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9 November 2011

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

**Re: Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities--File No. S7-08-10**

Dear Ms. Murphy:

CFA Institute<sup>1</sup> appreciates the opportunity to comment on the Securities and Exchange Commission's re-proposal of requirements relating to conditions for offering asset-backed securities (ABS) on a shelf-eligibility status. CFA Institute represents the views of investment professionals before standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues that affect the efficiency, integrity and accountability of global financial markets.

**Executive Summary**

*Conditions for Shelf-Registration*

With respect to this re-proposal, we generally support the types of conditions being imposed for shelf-registration, including requiring a written certification by the depositor addressing disclosures in the prospectus and the design of the securitization, as well as a requirement for appointment of a "credit risk manager" to review the assets underlying the securitization upon the occurrence of certain "trigger events." We believe that both conditions will result in higher-quality ABS involved in shelf registration.

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<sup>1</sup> CFA Institute is a global, not-for-profit professional association of over 111,000 investment analysts, advisers, portfolio managers, and other investment professionals in 139 countries, of whom over 101,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 135 member societies in 58 countries and territories.



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### *Time to Review Prospectus*

In keeping with our past positions on conditions for shelf-registration of ABS, we continue to support providing investors more time with which to evaluate the terms, structure and components of ABS offerings. We also continue to support a condition for shelf-registration that requires the providing of a preliminary prospectus at least five business days prior to commitment.

### *Underlying Transaction Documents*

Similar to our support for providing investors with adequate time to review a prospectus, we also support filing the underlying transactions agreements that are in substantially final form when filing the preliminary prospectus. The information provided in these agreements helps enable meaningful investment decision-making by investors.

## **Discussion**

### **A. Conditions for Shelf-Eligibility**

CFA Institute appreciates the approach taken by the SEC over the last year to address needed changes in the ABS market and have generally supported proposals to modify conditions for shelf-registration.<sup>2</sup> We also appreciate the proposed changes to its 2010 rule proposal required in this re-proposal due to certain provisions implemented by the Dodd-Frank Act.<sup>3</sup> We provide comments to certain other aspects of this re-proposal below.

### *Certification*

As one of the proposed conditions for shelf-registration, the depositor's chief executive officer or executive officer in charge of securitization would have to file a certification at the time of each takedown addressing disclosures in the prospectus and the design of the securitization. In particular, the officer would have to certify his or her review of the accuracy of the information contained in the prospectus and the expectation that the securitization will produce enough

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<sup>2</sup> See 20 August 2010 letter from James C. Allen and Linda Rittenhouse to Elizabeth Murphy, Secretary—Securities and Exchange Commission (File No. S7-08-10, Asset-Backed Securities) and 15 July 2004 letter from Patrick M. Miner and James C. Allen to Jonathan G. Katz, Secretary—Securities and Exchange Commission re Asset-Backed Securities (File No. S7-21-04).

<sup>3</sup> For example, ongoing Exchange Act reporting—a condition addressed in the SEC's 2010 proposal—will be required by Dodd-Frank, and thus is not a subject of this re-proposal. Likewise, Section 941 of the Dodd-Frank Act now requires regulations relating to risk retention, negating a need to readdress it through this re-proposal. While not applicable with regard to this proposal, we continue to believe that risk retention should have no bearing on whether an issuer is worthy of benefitting from the shelf-registration process.



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money to service payments on the ABS. So as not to imply a *guarantee* that the securitization would, in the future, produce cash flows that would cover the expected payments on the ABS, the actual text of the certification will state that it does not serve as a guarantee. Instead, the focus will be on the design of the securitization and on what the signer of the certification knew at the time of signing.

We agree that this required certification may result in a more careful review of the disclosure and transaction by the issuer, and ultimately in higher-quality ABS involved in shelf eligibility. For this reason, we support the proposed requirement that an officer sign the certification, as opposed to engaging “an independent evaluator” for this purpose.

We also support the recognition that the signer cannot be held to a standard of future conditions or as to the payment of the securities, but can only certify as to what is known at the time of signing. To this end, we recommend that the certification that is adopted explicitly state these limitations and that there may be certain facts and future developments resulting in insufficient cash flows.

### ***Representations and warranties***

This re-proposal is proposing as a second condition for shelf eligibility that underlying transaction documents for ABS shelf offerings include provisions that require the trustee to appoint a “credit risk manager” to review the underlying assets when certain “trigger events” occur. This new approach would replace how the 2010 proposal handled representations and warranties in ABS offerings and resulting disputes related to them. As now proposed, the credit risk manager would be required to review underlying assets for compliance with the representations and warranties upon occurrence of two trigger events:

- (1) when the credit enhancement requirements, such as required reserve account amounts or over-collateralization percentages as specified in the underlying transaction agreements, are not met; and
- (2) At the direction of investors pursuant to the processes provided in the transaction agreement and disclosed in the prospectus.

By setting this minimum standard, the method for addressing breaches of representations or warranties is established without restricting the ability of parties to contract for a review upon the occurrence of other events. We agree that this credit risk manager should not be an affiliate of any sponsor, depositor, or servicer, so as to ensure the objectivity of the review.

We appreciate that these two trigger events are intended to set the minimum requirements that would warrant a review by the credit risk manager. As proposed, the transaction parties could agree to include others in their specific agreements that could also compel a review.



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We also support the proposed mechanism for meeting the second of the trigger events noted above. Specifically, the proposal carries a provision that companies include in Form 10-D filings any request from an investor to communicate with other investors. This is particularly important, given the recognition that investors have long been frustrated by the inability to find and communicate with each other in order to enforce certain rights provided for in the transaction agreements.

By requiring transaction agreements to include a process by which investors can be assured their request to communicate with each other should substantially increase their ability to address concerns relating to representations and warranties. In recognizing this need, we support the proposed restrictions that would not allow ABS investors to use this process for marketing or identifying potential customers.

## **B. Disclosure and Filing Deadlines**

### ***Time to review prospectus***

As noted in our prior comment letter on the SEC's original proposal, investors traditionally have lacked adequate time to evaluate the details of ABS offerings before having to commit to participating in an offer. Thus, we strongly support, as we have in the past, the proposed requirement that a preliminary prospectus be provided to investors at least five business days before the first sale.

In this re-proposal, the SEC now questions whether this time period should be shortened, asking if two business days would be adequate. We are concerned that two days may not reasonably provide potential investors with adequate to obtain and review the details before needing to commit. Consequently, we recommend that the five-business day requirement be retained.

### ***Underlying Transaction Documents***

In response to comments received on the 2010 proposal to file a preliminary prospectus, the SEC is now proposing to require underlying transaction agreements to be filed in substantially final form at the time of filing the preliminary prospectus. These transaction documents would include all attached schedules and documents that are referenced (for example, the representations and warranties as to the underlying assets), which would provide an investor with a more thorough and complete understanding of the proposed offering.

Along the same lines of our support for providing investors added time to review a prospectus, we also support providing investors with these documents that address underlying and fundamental aspects of the transaction. Only with the information with which to understand these essentials will an investor be able to make a meaningful investment decision.



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## **Conclusion**

We encourage the adoption of proposed requirement that will afford investors with the time and information with which evaluate to ABS transactions offered through shelf-registration and to make meaningful investment decisions. We also support requirements that will facilitate communications among investors for the purpose of enforcing their rights.

Should you have any questions about our positions, please do not hesitate to contact Kurt N. Schacht, CFA at [kurt.schacht@cfainstitute.org](mailto:kurt.schacht@cfainstitute.org) or 212.756.7728; or Linda L. Rittenhouse at [linda.rittenhouse@cfainstitute.org](mailto:linda.rittenhouse@cfainstitute.org) or 434.951.5333.

Sincerely,

*/s/ Kurt N. Schacht*

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