset-backed securities ("ABS"). In preparing this submission, MBA has worked with its broad commercial/multifamily real estate finance membership.

MBA shares the Commission's goals to promote market efficiency and transparency through increased disclosure of standards and practices that assist investors' ability to make informed investment decisions. We believe our comments and recommendations will advance these objectives. MBA also appreciates the Commission's thoughtful review of our August 2010 comment letter on its 2010 proposal on Regulation AB,[3] and the consideration given to MBA's submission as reflected in the Re-Proposal. We incorporate our prior comments by reference and provide specific comments in response to the Re-Proposal below, including footnote annotations to specific Commission questions being addressed.

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[2] Federal Register, Vol. 76, No. 151, dated August 5, 2011.

[3] MBA Letter to the Securities and Exchange Commission in response to Proposed Revision to Regulation AB, File Number S7-08-10, dated August 2, 2010.

OVERVIEW

MBA is committed to facilitating the establishment of a vibrant, transparent, liquid and responsible securitization market for commercial and multifamily real estate mortgages. We believe that the Commission shares this objective as it implements changes to Regulation AB through the current Re-Proposal. The challenge facing the Commission as it considers revisions to Regulation AB is to determine the point at which the regulatory framework will stifle the securitization market, effectively restricting the viability of this critical capital source. We believe the Commission recognized this tension when it requested comments on whether risk retention and continued Exchange Act reporting together are sufficient replacements for the investment grade rating condition to eligibility for shelf offerings.[4] The risk retention requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act[5] ("Dodd-Frank Act"), as well as the proposed continuation of Exchange Act reporting,[6] go far in accomplishing the public policy intent underlying Regulation AB.

In light of these separate, stringent regulatory regimes, MBA is concerned that the requirements set forth in the Re-Proposal go too far. The multiple requirements for shelf-registration eligibility, for example, would impose significant burdens on the CMBS market, without providing, in our view, commensurate benefits or protections to investors. Moreover, requirements such as executive certification and the credit risk manager proposal overlap in significant respects with existing or pending regulation. We urge the Commission to carefully examine and eliminate potential redundancies, as well as consider the cumulative impact of multiple regulatory regimes.

While Regulation AB governs the securitization of a broad range of asset-classes, our comments below focus on the commercial/multifamily real estate finance market; we urge the Commission to consider the unique impact that the Re-Proposal might have on this market. MBA's comments from the single-family residential finance perspective also are being included as part of this submission.

The primary areas of focus for the MBA's commercial/multifamily membership are the following:

- **Certification Requirement**. MBA recommends that the Commission eliminate the additional certification requirement for shelf offerings in the Re-Proposal, given the separate executive certification required for prospectus disclosure. To the extent that the additional certification requirement is retained, we suggest modifications to the

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[4] Responsive to Re-Proposal Question 61, Federal Register, page 47963.

[5] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[6] Suspension of the Duty to File Reports for Classes of Asset-Backed Securities Under Section 15(d) of the Securities Exchange Act of 1934, Release No. 34–63652 (Jan. 6, 2011), 76 Fed. Reg. 2049.

certification language and flexibility with regard to the officers eligible to execute the certification.

- **Credit Risk Manager**. While MBA supports the concept of a credit risk manager generally, we recommend that the Commission avoid redundant roles and consider other parties, such as CMBS special servicers, that already perform this function. We also emphasize the importance of negotiated triggering events among transaction parties and the roles of existing parties to CMBS transactions, as well as recommend that the independence requirement for credit risk managers be carefully tailored in light of the alignment of interest among the transaction parties.

- **Repurchase Disputes**. MBA recommends clarifications to the repurchase mechanisms that allow investors to raise claims in an effective manner, while ensuring that the mechanisms limit potential abuses that could be to the detriment of the trust and investors. Clarity in the parties authorized to resolve disputes, the importance of the trust as the recipient of recoveries, and the necessary specificity of governing transaction documents are underscored.

- **Investor Communications**. MBA supports mechanisms to facilitate inter-investor communications. We recommend parameters, such as minimum burden of proof standards, and comment on the importance of fact-based communications within investor forums in order to enhance communication efficiency and administrability.

- **Repercussions of Noncompliance and Waiting Period**. MBA recommends a shorter waiting period of 30 or 45 days following the cure of a defect and suggests that the Commission revise the requirement so that the waiting period is applicable for both a current effective shelf registration statement and a new shelf registration statement.

- **Disclosure – Exhibits, Representations and Warranties and Asset Level Reporting**. MBA supports effective disclosure that assists investors in making informed investment decisions. In particular, MBA (1) generally supports delivery of exhibits in substantially final form, but urges the Commission to limit occasions that re-start the 5-day waiting period to exhibit changes that impact prospectus disclosure; (2) supports industry-developed representations and warranties but opposes the regulatory codification thereof; (3) supports market-driven format requirements for disclosure and reporting consistent with investor demand; and (4) recommends that the rule maintain confidentiality of certain proprietary information, including workout information that enables optimal recoveries for the trust.

- **Privately-Issued Structured Finance Products**. MBA believes that there is a place and need for the private market for securitization and recommends that the Commission refrain from imposing public disclosure requirements that would curtail private issuance.

- **Timing for Compliance**. MBA believes that all changes under Reg AB should have at least a one-year transition period, with changes requiring more significant market adjustments to be given a two-year implementation period.

Each matter and MBA's recommendations are discussed below.

CERTIFICATION REQUIREMENTS

MBA reiterates its previous objection to an additional certification requirement for shelf offerings of CMBS by an executive officer of the depositor. We continue to believe this requirement is duplicative of existing certification requirements. The CEO of the depositor is currently responsible, as a signatory of the registration statement, for the ABS issuer's disclosure in the prospectus and, under the federal securities laws, can be liable for material misstatements or omissions, including with regard to the disclosure relating to cash flows and underlying pool assets. MBA agrees with the Commission that appropriate disclosure in the prospectus is vital to the ability of investors to make informed investment decisions; we continue to believe that certification of the accuracy and completeness of the prospectus disclosure meets this need. MBA encourages the Commission to limit any required certification to prospectus disclosure, and therefore, recommends that the additional certification requirements in the Re-Proposal be eliminated.[7]

While we strongly object to the Re-Proposal's additional certification requirement for shelf offerings, MBA appreciates the modifications reflected in the Re-Proposal, including the Commission's recognition that certification is not a guarantee of loan performance. The modified focus of the certification language — on the design of the transaction — is far preferable and appropriate compared to the prior proposal. We also support the flexibility of allowing other qualified officers to provide the certification. To the extent that the Commission elects to retain the re-proposed certification requirement, MBA believes that several additional modifications are warranted in order to clarify executive officer expectations at securitization, reflect that the expectation is based on the credit of the underlying assets, and that the certification does not reflect unknown future events.

In particular, MBA believes that the certification language should specify that the certification is knowledge-based, executed as of a particular date, and, importantly, subject to the risks set forth in the prospectus and other applicable disclosures.[8]

MBA also suggests that the "executive officer" definition for purposes of certification eligibility be expanded beyond the current language provided in the definition of 17 CFR § 230.405 under

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[7] Responsive to Re-Proposal Question 1, Federal Register, page 47953.

[8] Responsive to Re-Proposal Question 4, Federal Register, page 47954.

the Securities Act of 1933[9] to reflect registrant organizational structure. For example, the definition could include language similar to the following that permits certification by individuals, notwithstanding their particular position within a particular company, with the same functional executive role within the organization: "or such other person in a similar functional officer role, based on the organizational structure of the depositor."

In addition, MBA recommends that the rule allow "an executive officer in charge of the securitization" to execute the certification. (The current Re-Proposal language states "the executive officer in charge of securitization."[10]) In CMBS, it is not unusual for there to be more than one individual meeting the definition of executive officer who has worked closely with the securitization. This change would allow the executive officer with particular knowledge of the specific securitization to execute the certification.[11]

CREDIT RISK MANAGER

As part of the shelf eligibility requirements, the Re-Proposal requires that the transaction documents provide for an independent credit risk manager, who is not affiliated with any sponsor, depositor or servicer, to address investor concerns regarding the ability to enforce representation and warranty breaches. MBA recognizes the potential value of having a party serve in an oversight role with respect to the assets and any repurchase demands. We urge the Commission, however, to carefully craft such requirements, taking into account parties that already fulfill such a role and the risk of significant burdens and costs if multiple parties are required to perform similar functions. Indeed, we strongly agree with the Commission that "the 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."[12] We also ask that the Commission consider current CMBS market practices and transaction participants that largely address the policy objectives underlying the credit risk manager proposal.[13]

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[9] "The term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant." 17 C.F.R. § 230.405.

[10] Federal Register, page 47951.

[11] Responsive to Re-Proposal Question 2, Federal Register, page 47953.

[12] Federal Register, page 47956.

[13] Given the requirements outlined in the Re-Proposal, MBA questions whether the Commission intended to include CMBS transactions when proposing the credit risk manager role. In describing the role of the credit risk manager, the Commission noted triggering events that are not typically featured in CMBS transactions. In CMBS transactions, performance is assessed at a loan rather than a pool level, and it is

Overlap with Special Servicer Role in CMBS. With regard to CMBS transactions, we believe that the proposed credit risk manager role is redundant with that currently performed by a special servicer. In a CMBS transaction, loans that are at risk of, or that are non-performing, are transferred to a special servicer. For these specially-serviced loans, the special servicer, acting on behalf of all investors, is tasked with a review of the underlying assets (and, after its review, creating an asset status report for each loan). The special servicer also would initiate repurchase claims for breaches of representations and warranties, if appropriate. Since the special servicer currently performs the actions proposed to be taken by the credit risk manager, MBA questions the need to insert another party — with additional associated costs — into the transaction. We therefore request that, if the credit risk manager proposal is retained, that a CMBS special servicer be permitted to fulfill the role.[14]

Independence Requirement. MBA agrees that a party performing the credit risk manager role should be independent of any party which could be obligated to repurchase a loan from the pool. We believe, however, that the ban on affiliation with virtually all transaction parties, including the servicer, is overly broad. In CMBS transactions, the roles of the transaction parties are clearly delineated and the servicers do not make loan-level representations and warranties and are not obligated to repurchase loans. It is therefore unlikely that, in the context of repurchases, the interests of the special servicer (which has no repurchase obligation) would be in conflict with the interest of the investors. In fact, the B-piece buyer (which often controls the engagement of the special servicer), as the purchaser of the bonds typically at a below-par price, has an economic incentive to enforce a repurchase claim. Further, in the instance of a repurchase claim, the interest of the B-piece buyer and the other investors are typically aligned. We therefore believe that disclosure of any relationship between the special servicer and the B-piece buyer or other transaction party — rather than a blanket prohibition on a special servicer's ability to serve as a credit risk manager — would be the appropriate approach.[15]

Additionally, MBA recommends that the final rule not ban other qualified parties from performing the credit risk manager role solely because such party performs other assigned roles in the transaction, including activities as an operating advisor, trustee, the certificate administrator or other qualified party. For example, an "operating advisor," as discussed in the

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common to require transfer to special servicing when certain triggering events occur. Additionally, it is common to require servicers to notify the trustee of potential breaches of representations and warranties at any time that a breach becomes apparent. MBA believes that the current methodology employed in CMBS transactions provides an appropriate approach to ensuring that potential representation and warranty breaches are identified and enforced. To the extent that investors require additional detail as to the level of review, requirements could be further detailed in the transaction documents.

[14] Responsive to Re-Proposal Question 23, Federal Register, page 47958.

[15] Responsive to Re-Proposal Question 24, Federal Register, page 47958.

Credit Risk Retention Proposed Rule[16] with modifications recommended by MBA in our comments on the Credit Risk Retention proposed rule,[17] should be allowed to meet the requirements of a credit risk manager once a trigger event (*i.e.,* a change in control event) occurs. Since the operating advisor in current CMBS transactions (sometimes called the trust advisor) oversees appraisals of defaulted loans and, following a change in control event, the special servicer's performance, the same party should be permitted to perform the credit risk manager role set forth in the Re-Proposal. To require otherwise would lead to unnecessary redundancies, increased costs, and transaction inefficiencies — none of which are in the best interests of the investors or the transaction parties.

Trigger Events. MBA appreciates and supports the Commission's proposal to allow the transaction parties to determine the appropriate triggers to generate review of loans and to dictate the level of review of loans. Given the dynamic nature of the CMBS market, the governing transaction documents are the appropriate vehicle through which parties can negotiate both the trigger mechanisms and the level of required review. These determinations are best left to the market and the transaction participants. While the rule should provide that the governing documents should set forth trigger events (for intervention by the credit risk manager or a party functioning in that role, such as a special servicer, as discussed above), we do *not* believe that the rule should require that certain, specifically-identified trigger events be required. As the Commission acknowledges in the Re-Proposal, the appropriate trigger events should be tailored to the specific asset class and the structure of the securitization.[18] CMBS pool structures, as noted above, provide for transfer of loans to special servicers upon the occurrence of triggers specified in the transaction documents. CMBS pools, unlike certain other asset-backed securities, do not have pool-level credit enhancements that would trigger a credit risk manager review. Therefore, MBA believes that it is best left to the transaction parties to determine both the triggering events and the scope of review.[19] For example, the triggering event could be a loan default in one transaction, while another transaction would have a trigger at a transfer to special servicing or another event that the parties determine is appropriate for the particular assets and deal structure.[20]

Investor Requests for Investigation. MBA is supportive of the proposal to allow investors to direct the credit risk manager (or the special servicer, as applicable) to review a specific asset for potential breaches of a representation or warranty provided that such direction is tied to a triggering event negotiated in the transaction documents.[21]

[16] 76 Fed. Reg. 24090, 24161 (April 29, 2011).

[17] MBA Letter on Credit Risk Retention under the Dodd-Frank Act, dated July 11, 2011, pages 29-30.

[18] Federal Register, page 47956.

[19] Responsive to Re-Proposal Questions 33 & 34, Federal Register, page 47958.

[20] Responsive to Re-Proposal Question 28, Federal Register, page 47958.

[21] Responsive to Re-Proposal Question 30, Federal Register, page 47958.

Moreover, given the potential costs to the transaction (and all investors) of such a review, MBA believes that the governing documents should provide that a threshold of investors must agree that the investigation is warranted prior to directing the special servicer (or credit risk manager) to pursue such a claim. Because the costs associated with investigation of potential breaches can be high, it is important that (a) requests are not made without a trigger (*i.e.,* the foundation of a concern or reason to investigate) prior to requesting a review to determine if a particular representation has been breached, and (b) the party fulfilling the credit risk manager role can weigh the costs of any review request by an investor against the potential benefits to investors as a whole.

Reports to Trustee. MBA supports the Commission's proposal that the credit risk manager provide a report to the trustee of the findings and conclusions of its review of the assets and that the form of the report be negotiated in the transaction documents. MBA believes that the transaction agreement should set forth the manner of distribution of the credit risk manager report. However, we do *not* support automatic public filing as an exhibit to the Form 10-D filing, nor as a separate Form 8-K filing. MBA believes this information should only be provided to the investors on the related transaction and therefore should be distributed pursuant to current transaction practices (either directly to the investors or provided on a password protected website). To the extent that the Commission elects to require a filing, MBA recommends that the filing be included on Form 10-D and that the credit risk manager only provide a summary of the report.[22]

REPURCHASE DISPUTES

The repurchase claims process and procedure differ in CMBS transactions compared to other asset-backed transactions. CMBS transactions are made up of fewer loans with larger principal balances and backed by diverse real property types (*e.g.,* multifamily housing, retail, office, industrial, health care, and hotel) with unique characteristics. A typical repurchase demand for a breach of representation or warranty would likely impact only a single loan, as opposed to an entire pool or a segment of the pool in other asset classes. Current CMBS transaction documents contain detailed processes and procedures for repurchase demands. Rather than instituting wholesale, new processes and procedures, MBA believes that only enhancements to current CMBS practices are warranted in repurchases associated with CMBS.

MBA supports the Commission's efforts to ensure that investor claims for breach of representation and warranty are resolved timely. However, given the potential for non-repurchase resolution of a breach, MBA recommends changing the focus of the Re-Proposal from "repurchases" not completed in 180 days to "*resolutions*" not completed within 180-days. The satisfactory resolution of any repurchase request may not always involve a repurchase. For

[22] Responsive to Re-Proposal Questions 31, 32 & 36, Federal Register, page 47958.

example, requests may be withdrawn, the default may have been cured, a payment for the loss of value may be made (when there is only a partial loss of value), another remedy available under the transaction documents (including a substitution of the loan) could be utilized, or another resolution by the parties could occur.[23]

The Commission should also clarify that the party making the claim may only require mediation or arbitration if the claim has not been otherwise resolved pursuant to the transaction documents including if the investigation finds no evidence of breach. MBA recommends that the rule provide that transaction documents identify the transaction party with the authority to conclusively determine that a repurchase, cure, substitution, loss of value payment or other resolution provided for under the transaction documents is appropriate and that the claim has been resolved.[24]

While MBA appreciates the Commission's concerns with the current repurchase process, we oppose a provision that allows an investor to make a direct demand for repurchase and thereby act as the "requesting party" for purposes of determining the resolution forum. MBA believes that the insertion of the credit risk manager role (charged with reviewing specific assets to determine if a breach has occurred and the disclosure of results) and/or the proposed operating advisor role (charged with reviewing special servicer compliance following a change in control event) should satisfy this concern. MBA recommends that the governing transaction documents provide the mechanism by which individual investors are able to make breach claims to the credit risk manager (or another party that fulfills this role) so that all investigations of repurchase claims as well as the resolution of the claim itself are managed by a party subject to the transaction documents. Further, in the event a repurchase claim is successfully adjudicated for the requesting party, recoveries should remain the property of the trust and should be allocated and distributed pursuant to the transaction documents.[25]

We note that CMBS governing documents typically allocate losses (including costs of the type associated with investigations of representation and warranty claim) beginning at the bottom of the waterfall and that an unlimited ability to demand investigations of potential breaches, absent a triggering event and without reasonable evidence of the breach, would not be in the interests of all of investors. The Commission therefore should clarify that the transaction documents should set the parameters for such investigations.

In order to avoid forum shopping or multiple mediations or arbitrations of effectively the same claim, MBA believes that the determination of the method of resolution of disputes (*e.g.*, mediation or arbitration) and other dispute resolution protocols should be specified at the initiation of the securitization in the transaction documents.

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[23] Responsive to Re-Proposal Question 39, Federal Register, page 47959.

[24] Responsive to Re-Proposal Question 39, Federal Register, page 47959.

[25] Responsive to Re-Proposal Question 39, Federal Register, page 47959.

Finally, MBA believes that the party who does not prevail in the mediation or third-party arbitration should be responsible for the legal fees of both parties. This would encourage the party submitting such repurchase request to bring serious claims and the party obligated to repurchase the asset(s) to be responsive to such claims. Alternatively, in order to provide flexibility to meet market conditions, MBA recommends that the governing documents should determine which party bears the cost.[26]

INVESTOR COMMUNICATIONS

MBA supports the ability of investors to communicate with other investors. We offer several recommendations that would improve the proposed structure and process.

First, MBA recommends that a minimum burden of proof, as set forth in the transaction documents, be required of an investor in a transaction prior to permitting the investor to request communication. For example, the investor requesting the communication should provide a certification of its standing to provide the communication, as this is typical in current CMBS market practice. Such certification is often included as an exhibit to the pooling and servicing agreement.[27]

Second, the right to communicate with other investors should be limited to current investors. Investors who no longer hold an interest in the bonds do not have rights to additional proceeds under the transaction documents, as those rights have been transferred to current investors.

Third, the nature of the communication itself should be a factual statement that the investor wishes to communicate with other investors with respect to exercising a right under the transaction documents (as well as providing the investor's contact information). To eliminate any need for the filing party to monitor or edit such communication, and the associated liability concerns, the notice should not include any reference to a specific party to the transaction or to what contractual standard may have been violated. We are concerned that a mere allegation of misconduct against a specific party in a filing with the Commission, without any burden of proof standard to ensure the statement is accurate, could cause irreparable harm to certain transaction parties. In addition, the parties to the transaction should not be required to police or monitor the statements by the investors to ensure that they are appropriate.[28]

Fourth, MBA recommends that the Commission allow for flexibility by permitting, if set forth in the contractual documents (*i.e.,* the pooling and servicing agreement), the use of an established website or other mechanism maintained by the transaction parties, as opposed to requiring a separate filing with the Commission. MBA notes that many current CMBS transactions include

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[26] Responsive to Re-Proposal Question 40, Federal Register, page 47959.

[27] Responsive to Re-Proposal Question 45, Federal Register, page 47959.

[28] Responsive to Re-Proposal Question 42, Federal Register, page 47960.

increased investor access to information through an investor question and answer ("Investor Q&A") option that is provided typically on the Certification Administrator's website (which is open to all investors under password protection). The Investor Q&A allows investors to submit questions, review other investors' questions, and view historical questions and answers related to the reports supplied by the transaction parties. We believe that such a website could be expanded to allow for notices of requests to communicate.[29]

REPERCUSSIONS OF NONCOMPLIANCE AND WAITING PERIOD

MBA appreciates the Commission's willingness to consider alternatives for the cure period for failure to meet the transaction requirements or failure to file the required certification or transaction agreements in accordance with the required timing for shelf eligibility. The provision in the Re-Proposal governing the waiting period, however, requires further modification. MBA believes that a shorter timeframe is warranted after the cure of a defect; in our view, a 30-day or 45-day wait period is appropriate. Regardless, the waiting period should be no longer than 90-days. MBA also suggests that the Commission revise the requirement so that the waiting period after the deficiency is cured is applicable for both a current effective shelf registration statement and a new shelf registration statement.[30]

Further, MBA believes that restricting shelf eligibility based on issuer experience levels or other requirements would needlessly hamper the issuance of CMBS, increasing costs and limiting market competition.[31]

DISCLOSURE – EXHIBITS, REPRESENTATIONS/WARRANTIES AND ASSET-LEVEL REPORTING

Exhibits to the Prospectus. MBA generally agrees with the Commission's proposal to require the transaction documents to be submitted in substantially final form with the registration statement by the date the prospectus is required to be filed. MBA requests clarification that if the transaction documents require an update for any material change, those exhibits to the prospectus do not trigger the requirement for another minimum 5-day waiting period for such a change, so long as those changes do not impact the disclosures made in the prospectus. For example, if the pooling and servicing agreement were to be revised to better match the prospectus language, this should not require a restart of the clock.[32]

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[29] Responsive to Re-Proposal Question 50, Federal Register, page 47960. *See also* MBA Letter on Credit Risk Retention under the Dodd-Frank Act, dated July 11, 2011, page 29.

[30] Responsive to Re-Proposal Question 59, Federal Register, page 47963.

[31] Responsive to Re-Proposal Question 62, Federal Register, page 47963.

[32] Responsive to Re-Proposal Question 65, Federal Register, page 47964.

Representations and Warranties. While MBA strongly supports industry-developed representations and warranties, we do not support a regulatory codification of a specific set of representations and warranties with respect to CMBS transactions. We also do not believe that redlining to a standard set of representations and warranties would provide significant additional benefit to investors. Markets are dynamic, industry standards change over time and market practices evolve. We note that Rule 17g-7, which requires the rating agencies to identify how the representations, warranties and enforcement mechanisms in a particular transaction differ from similar transactions, is an alternative approach (already in place) that advances a similar objective.[33]

Asset-Level Information (Schedule L). CMBS assets typically have unique characteristics that may require flexibility in the information provided. MBA believes it is preferable that the Commission require asset-level disclosure generally, but allow the industry to set the requirements for disclosure in the prospectus,[34] thereby allowing the marketplace to provide the information and data that is tailored toward the actual assets offered in the pool. For CMBS, any standardized Schedule L assets should take into account definitions and terms currently used in the industry and provided for in the Investor Reporting Package (the "IRP").[35]

In addition, MBA does not support disclosure of broker compensation in the prospectus, as it does not provide information that would be useful to investors in performing due diligence on the assets in the pool.[36]

While MBA supports investor disclosure, when dealing with a defaulted loan, it is sometimes necessary to maintain a degree of confidentiality with respect to the proceedings as not to impair the special servicer's ability to maximize recovery on behalf of the trust. The special servicer's net present value (NPV) calculations[37] of a variety of potential resolutions should not be disclosed during the resolution process while the special servicer may still be negotiating with the borrower. Such information, if provided publicly on EDGAR, could disadvantage the special servicer's ability to maximize recovery on a particular asset. This is the type of information that should be made available only following resolution to restrict inappropriate access to the information.

XML Format. As CMBS investors generally do not currently utilize XML formatting for reporting, we have concerns with the potential for duplicate reporting formats and the

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[33] 17 C.F.R. § 240.

[34] MBA Supplemental Letter, File Number S7-08-10, dated November 22, 2010.

[35] The Commercial Real Estate Finance Counsel (CREFC) IRP provides, among other things, standards for the post-securitization monitoring of the performance of the underlying collateral.

[36] Responsive to Re-Proposal Question 76, Federal Register, pages 47966-67.

[37] Responsive to Re-Proposal Question 79, Federal Register, page 47967.

associated costs, as it will likely force CMBS issuers and servicers to provide multiple reports — one in the current format to be used by investors and a second solely for filings with the Commission. MBA believes that duplicate reports or transitioning the established reports for CMBS to XML should be tied to investor demand and when investors are prepared to receive reporting in an XML format. If the Commission elects to mandate the use of XML, then MBA recommends that it adopt the existing, voluntary, industry consensus XML standard, rather than the proprietary format suggested by the Commission in the 2010 Proposed Rule.[38] MBA again requests that the use of XML formatting be given a longer phase in time for compliance. MBA recommends that *at least a two year* transition timetable would be appropriate.[39]

Reg AB Revisions Not Addressed in the Re-Proposal — MBA's Prior Recommendations. Although not re-proposed in this release, MBA encourages the Commission to continue to consider MBA's comments in our August 2, 2010 letter, particularly with respect to Schedule L-D requirements. As the Commission considers a release related to a waterfall program, MBA also requests that the Commission reconsider comments provided in MBA's August 2, 2010 comment letter objecting to such a proposal.

PRIVATELY-ISSUED STRUCTURED FINANCE PRODUCTS

The Re-Proposal suggests that while the Commission is considering some novel asset types or structures for exemption from the requirement for asset-level reporting, that certain specific transactions types including transactions backed by CMBS would not be exempted. MBA is concerned that some transactions backed by CMBS will be adversely impacted by the Commission's proposed changes, resulting in market disruption and in some instances, the inability to bring certain transactions to market. MBA does not believe extension of the Proposed and Re-Proposals to Rule 144A transactions is necessary or prudent.

Rule 144A information disclosure requirements are dictated by the regulation itself, the transaction type, the assets involved and the investor requirements, and are currently governed by other federal and state securities laws. MBA restates our position that the private placement market should be a safe harbor for sales of securities to sophisticated investors who negotiate the terms of the securities directly and conduct their own due diligence in reliance on extensive information provided to them on a confidential basis.

Some key types of CMBS transactions may be significantly curtailed or halted by the Proposal. CMBS transactions collateralized by a single asset, where the disclosure is specifically tailored to the related asset rather than the broad disclosure provided for in the standard reporting package could be impacted by the suggested changes to Rule 144A. Additionally, loans

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[38] MBA Letter to the Securities and Exchange Commission in response to Proposed Revisions to Regulation AB, File Number S7-08-10, dated August 2, 2010, pages 13-14.

[39] Responsive to Re-Proposal Question 69, Federal Register, page 47966.

collateralized by properties that are included in private transactions (for example, loans with short term maturities or loans securitized by transition properties) may not provide for collection of the comprehensive disclosure data that is required for public CMBS transactions.[40]

MBA believes there is a place and a need for a private securitization market and that the Commission's proposed disclosure requirements would severely limit the private market by requiring that public market standards be met.[41]

TIMING FOR COMPLIANCE

MBA supports a phased-in approach for compliance, with the market changes that require parties to make larger, more significant, market adjustments to a new process (or expend more financial resources to accommodate) being given a longer implementation timeframe. MBA believes that all requirements should have at least a one-year transition period and those more significant requirements be given a two-year timeframe. Ultimately, MBA believes the rule should strike the balance of fostering an environment that allows transaction parties to continue to bring transactions to the marketplace and ensuring that market transparency leads to more informed decisions to invest in CMBS.[42]

CONCLUSION

MBA appreciates the opportunity to submit comments on this important rulemaking. If you have any questions or if further briefing is required, please contact Thomas Kim, MBA's Vice President of Commercial & Multifamily Policy (at 202-557-2745 or tkim@mortgagebankers.org) or Kathy Marquardt, Associate Vice President of Commercial Servicing (at 202-557-2742 or kmarquardt@mortgagebankers.org).

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[40] Responsive to Re-Proposal Question 99, Federal Register, page 47971.

[41] Responsive to Re-Proposal Question 99, Federal Register, page 47971.

[42] Responsive to Re-Proposal Question 102, Federal Register, page 47971.

THE MORTGAGE BANKERS ASSOCIATION'S COMMENTS ON RESIDENTIAL REAL ESTATE FINANCE ASPECTS OF THE COMMISSION'S RE-PROPOSAL OF REGULATION AB SHELF ELIGIBILITY CONDITIONS (File Number S7–08–10)

OCTOBER 4, 2011

The residential single-family real estate side of the Mortgage Bankers Association[1] ("MBA") welcomes the opportunity to respond to the Securities and Exchange Commission's (the "Commission") request for comment on the re-proposed revisions to Shelf Eligibility Conditions under Regulation AB and other rules[2] (collectively, the "Re-Proposal"), regarding shelf registration, disclosure and asset-level information for asset-backed securities ("ABS"), including residential mortgage-backed securities ("RMBS").

MBA supports and shares the Commission's goals to promote market efficiency and transparency through increased disclosure of the standards and practices of the transaction parties to ensure investors can make informed decisions to participate in the RMBS market. MBA hopes the Commission will find our comments and suggestions helpful in achieving these goals.

MBA would like to thank the Commission for its thoughtful review of our original comment letter, dated August 2, 2010[3], and the consideration given to that letter as reflected in the Re-Proposal. We incorporate our prior comments by reference and provide specific comments in

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies, including all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] Federal Register, Vol. 76, No. 151, dated August 5, 2011.

[3] MBA Letter to the Securities and Exchange Commission in response to Proposed Revision to Regulation AB, File Number S7-08-10, dated August 2, 2010

response to the Re-Proposal below, including footnote annotations to specific Commission questions being addressed.

OVERVIEW

MBA champions having a thriving RMBS market as an important financing option for lenders, borrowers and investors, but understands and supports the importance of such a market being transparent, reliable and responsible. The Commission seems to share the same goal to maintain and enhance the RMBS market. MBA believes that any changes to Regulation AB and the shelf eligibility requirements should be focused on the opportunity to encourage a strong and active RMBS market, balanced with greater information and clearer direction for the transaction parties and its investors. Adding requirements that will make the securitization process unduly burdensome, which provide insignificant benefit to the investors or worse, could have the effect of driving companies or assets away from the RMBS liquidity channel, does not seem to meet the Commission's stated goals.

To that end, in the Re-Proposal the Commission asks the question, "are risk retention and continued Exchange Act reporting together, sufficient replacements for the investment grade rating condition to eligibility for shelf offerings, so that no other conditions are necessary or appropriate?"[4] MBA notes that risk retention and the changes to on-going Exchange Act reporting requirements are not the only recent regulatory actions with respect to the RMBS market. For example, MBA notes the Commission's newly issued rules regarding additional disclosures for representations, warrants and repurchases, and other regulations to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act[5] (the "Act"). MBA believes all of the proposed regulatory measures combined will meet the Commission's goal to incent depositors and sponsors to ensure sound underwriting standards and high quality loans, and that the on-going reporting and disclosure requirements will enhance transparency, enabling investors to make informed investment decisions. Therefore, MBA thinks the additional shelf eligibility requirements in the Re-Proposal are unnecessary. MBA also requests the Commission consider the dynamic nature of the housing finance market, particularly as the market is attempting to recover from the recent turmoil. It is likely that investors' information needs will continue to evolve. MBA believes the market is well-suited to adapt to these changes and that additional regulatory burden may hamper that ability to grow and evolve, and is therefore counter-productive.

Further, the Act includes directives for various government agencies to implement vast, far reaching and complex requirements to ensure consumer and investor protections. The regulatory proposals required under the Act are still being drafted and proposed. MBA

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4 Federal Register, Question 61, page 47963.

5 Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

suggests that the Commission consider (a) allowing the regulations under the Act to be promulgated to the full extent of the Act's directives, (b) completing a review of the regulations in their entirety to gauge if there are any gaps in the regulations that require additional regulation, and (c) allowing an appropriate amount of time to pass, for implementation of and compliance with all of the regulations, in order to assess the full impact of the Act and its implementing regulations on the RMBS market and investor confidence prior to proposing additional regulations not required under the Act. The securitization market is already being impacted by the new regulations and the transaction parties are working diligently to absorb all of the changing requirements and the associated increases in liability. MBA asks that the Commission take time to consider the cumulative effect of the regulations and to determine if, at this time, such additional changes are truly necessary.

While Regulation AB governs the securitization of a broad range of asset classes, our comments below focus on the single-family residential real estate finance market and we urge the Commission to consider the unique impact that the Re-Proposal might have on this market. MBA's comments from the commercial/multifamily finance perspective also are being submitted as part of this submission.

In preparing this response, MBA worked with its broad residential membership. In the Re-Proposal, the primary areas of focus for the RMBS MBA membership are:

- Certification Requirements;
- Credit Risk Manager;
- Repurchase Disputes;
- Investor Communication;
- Repercussions of Failure to Comply, Cures and the Waiting Period;
- Disclosure – Exhibits and Asset Level Reporting;
- Privately-Issued Structured Finance Products;
- Timing and Costs of Compliance; and
- Waterfall Computer Program.

CERTIFICATION REQUIREMENTS

MBA reiterates its previous objection to the Commission's proposal to impose an additional executive officer certification requirement. We believe this requirement is duplicative of existing or proposed investor protection requirements. The CEO of the depositor is already responsible, as a signatory of the registration statement, for the ABS issuer's disclosure in the prospectus and, under the federal securities laws, can be liable for material misstatements or omissions, including with regard to the disclosure relating to cash flows and underlying pool assets. Therefore, it seems an unnecessary additional step that increases liability for the signor without actually enhancing the current disclosure requirements.[6]

If the Commission elects to retain the certification requirement, then MBA requests the proposed definition of executive officer be expanded beyond the current definition in 17 CFR 230.405 under the Securities Act of 1933.[7] This definition was specifically written to reflect public company structures and does not reflect how each registrant may be organized. MBA suggests that the proposed executive officer definition also include language similar to the following: "or such other person in a similar functional officer role, based on the organizational structure of the depositor."[8]

With respect to the proposed certification language itself, MBA still has concerns regarding the language proposed in certification number 4. Certification number 4 still requires the certifying party to state "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 to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement."[9] We support the Commission's acknowledgement that nothing in the certification should be perceived as a guarantee that the securities will produce cash flows that cover all expected payments on the securities. However, MBA is concerned that the language proposed in number 4 could be misinterpreted to suggest that the certifying party is ensuring that the transaction can produce such cash flows. We are also concerned that the ambiguity in the proposed language could lead to excessive litigation. For example, it is unclear whether the term "expected payments" is defined as the expected amount defined by the rating agencies, which include a certain amount of expected losses, as each and every payment of principal and interest being collected under the loan documents or some other definition. MBA suggests that the certification instead focus

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[6] Federal Register, Question 1, page 47953 and Question 8, page 47954.

[7] "The term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant." 17 C.F.R. § 230.405.

[8] Federal Register, Question 3, page 47953-47954.

[9] Federal Register, page 47953.

only on the actual assets themselves, including the data and disclosures made in the transaction documents, as is set forth in numbers 1 through 3, and that number 4 be deleted from the proposed certification.[10]

Should the Commission elect to retain certification number 4, then MBA suggests the Commission treat number 4 as similar to a forward-looking statement, and therby offer additional language more akin to the protections for forward-looking statements. The Commission also asks, "would this certification be appropriate if it also stated that this certification 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?"[11] If the Commission does elect to retain number 4, then MBA would agree that such a statement would be an improvement on the current draft language.[12]

The Commission asked several questions regarding the concept of the depositor getting assistance from a third party (an independent evaluator) in order to provide the certification. MBA recommends the Commission not mandate the use of an independent evaluator. It is uncertain, particularly in the RMBS market, whether there are companies currently capable of serving as an independent evaluator or that would be willing to fulfill this role, given the liabilities associated with performing such functions and the fact that they would be precluded from performing other more desirable roles in connection with the transaction.[13]

CREDIT RISK MANAGER

As an addition to the shelf eligibility requirement, the Re-Proposal has suggested that the transaction documents provide for an independent credit risk manager to review the underlying assets upon the occurrence of certain trigger events. The credit risk manager must not be affiliated with any sponsor, the depositor or the servicer. MBA appreciates the importance of one unaffiliated party serving in an oversight role with respect to the assets and any repurchase demands and is generally supportive of the Commission's proposal for RMBS transactions. MBA believes that the credit risk manager should be selected by the depositor, and that the trustee should only appoint a credit risk manager if, after the transaction has closed, such party is terminated or resigns. As a technical point, the trustee is not actually a party to the transaction until the transaction documents are executed and the transaction is closed, therefore

[10] Federal Register, Question 2, page 47953 and Question 4, page 47954.

[11] Federal Register, page 47954.

[12] Federal Register, Question 4, page 47954.

[13] Federal Register, Questions 9, 12-15, 17-21, page 47954-47955.

the trustee would be unable to appoint anyone prior to the securitization, thereby making disclosure in the prospectus not possible if the trustee has to wait until the transaction closes to appoint the credit risk manager. Further, the selection by the depositor would be similar to the appointment of the other transaction parties; this would maintain current industry practice prior to a securitization, without harming the investors, since the Commission's requirement of non-affiliation and disclosure of the credit risk manager would still be required. The investor will be able to make an informed decision regarding the selected credit risk manager for the related transaction based on disclosures made in the marketing materials and prospectuses, which would not be the case if the trustee selected the credit risk manager on or after the closing date for the transaction.[14]

Costs Associated with the Credit Risk Manager. MBA raises the question of who shall be responsible for the compensation of the credit risk manager role and the expenses associated with the actual investigations performed by the credit risk manager. With respect to the credit risk manager's compensation, MBA believes such compensation should not be based on the number or percentage of assets investigated or the number or percentage of repurchases that occur, which may create its own conflict of interest whereby the credit risk manager is incented to bring claims, even if frivolous.

Investor Requests for Investigation. With respect to the expenses associated with the investigation of a breach claim, MBA is concerned about permitting individual investors to raise a repurchase demand; the costs associated with an investigation may be paid as trust expenses, which may lead to a divergence of interests among the investors, since the costs will ultimately impact the lower rated securities and their proceeds. Further, the investors should not have public access to the mortgage files to try to ascertain if they should make a repurchase demand, as that raises significant privacy concerns.

MBA suggests that the credit risk manager be truly independent and not be required to investigate claims based on any investor request and that instead the credit risk manager role will be strictly based on the identified trigger events specified in the transaction documents. To the extent the investors have concerns with the performance of the credit risk manager, MBA endorses the investor right to terminate the credit risk manager if, in accordance with the requirements under the transaction documents to direct the trustee to act on their behalf, they wish to replace the credit risk manager for not fulfilling its obligations under the transaction documents.[15]

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[14] Federal Register, Questions 22-24, page 47958.

[15] Federal Register, Questions 30 and 35, page 47958.

Trigger Events. MBA appreciates and endorses the Commission's proposal to provide for flexibility in the marketplace to tailor the monitoring procedures and dictate the triggers appropriate for each asset class. We believe that governing transaction documents as negotiated by the parties should determine the trigger mechanisms and the portion of the assets that must be reviewed. MBA also agrees with the Commission's proposal that the credit risk manager's duties, responsibilities and qualifications be disclosed in the prospectus.[16]

Reports to Trustee. MBA accepts the Commission's suggestion that the credit risk manager provide its report of the findings and conclusions of its review of the assets to the trustee. However, MBA does not think the credit risk manager report should be filed as an exhibit to the Form 10-D filing, nor as a separate Form 8-K filing. In order for the credit risk manager to properly review the assets and complete a useful report for the trustee, that report will most likely require details concerning what the credit risk manager actually reviewed; that information, along with its findings and conclusions, could include non-public personal information of the borrowers that would raise significant privacy concerns. If the Commission elects to require disclosure to investors regarding the report of the credit risk manager, MBA suggests the filing be included on Form 10-D and that the credit risk manager only provide a summary of the report that has been redacted to remove non-public personal information regarding the borrowers subject to the report.[17]

REPURCHASE DISPUTES

MBA supports the Commission's effort to ensure that investor claims for breach of representation and warranty are resolved timely. However, the Re-Proposal currently is only focused on when "a repurchase is not completed within 180-days."[18] MBA would suggest that instead the focus should be centered on when a *resolution* is not reached, as the language seems to presume that a breach has occurred. The resolution of any repurchase request may not always lead to a repurchase being required; the request may be rebutted and withdrawn, the default is cured, a payment for the loss of value is made (when there is only a partial loss of value), another remedy available under the transaction documents (including a substitution of the loan) occurred or some other resolution by the parties has occurred. The parties should not be forced into mediation and third-party arbitration if the claim has been otherwise resolved to the satisfaction of the transaction parties (or the credit risk manger) or if the parties should find that a breach did not occur and the claim was not appropriate.[19]

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[16] Federal Register, Questions 29, 33-34, page 47958.

[17] Federal Register, Questions 31-32, page 47958.

[18] Federal Register, page 47957.

[19] Federal Register, Question 39, page 47959.

Further, in RMBS transactions, it is possible that a single repurchase request will encompass numerous rebuttals. In this situation, even if a repurchase may ultimately be determined to be warranted, the review, investigation, negotiation and final resolution process may take longer than 180 days to complete. MBA believes parties that are diligently negotiating in good faith should not be automatically required to move to mediation or third-party arbitration. MBA suggests that the 180 days serve as a timeframe for due diligence and discussion, and then if at the end of such 180-day timeframe the repurchase demand is not resolved, there be a notice (such notice to include the assets involved) to the related sponsor that if such repurchase claim remains unresolved for a certain amount of time (to be decided by the related transaction and disclosed in the prospectus), then that population of assets may proceed to mediation or third-party arbitration. MBA believes the Commission should encourage market participants to develop appropriate and fully-disclosed dispute resolution procedures, and allow the deal documents to govern for transactions involving various asset types, rather than prescribing a particular dispute resolution process through regulation that may not be viable, efficient or effective for any particular asset type.[20]

With respect to RMBS transactions, MBA recommends that the credit risk manager be the party that makes the final determination whether to pursue a repurchase demand. However, MBA has some concerns about the proposed unilateral right to select mediation or third-party arbitration; such a right may lead to forum shopping by the credit risk manager. We suggest that the transaction documents disclose the dispute resolution process, including whether mediation or third-party arbitration will be utilized for the related transaction, and in which jurisdiction such actions will be adjudicated, thereby putting all the transaction parties on notice. This will also keep the party obligated to repurchase from having to respond to multiple mediations and third-party arbitrations in multiple jurisdictions simultaneously.[21]

MBA believes that the party who loses in the mediation or third-party arbitration should be responsible for the legal fees of both parties. This will encourage the party submitting such repurchase request to only bring serious claims and the party obligated to repurchase the asset(s) to be responsive to such claims.[22]

INVESTOR COMMUNICATION

MBA generally supports the Commission's suggestion to enhance the ability of investors to communicate with other investors. However, we have a few concerns with the Re-Proposal requirements as drafted.

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[20] Federal Register, Question 39, page 47959.

[21] Federal Register, Question 39, page 47959.

[22] Federal Register, Question 40, page 47959.

First, MBA recommends that a minimum level of proof, as set forth in the transaction documents, be required of an investor in a transaction prior to permitting the investor to offer a communication. We suggest that an RMBS investor provide a certification of its standing, similar to what is currently provided in commercial mortgage-backed securities (CMBS), with such form certification being an exhibit attached to the pooling and servicing agreement.

Second, the right to communicate with other investors should be limited to current investors, and not an option for past investors who no longer hold an interest in the bonds and have no rights to additional proceeds; those rights have been transferred to the current investor.

Third, the nature of the communication itself should be a factual statement that the investor wishes to communicate with other investors with respect to exercising a right under the transaction documents (as well as the investor's contact information). To eliminate any need for the filing party to monitor or edit such communication and the associated liability, the notice should not include any reference to a specific party to the transaction or to what contractual standard may have been violated. We are concerned that a mere allegation of misconduct against a specific party in a filing with the Commission, without any burden of proof standard to ensure the statement is accurate, could cause irreparable harm to certain transaction parties. In addition, the parties to the transaction should not be required to police or monitor the statements by the investors to ensure they are appropriate or in compliance with any applicable law, including the federal securities laws..[23]

MBA would point out that the RMBS market could provide this type of communication or "message board" type concept in the future on the related trustee website, along with the required reports, without requiring a separate Commission filing. MBA asks that the Commission consider building in flexibility in the regulation to allow for options that include the parties using an established website maintained by a transaction party.[24]

REPERCUSSIONS OF FAILURE TO COMPLY, CURES AND THE WAITING PERIOD

MBA appreciates the Commission's willingness to consider alternatives for the cure period for failure to meet the transaction requirements or failure to file the required certification or transaction agreements in accordance with the required timing for shelf eligibility; however, the provision in the Re-Proposal related to the waiting period requires further clarification. MBA believes that a shorter timeframe is warranted after the cure of a defect and the suggestion of a 30-day or 45-day wait period is appropriate; but in any case, the wait period should not be longer than 90 days. MBA would also suggest that the Commission revise the requirement so that the 90-day waiting period (or such shorter timeframe) after the deficiency is cured is

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[23] Federal Register, Questions 42 and 45, page 47960.

[24] Federal Register, Questions 43 and 50, page 47960-47960.

applicable for both a current effective shelf registration statement and a new shelf registration statement.[25]

The Commission has requested comments on its proposal to possibly base shelf eligibility on previous offerings or the addition of a requirement for an experience threshold. MBA is very concerned about this suggestion and sees these proposals as limiting the free market, and possibly eliminating the ability for new players to enter the market. These suggestions seem to be the opposite of promoting an open and robust securitization marketplace and could harm the RMBS market, which is still working to bring new transactions to its investors. MBA asks the Commission to strongly consider the disincentive, and perhaps insurmountable obstacle, that such requirements would signal to potential new depositors and issuers. Again, MBA believes the Commission should focus on a disclosure based approach, whereby the depositor or issuer must disclose its experience with previous shelf offerings and experience with assets in the related asset class rather than mandating a certain threshold.[26]

DISCLOSURE – EXHIBITS AND ASSET LEVEL REPORTING

Exhibits to the Prospectus. While MBA believes that the current form document filing and prospectus disclosure requirements adequately disclose transaction document terms to investors, MBA does not object to the Commission's proposal to require the transaction documents to be filed in substantially final form with the registration statement by the date the prospectus is required to be filed. MBA requests clarification that if the transaction documents should require an update for any material change, that those exhibits to the prospectus do not trigger the requirement for another minimum 5-day waiting period for such a change (for example, if the PSA were to be revised to better match the prospectus language, this should not require a restart of the clock).[27]

Asset-Level Information (Schedule L). MBA continues to have concerns regarding the significant amount of information proposed to be included on Schedule L and maintaining privacy requirements for individual borrowers. Several of the data fields suggested by the Commission may allow someone to trace information back to the actual borrower or to other information, including borrower loan files, that are private and should be protected. MBA restates its objection to the proposed ranges for information; the income and credit score ranges do not mitigate privacy issues because the suggested ranges are so narrowly defined that they virtually identify the actual score or dollar amount of income. These ranges do not hide the key determination as to wealth and creditworthiness of individuals or segments of the population.

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[25] Federal Register, Question 59, page 47963.

[26] Federal Register, Question 62, page 47963.

[27] Federal Register, Question 65, page 47964.

Once the third party captures the unique mortgage identifier, these parties can also amass lists of borrower performance information from the on-going reports, including whether the borrower is delinquent and the severity of the delinquency. Identity theft is already a pervasive problem; the need for additional public information concerning the assets should be weighed against the ability for such information to be used in a manner that causes irreparable harm to individual borrowers.[28]

MIN Number Identifier. For RMBS, MBA continues to support the idea of adding the MERS generated Mortgage Identification Number ("MIN") as a unique life of the loan identifier. However, MBA requests that the Commission consider flexibility in requiring the MIN as a data point on Schedule L, as not all loans currently have a MIN. MBA suggests the Commission provide that such a field could remain not populated (or a response of "not applicable") to the extent a MIN number is not issued or if, in the future, such a MIN number were to become no longer commercially available. MBA requests the Commission instead require the disclosure of the MIN number, to the extent one has been issued on the related loan. This would avoid any market disruption based on the inability of an entity to procure MIN numbers for its loans. MBA asks the Commission to consider that set data fields may hamper the ability of the RMBS market to grow and evolve over time to meet market investor demands.[29]

NMLS Identifier. MBA believes that disclosure should focus only on the underlying collateral and its performance; the proposal to add a NMLS identifier does not provide more information to assist an investor in assessing the value of an asset or the collateral. The use of the NMLS number will publicly identify individual loan asset managers who are a company's top producers. A company's competitors could use this information to identify and attempt to recruit the company's highest performing employees. MBA recommends not requiring the NMLS identifier.[30]

Broker Compensation. With respect to broker compensation, MBA would point out that this is difficult to track and widely differs from company to company. Compensation may be based in part on the performance of the assets, certain triggers (which may be aggregated, and not based on a specific separate transaction) or other discretionary components. The information may not be known at the time of the related transaction since such thresholds may not have been achieved by the time disclosure is required in the prospectus; this would make the information that was known at the time for disclosure misleading to investors, as it would only be able to tell what compensation has been already earned and not what ultimately may be earned. Further, because compensation significantly varies by company, it would be extremely difficult

[28] Federal Register, Question 82, page 47967.

[29] Regarding MISMO Data Standards, MBA incorporates by reference its comment letter to the Commission dated August 2, 2010.

[30] Federal Register, Question 70, page 47966.

for an investor to attempt to compare compensation information provided by one company against information provided by another company. MBA strongly recommends against the inclusion of broker compensation information.[31]

Net Present Value Calculation. With respect to the Commission's questions regarding the disclosure of the net present value ("NPV") calculations or the method for arriving at NPV, MBA believes that the NPV calculation has historically been flexible, so a servicer may adjust its process to reflect current economic conditions. NPV models ordinarily take into account information that is not static – including the discount rate, liquidation timelines and whether home prices are increasing or decreasing. Attempting to define the criteria used in a servicer's NPV model would actually be a disservice to investors, since such a model would no longer have the flexibility to include the impact of economic and housing market conditions. In addition, MBA opposes the detailed disclosure of the criteria for a servicer's NPV model being added to any on-going reporting that is provided to the public (on EDGAR), since the public availability of such proprietary information may undermine the ability to effectively mitigate losses for investors.[32]

PRIVATELY-ISSUED STRUCTURED FINANCE PRODUCTS

The Re-Proposal seems to suggest that while the Commission is considering some novel asset types or structures for exemption under this proposal, that RMBS transactions would not be considered for exemption of the disclosure requirements. MBA again states that we believe extension of the Re-Proposal to Rule 144A and Rule 506 of Regulation D ("Rule 506") transactions will result in market disruption and in some instances, the inability to bring certain transactions to market.

These are examples of RMBS product lines or assets that may be unable to meet the Commission's proposed changes:

1. The Federal Deposit Insurance Corporation's ("FDIC") use of the RMBS market for liquidation of assets may be compromised by the Re-Proposal, where the FDIC does not have enough information on the defaulted assets to provide the proposed disclosure.

2. If an issuer has purchased assets from third parties where collateral information is unavailable, then such a transaction may not meet the requirements for disclosure of information (such as historical data) under Regulation AB, but investors may seek other information from the depositor or sponsors in order to evaluate the assets.

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[31] Federal Register, Questions 73-74, page 47966.

[32] Federal Register, Question 79, page 47967.

3. Smaller or infrequent securitization programs that cannot justify the substantial costs associated with a public filing, given the limited volume of securities they plan to offer.[33]

As the private placement market is a market for sales of securities to generally sophisticated and/or accredited investors that negotiate the terms of the securities directly and conduct their own due diligence in reliance on extensive information provided to them on a confidential basis, the market and those investors should dictate the terms of any disclosure or on-going information that will be provided in the related transactions.

Rule 144A and Rule 506 were not designed to impose substantive disclosure requirements or otherwise regulate private offerings of securities; they were promulgated in order to provide market participants with greater certainty as to the types of transactions that would be deemed not to involve a public offering. MBA is concerned that the Re-Proposal threatens to push some transactions away from the nonexclusive safe harbors offered in Rule 144A and Rule 506, effectively making the requirements too burdensome and forcing transactions to be brought under Section 4(2) of the Securities Act of 1933, with reduced transparency, less assurance to the investors and potentially less attractive economics (offering a less liquid market for securities).

The Re-Proposal may block new market entrants, since the costs associated with compliance with the requirements may be too high a threshold. The proposal shall require a company that intends to participate in the securitization market to have first made a substantial investment in its computer systems to capture the volume of data for disclosure; this may not be economically feasible for new companies. MBA believes that potential insurmountable hurdles for new market participants restricts competition and goes against the goal of developing a vibrant and thriving market.

Further, MBA would note that in the past, after a market disruption, the private market has served as the first option for new offerings; MBA sees signs of this in our current market. If the private market also requires significant regulation requirements, then the timing for a market return after such a disruption may be elongated or protracted.

MBA believes that the Commission should not regulate private offerings and private sales of securities. The proposal to include Rule 144A and Rule 506 transactions as part of Regulation AB and public shelf eligibility is an infringement on the private market and beyond the scope of the Commission's goal to regulate public offerings of securities.

WATERFALL COMPUTER PROGRAM

MBA restates its position on the Commission's proposal to require a waterfall computer program, that such program may produce results that can be misleading and may cause

33 Federal Register, Question 99, page 47971.

overreliance on the model by investors. Further, modeling is inherently non-standard and unique and will require customization to meet specific transaction (and collateral) requirements, making attempts to standardize the data and the program inherently in conflict with the use of risk models. In addition, all of the maintenance of the waterfall computer program, coupled with the implementation of the program, will be very costly.

TIMING AND COSTS OF COMPLIANCE

MBA supports the Commission's concept of providing a phased-in approach for compliance, where changes that require parties to make larger, more significant adjustments to a new process (or expend more financial resources to accommodate) are given a longer implementation timeframe. MBA believes that all requirements should have at least a one-year timeframe for compliance and those more significant requirements be given a two-year timeframe for compliance (for RMBS, MBA would suggest that compliance with Schedule L have a two-year timeframe). We would also point out that some of the data fields and other information suggested in the Re-Proposal are not captured in the transaction parties' current systems of record, and such systems in some cases will need to be updated to create a place to capture such data. MBA requests that the Commission offer the RMBS industry time to update its systems to capture such data fields and then to start collecting such information prior to the end of any compliance period. MBA would also suggest that any penalty period for non-compliance with the regulation commence after a two-year timeframe, in order to allow the market to fully adjust to the changes. Ultimately, MBA believes the regulation should strike the balance of fostering an environment that allows transaction parties to continue to want to bring transactions to the marketplace and ensuring that market transparency leads to more informed decisions to invest in RMBS by investors.[34]

MBA asks the Commission to very carefully and thoughtfully consider the economic analysis and the costs associated with the Re-Proposal, giving particular attention to the requirement of the additional certification, the significant data and information on the proposed Schedule L and the inclusion of Rule 144A and Regulation D.

CONCLUSION

MBA appreciates the opportunity to submit comments on this important rulemaking. If you have any questions or if further briefing is required, please contact Michael Carrier, Associate Vice President of Secondary and Capital Markets at mcarrier@mortgagebankers.org or 202-557-2870 or Shareé McKenzie Taylor, Director of Public Policy at staylor@mortgagebankers.org or 202-557-2816.

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[34] Federal Register, Question 102, page 47971.