



October 4, 2011

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

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

Re: Release Nos. 33-9244; 34-64968 (File No. S7-08-10)

Ladies and Gentlemen:

The American Securitization Forum (“ASF”)¹ appreciates the opportunity to submit this letter in response to the request of the Securities and Exchange Commission (the “Commission”) for comments regarding Release Nos. 33-9244; 34-64968; File No. S7-08-10, dated July 26, 2011 (the “2011 ABS Re-Proposing Release”)², relating to the revision and re-proposal of certain rules initially proposed by the Commission in Release Nos. 33-9117; 34-61858; File No. S7-08-10, dated April 7, 2010 (the “2010 ABS Proposing Release”)³, relating to offering, disclosure and reporting requirements for asset-backed securities under the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”).

ASF submitted four comment letters (collectively, the “ASF Reg AB II Comment Letters”) in response to the 2010 ABS Proposing Release: (1) a broad letter, dated August 2, 2010, addressing the five primary regulatory areas addressed in the 2010 ABS Proposing Release, including Securities Act registration, disclosure, the definition of an asset-backed security (“ABS”), Exchange Act reporting and privately-issued structured finance products (the “ASF Reg AB II Broad Comment Letter”)⁴; (2) a letter on behalf of our members who participate in

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

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

³ Asset-Backed Securities, 75 Fed. Reg. 23328 (May 3, 2010).

⁴ For the **ASF Reg AB II Broad Comment Letter** see:

<http://www.americansecuritization.com/uploadedFiles/ASFRegABIICommentLetter8.2.10.pdf>.

the ABCP market, dated August 2, 2010, regarding the proposed information-delivery requirements for privately-issued structured finance products (the “ASF Reg AB II ABCP Comment Letter”)⁵; (3) a supplemental letter, dated August 31, 2010, addressing the Commission’s proposals concerning the disclosure of loan-level information about the assets underlying auto loan, auto lease and auto floorplan ABS (the “ASF Reg AB II Supplemental Comment Letter Regarding Auto ABS Disclosure”)⁶; and (4) a supplemental letter, dated August 31, 2010, addressing the Commission’s proposal concerning the filing of a waterfall computer program that gives effect to the flow of funds provisions of an ABS transaction (the “ASF Reg AB II Supplemental Comment Letter Regarding Waterfall Computer Program”).⁷

We value the Commission’s efforts in proposing regulations designed to improve investor protection and promote more efficient asset-backed markets in the wake of the financial crisis and we applaud the hard work of the Commission in revising and re-proposing certain rules set forth in the 2010 ABS Proposing Release in light of the provisions added by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) and the comments received from numerous market participants, including comments contained in our ASF Reg AB II Comment Letters.

COMMENTS REGARDING THE REVISED AND RE-PROPOSED RULES

I. SECURITIES ACT SHELF REGISTRATION

A. Shelf Eligibility for Delayed Offerings

1. Revised and Re-Proposed Transaction Requirements

In the 2010 ABS Proposing Release, the Commission proposed to create new registration forms for use in connection with sales of securities that meet the Regulation AB definition of an asset-backed security. Offerings that qualify for delayed shelf registration would be registered on proposed Form SF-3 and all other offerings would be registered on proposed Form SF-1.

The Commission also proposed changes to shelf eligibility for ABS issuers, including changes to both registrant and transaction requirements. In the 2011 ABS Re-Proposing Release, the Commission is revising and re-proposing certain of those registrant and transaction requirements.

⁵ For the **ASF Reg AB II ABCP Comment Letter** see:

<http://www.americansecuritization.com/uploadedFiles/ASFRegABIIABCPCCommentLetter8.2.10.pdf>

⁶ For the **ASF Reg AB II Supplemental Comment Letter Regarding Auto ABS Disclosure** see:

<http://www.americansecuritization.com/uploadedFiles/ASF Reg AB II Auto ABS Comment Letter 8.31.10.pdf>

⁷ For the **ASF Reg AB II Comment Letter Regarding Waterfall Computer Program** see:

<http://www.americansecuritization.com/uploadedFiles/ASF Reg AB II Waterfall Comment Letter 8.31.10.pdf>

The other registrant and transaction requirements originally proposed remain unchanged and outstanding.⁸

a. Certification of Depositor's CEO or Executive Officer in Charge of Securitization

The Commission proposes to replace the investment grade ratings criterion in the ABS shelf eligibility conditions with, among other things, a revised and re-proposed condition that the issuer provide a certification of either the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor in connection with each shelf takedown transaction.

The re-proposed certification would indicate that the executive officer has reviewed the prospectus and is familiar with the structure of the securitization, and would state that, to the officer's knowledge –

- the prospectus is materially accurate and free of material omission;
- the prospectus fairly presents in all material respects the characteristics of the securitized assets and the risks of ownership of the ABS; and
- taking into account the characteristics of the securitized assets, the structure of the securitization and any other material features of the transaction, the securitization is designed to produce, but is not guaranteed to produce, cash flows at times and in amounts sufficient to service expected payments on the ABS offered and sold pursuant to the related registration statement.⁹

⁸ As noted earlier in this letter, ASF has provided significant comment on the Commission's proposed rules as set forth in the 2010 ABS Proposing Release, including comment on the other registrant and transaction requirements originally proposed that remain unchanged and outstanding. All of ASF's comments and views on those other proposed rules remain outstanding.

⁹ The entire text of the proposed certification is as follows:

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

1. I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] and am familiar with the structure of the securitization, including without limitation the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements and the material terms of all contracts and other arrangements entered in to the effect the securitization;
2. Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;
3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present 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; and
4. Based 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

The revised certification would, therefore, address the accuracy and completeness of the prospectus disclosure (paragraphs 2 and 3), but would also continue to address the ultimate performance of the offered securities (paragraph 4). While we have certain, more limited concerns with elements of the disclosure certifications, which we discuss further below, we continue to have far more significant concerns with the proposed performance certification.

First and most significantly, the proposed performance certification represents an unprecedented and inappropriate departure from the disclosure standards that have long served as the basis for the content of prospectuses in both ABS and more traditional debt and equity securities offerings. As noted by the Commission, under current disclosure standards, the registration statement for an ABS offering is required to include a description of the material characteristics of the asset pool, as well as information about the flow of funds for the transaction, including the payment allocations, rights and distribution priorities among all classes of the issuing entity's securities with respect to cash flows generated by the securitized assets. This disclosure by its nature focuses on current and historical factual information, and corresponding certifications as to the accuracy and completeness of such disclosure would be a natural complement. Conversely, the applicable disclosure standards do not require, nor should they require, an issuer to make assessments, forecasts or predictions, or to otherwise speculate about future events or performance. As a result, the proposed performance certification, which represents an assessment and forecast of the future performance of the securitized assets and the ABS, goes far beyond the integrity of stated disclosure into the realm of the predictive.

The Commission indicates that the proposed certification “would be an explicit representation by the certifying person of [that which] is implicit in what should already be disclosed in the registration statement.” The Commission reasons that, if 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 registered ABS, disclosure about such insufficiency would be required. In point of fact, however, prospectuses for ABS offerings do include extensive disclosure concerning the risks and uncertainties that could adversely affect the timing and sufficiency of cash flows, and it is precisely those disclosed risks and uncertainties that prevent the certifying person from being able to know that the securitization will produce cash flows at times and in amounts sufficient to service payments on the ABS.¹⁰

The Commission also gives weight to a revision intended to clarify that the certification does not address how the offered securities “will” pay or perform but instead focuses on the design of the transaction (*i.e.*, that the securitization is “designed” to perform). We respectfully submit that the Commission places far too much weight on this subtle change in proposed text. Taken on the whole, the certification as revised and re-proposed remains an assessment by the certifying officer of the expected future performance of securitized assets and the ABS, but without any

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.

¹⁰ It is important to note that these disclosed risks and uncertainties do not mean that the certifying person believes that the securitization will *not* produce cash flows at times and in amounts sufficient to service the ABS in accordance with their terms. Instead, as noted, these risks and uncertainties prevent the certifying person from being able to know that future cash flows will be timely and sufficient.

qualification by reference to the risks and uncertainties described in the prospectus that could affect that conclusion. Stated another way, if an investor were to challenge an officer's certification after the fact because one or more risks and uncertainties outlined in the prospectus had, in fact, come to bear on the timing or sufficiency of future cash flows for the securitization, neither the depositor nor a certifying officer would take any meaningful comfort in the nuanced argument and defense that their certification was not that the securitized assets and ABS "will" perform in a certain manner but instead merely that the securitization was "designed" to perform in a certain manner.

As discussed in our ASF Reg AB II Broad Comment Letter in response to the 2010 ABS Proposing Release, it is the business of credit rating agencies – not depositors or their officers – to marshal their expertise to analyze and gauge asset performance under various pool-specific and macroeconomic scenarios and the timing and sufficiency of cash flows to service payments on the ABS. An officer's certificate is a poor substitute for the judgment, processes and other resources that a credit rating agency has developed and brings to bear to assess and forecast the future performance of the ABS across varied economic environments and performance scenarios. As a result, our investor members derive no incremental comfort from such a certification.

We also have serious concerns that, for all of the reasons discussed above, a certifying person would not be willing to sign a performance certification of the type contemplated by paragraph 4 because, again, the risks and uncertainties associated with the securitization, as disclosed in the prospectus, prevent the certifying person from knowing that future cash flows will be timely and sufficient. In that case, the certification requirement, while cast as a shelf eligibility criterion, would in fact be a complete barrier to shelf registration and would, therefore, represent another significant impediment to the recovery of the securitization market by adding significant additional cost to the process of completing a registered ABS offering without corresponding benefits to investors.

Based on the foregoing, issuers are deeply troubled by, and strongly object to, the proposed performance certification, because it would significantly and inappropriately extend an officer's liability exposure under the federal securities laws by making the officer responsible not only for the accuracy and completeness of disclosure contained in the prospectus, but also for predictive assessments regarding the timing and sufficiency of future cash flows that are themselves subject to a variety of risks and uncertainties described in the prospectus. We also note that, while the Commission cites some investor support for its proposed performance certification,¹¹ comment in opposition to this performance certification and in favor of a disclosure certification has been overwhelming.¹² As noted above, our investor members derive no incremental comfort from such a certification.

We believe, therefore, that the certification should focus on transparency and disclosure concerning the securitization transaction, as contemplated by paragraphs 2 and 3, but not on the speculative exercise of forecasting future performance, as contemplated by paragraph 4. An

¹¹ See 2011 ABS Re-Proposing Release at footnote 37.

¹² *Id.* at footnote 38.

executive officer of the depositor is in a far better position to certify as to disclosure matters and, as such, we believe that a certification focusing on that aspect would be more appropriate and effective than one concerning future performance. The Commission has indicated that the certification is intended to encourage better oversight by an executive officer of the securitization process and, in turn, higher quality ABS offerings. We believe that a certification that focuses on disclosure concerning the securitization transaction will encourage the certifying officer to take more responsibility in reviewing the adequacy of the disclosure document, while a certification that focuses on future performance would merely extend the certifying officer's liability exposure under the federal securities laws to subject matters beyond his or her ability to know.

Even in the case of a certification that focuses on disclosure, however, we believe that such a certification could create new potential liability for the certifying officer under the federal securities laws. While it is correct that certain executive officers of the depositor, including its chief executive officer, must sign the registration statement related to the ABS offering, the federal securities laws afford the signing officer certain defenses to liability, including that the officer had, after reasonable investigation, reasonable ground to believe and did believe that the disclosure was true and free of material omission.¹³ Similarly, with regard to disclosure purporting to be made on the authority of an expert or purporting to be a copy of or extract from a report or valuation of an expert, the signing officer may raise as a defense that he or she had no reasonable ground to believe and did not believe that such disclosure was untrue or that there was a material omission, or that the disclosure did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert.¹⁴ As a result, and in response to the Commission's Request for Comment No. 8, we request that the Commission make clear, preferably within the text of the certification itself,¹⁵ that any and all defenses available to an executive officer under the federal securities laws as a person signing the registration statement related to the ABS offering,¹⁶ as a person who controls a person liable under the federal securities laws or as a person who might otherwise be held liable under the federal securities laws for inaccurate or misleading disclosure, are in each case available to the executive officer signing the Commission's proposed certification relating to shelf eligibility for ABS issuers.

We also have certain other requested modifications to the text of the proposed certifications in paragraphs 1, 2 and 3. We have included as Exhibit A to this letter a complete copy of the proposed certification as we request that it be modified. Many of the requested changes are more

¹³ See Securities Act of 1933, as amended, Section 11(b)(3)(A).

¹⁴ *Id.* at Section 11(b)(3)(C). A parallel defense is available to the signing officer in respect of disclosure purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document. *Id.* at Section 11(b)(3)(D).

¹⁵ We have proposed text for this purpose. See Exhibit A to this letter.

¹⁶ We believe that any and all defenses available to an executive officer under the federal securities laws as a person signing the registration statement related to the ABS offering should be available to the executive officer signing the Commission's proposed certification, regardless of whether the certifying officer in fact signed the related registration statement, which could be the case if, for example, the certifying officer was the executive officer in charge of securitization of the depositor or if the certifying officer became an executive officer after the registration statement was filed.

technical in nature and the reasons for those changes are self-evident. We describe below certain other requested changes.

1. An executive officer preparing to sign the certification will, of necessity, rely on one or more senior officers of the depositor under his or her supervision who are more directly involved in, and familiar with, the structuring of the ABS transaction. In the 2011 ABS Re-Proposing Release, the Commission acknowledges this reality when it indicates that it understands that, while the executive officer should provide appropriate oversight so that he or she is able to make the certification, the executive officer may rely on the work of other parties to assist him or her in that effort.¹⁷ We request, therefore, that paragraph 1 of the certification be revised to reflect the reality that, in making this certification, an executive officer of the depositor will rely on one or more senior officers of the depositor under his or her supervision that are more directly involved in, and familiar with, the structuring of the ABS transaction.
2. We request that paragraph 3 of the certification be revised as follows:
 - We request that the phrase “fairly present” be changed to “describe” because “fairly present” is the phrase consistently used in audit letters relating to financial statements and in attestation letters where a registered public accounting firm expresses its opinion in response to a management’s assertion, such as a management’s assertion regarding compliance with established or stated servicing criteria. As such, the phrase may carry with it an aura of independence that would not be appropriate for a certification by an executive officer of the depositor.
 - We request that the phrase “all risk factors” be changed to “the material risks” because the phrase “risk factors” refers to a section of the prospectus rather than to the risks themselves and because the revised formulation more closely tracks the relevant disclosure standards.
3. The remaining changes are either (i) intended to more clearly represent what we believe to be the intended scope of the certification or (ii) intended as technical, conforming changes that key off the proposed defined terms “securitized assets” and “offered securities.”

If, notwithstanding our views and concerns as outlined in this letter, the Commission were to determine to proceed with a performance certification, critical changes to the certification would have to be made, as described below. We have included as Exhibit B to this letter a copy of the performance certification as we believe it would need to be modified.

1. As has been discussed above, the performance certification represents an assessment and forecast of the future performance of the securitized assets and the ABS. Fundamentally, therefore, the performance certification constitutes a forward-looking statement entitled

¹⁷ See 2011 ABS Re-Proposing Release at 47952.

to the benefits and protections afforded by the safe harbor for forward-looking statements set forth in Section 27A of the Securities Act.¹⁸

A key condition that must be satisfied to avail oneself of the safe harbor protection is that the statement (here, the certification) be identified as a forward-looking statement and be accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement. Inasmuch as the certifying officer, if required to give a performance certification, would be required to make a predictive assessment regarding the timing and sufficiency of future cash flows that are themselves subject to a variety of risks and uncertainties described in the prospectus, it is imperative that the performance certification be accompanied by meaningful cautionary statements identifying those risks and uncertainties as factors that could cause actual results to differ materially from those set forth in the certification.

Accordingly, while we strongly urge the Commission to eliminate a performance certification for the reasons discussed above, in the event the Commission were to proceed with a performance certification, it is essential that the certification be revised to incorporate the cautionary statements and certain related changes as outlined in Exhibit B. In formulating this cautionary statement, we drew directly from the language outlined by the Commission in its Request for Comment No. 4.¹⁹ In the absence of such cautionary statements, the issuer would be unable to satisfy the conditions of the safe harbor and, more to the point, the issuer would be unable to make the certification since, once again, any predictive assessment regarding the timing and sufficiency of future cash flows will necessarily be subject to the various risks and uncertainties described in the prospectus.

We also note that the certification in its current form fails to acknowledge the Commission's intent, as set forth in the 2010 ABS Proposing Release, to qualify the certification by the disclosure in the prospectus.²⁰ The Commission notes as an example that, "if the prospectus describes the risk of non-payment, or probability of non-payment,

¹⁸ Section 27A of the Securities Act defines a "forward-looking statement" as:

"(A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items; (B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer; (C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission; (D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C); (E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or (F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission."

¹⁹ In the alternative, the text of paragraph 4 of the proposed certification would have to be revised to expressly indicate that the performance certification was provided "subject to the risks and uncertainties described in the prospectus relating to the securitized assets and ownership of the offered securities."

²⁰ "[A]ny issues in providing the certification would need to be addressed through disclosure in the prospectus." See 2010 ABS Proposing Release at 23346.

or other risks that such cash flows will not be produced or such payments will not be made, then those disclosures would be taken into consideration in signing the certification.”²¹ This critical qualification is nowhere evidenced in the certification itself.

2. In delivering the performance certification, an executive officer must also be allowed to take into account the nature and terms of any *external* credit enhancements. Depending on the structure of the transaction, external credit enhancements can play an integral role in maximizing the likelihood that the securities will receive payment. In these cases, therefore, the certifying officer would not be able to sign a performance certification unless the officer was permitted to take into account external credit enhancements. In its current form, therefore, the certification requirement, while cast as a shelf eligibility criterion, would once again become a complete barrier to shelf registration for most ABS transactions employing external credit enhancement.²²

Item 1114 of Regulation AB sets forth extensive disclosure requirements relating to the nature and terms of external credit enhancement and the financial condition of significant enhancement providers, and Item 1114 applies equally to ABS offerings registered on stand-alone and shelf registration statements. We respectfully submit, therefore, that matters pertaining to the nature and terms of external credit enhancements are more appropriately addressed through disclosure regulations and should not become de facto eligibility criteria for, or worse still, barriers to, shelf registration.

b. Credit Risk Manager and Repurchase Request Dispute Resolution

In the 2010 ABS Proposing Release the Commission proposed, as a condition of eligibility to register ABS on a shelf basis, that the pooling agreement or other transaction agreement for the securitization which is required to be filed with the Commission contain a provision requiring the party that is making representations and warranties relating to the pool assets and that is obligated to purchase or substitute for any noncompliant pool asset, to furnish an opinion or certificate of a non-affiliated third party to the securitization trustee on a quarterly basis, to the effect that any pool asset as to which the trustee asserted a breach of a representation or warranty and which was not repurchased or replaced by the obligated party, did not violate a representation and warranty contained in the agreement.

²¹ *Id.*

²² In footnote 55 to the 2011 ABS Re-Proposing Release, the Commission indicates that an executive officer in delivering the certificate is precluded from taking into account external credit enhancements “because the certification is expressly directed to the design of the securitization and whether or not 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, such securitization is designed to produce cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement.” In essence, the Commission indicates that an executive officer is precluded from taking into account external credit enhancements because the certification directs the executive officer not to do so. We find this to be nothing more than a conclusory assertion that lacks sufficient rationale or support.

In our ASF Reg AB II Broad Comment Letter, we stated our agreement with the Commission's observation that the effectiveness of the specific mechanisms used prior to the recent financial crisis to identify breaches or to resolve a question as to whether a breach occurred in the residential mortgage-backed securities ("RMBS") sector has in many cases been insufficient. We noted that the members of ASF's Project RESTART™, consisting of significant issuers of and investors in RMBS, were engaged in the process of constructing a set of governance principles for RMBS to be built around the following core elements: (i) review of pool assets by an independent third party that is given full access to the files regarding the pool assets for compliance with representations and warranties following the occurrence of a triggering event, (ii) recommendation by the independent third party to the securitization trustee of whether or not to demand repurchase of, or substitution for, the pool asset by the representing party and (iii) if the representing party disputes the independent third party's findings, submission of the dispute to a binding determination by a second independent party.

Since the date of the 2010 ABS Proposing Release the members of Project RESTART™ have further crystallized their thinking around the application of these core elements to RMBS, the predominant asset class in which the questions raised by the Commission and the commentators cited in the 2010 ABS Proposing Release arose. On August 30, 2011, after more than six months of intensive industry development and study, ASF published the conclusions of the Project RESTART™ working group as the "ASF Model RMBS Repurchase Principles," which consists of a statement of the principles that ASF's issuer and investor members believe should be prospectively applied to new issue RMBS transactions. In crafting the ASF RMBS Repurchase Principles, the members of Project RESTART™ deliberately chose to employ a principles-based approach, in order to set a very clear baseline expectation of the parameters of governance in RMBS transactions, while leaving the particulars of execution, consistent with the principles, to the transaction agreements. The ASF RMBS Repurchase Principles are attached to this letter as Exhibit C.

We are pleased that the Commission has been responsive to the view expressed by ASF and other commenters in response to the 2010 ABS Proposing Release that investor concerns about the effectiveness of remedies in RMBS transactions would be better addressed by an independent third party review of representations and warranties, coupled with a dispute resolution mechanism, and we support the Commission's inclusion of such mechanism among the proposed conditions to shelf eligibility. However, we have some concerns about the efficacy of requiring independent review in all transactions and, where the independent review mechanism is required, we have some comments on the particulars of the Commission's proposal. We address these matters in the following sections.

i. Alternatives to Independent Review Should be Permitted Where Appropriate

ASF strongly endorses the principle of independent review of compliance with transaction representations and warranties, and related dispute resolution, in RMBS transactions and other ABS transactions in which compliance with representations and warranties may be at issue. The implementation of such mechanisms will not be without significant cost to transactions however, as it will require the drafting and negotiation of material transaction obligations among the

representing party, the trustee, the party performing the independent review, the parties having custody of loan documentation and others, and will require an independent reviewer to be identified and standing by from the inception of the securitization, which will involve the payment of additional fees not previously required from securitization proceeds, asset cashflows or otherwise. As evidenced by the ASF RMBS Repurchase Principles, we believe that the cost of implementing such mechanisms is justified in RMBS transactions, as they will enhance investor protection and promote the integrity of residential mortgage securitization. However, we do not believe that an independent review and dispute resolution process is necessary or should be required, whether as a matter of industry best practices or a condition to shelf eligibility, in transactions of the type in which breaches of representations and warranties have historically not been asserted. For example, repurchase demands are rarely, if ever, asserted in connection with certain classes of ABS, such as those backed by auto loans or credit card receivables. For those asset classes, we believe it is appropriate to weigh the costs and benefits of mandating an independent review process, and we encourage the Commission to permit an alternative to such mechanism or to suspend the applicability of the proposed new condition to eligibility with respect to issuers who have generally not experienced repurchase demands.

In our ASF Reg AB II Broad Comment Letter, we proposed that the Commission permit a robust third party mechanism for investigating and resolving breaches of representations and warranties *as an alternative to* (rather than *as a replacement for*) the quarterly third party opinion with respect to compliance with transaction representations of unrepurchased pool assets for which demand for repurchase was made. We continue to believe that, except with respect to RMBS, the quarterly third party opinion should be permitted in lieu of requiring the transaction to include an independent review and dispute resolution process. This would strengthen the current remediation process in those asset classes in which repurchase demands are a rarity, without requiring the burden of an additional layer of upfront expense that is unlikely to yield significant benefits to investors over the life of the transaction. While we anticipate that the process a third party would have to perform with respect to an unrepurchased pool asset for which a demand for repurchase is made would not be dissimilar to that undertaken in an independent review, the attendant cost would be deferred until such time as it becomes relevant, thereby minimizing or eliminating expense in transactions in which breaches of representations and warranties historically have not been at issue, and the obligation to provide the opinion would, unless the demand is in bad faith or otherwise specious, itself incentivize representing parties to repurchase the rare asset for which demand is made, rather than to dispute it, thereby enhancing investor protection.

In addition, or if the Commission declines to retain the third party opinion as an alternative condition to independent review, we propose that the Commission provide for the suspension of the obligation to include an independent review and dispute resolution process as a condition to shelf eligibility with respect to any ABS transaction if the depositor or any affiliate of the depositor has not received more than a *de minimis* amount of repurchase demands for securitized assets in the asset class within a specified period of time, which we believe would appropriately be two years, preceding the date of the initial bona fide offer in the offering. Such a suspension would be analogous to the suspension, under Exchange Act Rule 15Ga-1(c)(2)(i), of a securitizer's obligation to report demand and repurchase activity for any reporting period if it has

had no activity to report during the period and annually confirms that it has had no activity during the previous year.

We believe that a *de minimis* threshold is appropriate to address issuer concerns about the ability of a party to exert undue influence over the transaction by making a single repurchase demand without merit, thereby triggering the incurrence of all of the costs of the independent reviewer architecture that this alternative is intended to avoid under circumstances in which it is not justified based on the infrequency of demand. We propose that such suspension terminate with respect to the first transaction by the issuer in the asset class having an initial bona fide offering date after demands for repurchase in the asset class exceed the *de minimis* threshold, subject to the possibility of re-suspension following a subsequent two year period in which the threshold is not exceeded.

Monitoring of the suspension could be implemented by requiring that the chief executive officer or executive officer in charge of securitization for the depositor certify, if applicable, as part of the new certification proposed to be required to be filed with each transaction as a condition to shelf eligibility, that, if the depositor is relying on the suspension of the independent review requirement of the eligibility requirements of Form SF-3, to his or her knowledge, during the two-year period preceding the date of the first bona fide offer of the offered securities, demands to repurchase or replace pool assets for breach of the representations or warranties concerning those pool assets with respect to asset-backed securities issued or sponsored by the depositor or its affiliates involving the same asset class that is supporting the offered securities have not exceeded the *de minimis* threshold. We suggest that an appropriate *de minimis* threshold for purposes of this condition would be (i) in the case of ABS not employing a master trust structure, demands with respect to more than 1% of the original principal balance of the pool assets supporting any asset-backed securities issued or sponsored by the depositor or its affiliates involving the same asset class that is supporting the offered securities²³ or, (ii) in the case of ABS employing a master trust structure, cumulative demands exceeding 1% of the aggregate average outstanding principal balance of the pool assets supporting any asset-backed securities issued or sponsored by the depositor or its affiliates involving the same asset class that is supporting the offered securities during the two-year period preceding the date of the first bona fide offer of the offered securities. We have included as Exhibit D to this letter a copy of the proposed certification regarding repurchase demands.

ii. Comments on the Proposed Shelf Eligibility Criterion

(a) Nomenclature

We respectfully request that the Commission adopt the term “independent reviewer” in lieu of the term “credit risk manager” to describe the party appointed to perform asset reviews for breaches of representations and warranties. The concept of an independent third party whose duty is to review assets for breaches of representations and warranties and to report its findings and conclusions to the trustee is a new role in securitization, and in adopting the ASF RMBS

²³ In the context of ABS backed by leases, the phrase “original principal balance” refers to the “securitized pool balance as of the measurement date,” as used in each of Items 1101(c)(2)(v)(A) and (B) of Regulation AB.

Repurchase Principles, our members deemed it advisable to create a new designation for the party performing that new role. Although the proposed change in designation is nonsubstantive, as it would not affect the independent reviewer's duties, we believe it would aid investor understanding of the reviewer's basic responsibility. Credit risk managers had been appointed in many pre-financial crisis transactions, and their duties varied depending on the dictates of the particular transaction, but frequently consisted of providing loss mitigation and reporting advice to the servicer of the pool assets. The function contemplated by the proposed rules is quite different, and a unique designation would help prevent confusion about the party's responsibilities. Further, the term "credit risk manager" is a bit misleading, as the independent reviewer's function is limited to a single category of transactional risk, *i.e.* identifying assets that do not conform to the quality standards established by the transactional representations. In fact, credit risk in securitization comes predominantly from the failure or inability of obligors to make required payments on the financial assets pooled due to loss of employment, decline in income, death, divorce or other "life events" and the skill with which the transaction's servicer or special servicer is able to mitigate loss resulting therefrom. None of these significant credit risks will be managed in any fashion by the independent reviewer, and applying the appellation "credit risk manager" to that party could be intrinsically misleading.

For purposes of the rest of this letter, we will refer to the credit risk manager as the independent reviewer.

(b) Appointment of the Independent Reviewer

The proposed rules require that the independent reviewer be appointed by the trustee. We request that the Commission instead provide that the independent reviewer be appointed in the pooling agreement or other transaction documents. In our conversations with several institutional trustees, they have indicated their discomfort with being designated to appoint the independent reviewer, lest that imply some recommendation or affirmation of the independent reviewer's capabilities by the trustee. Instead, our trustee members prefer, and our other members agree, that the independent reviewer be permitted to be selected by the sponsor, who by definition is the organizer of the securitization, in the same fashion as the other parties to the governing agreements, including the trustee, are selected. Our members view the independence of the independent reviewer as far more important than who makes the selection and, indeed, we suspect that investor preference for particular independent reviewers in individual asset classes may eventually drive the selection. We do not view the actual engagement of the independent reviewer by the sponsor as compromising the independence of the independent reviewer or providing an opportunity for undue influence by the sponsor, who may or may not be the party obligated to repurchase assets, and, if necessary to address any concerns in that regard, we would not object to a requirement that the transaction agreements provide that the sponsor may not remove the independent reviewer without cause.

(c) Review Trigger and Scope of Review

In the 2011 ABS Re-Proposing Release, the Commission states that it is "not proposing to mandate that transaction parties follow specific procedures related to the review or repurchase process because we preliminarily believe 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.”²⁴ We concur in the Commission’s principles-based approach, which is similarly reflected in the approach taken by the members of Project RESTART™ in crafting the ASF RMBS Repurchase Principles, and we encourage the Commission to reaffirm its “preliminary” view in the release adopting the final rules, when published.

Notwithstanding its principles-based approach, the Commission has chosen to expressly specify two minimum conditions under which asset review would be required, first if “the credit enhancement requirements, as specified in the underlying transaction agreements, are not met,”²⁵ and second, “at the direction of investors pursuant to the processes provided in the transaction agreement and disclosed in the prospectus.”²⁶ These conditions appear to us to represent an attempt to be responsive to comments made by various parties, including ASF, in response to the 2010 ABS Proposing Release, as to the appropriate triggers to the performance of an independent review. As noted by the Commission in the 2011 ABS Re-Proposing Release, some commentators favored objective, fact-based triggers, while others favored a subjective test, such as a reasonably substantiated demand for repurchase. The Commission appears to us to have tried to embrace a middle ground in the proposed rules by mandating that transaction agreements include, at a minimum, both an objective trigger based on credit enhancement and a subjective trigger based on investor demand. We address each of the proposed triggers below.

Objective trigger—ASF’s thinking on the appropriate trigger to an independent review of assets underlying an ABS has evolved since our comment letter cited by the Commission in the 2011 ABS Re-Proposing Release, which noted that at the time our issuer members tended to favor a subjective trigger, specifically a substantiated allegation of breach, in lieu of an objective trigger, while our investor members tended to favor an objective trigger. That evolution has come about as a result of the extensive attention given to the subject by the members of Project RESTART™ in connection with the development of the ASF RMBS Repurchase Principles. Today, there is consensus among our members that a trigger to review assets based on the occurrence of objective factors is appropriate in all instances. That consensus also extends to the proposition that the particular trigger should not be mandated for all transactions, but should rather be tailored to the particular transaction, taking into consideration collateral attributes, collateral performance, transaction features and the level of pre-issuance due diligence on the pool assets. In the ASF RMBS Repurchase Principles, we cite examples of some factors that might form the basis of an objective trigger in an RMBS transaction, including cumulative losses, delinquencies or average loss severity on the mortgage loans in the pool exceeding a threshold specified in the transaction documents. By contrast, possible objective factors that may be appropriate triggers for review in ABS backed by revolving assets, such as credit card receivables, might be the occurrence of an early amortization event related to the performance of the pool assets or an excess spread trigger.

We appreciate the Commission’s attempt to give some specific content to the form of an objective trigger, but the one-size-fits-all test of whether “credit enhancement requirements, as

²⁴ See 2011 ABS Re-Proposing Release at 47956.

²⁵ See 2011 ABS Re-Proposing Release at 47980 (proposed to be codified at Securities Act §239.45(b)(1)(ii)(C)(1)).

²⁶ See 2011 ABS Re-Proposing Release at 47980 (proposed to be codified at Securities Act §239.45(b)(1)(ii)(C)(2)).

specified in the underlying transaction agreements, are not met,” proposed by the Commission simply does not work well for all asset classes or even for different transactions within the same asset class. For example, a transaction involving assets with interest rates in excess of the rates required to be paid on the ABS may initially be structured with little or no initial overcollateralization, with the required credit enhancement being built up over time through the application of excess interest on the assets to pay principal on the ABS, resulting in overcollateralization. Other transactions, such as shifting interest senior subordinated RMBS, will have multiple credit tranches, the most junior of which has no credit enhancement, meaning that the review would be triggered on the first dollar of loss. We emphatically believe that the Commission’s proposed objective test should be replaced by a requirement, consistent with the principles-based approach espoused by the Commission in the proposed rules and embraced by our diverse membership in the ASF RMBS Repurchase Principles, that the transaction documents provide for a review of the pool assets upon the occurrence of a trigger based on objective factors, as specified in the transaction documents and disclosed in the prospectus, and that the Commission set forth some nonexclusive examples of objective factors, including, where appropriate, credit enhancement levels not being met and the other examples cited above. This will allow the market to develop the most appropriate objective triggers for particular types of ABS transactions, which should be designed to cause review at a time that pool asset performance indicates that the cost of review is warranted, while preserving the flexibility to adopt alternative triggers on a going forward basis as market participants evaluate the effect of this relatively new mechanism and the efficacy of different triggers in different types of transactions.

In a similar vein, we request that the Commission clarify that its principles-based approach applies to the nature and scope of the review, as well as the trigger.²⁷ While our members contemplate that, upon the occurrence of a trigger event, the independent reviewer would generally review defaulted assets, such a procedure may be impractical or prohibitively expensive in transactions, such as credit card master trusts, which may contain tens of millions²⁸ of accounts.²⁹ In such transactions, an alternative approach such as the review of a sample of

²⁷ We believe that this was the Commission’s intent, as it suggested in the 2011 ABS Re-Proposing Release that a review of defaulted assets would satisfy the proposed rule. *See* 2011 ABS Re-Proposing Release at 47956 (“We believe it would be appropriate for the credit risk manager to review defaulted assets when the credit enhancements (including structural supports, such as subordination), fall below the required target levels, as specified in the underlying transaction agreements....”).

²⁸ *See* 2010 ABS Proposing Release at 23360 (“Based on staff reviews of credit card and charge card asset pools, it appears that some may contain as many as 20 to 45 million accounts.”)

²⁹ The form of independent review that is appropriate will vary based on the asset class and the characteristics of individual issuance platforms, making it important that the regulatory framework allow for a reasonable degree of flexibility. For example, eligibility requirements for credit card receivables are more limited than in other asset classes, rendering independent reviews of individual receivables or accounts of little benefit. Generally, credit card receivables are eligible for inclusion as master trust assets if they are payable in U.S. dollars, created in compliance with applicable law and created and conveyed with good and marketable title free and clear of liens. Separate fraud provisions already require issuers to absorb losses resulting from fraudulent transactions. Credit card master trusts are generally populated with highly seasoned accounts with established performance histories. An alternative approach for credit card receivables could involve a review of recent additions (account designations) to the master trust to determine if a receivable repurchase event has occurred. A review for the occurrence of a repurchase event

defaulted accounts may be the more appropriate approach, and we believe that the transaction documents should be permitted to specify the nature and scope of the review.³⁰

Subjective Trigger—The proposed requirement for a subjective, investor-triggered review is the one element of the proposed rules on which there is not a unanimity of view among our members. Our investor members generally favor the proposal, as they believe it would provide an additional basis for review if the objective trigger proves ineffective. For example, investors are concerned that circumstances unforeseen at the time of issuance may inhibit the objective trigger’s ability to cause review by the independent reviewer. Our investor members believe an investor trigger would be an appropriate backstop in such a case. By contrast, our issuer members generally oppose the proposal, as they consider it to be fundamentally inconsistent with the principle of independent review to allow the review to be triggered by an interested party and premature to assume that objective triggers would be ineffective to assure an appropriate level of asset reviews.

Our issuer members respectfully request that the Commission remove the proposed subjective trigger to independent review from the re-proposed conditions to shelf eligibility. While there is unanimity of opinion on the need for an objective, fact-based trigger to independent review, our issuer members have, with the benefit of time to consider the possibility more closely since the date of the ASF Reg AB II Broad Comment Letter, come to believe that a trigger based on the subjective judgment of an interested party could undermine the objectivity and independence of the review process. As discussed above, ASF strongly believes that a robust mechanism for identifying, investigating and resolving breaches of representations and warranties is essential to the restoration of investor confidence in the RMBS markets, which was shaken by the perception that traditional remedies in RMBS transactions were not sufficient during the financial crisis. The ASF RMBS Repurchase Principles, and the independent review and dispute resolution process proposed by the Commission to be made a condition to shelf eligibility, are both designed to (1) replace the traditional “honor system” relying on self-reporting of breaches by transaction parties who are often affiliated with the obligated party with a review conducted by an independent third party having access to all of the requisite underlying documents relating to the pool assets and (2) address investor concerns about enforcement of remedies for breach by clearly delineating the obligation of the parties to act when breaches are discovered and providing for third party dispute resolution in the event that the obligated party does not exercise the remedies for breach provided for in the transaction documents. Both approaches address perceived concerns about control of the repurchase process by potentially interested parties and tepid enforcement mechanisms by replacing the traditional approach with new processes grounded in objectivity and independence. To layer on to the new processes a subjective

could be directed at recent account designations, to determine if the conveyance or account selection process complied with the requirements set forth in the transaction agreements.

³⁰ We note that the Commission has taken a similar position in the context of a review of assets to satisfy Rule 193. See Release Nos. 33-9176, 34-63742; File No. S7-26-10 at 4235 (“For example, in offerings of residential mortgage-backed securities (“RMBS”), where the asset pool consists of a large group of loans, it may be appropriate, depending on all the facts, to review a sample of loans large enough to be representative of the pool, and then conduct further review if the initial review indicates that further review is warranted in order to provide reasonable assurance that disclosure is accurate in all material respects.”).

element, wholly within the control of a different, but equally interested, party raises the specter that excessive reviews could be triggered with the goal of “fishing” for breaches of representations, notwithstanding that the transaction’s objective review trigger has not been tripped.

Our issuer members acknowledge that an investor-triggered review is popular with many of our investor members, given their experiences with the ineffectiveness of pre-financial crisis repurchase mechanisms in many transactions. However, absent evidence that objective triggers would not adequately protect the interest of investors, issuers are concerned that responding to issues about broad control of the repurchase process by one interested party by giving control, in part, to another interested party, is inconsistent with the core principles of independence and objectivity which the proposed rules otherwise seek to introduce. Issuers do not dismiss the possibility that a subjective, investor-triggered review could be a useful adjunct to an objective trigger, but they strongly believe that the brand new mechanism of objectively-triggered independent review be given time to demonstrate its effectiveness in the marketplace before the Commission effectively deems it insufficient. Of course, this would not preclude market participants from structuring transactions with investor-triggered reviews in addition to objectively triggered reviews if the parties deem it appropriate or desirable. However, until such time as truly independent review is allowed to demonstrate its worth, issuers believe that the Commission should leave to the investor the decision of whether to invest in shelf-registered ABS featuring the enhanced governance provisions based on objectively triggered asset review. To assist investors with better understanding the nature of the triggers in transactions, issuers suggest that the Commission require, as part of the proposed rules, that if the transaction does not contain an investor-triggered review, such fact be disclosed in the prospectus. This is similar to the requirement in the Commission’s proposed revisions to Item 1111(e) of Regulation AB, which would address investor concerns about the strength of fraud representations by requiring the prospectus to disclose the absence of a representation and warranty relating to fraud in the origination of the pool assets, rather than dictating substantive transaction provisions.

ASF encourages the Commission to consider the merits of both points of view in fashioning its final rules with respect to shelf eligibility for ABS.

Finally, the Commission has requested comment on whether it should specify procedures for investor directed reviews, and whether, in particular, it should specify percentages or minimum percentages of investors required to trigger a review or to direct the trustee of the ABS to poll investors on whether to initiate a review.³¹ We reiterate our emphatic view that the procedures, as well as the triggers, for conducting an independent review should be left to the transaction documents and disclosed in the prospectus in order to allow investors to make an informed investment decision based, in part, on an understanding of the full extent of the transaction’s remedial provisions, including independent review, where included in order to satisfy the eligibility requirements for shelf registration or otherwise. We agree with the Commission’s comment that “transaction parties should have the flexibility to tailor the procedures to each ABS

³¹ See 2011 ABS Re-Proposing Release, Request for Comment No. 30, at 47958.

transaction, taking into account the specific features of the transaction and/or asset class”³² and, accordingly, request that, if investor direction remains a mandatory review trigger, the Commission not prescribe specific procedures or participation thresholds for investor directed review.

(d) Report to Trustee

The proposed rules would require the independent reviewer to provide a report to the trustee of the findings and conclusions of any required review of assets. In addition, the Commission has proposed to amend Item 1121 of Regulation AB to require, among other things, that if the independent reviewer is required to review pool assets during a reporting period for compliance with representations and warranties, the full report provided by the independent reviewer to the trustee during the distribution period be filed as an exhibit to the issuer’s Form 10-D for the period. ASF agrees that the independent reviewer should be obligated to report its findings and conclusions to the trustee, but we have some discomfort about the requirement to include the full report in a publicly available filing. Of necessity, an independent reviewer’s review of assets may involve the review of confidential or nonpublic personal information of the obligor, such as information relating to the obligor, or a co-obligor or guarantor’s income, employment and/or assets, and we anticipate that the pooling agreement or other transaction documents will have appropriate provisions obligating the independent reviewer to maintain the confidentiality of such information. To the extent that such information is necessary to aid the trustee in making a determination to exercise a remedy against the representing party (or to act upon the recommendation of the independent reviewer to exercise a remedy against the representing party), we have no objection to it being included in the report, but public disclosure of such information would be anathema to obligors and likely violative of the legal obligations of various transaction parties under the Gramm-Leach-Bliley Act, the Fair Credit Reporting Practices Act or other laws or regulations applicable to them. We therefore request that the Commission further amend Item 1121 to provide that the independent reviewer may provide a summary of its finding and conclusions, rather than the full report or, alternatively, that the filed report may be redacted to exclude confidential obligor information.

(e) Dispute Resolution

ASF generally concurs with the requirement of the proposed rules that if the obligated party does not implement the remedy contemplated by the transaction agreements with respect to assets that breach transaction representations and warranties within 180 days after notice, the party making the demand should be entitled to refer the dispute to mediation or arbitration, and that the obligated party should be required to submit to the selected dispute resolution process. However, we note that the proposed transaction requirement for use of Form SF-3 specifically refers to the failure by the asset to be “repurchased” by the obligated party. This would have the effect, which we believe was unintended, of restricting the remedy for breach of a representation and warranty about the pool assets to repurchase of the affected asset. Our members strongly believe that the remedies for breach of representations and warranties should be specified by the

³² See 2011 ABS Re-Proposing Release at 47956.

transaction documents and disclosed in the offering documents, and could, in addition to repurchase of the affected asset, include other traditional ABS market remedies for breach, such as cure of the breach, substitution of a new asset meeting the eligibility requirements of the transaction (including compliance with all representations) or indemnification of the trust against losses resulting from the breach. In some cases, these remedies, if feasible, may actually be more advantageous to investors than repurchase. For example, the substitution of a new asset would ease the adverse yield consequences that may be experienced by certain investors as the consequence of a repurchase. The consensus of our members on that point is reflected in the ASF RMBS Repurchase Principles. Accordingly, we respectfully request that the Commission revise proposed SF-3 transaction requirement I.B.1(e) to refer to the failure by the obligated party to perform a remedy required by the transaction documents in respect of a breach of representations and warranties with respect to an asset, rather than the failure to repurchase the asset. We further request that any similar reference to repurchase in the proposed rules also be changed to refer to the exercise of remedies prescribed in the transaction documents.

c. Investor Communication

ASF strongly concurs with the Commission that ABS transactions need to include an effective mechanism to facilitate communication among investors, particularly when ownership of the ABS is held in book-entry form through the Depository Trust Company. In that regard, we have no objection to the mechanism specified in the proposed rules, which would allow an investor, subject to verification requirements where appropriate, to request that the person responsible for filing Form 10-D include the request to communicate, and information designed to enable other investors to reach the requesting investor, in the Form 10-D. However, we encourage the Commission to permit alternative methods to allow investors to more easily communicate with each other. This would permit transactions to continue to use investor communications processes, such as the voluntary investor registry maintained by the trustee or certificate registrar that is successfully employed in many CMBS transactions today, without imposing an additional layer of transaction obligations. We have no objection to the proposed Form 10-D communication process serving as the default requirement applicable to transactions in which the transaction agreements do not otherwise provide a mechanism designed to facilitate communication among beneficial owners of the ABS although we suggest that the party responsible for filing Form 10-D should be required to include the communication request in the later of (i) the period in which the party responsible for filing the Form 10-D receives the request and (ii) if the investor holds its securities in book-entry form, the period in which the responsible party receives verification of the investor's status from the applicable depository.

2. Annual Evaluation of Form SF-3 Eligibility in Lieu of Section 10(a)(3) Update

The Commission proposes to amend Securities Act Rule 401(g) to require, as a condition to conducting an offering off of an effective shelf registration statement, an annual evaluation of whether the registrant requirements set forth in General Instruction I.A. of Form SF-3 have been

satisfied.³³ An ABS issuer seeking to conduct a takedown off an effective shelf registration statement would be required to evaluate (i) whether affiliated issuers that were subject to ongoing Exchange Act reporting requirements during the twelve-month look-back period have filed such reports on a timely basis and (ii) its satisfaction of the proposed new registrant requirements relating to compliance with the new transaction requirements of shelf registration, in each case as of ninety days after the end of the depositor's fiscal year end. The Commission proposed similar amendments to Rule 401(g) in the 2010 ABS Proposing Release.

As detailed in our ASF Reg AB II Broad Comment Letter, our most significant area of concern with this proposal is the operation of Rule 401(g) as the Commission proposes to amend it. As the Commission is aware, Rule 401 sets out the requirements as to proper form that apply to registration statements filed under the Securities Act. Rule 401(a) establishes the core rule that "[t]he form and contents of a registration statement and prospectus shall conform to the applicable rules and forms as in effect on the initial filing date of such registration statement and prospectus."

At the time a registrant files a registration statement, it certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on the form filed. Following effectiveness of a registration statement, however, a registrant needs a requisite degree of certainty that it can conduct offerings without concern that some eligibility standard might subsequently be called into question and thereby give rise to a potential violation of Section 5 of the Securities Act for the completed offerings. Rule 401(g)(1) in its current form addresses this concern by providing that, except in limited cases that are not relevant here, "a registration statement or any amendment thereto is deemed filed on the proper registration form unless the Commission objects to the registration form before the effective date."³⁴

Under the Commission's current proposal, Rule 401(g) would be amended to provide that, notwithstanding the effectiveness of an ABS registration statement, requirements as to proper form would be violated where the registrant requirements set forth in General Instruction I.A. of Form SF-3 have not been met as of ninety days after the end of the depositor's fiscal year end.

ABS issuers are very concerned with this proposed amendment, particularly in the case of the Exchange Act reporting requirement, because, despite appropriate diligence, it is not possible to fully verify compliance with the Exchange Act reporting registrant requirement since there could be an unknown defect, latent or otherwise, in one or another of the relevant issuing entity's periodic reports or in its reporting history.³⁵ As a result, for any offering of ABS following the annual evaluation of the Exchange Act reporting registrant requirement, an ABS issuer would

³³ These registrant requirements include (i) the Exchange Act reporting registrant requirements and (ii) the proposed new registrant requirements relating to compliance with the new transaction requirements for shelf registration.

³⁴ Similarly, Rule 401(g)(2) provides that an automatic shelf registration statement (as defined in Rule 405) and any post-effective amendment thereto are deemed filed on the proper registration form *unless and until the Commission notifies the issuer of its objection to the use of such form.* [Emphasis added.]

³⁵ For example, an ABS registrant could have a good-faith belief after appropriate diligence that the Exchange Act reporting registrant requirement had been met, but subsequently might learn that a relevant issuing entity filed an Exchange Act report that was incomplete or incorrect and required an amendment, or that the issuing entity inadvertently failed to timely file a Form 8-K report that previously was believed to have been timely filed.

ASF Comment Letter re Reg AB II Re-Proposal
October 4, 2011
Page 21

have the continual concern that a relevant issuing entity's Exchange Act reporting might subsequently be called into question and give rise to a potential violation of Section 5 of the Securities Act for the completed offering.

We respectfully submit, therefore, that the Commission should revise proposed Rule 401(g)(4) to incorporate the standard adopted by the Commission in Rule 401(g)(2), which deems a registration statement to be filed on the proper registration form unless and until the Commission notifies the issuer of its objection to the use of such form.

II. DISCLOSURE REQUIREMENTS

A. Exhibits to be Filed with 424(h) Filing

In the 2010 ABS Proposing Release, the Commission proposed to amend Item 1100(f) of Regulation AB to require that the exhibits filed in connection with an ABS shelf takedown transaction must be on file and made part of the related registration statement no later than the date the final prospectus is required to be filed pursuant to Rule 424.

In response to the concerns of some commenters that requested that the exhibits be available for investor review prior to making an investment decision, the Commission is revising and re-proposing Item 1100(f) to require that the underlying transaction documents, in substantially final form, be filed and made part of the registration statement by the date the Rule 424(h) prospectus is required to be filed.³⁶ If the exhibits filed with the Rule 424(h) prospectus remain unchanged at the time the final prospectus under Rule 424(b) is required to be filed, then an issuer would not be required to re-file the same exhibits. Our investor members are supportive of the Commission's proposal. They believe that the underlying transaction documents are material to their investment decision and should be available in substantially final form at the time the Rule 424(h) prospectus is filed. Our investor members acknowledge that the tax sections required to be included in those agreements (discussed further below) are generally not relevant for purposes of making an investment decision.

In commenting on the Commission's revised proposal, our issuer members believe it would be helpful to begin by reviewing historical filing practices in the structured finance market relating to the final forms of agreements, and the reasons for those filing practices.

The Commission has previously indicated that required exhibits, such as final forms of transaction agreements, may be filed on Form 8-K and thereby incorporated by reference into the registration statement,³⁷ and Item 1100(f) of Regulation AB currently contemplates that, where agreements or other documents specified in such regulation are to be filed as exhibits to a Securities Act registration statement, they may be incorporated by reference as exhibits to the registration statement, such as by filing a Form 8-K in the case of offerings registered on Form S-3.³⁸ While these regulations address the method by which transaction agreements may

³⁶ In the 2010 ABS Proposing Release, the Commission proposed to require an asset-backed issuer using a shelf registration statement to file, in accordance with proposed Securities Act Rule 424(h), a full-scale preliminary prospectus containing substantially all the information required for the specific ABS takedown, except for pricing and price-dependent information, at least five business days in advance of the first sale of securities in the offering. As noted in our ASF Reg AB II Broad Comment Letter, our members agree that a mandatory five business-day waiting period between the proposed Rule 424(h) filing and the first sale of securities is too long and should be replaced with a two business-day waiting period. We also recommend that, in cases where there has been a subsequent material change in the legal structure, terms of the securities or composition of the asset pool, a one business-day waiting period would be appropriate.

³⁷ See Securities Act Rel. No. 6470 (Jun. 9, 1983), at n. 11.

³⁸ Alternatively, such agreements or documents may be added as exhibits to the registration statement through the filing of a post-effective amendment that, pursuant to Securities Act Rule 462(d), would become effective upon filing with the Commission.

be filed and made a part of the registration statement, neither regulation contains a reference to the timeframe for filing such agreements.

For many years, the predominant practice in the structured finance market had been to file the final forms of agreements within 15 calendar days after closing the related ABS offering. This broad-based filing practice had been in place from the early stages of the ABS market and was followed both by registrants filing “one-off” registration statements on Form S-1 and by registrants filing shelf registration statements on Form S-3.³⁹ This filing practice was also known to, and sanctioned by, the Commission staff from at least the mid-1980s. Indeed, in the course of the Commission staff’s review of pending shelf registration statements, the staff would often obtain a commitment from the registrant to adhere to this filing practice in connection with each shelf takedown transaction.

This filing practice developed out of the simple reality that, in contrast to most standard corporate debt issuances, ABS transactions are often highly structured and the related transaction agreements require careful drafting and review for consistency with the prospectus to ensure that complex provisions concerning cash flow allocations and, in the case of RMBS and CMBS, tax requirements are accurately documented.⁴⁰ To ensure accuracy, this drafting and review process in many cases extends over several days, and the drafting and review process for the REMIC provisions will often extend several days beyond the closing itself.

In more recent years, the Commission staff has applied more stringent filing deadlines – in some cases, requiring a registrant to commit to file final forms of transaction agreements within 4 business days after the related closing and, more recently, requiring registrants to commit to file final forms of transaction agreements by the date the final prospectus is required to be filed pursuant to Rule 424.

Our issuer members do not believe there is any compelling reason to further accelerate the filing deadline for the final forms of transaction agreements and, in fact, have significant concerns with the Commission’s proposal to do so.

First, the Commission bases its proposal to further accelerate the filing deadline on the premise that the transaction agreements contain important information regarding the terms of the transaction, representations and warranties about the assets, servicing terms and many other rights that would be material to an investor. This premise, however, wholly ignores the existence and function of the statutory prospectus in the ABS offering process, which discloses the material terms of those transaction agreements (including all of the subjects outlined above) and

³⁹ We note, for example, that even Form S-1 registration statements relating to discrete offerings of ABS routinely included “forms of” the related transaction agreements as exhibits and were declared effective in such form. Following the closing of the ABS transaction (typically within 15 days thereafter) the final agreements would be filed on Form 8-K.

⁴⁰ In the case of RMBS and CMBS, the transactions may require multiple REMICs, involving complicated mathematical calculations or concepts that must be incorporated into the pooling and servicing agreement. These provisions do not affect payments to the security holders. However, the tax provisions, which often involve complex allocations of cash flow between REMICs, are required to be included in the pooling and servicing agreement in order for the related trust to comply with relevant tax regulations.

which, under the Commission's proposed Rule 424(h), would be available to investors at least some minimum number of days before investors make their investment decision.⁴¹ Issuers appreciate, of course, the ultimate relevance of the final transaction agreements as legal instruments that define the terms of the transaction and the rights of security holders and agree that they should be filed once executed, but issuers seriously question their significance to an investor's understanding of the transaction when the statutory prospectus discloses the material terms of those agreements.

Second, an accelerated filing deadline would place undue pressure on the issuer to finalize complex provisions of the transaction agreements in a compressed period of time and could, therefore, lead to a higher incidence of inadvertent drafting errors that would not have occurred with a more reasonable filing deadline. In that situation, neither the interests of investors nor issuers is advanced. Issuers believe that the Commission should seek to avoid such a "lose-lose" scenario by affording issuers a more reasonable amount of time within which to complete and file the final forms of the transaction agreements, and thereby better ensure that the complex cash flow and tax provisions described above are accurately documented. Simply put, the drafting process for these transaction agreements requires time to ensure accuracy and a rule requirement that directs issuers to complete that process in less time will not advance the interests of investors or issuers. To the contrary, while issuers would, of course, undertake to execute this task responsibly, we are concerned that the incidence of drafting errors could nevertheless increase.

ABS issuers also feel that it would be particularly anomalous if they were subjected to a more stringent filing deadline for transaction agreements in ABS offerings – with all of the careful drafting and review that is entailed – as compared with the filing deadline for transaction agreements in corporate securities offerings, particularly since, in both cases, the material terms of those transaction agreements will have been disclosed to investors in the related prospectus.

Third, if ABS issuers are compelled to finalize transaction agreements by the time of the Rule 424(h) filing, it will inevitably delay issuers' access to the market and, in turn, delay pricing and the formation of contracts of sale, exposing both issuers and investors to the vagaries of market movements that may be adverse to one or the other, but without any meaningful corresponding benefit to investors since, once again, the material terms of those transaction agreements will have been disclosed to investors in the Rule 424(h) filing itself.

Fourth, in even the most ordinary of ABS offerings, the proposed accelerated filing deadline will in many cases require the ABS issuer to re-file the same transaction agreements for the same transaction at least *three times*:

⁴¹ Regulation AB contains several provisions requiring that the statutory prospectus describe the material terms of transaction agreements. Item 1108(c)(1), for example, requires a description of the material terms of the servicing agreement; Instruction 1 to Item 1114(a) requires a description of the material terms of any enhancement or support arrangement; Item 1115(a)(2) requires a description of the material terms of derivative instruments; and Item 1100(d)(1) requires a description of the material terms of any agreement with any other material transaction participant. More recently, the Commission has amended Regulation AB to add Item 1104(e) and Item 1121(c), which require descriptions of repurchases and replacements of pool assets that were the subject of a demand to repurchase or replace for breach of representations and warranties concerning the pool assets.

- once, at the time of the Rule 424(h) filing;
- again, at the time of the Rule 424(b) filing, in the event a change (other than a “minor” change) to the agreement occurs; and
- yet again, at or after the time those transaction agreements are executed, since Commission regulations appear to provide that an exhibit to a registration statement filed without signatures would be considered an incomplete exhibit and, therefore, could not be incorporated by reference in any subsequent filing under any Act administered by the Commission (including, for example, an annual report on Form 10-K).⁴²

Issuers observe that there are any number of changes that could occur between the time of the Rule 424(h) filing and the time of the first contract of sale, some of which might trigger the filing of a new Rule 424(h) filing and some of which might not trigger the filing of a new Rule 424(h) filing, but each of which would appear to trigger an obligation to re-file the same agreements again at the time of the Rule 424(b) filing. Issuers are extremely disheartened by a proposal to require the same agreements for the same transaction to be EDGAR-ized and filed again and again because the exercise adds significant costs and other burdens to issuers but with no appreciable benefit to investors.

If, notwithstanding the views and concerns of issuers as outlined in this letter, the Commission were to determine to proceed with its proposal to accelerate the filing deadline for the final forms of transaction agreements, we request that the Commission modify those filing requirements in the manner outlined below:

1. Some ABS issuers maintain issuance platforms that are highly standardized, such that the only changes made to the transaction agreements from one transaction to the next are a limited number of key terms of the securities to be offered. In these cases, the forms of the transaction agreements that are filed and made part of the registration statement at the time the registration statement is initially filed set forth the entirety of the agreement – including the legal structure of the transactions to be completed from time to time, the representations and warranties about the assets underlying the offered securities, the servicing terms and the other rights that would be material to an investor – except for a limited number of key terms of the securities to be offered, each of which is prominently disclosed in the statutory prospectus.⁴³ In effect, the forms of the transaction agreements that are already on file and made part of the registration statement well in advance of any particular takedown transaction reflect the final terms of each takedown and are complete except for a limited number of blanks relating to the key terms of the securities that vary from one takedown to the next.

In these cases, ABS issuers see no purpose whatsoever in requiring that the forms of transaction agreements already on file be updated to reflect the limited number of missing

⁴² See Instruction 1 to Item 601(a) of Regulation S-K.

⁴³ In these highly standardized issuance platforms, the key terms that vary from one transaction to the next are typically identified in the forefront of the prospectus under a “Summary of Terms” (or similar) heading.

key terms by the time of the Rule 424(h) filing because, as noted above, those key terms will be prominently disclosed in the Rule 424(h) prospectus itself. Instead, issuers believe that the final forms of transaction agreements in these cases should be permitted to be filed once executed, on or within a small number of days following the closing date. If the Commission were unwilling to accommodate this request, then even issuers with the most highly-standardized issuance platforms possible (*i.e.*, platforms that are far more standardized than many corporate MTN programs) will in many cases be among the ABS issuers described above that could have to file the same transaction agreements for the same transaction at least three times. Issuers respectfully request, therefore, that the Commission modify the proposed filing requirements to account for the circumstances outlined above.⁴⁴

2. As described above, the drafting and review process for transaction agreements in the structured finance market is time-intensive and, in the case of the complex provisions concerning tax requirements under the REMIC rules, that process is more time-intensive still. In the case of RMBS and CMBS, the transactions may require multiple REMICs, involving complicated mathematical calculations or concepts that must be incorporated into the pooling and servicing agreement. These provisions do not affect payments to the security holders. However, the tax provisions, which often involve complex allocations of cash flow between REMICs, are required to be included in the pooling and servicing agreement in order for the related trust to comply with relevant tax regulations. To ensure accuracy, this aspect of the drafting and review process will often extend several days beyond the closing itself.

In the context of the Commission's current proposal to require that transaction documents, in substantially final form, be filed and made part of the registration statement by the date of the Rule 424(h) filing, we request that the Commission revise its proposal to clarify or provide that, for transactions involving REMICs, the transaction agreements will be considered to be "in substantially final form" even if they omit provisions concerning tax requirements under the REMIC rules, provided that such provisions are included in the final executed forms of those agreements within 4 business days after the related closing.

3. In the 2010 ABS Proposing Release, the Commission proposed Securities Act Rule 430D, which would require that, with respect to each offering, substantially all the information previously omitted from the prospectus filed as part of an effective registration statement, except for pricing and price-dependent information, be included in the Rule 424(h) filing.

In our ASF Reg AB II Broad Comment Letter, we observed that the exception for pricing and price-dependent information is extremely narrow and does not take into account certain other categories of information that, while not technically price-dependent

⁴⁴ We are familiar with Instruction 1 to Item 601(a) of Regulation S-K and, while the principle underlying our request is fully consistent with the principle underlying that Instruction, as a technical matter, that Instruction is too narrow to address the circumstances we outline above.

information, are typically not known or available to the issuer until at or about the time of pricing. We illustrated this point by reference to a transaction involving interest rate or currency swaps, where a preliminary prospectus includes substantially all the information that is required in a full-scale preliminary prospectus, including information about the terms of the swap and the eligibility criteria to serve as a swap counterparty, but would not include information relating to a specific swap counterparty or information dependent on the pricing of the swap (such as the fixed rate in an interest rate swap) because, as a hedge for market risk associated with the offered securities, the optimal pricing of the swap and the counterparty with the most competitive bid cannot be determined by the issuer until at or about the time of pricing for the offered securities.

As a result, for transactions involving derivative instruments, we requested that proposed Rule 430D be revised to permit an issuer to omit information relating to the specific derivative counterparty and information dependent on the pricing of the derivative instrument from the Rule 424(h) filing, provided that such information is conveyed to investors by the time they enter into contracts of sale.

In the context of the Commission's current proposal to require that transaction documents, in substantially final form, be filed and made part of the registration statement by the date of the Rule 424(h) filing, we request that the Commission revise its proposal to clarify or provide that, for transactions involving derivative instruments, the transaction agreements will be considered to be "in substantially final form" even if they omit information relating to the specific derivative counterparty and information dependent on the pricing of the derivative instrument, provided that such information is conveyed to investors by the time they enter into contracts of sale and is included in final forms of the transaction agreements filed once executed, on or within a small number of days following the closing date.

4. As noted above, in connection with its proposal to accelerate the filing deadline for the final forms of transaction agreements to the time of the Rule 424(h) filing, the Commission also indicates that, if the transaction agreements filed with the Rule 424(h) filing remain unchanged at the time the final prospectus under Rule 424(b) is required to be filed, then an issuer would not be required to re-file the same agreements. In footnote 120, the Commission goes on to observe that "minor" changes would not trigger an obligation to re-file the same agreements. The Commission does not, however, provide any insights into the types of changes that would be considered "minor" or how an issuer should proceed to make that assessment. We request, therefore, that the Commission clarify that "immaterial" changes would not trigger an obligation to re-file the same agreements, since issuers are better able to gauge the materiality of a change than to assess whether a change is "minor."

B. Requests for Comment on Asset-Level Information

1. Section 7(c) of the Securities Act – The Commission’s Original Proposals as Compared with Alternative Approaches

As noted by the Commission, Section 942(b) of Dodd-Frank added Section 7(c) to the Securities Act, which requires the Commission to (i) “set standards for the format of the data provided by issuers of an asset-backed security, which shall, to the extent feasible, facilitate the comparison of such data across securities in similar types of asset classes” and (ii) “require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence....”

In the 2011 ABS Re-Proposing Release, the Commission solicits comment on whether (i) the asset-level information requirements included in the 2010 ABS Proposing Release would provide investors with the information Congress has required and (ii) there are alternative ways to provide the information required under Section 7(c) that would address the concerns expressed in the comments the Commission has received on its original asset-level information proposals set forth in the 2010 ABS Proposing Release.

In the 2010 ABS Proposing Release, the Commission proposed new requirements to disclose asset-level information in prospectuses and periodic reports. The asset-level information would include standardized data points that are generally applicable to most asset classes and additional data points for residential mortgages, commercial mortgages, auto loans, auto leases, equipment loans, equipment leases, student loans, floorplan financings, corporate debt and resecuritizations. For credit and charge card ABS, the Commission proposed to require “grouped account data” in lieu of asset-level information.

ASF commented extensively on the Commission’s proposed rules with respect to pool asset disclosure. For private-label RMBS transactions, ASF observed that the Commission’s proposals substantially incorporate the spirit and substance of the asset-level disclosure and reporting packages that had gained industry-wide consensus through ASF’s RMBS Project RESTART™. As a result, we proposed only a small number of specific modifications to those proposed rules.

Since the Credit Card Project RESTART initiative had not reached an industry-wide consensus by the time of the Commission’s proposal, the Commission did not have a similar market-developed proposal regarding disclosure and reporting packages on which to base its proposal for credit and charge card ABS. Therefore, we proposed an alternative disclosure and reporting package for credit and charge card ABS that represents an industry-wide consensus and builds upon the Commission’s proposals, but with important modifications, including more expansive data relating to certain collateral performance metrics.

Similarly, by the time of the Commission’s proposal, the industry had not yet reached an industry-wide consensus on comprehensive disclosure and reporting packages for the auto loan, auto lease and auto floorplan financing sectors. In our ASF Supplemental Comment Letter Regarding Auto ABS Disclosure, we proposed an alternative disclosure and reporting package

for the auto floorplan financing sector that represents an industry-wide consensus and is based on the grouped account data model outlined by the Commission for the credit and charge card sector. We were unable to reach a consensus ASF view on the Commission's auto loan and lease proposals but did present to the Commission separate proposals on behalf of two member groups. All of our issuer members and many of our investor members developed and agreed upon an alternative disclosure and reporting package for auto loan and lease ABS based on the grouped account data model, while many of our other investor members supported a loan-level data model more akin to the Commission's proposal.

In the 2011 ABS Re-Proposing Release, the Commission makes a specific request for additional comment on its asset-level data proposal as applied to equipment loan, lease and floorplan ABS. As of the date of this letter, we are engaged in discussions in an effort to develop balanced and practical recommendations on how best to move forward to achieve the Commission's goals in the context of the equipment loan, lease and floorplan financing sectors. As discussions in these sectors progress, we hope to be in the position to submit a supplemental letter addressing the Commission's proposals concerning disclosure for those sectors.

As the Commission has recognized, its proposals in this area involve significant changes from current disclosure requirements and, as we have previously indicated, it is of paramount importance that any pool asset disclosure ultimately required be both beneficial to investors and feasible and appropriate for issuers to provide. We take this opportunity to again highlight that each asset sector comprising the ABS market itself represents a separate industry within the broader U.S. and global economies, and each of these industries has its own unique issues and considerations, including greater or lesser sensitivities to certain asset-level disclosure requirements.

In response to the Commission's specific request concerning whether its proposed asset-level information requirements would provide investors with the information Congress has required, the views of our issuer and investor members as outlined above and as set forth in greater detail in our ASF Reg AB II Comment Letters remain unchanged. However, our auto and credit card ABS issuer members wish to call to the Commission's attention that a Senate Report, submitted by former Senator Christopher Dodd, from the Committee on Banking, Housing and Urban Affairs included the following remarks about Section 942 of Dodd-Frank:

“The Committee does not expect that disclosure of data about individual borrowers would be required in cases such as securitizations of credit card or automobile loans or leases, where asset pools typically include many thousands of credit agreements, where individual loan data would not be useful to investors, and where disclosure might raise privacy concerns.”⁴⁵

Our auto and credit card ABS issuer members believe that this statement makes clear that Congress did not intend asset-level or loan-level data to be required in the context of credit card

⁴⁵ Senate Report No. 111-176 at 131 (available at http://banking.senate.gov/public/files/Comittee_Report_S_Rept_111_176.pdf.)

or auto loan and lease ABS transactions and that such statement should be appropriately considered by the Commission in implementing Section 942.

2. Additional Requests for Comment on Privately-Issued Structured Finance Products

In the 2010 ABS Proposing Release, the Commission proposed to condition the availability of the safe harbors for privately-issued structured finance products on an issuer's undertaking to provide to investors, upon request, the same information as would be required in a registered offering in connection with initial offers or sales and on an ongoing basis thereafter.

ASF commented extensively on the Commission's proposal, supporting the Commission's goal of ensuring that sophisticated investors are able to consider and understand the risks of their investments, but highlighting a number of significant concerns with the Commission's one-size-fits-all information-delivery standard and offering a more balanced approach in furtherance of the Commission's goal.

Recently, Commission Chairman Mary Schapiro publicly acknowledged market concerns over the Commission's proposal, particularly with respect to privately-issued structured finance products supported by asset classes that have not historically been offered on a registered basis, since there are no explicit disclosure requirements for these more esoteric products against which to benchmark the proposed disclosure standards.⁴⁶ Chairman Schapiro also expressed an interest in a constructive dialogue with market participants in an effort to craft a regulatory solution that appropriately balances the competing concerns presented.

ASF has engaged the Commission staff in preliminary discussions relating to the Commission's proposed information-delivery requirements in an effort to advance this issue. In furtherance of those discussions, ASF has separately prepared Discussion Points outlining our significant concerns with the Commission's original proposal and setting forth an alternative proposal that, we believe, appropriately balances those concerns with the competing concerns outlined in our Discussion Points. We have included as Exhibit E to this letter a copy of our Discussion Points. We look forward to continuing discussions with the Commission staff and share the Commission's goal of crafting a regulatory solution that appropriately balances the competing concerns presented.

In the 2011 ABS Re-Proposing Release, the Commission solicits comment on whether there should be limitations on the scope of the asset-level information requirements as applied to certain types of privately-issued structured finance products. In response to this request, we refer the Commission to the alternative proposal set forth in our Discussion Points, for which there is broad support among our members.

⁴⁶ For Commission Chairman Mary Schapiro's keynote address at ASF's 2011 Annual Meeting on June 22, 2011, see <http://sec.gov/news/speech/2011/spch062211mls.htm>.

III. TRANSITION PERIOD

In the 2011 ABS Re-Proposing Release, the Commission reiterates its view that compliance dates for its Regulation AB II rule proposals should not extend beyond a year after adoption of the new rules. Likewise, we reiterate that our views on a transition period – including those relating to (i) the effective date for the new rules and regulations, (ii) the prospective application of the new rules and regulations, and, equally important, (iii) the treatment of ABS supported by legacy assets (including resecuritizations supported by legacy underlying securities) – remain as set forth in our ASF Reg AB II Comment Letters. We propose, therefore, that the effective date be no earlier than the later of one year following the date of publication of the related final rules in the Federal Register and January 1, 2013.

ASF Comment Letter re Reg AB II Re-Proposal
October 4, 2011
Page 32

ASF very much appreciates the opportunity to provide the foregoing comments in response to the Commission's 2011 ABS Re-Proposing Release. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me via telephone at 212.412.7107 or via email at tdeutsch@americansecuritization.com, Evan Siegert, ASF Managing Director, Senior Counsel, via telephone at 212.412.7109 or via email at esiegert@americansecuritization.com, or ASF's outside counsel on these matters, Michael Mitchell of Orrick, Herrington & Sutcliffe LLP, via telephone at 202.339.8479 or via e-mail at mhmittell@orrick.com, and Jordan Schwartz of Cadwalader, Wickersham & Taft LLP, via telephone at 212.504.6136 or via e-mail at jordan.schwartz@cwt.com.

Sincerely,



Tom Deutsch
Executive Director
American Securitization Forum

cc: Via Hand Delivery

The Honorable Mary L. Schapiro, Chairman
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
Paula Dubberly, Deputy Director (Policy and Capital Markets), Division of Corporation Finance
Katherine W. Hsu, Chief, Office of Structured Finance
Rolaine S. Bancroft, Senior Special Counsel, Office of Structured Finance
David Beaning, Special Counsel, Office of Structured Finance
Robert Errett, Special Counsel, Office of Structured Finance
Jay Knight, Special Counsel, Office of Structured Finance

Requested Modifications to Proposed Certification

§229.601 (Item 601) Exhibits.

(b) (36) *Certification for shelf offerings of asset-backed securities.* For any offering of asset-backed securities (as defined in §229.101) made on a delayed basis under §230.415(a)(1)(vii), provide the certification required by General Instruction I.B.i.(a) of Form SF-3 (referenced in §239.45) exactly as set forth below:

Certification

I, [identify the certifying individual,] certify as of [the date of the final prospectus under Securities Act Rule 424 (12 C.F.R. 239.424)] that:

1. I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] (the “offered securities”), and ~~am~~ I am, or one or more senior officers under my supervision are, familiar with the structure of the securitization described therein, ~~including without limitation~~ the material characteristics of the securitized assets underlying the offering (the “securitized assets”), the material terms of any internal credit enhancements and the material terms of ~~all~~ material contracts and other arrangements entered ~~in~~ into ~~to~~ ~~the~~ effect the securitization;

2. Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; and

3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, ~~fairly present~~ describe in all material respects (i) the characteristics of the securitized assets ~~underlying the offering described therein and~~ (ii) the risks of ownership of the ~~asset-backed~~ offered securities ~~described therein, including all~~ (iii) the credit enhancements and ~~all risk factors~~ (iv) the material risks relating to the securitized assets ~~underlying the offering~~ that would adversely affect the cash flows ~~sufficient~~ available to service payments on the ~~asset-backed~~ offered securities in accordance with their terms as described in the prospectus; and

~~4. Based 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 to service expected payments on the asset-backed securities offered and sold pursuant to~~

The foregoing certifications are given subject to any and all defenses available to me under the federal securities laws, including any and all defenses available to an executive officer that signed the registration statement of which the prospectus referred to in this certification is a part, or that could be available to me under the controlling persons or other relevant liability provisions of the federal securities laws.

Date _____

[Signature]

[Title]

This certification should be signed by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor, as required by General Instruction I.B.1(a) of Form SF-3.

Requested Modifications to Performance Certification

If the Commission determines to proceed with a performance certification, we believe that it should be modified as follows:

“[]]. Based on my knowledge, taking into account the material characteristics of the securitized assets ~~underlying the offering~~, the structure of the securitization, ~~including internal~~the nature and material terms of any credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, there is a reasonable basis to conclude that the securitization is ~~designed~~structured to produce, ~~but is not guaranteed by this certification to produce~~, cash flows at times and in amounts sufficient to service ~~expected payments on the asset backed securities offered and sold pursuant to the registration statement~~payments on the offered securities in accordance with their terms as described in the prospectus.

The certification set forth in paragraph [] above is a forward-looking statement that is subject to risks and uncertainties. The certification is an expression of my current belief only and is not a guarantee that the securitization will produce such cash flows. There may be current facts not known to me and there may be future developments that would cause my view to change or that would adversely affect the timing and sufficiency of such cash flows. Factors that could adversely affect the timing and sufficiency of such cash flows include the risks and uncertainties described in the prospectus relating to the securitized assets and ownership of the offered securities.”



**AMERICAN SECURITIZATION FORUM
ASF PROJECT RESTART™
ASF MODEL RMBS REPURCHASE PRINCIPLES RELEASE
AUGUST 30, 2011**

The American Securitization Forum¹ (“ASF”) supports efforts to align the incentives of issuers and originators with investors of residential mortgage-backed securities (“RMBS”) and we believe these incentives should encourage the application of sound underwriting standards by both the originator and securitizer in connection with the mortgage loans that are securitized. ASF began the process to better align incentives and information among securitization participants over three years ago, when we launched our Project on Residential Securitization Transparency and Reporting (“ASF Project RESTART”),² which is an industry-developed initiative to help rebuild investor confidence in RMBS. As part of this effort, ASF developed and finalized loan-level disclosure and reporting packages (the “ASF RMBS Disclosure and Reporting Packages”) that have since been proposed by the Securities and Exchange Commission through Regulation AB II,³ as well as a set of model representations and warranties (the “ASF RMBS Model Reps”) aimed at infusing transparency and comparability across securitization transactions. Today, ASF releases a model set of RMBS repurchase principles (the “ASF Model RMBS Repurchase Principles”) for investigating, resolving and enforcing remedies with respect to representations and warranties in RMBS transactions involving newly originated mortgage loans. The ASF Model RMBS Repurchase Principles appended to this release have been developed by our broad membership and represent a consensus recommendation by, in particular, our RMBS issuer and investor members for future transactions.

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), Congress also decided to address alignment of incentives, but opted to employ credit risk retention and assign a team of regulators with the difficult task of implementing regulations that attempt to create more “skin in the game,” but still permit appropriate access to credit. While ASF believes that appropriately developed risk retention rules can aid in achieving an appropriate alignment of incentives, we believe that the rules proposed by the regulators (the “Proposed Risk Retention Rules”) ⁴ are not sufficiently tailored to the various asset classes that are securitized and will likely cause a host of negative unintended consequences.⁵ Instead, ASF

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. The ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

² For more information on ASF Project RESTART, see <http://www.americansecuritization.com/restart>.

³ Regulation AB II effectively responds to the disclosure mandate of Section 942 of Dodd-Frank.

⁴ See <http://www.sec.gov/rules/proposed/2011/34-64148.pdf>.

⁵ Our comprehensive comment letter, dated June 10, 2011, addressing the Proposed Risk Retention Rules can be found at http://www.americansecuritization.com/uploadedFiles/ASF_Risk_Retention_Comment_Letter.pdf and our supplemental

continues to advocate that “skin in the game” for originators and issuers of RMBS would be better implemented through appropriate representations and warranties that issuers provide with respect to securitized loans coupled with an effective repurchase framework that is consistent with our ASF Model RMBS Repurchase Principles.

Without exception, our originator, issuer and investor members view appropriate representations and warranties and effective enforcement provisions as significant risk retention for RMBS transactions. In fact, ASF believes that risk retained through representations and warranties results in an even greater amount of skin in the game than the 5% risk retention mandated by Dodd-Frank because a repurchase is for 100% of the loan’s unpaid principal balance. Furthermore, the principal goal of any risk retention initiative should be to establish and reinforce commercial incentives for originators and issuers to create and fund mortgage loans that conform to stated underwriting standards and other securitization eligibility criteria, thereby making those parties economically responsible for the stated attributes and underwriting quality of securitized loans. Our RMBS issuer and investor members strongly agree that the ASF Model RMBS Repurchase Principles effectively achieve that goal, and in a more direct manner than the Proposed Risk Retention Rules.

Appropriate “skin in the game” for securitization transactions begins with representations and warranties, which are used to allocate the origination risk of mortgage loans between the issuers of the securities and the investors who purchase them. The allocation of origination risks begins when a mortgage loan is sold by an originator for inclusion in a securitization trust. This sale is accompanied by representations and warranties regarding the mortgage loans being sold, including representations and warranties relating to the mortgaged property securing the loan, the documentation for the loan, the manner in which the loan was originated and its compliance with applicable law. Generally, if a loan is found to have breached the representations and warranties and such breach is sufficiently material, the loan can be “put back” or returned to the seller who is obligated to repurchase it, essentially effecting a 100% risk retention. Much like a defective product would be returned to the store from which it was sold, a materially defective mortgage loan would be returned to the issuer or other representing party through its removal from a securitization trust for the applicable repurchase price (or a qualified substitute loan, if applicable).

Many investors believe that the repurchase process set forth in most existing securitization contracts does not provide applicable parties with an adequate means to pursue a repurchase demand nor does it effectively specify mechanisms to identify breaches or resolve a question as to whether a breach occurred. For these reasons, our membership began working towards the ASF Model RMBS Repurchase Principles to delineate a consensus framework for enforcing remedies with respect to representations and warranties in RMBS transactions by, among other things, establishing the role of a new “independent reviewer” that will have access to the files of applicable mortgage loans to determine if a breach has occurred and requiring a robust mechanism for the investigation and resolution of disputes regarding breaches of transaction representations and warranties. The basic elements of the framework involve (i)

review of pool assets by an independent third party that is given access to the loan files for compliance with representations and warranties following the occurrence of an agreed-upon “review event,” (ii) recommendation by the independent third party to the securitization trustee of whether or not to demand repurchase of, or substitution for, the pool asset by the representing party and (iii) if the representing party disputes the independent third-party’s findings, submission of the dispute to a binding dispute resolution process. We believe that the ASF Model RMBS Repurchase Principles are generally consistent with the re-proposed conditions for shelf eligibility for asset-backed securities proposed by the Securities and Exchange Commission on July 27, 2011 (Release Nos. 33-9244; 34-64968).⁶ Insofar as the re-proposed conditions provide for (1) the appointment of an unaffiliated “credit risk manager” to review pool assets for compliance with transaction representations and warranties, (2) a dispute resolution mechanism involving mediation or arbitration if the obligated party does not repurchase the relevant assets after demand and a specified time for investigation and (3) a mandatory mechanism to facilitate direction of trust actions by investors, it reflects the same philosophical approach underpinning the ASF Model RMBS Repurchase Principles, although ASF intends to review the particulars of the proposals and comment as appropriate.

ASF believes that the strong third-party mechanism set forth in the ASF Model RMBS Repurchase Principles will ensure that representations and warranties in future RMBS transactions are subject to clearly defined enforcement mechanism, with the beneficial effect of causing asset originators to exercise caution in underwriting and deterring transfers of substandard assets to securitization vehicles. We recommend that all future RMBS transactions of newly-originated mortgage loans include a repurchase framework that is consistent with the ASF Model RMBS Repurchase Principles.⁷

* * * * *

⁶ See <http://www.sec.gov/rules/proposed/2011/33-9244.pdf>.

⁷ ASF is recommending the implementation of the ASF Model RMBS Repurchase Principles to help align incentives of issuers and investors in future RMBS transactions. ASF is not mandating the implementation or adoption of any recommendation contained in this release. This release should not be interpreted to create or grant any enforceable rights, including repurchase rights, to any party nor should any party read any statement contained herein as creating or granting to such party any such enforceable rights. The enforceable rights of parties to a particular transaction continue to be governed by the contracts and agreements associated with such transaction. Finally, nothing in this release should be read as any statement or acknowledgment as to the materiality of the ASF Model RMBS Repurchase Principles for securities law purposes as such materiality can only be determined on a case by case basis.



APPENDIX

ASF Model RMBS Repurchase Principles August 30, 2011

1. Going forward, each Pooling and Servicing Agreement or comparable operative document governing publicly offered residential mortgage-backed securities (“RMBS”) transactions that provides for repurchase or substitution of, or indemnification with respect to, breaches of representations and warranties regarding the mortgage loans (each, a “Pooling Agreement”) should provide for an independent reviewer (the “Independent Reviewer”) who is appointed and in place on the closing date. A free writing prospectus relating to the RMBS should disclose the identity of the Independent Reviewer and describe, in clear language, the relevant provisions of the Pooling Agreement dealing with the Independent Reviewer.
2. The Independent Reviewer should be independent of (i.e. should not control, be controlled by or be under common control with) the sponsor, depositor, trustee, master servicer and servicer of the RMBS, the party making the representations (the “Representing Party”), any investor in the RMBS, any insurer of the RMBS, or any of their affiliates, and of any entity engaged to perform due diligence in connection with the issuance of the RMBS. The Independent Reviewer should have no pecuniary interest in whether remedial action with respect to breaches of representations and warranties is required to be taken under the Pooling Agreement.
3. The Independent Reviewer should have such knowledge and experience with respect to mortgage loan origination and underwriting as is necessary to perform its review obligations under the Pooling Agreement and to satisfy the criteria of each hired rating agency rating the particular RMBS transaction and should have sufficient internal controls necessary to comply with its requirements under the Pooling Agreement and applicable law including, without limitation, all requirements of Regulation AB. The Pooling Agreement should provide for the annual delivery by the Independent Reviewer of an officer’s certificate to the effect that the Independent Reviewer continues to meet the eligibility criteria of the Pooling Agreement as of the date of the certification.
4. Within a reasonable and specified time following the occurrence of a “Review Event” specified in the Pooling Agreement, the Independent Reviewer should review each mortgage loan that either (i) was previously liquidated or became real estate owned (REO) or (ii) has become delinquent for a period specified in the Pooling Agreement but has not yet been liquidated for the purpose of determining whether a breach exists of a representation and warranty made with respect to such loan that meets the threshold for remedial action specified in the Pooling Agreement.

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5. Within a reasonable and specified time following the occurrence of a Review Event, the Independent Reviewer should have access to copies of all credit files, collateral files, servicing files and of the underwriting guidelines used to originate the mortgage loans as may be required by it in order to perform its review. In order to facilitate access to such files and/or guidelines maintained by the Representing Party or another person (the “Retaining Party”) in the event of the bankruptcy or insolvency of such party, the Pooling Agreement or other operative documents governing the RMBS should provide for (i) the delivery of electronic copies of any credit files or applicable underwriting guidelines maintained by a Retaining Party to the trustee of the RMBS in connection with the issuance of the RMBS or upon the occurrence of a “credit event” (such as a ratings downgrade or other event set forth in the operative documents and disclosed in a free writing prospectus) with respect to such Retaining Party and (ii) delivery of such files or guidelines by the trustee to the Independent Reviewer in the event that such Retaining Party is the subject of, or has been discharged from its file delivery obligations by, a bankruptcy or insolvency proceeding, provided that the trustee is reimbursed from the trust’s assets for the reasonable cost of effecting such delivery.
6. A Review Event should be based on the occurrence of objective factors, which may, as appropriate to the transaction, take into consideration collateral attributes, collateral performance, transaction features and the level of pre-issuance due diligence performed on the mortgage loans. Examples of objective factors would be cumulative losses, delinquencies or average loss severity on the mortgage loans in the pool exceeding a threshold specified in the Pooling Agreement.⁸ The Pooling Agreement may provide that Review Events cease to become applicable under the circumstances specified in the Pooling Agreement, such as, for example, after a specified interval following the issuance date of the RMBS or if only a de minimis number of mortgage loans previously reviewed were found to have had breaches of representations and warranties that meet the Pooling Agreement threshold for remedial action.
7. The Independent Reviewer should, within a reasonable and specified time following its review, advise the trustee regarding whether, in its opinion, a breach of a representation or warranty has occurred that meets the threshold for remedial action specified in the Pooling Agreement, and the trustee or its agent should demand in accordance with the procedures in the Pooling Agreement that the Representing Party cure the breach or take the applicable remedial action by the end of the specified cure period. The Representing Party should be entitled to present the trustee or the Independent Reviewer with evidence rebutting such determination during the cure period. Once a loan has been reviewed by the Independent Reviewer following the occurrence of a Review Event, such loan may not be eligible for further review by the Independent Reviewer following the occurrence of any subsequent Review Event.

⁸ Our investor members believe that it is also appropriate for investors to be able to trigger a Review Event if an objective trigger proves to be ineffectual. Our issuer members believe that the inclusion of a unilateral trigger conflicts with an otherwise independent process that is defined and fixed at issuance by enabling reviews at the direction of an interested party.

8. The trustee or its agent should enforce the Representing Party's obligations and should have the authority to bring action on behalf of the trust. For example, the trustee or its agent should be required to enforce the obligation of the Representing Party (or each Retaining Party, if not the Representing Party) to deliver copies of credit files and/or underwriting guidelines to the trustee upon the occurrence of a credit event.
9. A Representing Party that disagrees with the findings of the Independent Reviewer may, if the trustee or the Independent Reviewer has not withdrawn its demand by the expiration of the cure period, request that the trustee or its agent submit the repurchase demand to a binding dispute resolution process specified in the Pooling Agreement.
10. Certificateholders having the requisite percentage of ownership specified in the Pooling Agreement should be entitled to remove the Independent Reviewer, subject to the appointment of a duly qualified successor that meets the criteria set forth in the Pooling Agreement. To facilitate the administration of such right of removal, the Pooling Agreement should provide for a mechanism maintained by the trustee to facilitate either communication among, or a vote by, beneficial owners of certificates, such as a voluntary investor registry or other mechanism. The Pooling Agreement should specify the method for selecting a successor Independent Reviewer.
11. The monthly distribution date statement delivered to holders of the RMBS should disclose the occurrence of any Review Event during the reporting period.

Proposed Certification Relating to Suspension of Independent Review Requirement¹

For ABS not employing a master trust structure:

“[___]. Based on my knowledge, during the two-year period preceding the date of the first bona fide offer of the offered securities, demands to repurchase or replace pool assets for breach of the representations and warranties concerning those pool assets with respect to asset-backed securities issued or sponsored by the depositor or its affiliates involving the same asset class that is supporting the offered securities have not exceeded one percent of the original principal balance of the pool assets supporting any such asset-backed securities.”²

For ABS employing a master trust structure:

“[___]. Based on my knowledge, during the two-year period preceding the date of the first bona fide offer of the offered securities, demands to repurchase or replace pool assets for breach of the representations and warranties concerning those pool assets with respect to asset-backed securities issued or sponsored by the depositor or its affiliates involving the same asset class that is supporting the offered securities have not exceeded one percent of the aggregate average outstanding principal balance of the pool assets supporting any such asset-backed securities during such two-year period.”

¹ This certification would be included if the depositor is relying on the suspension of the independent review requirement set forth in the eligibility requirements of Form SF-3 as outlined in our letter.

² In the context of ABS backed by leases, the phrase “original principal balance” refers to the “securitized pool balance as of the measurement date,” as used in each of Items 1101(c)(2)(v)(A) and (B) of Regulation AB.



**AMERICAN SECURITIZATION FORUM¹ DISCUSSION POINTS
PRIVATELY-ISSUED STRUCTURED FINANCE PRODUCTS
PROPOSED INFORMATION REQUIREMENTS
OCTOBER 4, 2011**

- **Commission Proposal.** In connection with its “Regulation AB II” rule proposals, the Commission has proposed to condition the availability of the safe harbors for privately-issued structured finance products on an issuer’s undertaking to provide to investors, upon request, the same information as would be required in a registered offering in connection with initial offers or sales and on an ongoing basis thereafter.²
- **ASF Concerns and SQIB Proposal.** ASF submitted a comment letter on August 2, 2010 detailing our significant concerns with this proposal, including the following:³
 - ⌘ The proposed information requirements eliminate the regulatory distinction between public and private offerings of structured finance products, risk compromising the essential function of the private placement market as a means of efficient capital formation and would be tantamount to a determination by the Commission that a class of investors that are able to fend for themselves in the purchase of structured finance products does not exist.
 - ⌘ The proposed information requirements also fail to recognize that an array of structured finance products that are offered and sold in the private placement market operate in that market because the disclosure framework for the registered market is too rigid and, therefore, ill-suited to the structure and terms of those products and transactions.⁴

¹ The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

² See Asset-Backed Securities, 75 Fed. Reg. 84 (May 3, 2010).

³ For the ASF Reg AB II Broad Comment Letter, see:

<http://www.americansecuritization.com/uploadedFiles/ASFRegABIICommentLetter8.2.10.pdf>. Our views on the Commission’s proposal are set forth in Section V of this letter, at pp. 88-97.

⁴ We note that the Commission has requested comment on the appropriate disclosure standards for privately-issued structured finance products that do not necessarily meet the definition of “asset-backed security” set forth in Regulation AB. See Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, 76 Fed. Reg. 151 (August 5, 2011) pp. 47970-47971. Our Alternative Proposal as outlined in

- ⊠ Issuers operate in the private placement market for a number of other important and valid reasons. For example, (i) an issuer may not have access to all of the information required for a registered transaction, (ii) the underlying assets or transaction structure may not lend themselves to the delivery of information required for registered transactions, or (iii) the issuer's issuances may not be of a sufficient scale or the market for a particular product may be sufficiently limited that the costs and difficulties of compliance with the disclosure standards for a registered transaction make the private placement market the only viable alternative.
- ⊠ The proposed information requirements will effectively extinguish the market for many types of financial products and will severely constrain the development of new asset types and financing techniques.
- ⊠ The proposed information requirements will limit the private market to the same issuers that participate in, and the same products that are available in, the registered market. Consequently, the array of products that have previously had a place in the private market but no corresponding place in the registered market will no longer have a place in the capital markets.
- ⊠ These deleterious consequences can be averted by the alternative proposal outlined in our previous broad comment letter. Our proposal builds upon nearly 80 years of legislation, case law and Commission regulations that recognize the ability of institutional investors to make investment decisions without the protections mandated by the registration and information-delivery requirements of the Securities Act. We strongly urge the Commission to adopt our proposal to establish criteria for identifying "qualified institutional buyers of structured finance products" (SQIBs) and avoid what we believe to be ill-advised attempts to define and apply a one-size-fits-all information-delivery standard across the vast array of products comprising the private market.
- ⊠ We also note that our proposal is broadly supported by the ASF membership, including issuers and investors. Some investors are concerned that issuers that have historically operated in the registered market might seek to arbitrage the differing information-delivery standards between the registered and private markets. Our issuer members believe, however, that investor concerns about information arbitrage are overstated and unwarranted, noting that issuers have always had the option of choosing between the more heavily-regulated registered market and the private market, and that information arbitrage has never been an issue, even after the adoption of Regulation AB with its enhanced disclosure and reporting requirements. Issuers also observe that they have ample incentives to

these Discussion Points is intended as our response to the Commission's request for comment. As noted below, our Alternative Proposal would apply to *all* structured finance products (including products that meet the Regulation AB definition of "asset-backed security") other than asset-backed commercial paper (ABCP) issued by ABCP conduits.

produce fulsome disclosure, including the liability framework of the federal securities laws and the disclosure standards applicable in the registered markets (which operate as a benchmark for materiality).⁵

- **ASF Alternative Proposal**. To the extent the Commission continues to have concerns about information gaps in the private market, it is imperative that any regulatory response appropriately balance those concerns with the competing concerns outlined above and detailed in our previous broad comment letter.⁶ To that end, we outline here a modified version of our alternative proposal which seeks to balance these competing concerns:
 - ⌘ The term “qualified institutional buyer” in Rule 144A would remain defined as it is today and there would not be a different version for purposes of the purchase of structured finance products.
 - ⌘ The information-delivery requirements included in the Commission’s rule proposals would be replaced with principles-based requirements intended to serve as workable disclosure standards across the array of structured finance products offered for sale in the private placement market other than asset-backed commercial paper (ABCP) issued by ABCP conduits, which would be subject to separate disclosure standards as detailed in our separate comment letter on August 2, 2010 submitted on behalf of ASF’s ABCP sponsor, dealer and investor members.⁷
 - ⌘ Under this approach, the availability of the safe harbors for privately-issued structured finance products would be conditioned on an issuer’s undertaking to provide to investors, upon request:
 - (i) in connection with initial offers or sales, the following information (which information shall be reasonably current in relation to the date of such initial offer or sale):
 - material information regarding the role, function and experience in relation to the securities and the asset pool of each material transaction party;
 - material information regarding the terms of the securities, the structure of the transaction and the terms of the offering;

⁵ See ASF Reg AB II Broad Comment Letter, at pp. 95-96.

⁶ *Id.* Many of our members that invest in structured finance products that have historically been offered in the private market question the extent to which sophisticated investors have been unable to obtain access to information relevant to their investment decision and believe that, in fact, investors in the private market for structured finance products have insisted upon and received robust disclosure, particularly at the time of issuance of the product.

⁷ For the ASF Reg AB II ABCP Comment Letter, see:

<http://www.americansecuritization.com/uploadedFiles/ASFRegABIABCPCCommentLetter8.2.10.pdf>.

- material information regarding the characteristics, performance and servicing of the asset pool;
- material information regarding any enhancement mechanism associated with the securities; and
- copies of all instruments defining the rights of security holders and other material transaction documentation relating to the securities.

(ii) in connection with resales on an ongoing basis thereafter, (a) information that the issuer provided to investors in accordance with clause (i) above and (b) the following additional information (which additional information shall be reasonably current in relation to the date of such resale):

- material information regarding distributions on the securities and performance and servicing of the asset pool; and
- copies of all instruments defining the rights of security holders and other material transaction documentation relating to the securities in their then-current form.

- ⌘ For purposes of information provided in accordance with clauses (i) and (ii)(b) above, the requirement that such information be *reasonably current* will be presumed to be satisfied if: (x) in the case of quantitative statistical data, the information is as of a date within 6 months of the date of such initial sale or resale, as applicable, (y) in the case of financial statements or summary financial data, the information is as of a date within the periods specified in Rule 144A(d)(4)(ii) in relation to such initial sale or resale, as applicable, and (z) in all other cases, the information is as of a date within 12 months prior to the date of such initial sale or resale, as applicable.
- ⌘ If any of the information identified above is unknown or not reasonably available to the issuer, either because obtaining that information would involve unreasonable effort or expense or because that information rests peculiarly within the knowledge of another person not affiliated with the issuer, the issuer would not be required to provide that information, so long as the issuer provides the information on the subject that it does possess or that is reasonably available to it, and the issuer provides information to investors showing that unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information.
- ⌘ As noted above, there are a number of important and valid reasons why issuers that operate in the private placement market may not satisfy the information-delivery requirements that apply to registered transactions, and why, if the information-delivery requirements of the private placement safe harbors are expanded, a principles-based standard is necessary. We believe, therefore, that a

note should be added to the relevant information-delivery provisions of each safe harbor to the following effect:

“The information that is material from one issuer and product to the next will depend on the facts and circumstances of the particular transaction, including, but not limited to, the nature and characteristics of the underlying collateral and the structure of the transaction. As a result, this information-delivery undertaking is purposefully principles-based and should be construed flexibly, and not rigidly, across the array of products and collateral comprising the structured finance market. Moreover, we recognize that, for one reason or another, an issuer may not satisfy the disclosure standards applicable for a registered transaction. An issuer may not have access to all of the information required for a registered transaction, the underlying assets or transaction structure may not lend themselves to the delivery of information required for a registered transaction or the issuer’s issuances may not be of a sufficient scale or the market for a particular product may be sufficiently limited that the costs and difficulties of compliance with the disclosure standards for a registered transaction are too significant.”

- **Rule 192 Concerns.** As noted above, if the information-delivery requirements of the private placement safe harbors are expanded, it is imperative that the Commission adopt principles-based requirements that are workable across the array of structured finance products offered for sale in the private placement market. Proposed Rule 192 would require an issuer to honor its information-delivery undertaking and would make the failure to provide the required information a fraud in the offer of the securities.

We strongly believe that an issuer operating under a principles-based information-delivery standard should not have to do so with uncertainty about whether the Commission might recharacterize the scope of its information-delivery undertaking after the fact, particularly because the information that is material in any case will depend on the facts and circumstances of the particular transaction. Moreover, in each case, the issuer will be subject to the antifraud provisions of Exchange Act Section 10(b) and Rule 10b-5, which provide the issuer with ample incentives to ensure that the information that is provided to investors is materially accurate and complete and provide the Commission with the powers necessary to hold an issuer accountable if it fails to do so. As a result, we believe that proposed Rule 192 should be eliminated, to remove the risk that an issuer could be challenged after the fact on the scope of its undertaking, separate and apart from a challenge to the quality of its disclosures.

- **Transition Issues.** As indicated in our previous broad comment letter, as a matter of transition it is imperative that any amendments to the safe harbors apply only prospectively, to issuances of structured finance products, and to resales of such

products initially issued, on and after a specified effective date for those amendments. Conversely, structured finance products that are initially issued before the specified effective date, and resales of those products at any time, should be grandfathered in their entirety from the amendments and such transactions should continue to be exempt from the registration provisions of the Securities Act so long as they are undertaken in compliance with the exemption framework as in effect at the time those products were initially issued.

Similarly, and by extension, we strongly believe that resecuritizations of legacy underlying securities (i.e., underlying securities issued before the effective date) should be grandfathered in their entirety from any amendments to the safe harbors. Issuers of those underlying securities will have no contractual obligation to provide the types of information contemplated by any expanded information-delivery standards, making it extremely difficult, if not impossible, for ABS supported by legacy underlying securities to meet such standards.⁸

- **Proposed Form 144A-SF and Revisions to Form D.** For the avoidance of doubt, our comments and concerns with respect to proposed Form 144A-SF and corresponding revisions to Form D, as set forth in our previous broad comment letter, continue to be relevant under the modified version of our alternative proposal outlined above.

⁸ As indicated in our previous broad comment letter, we believe it is essential that ABS supported by legacy assets in general, including resecuritizations supported by legacy underlying securities, be grandfathered and not be subject to the new and amended rules, at least to the extent that information called for under those rules with respect to legacy assets is unknown or not available to the issuer without unreasonable effort or expense. In addition to the complete absence of such disclosure in prospectuses and ongoing reports historically, in many cases asset-backed issuers and other transaction parties will not have maintained such information and, in any event, issuers may have no contractual entitlement to such information.