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November 10, 2011

VIA ELECTRONIC MAIL

Ms. Elizabeth 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
Release Nos. 33-9117; 34-61858; File No. S7-08-10

Dear Ms. Murphy:

The American Bankers Association (ABA)[1] and the ABA Securities Association (ABASA)[2] appreciate the opportunity to comment on the above re-proposal of shelf eligibility conditions for asset-backed securities (ABS). The original proposal released in April 2010 (the 2010 ABS proposal)[3] would have significantly revised the offering, disclosure and reporting requirements for asset-backed securities under the Securities Act of 1933 and the Securities Exchange Act of 1934. The re-proposal revises a number of provisions originally proposed in April 2010 to reflect the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act)[4] as well as comments received in response to the 2010 ABS proposal. Our members serve as originators, issuers, sponsors, underwriters, trustees and in corporate trust agency capacities across the broad spectrum of securitization transactions.

At the outset, we recognize and very much appreciate the Commission's demonstrated efforts to respond both to comments received on the 2010 ABS proposal and the requirements of the Dodd-Frank Act. Nonetheless, we remain concerned that the re-proposal is overbroad and does not reflect sufficiently the differences in experience of the various asset classes of ABS during the recent financial turmoil or the costs attendant to meeting its requirements. Without further modification, we believe the overall impact will be to stifle the recovery of and growth in the securitization market necessary to provide

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[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.
[2] ABASA is a separately chartered affiliate of the ABA that represents those holding company members of the ABA that are actively engaged in capital markets, investment banking, and broker-dealer activities.
[3] Asset-Backed Securities, Release No. 33-9117, 75 *Fed. Reg*. 23328 (May 3, 2010).
[4] *Pub. L.* 111-203 (July 21, 2010).

credit to all sectors of our struggling economy. Accordingly, we strongly urge the Commission to weigh the costs and benefits attendant to the re-proposed reforms against the need for the return of a vibrant securitization market.

It is self-evident that historically the securitization markets have provided a significant portion of this nation's funding and investment needs. It is also beyond question that in order to improve our economy, loan originations and attendant securitizations must be allowed to grow. Indeed, both the Administration and Congress have consistently urged bankers to increase their lending to creditworthy individuals and businesses. Yet the uncertainty of the costs of complying with coming reforms – not only in the securitization market, but also with respect to capital, liquidity and the many other rules required to be imposed by the Dodd-Frank Act – serves as a significant drag on increased lending. A robust securitization market is critical to meet funding needs, and we are concerned that the costs that will necessarily be incurred to comply with this re-proposal may cause some issuers – particularly for smaller transactions – to fall short of the amount of lending that they could otherwise provide to their communities.

BACKGROUND

The 2010 ABS proposal would have amended the offering process and expanded disclosure and reporting requirements for ABS to address deficiencies in the securitization markets that were exposed during the recent financial crisis.

A key goal of the Commission in developing the original proposal was to reduce the potential for undue reliance on credit ratings by investors. Accordingly, the 2010 ABS proposal would have eliminated, as a condition for eligibility for offering ABS under a shelf registration statement, the current requirement that the securities be rated investment grade at the time of the offering. In lieu of the current requirement of Form S-3 that each class of registered ABS have an investment grade credit rating, the 2010 ABS proposal set forth four conditions for shelf eligibility: (i) a certification by the chief executive officer (CEO) of the depositor; (ii) third-party opinions concerning repurchase obligations; (iii) a risk retention requirement; and (iv) ongoing reporting under the Securities Exchange Act of 1934. The subsequent enactment of the Dodd-Frank Act made moot the latter two of those criteria.

Under the re-proposal, issuers would be required to satisfy the following conditions to be eligible to take advantage of shelf registration:

- Provide a certification by the CEO of the depositor or an executive officer in charge of securitization of the depositor, to be filed at the time of each offering off of a shelf registration statement, or takedown, concerning the disclosure contained in the prospectus and the design of the securitization;

- Inclusion in the underlying transaction agreements of provisions requiring the appointment of a credit risk manager to review assets upon the occurrence of certain trigger events and provisions requiring repurchase request dispute resolution;
- Inclusion in an underlying transaction agreement of a provision to include in ongoing distribution reports on Form 10-D any request by an investor to communicate with other investors; and
- An annual evaluation of compliance with the registrant requirements.

The re-proposal further seeks comment, among other things, on the requirement extending the disclosure requirements applicable to publicly issued ABS to ABS issued in reliance on the safe harbors of Rules 144A and 506

DISCUSSION

I. RE-PROPOSED CONDITIONS TO SHELF ELIGIBILITY

As a preface to our discussion of these conditions, we again note the importance of shelf eligibility to participants in the securitization markets and urge the Commission to ensure its continued availability in practice. This mechanism provides issuers with flexibility to access the market at the optimum time at a reduced cost while at the same time providing investors with disclosure that does not differ materially from that provided in offerings currently registered on Form S-1. Accordingly, we urge the Commission to ensure that the new eligibility criteria are neither so costly nor fraught with legal risk as to eliminate their use as a practical matter.

A. Depositor Certification

The 2010 ABS proposal included a requirement that the issuer file a certification signed by the CEO of the depositor that, at the time of each offering or takedown off a shelf, to such person's knowledge, "the securitized assets backing the issue have characteristics that provide a reasonable basis to believe that they will produce, taking into account internal credit enhancements, cash flows at times and in amounts necessary to service any payments of the securities as described in the prospectus," and that such person has "reviewed the prospectus and the necessary documents to make such certification."

In our comment letter on the 2010 ABS proposal,[5] ABA and ABASA expressed concern that the proposed form of CEO certification appeared to require the officer to express an opinion as to the future performance of the particular assets. We further stated our belief that such a forward-looking statement was inappropriate.

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[5] Our comment letter on the 2010 ABS Proposal is available at http://www.sec.gov/comments/s7-08-10/s70810-146.pdf. We have also appended a copy to this letter.

In response to comments raising concerns about the likely inability of a chief executive officer to know the details of a particular transaction, in the re-proposal, the Commission has provided that the certification can be made by the CEO of the depositor or an executive officer in charge of securitization of the depositor who would be more familiar with transactions than would the CEO. We appreciate that the Commission has also amended the certification to indicate that it does not constitute a guarantee of performance. Nonetheless, it would still require an assessment and forecast of the future performance of the pool assets and the ABS.

ABA and ABASA reiterate our position that any officer certification should be limited to the disclosures made in the offering (in accordance with traditional materiality standards) and not the performance of the assets. The effect of this requirement, we believe, will be to have an officer of the depositor, who is not trained in credit analysis, opine on the quality and future performance of the transaction. This is contrary to the intent of the Commission to encourage investors to conduct their own credit analysis and reduce reliance on credit ratings. As the Commission itself stated in the 2010 ABS proposal, the reason for providing investors with the asset level disclosures is to "give investors better tools to evaluate the underlying assets and to determine whether or not to invest in the instrument and at what price."[6]

Accordingly, we oppose the certification requirement in its present form and support the comments and recommendations of the American Securitization Forum (ASF) and the Securities Industry and Financial Markets Association (SIFMA) with respect to the certification.[7]

B. Repurchase Requests

To ensure that representations and warranties given by originators and sponsors offer meaningful protection for investors, the 2010 ABS proposal required that the party making the representations and warranties furnish, on a quarterly basis, an opinion from a third party concerning any asset as to which the trustee has alleged a breach, but which was not repurchased or replaced because the representing party disputed the breach.[8] In our previous comment letter, ABA and ABASA urged the Commission to defer to market participants to develop commercially reasonable solutions to repurchase request issues. We note that on August 30, 2011, the American Securitization Forum (ASF) working with both issuers and investors published a model set of repurchase provisions for residential mortgage-backed transactions that include specific provisions for an independent review of and an enforcement mechanism for breaches of representations and warranties.

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[6] 76 *Fed Reg.* 47948 at 23416.

[7] The ASF comment letter (ASF Letter) is available at http://www.sec.gov/comments/s7-08-10/s70810-223.pdf. The SIFMA comment letter (SIFMA Letter) is available at http://www.sec.gov/comments/s7-08-10/s70810-209.pdf.

[8] We note that in many existing securitization transactions depending on the asset class, the trustee is not necessarily the party authorized to allege a breach of representations and warranties. Nor does the trustee have independent knowledge of breaches unless notified by other transaction parties.

Previously, in March 2011, the CRE Finance Council published model representations and warranties and model remediation language as part of its "CMBS 2.0" initiative to provide comprehensive market standards for commercial mortgage-backed securities.
We appreciate that in the re-proposal, the Commission has accepted the industry concept of (i) an independent credit risk manager to review pool assets and (ii) for a mechanism for resolution of repurchase demands. Under the re-proposal, as a condition to shelf eligibility, the transaction documents would be required to include (i) a provision for appointment by the trustee of a credit risk manager who would, upon the occurrence of certain trigger events, review the pool assets to determine whether there was a breach of the representations and warranties made in such documents; and (ii) a dispute resolution mechanism.

At the outset, we concur with the recommendation of the ASF and other commenters that a more appropriate term for the party performing asset reviews for breaches of representations and warranties is "independent reviewer" rather than "credit risk manager." Our further comments will refer to the independent reviewer.

1. The Independent Review Process Should Not Apply to All Classes of ABS

As a threshold matter, ABA and ABASA believe it is important to recognize that both the 2010 ABS proposal and the Dodd-Frank Act are a direct response to a financial crisis that was largely centered on housing-related issues. The remedial provisions of that proposal, the re-proposal and the legislation are aimed squarely at the RMBS market and are intended to remedy flaws in the RMBS securitization process made evident by the crisis. We do not disagree that existing contractual provisions with respect to the determination of and remedies for breaches of representations and warranties, when tested in the RMBS marketplace, were found to be inadequate and ineffective. And, we support the independent review processes developed through collaborative efforts between issuers and investors. Nonetheless, because any new process will be funded through the transaction's cash waterfall, it will necessarily come with significant costs. As noted by ASF, a new independent review process will require drafting and negotiation of contracts among various transaction parties, as well as fees for the identified independent reviewer. Accordingly, ABA and ABASA believe the new process should not be imposed on all classes of ABS without demonstrated evidence that such costs are necessary to resolve repurchase requests.

While it is clear that the independent review process is necessary in RMBS transactions, in other asset classes – for example, auto or credit card securitizations – there is little or no historical repurchase request activity. Indeed, these types of ABS have performed well even during the financial crisis. Beginning in February 2012, all sponsors and depositors will be required to file Form ABS-15G that will disclose for the preceding three years the disposition of all repurchase requests, thereby affording the Commission the information necessary to undertake a cost benefit analysis of the independent review requirement. Accordingly, ABA and ABASA strongly urge the Commission to defer any decision to require the independent review process for ABS classes other than RMBS until the Form ABS-15G data are available and have been reviewed. Only then will be Commission be able to make a proper determination of whether the costs of the independent review process for any given class of ABS other than RMBS are warranted.

We note further that CMBS transactions now typically include a special servicer and operating advisor that effectively already accomplish the independent review activity contemplated by the Commission. To impose on such transactions an additional layer of review would, we believe, impose costs on investors with little or no benefit to them. We support the comments of the CRE Finance Council on this issue,[9] and we urge the Commission to exempt from any independent review requirement such CMBS transactions.

Finally, should the Commission determine to require the independent review process for asset classes other than RMBS, we believe that where the depositor or an affiliate has not received more than a *de minimis* amount of repurchase demands in a particular asset class, the cost of the independent review process will likely outweigh any benefit to investors and, therefore, should not be required. ABA and ABASA support the comments of the ASF with respect to this issue.[10]

2. Appointment of the Independent Reviewer

Under the re-proposal, the independent reviewer would be appointed by the trustees. ABA and ABASA believe that appointing any ABS transaction party is outside the normal scope of the duties of trustees. Prior to default, trustees serve in a largely ministerial capacity in accordance with instructions set forth specifically in the transactions documents or in accordance with instructions of transaction parties. Our members, including our trustee members, instead believe it would be more appropriate to have the independent reviewer be selected in the same manner as are other transaction parties. We support the independence criteria set forth in the ASF Model RMBS Repurchase Principles, and we believe these criteria are far more important than the manner of selection. Indeed, we believe it likely that investors will play a significant role in the selection process. Further, ABA and ABASA agree that the name and qualifications of the independent reviewer should be disclosed in the prospectus, thus affording investors the opportunity to review this information prior to making an investment decision.

3. Review Trigger and Scope of Review

The re-proposal requires that transaction agreements include provisions requiring an independent review of pool assets: (i) when the credit enhancement requirements, such as required reserve account amounts or overcollateralization percentages, as specified in the underlying transaction documents, are not met; and (ii) at the direction of investors pursuant to processes provided in the transaction documents and disclosed in the

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[9] CRE Finance Council Comment Letter available at http://www.sec.gov/comments/s7-08-10/s70810-219.pdf.

[10] ASF Letter at page 11.

prospectus. At the same time, the Commission also expressed its view that transaction parties should be free to tailor the procedures related to the review or repurchase process to each individual ABS transaction.[11] ABA and ABASA strongly urge the Commission to retain a principles-based approach to the independent review requirements and leave to transaction participants the determination of review triggers that are appropriate for particular transactions.

a. Credit Enhancement Trigger

For the reasons expressed in the ASF and SIFMA Letters,[12] we believe the credit enhancement trigger simply will not work for all asset classes or even for different transactions within the same asset class. More importantly, we believe that a review event should be based on objective factors specified in the transaction documents, and we support the formulation expressed in the ASF Model RMBS Repurchase Principles. Given the heterogeneity of ABS transactions, we believe that a "one size fits all" approach simply is not workable, and that the transaction participants are best positioned to determine the review triggers for any given transaction.

b. Investor Trigger

ABA and ABASA urge the Commission to eliminate the mandatory requirement for an investor trigger as a review event. We note that virtually all transaction agreements contain a provision authorizing a certain percentage of investors, typically 25 percent, to direct the trustee to take action so long as those investors provide to the trustee reasonable security or indemnity satisfactory to the trustee.[13] In the experience of our trustee members, the perspectives of investors in senior tranches diverge significantly from the perspectives of investors in subordinate tranches. Given that there are significant costs attendant to the independent reviewer process and, ultimately, arbitration, we believe it is entirely appropriate that the burden should be borne by the investors requesting an investigation in accordance with the transaction documents. Accordingly, we believe that such existing provisions are effective to address the concerns of all investors.

In addition, we note that, absent a mandatory requirement, the transaction participants would still be free to adopt an investor-directed trigger if they so choose. As above, we believe such decisions are best left to those parties, and we believe investors are likely to be active participants in the process.

4. Report to Trustee

Under the re-proposal, the independent reviewer would provide a report to the trustee of the findings and conclusions of any review, with the full report filed as an exhibit to the issuer's Form 10-D for the period. While ABA and ABASA agree that the report should

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[11] 76 *Fed. Reg.* 47948 at 47956.

[12] ASF Letter at 14; SIFMA Letter at 12.

[13] Our trustee members believe this minimum threshold is necessary to ensure that a small number of investors cannot invoke the process to the disadvantage of the remaining investors.

be provided to the trustee, we believe providing the full report in a public filing raises significant privacy concerns. The report is likely to contain confidential proprietary information or nonpublic personal information, and public dissemination could cause violations of the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act or similar laws. Moreover, our trustee members believe that they should be able to provide the report to investors. Accordingly, we believe an appropriate solution would be to require public disclosure only of a summary of the findings and conclusions in the report.

5. Dispute Resolution

Under the re-proposal, the transaction agreements would be required to provide that if an asset subject to a repurchase request is not repurchased by the end of the 180-day period beginning when the notice is received, then the party submitting such repurchase request must have the right to refer the matter to either mediation or third-party arbitration. We agree that an effective dispute resolution process will benefit all transaction parties by facilitating a timely resolution of repurchase claims.

ABA and ABASA strongly believe that binding arbitration is necessary to provide the finality needed to resolve claims. For parties who have been unable to resolve a dispute, mediation may well prolong the process rather than provide a timely resolution.

The Commission has requested input on whether the rules should specify who must pay for the expenses of dispute resolution. ABA and ABASA firmly believe that to discourage frivolous claims, the costs of arbitration should be borne by the losing party. We generally agree with the payment formulation set forth in the SIFMA Letter whereby if an arbitrator rules against the seller, the seller must reimburse all of the relevant costs. Similarly, if an arbitrator rules in favor of the seller, all such costs be would be reimbursed by the trust.[14] However, our trustee members request that in the event that full reimbursement of costs cannot be achieved because either the seller or the trust lack sufficient assets, any unreimbursed expenses of the trustee be paid by the investors. This structure would be consistent with the provisions of the transaction agreements permitting investors to direct the trustee to act, but only if the investors provide to the trustee reasonable security or indemnity.

Finally, we note that the remedies for a breach of representations and warranties are not limited to a repurchase of the particular asset in question, but often include a cure or substitution. Thus, we request that the requirement to "repurchase" the asset should be amended to refer to a "failure to perform a remedy under the transaction agreements."

6. Investor Communications

The re-proposal would require that an underlying transaction document include a provision to require the party responsible for making periodic filings on Form 10-D include on the form any request from an investor to communicate with other investors with respect to

[14] SIFMA Letter at 15.

rights under the transaction agreement. We agree that it would be appropriate to include as objective categories: servicing, trustee, representations and warranties, voting matters, pool assets, and other.

We are aware that in CMBS transactions trustees often provide websites to facilitate investor communications. We believe the Commission should provide the flexibility to market participants to include in transaction documents such alternative methods of investor communications in lieu of Form 10-D filings.

With respect to requirements for verification of beneficial ownership, we ask that the Commission clarify that trustees be permitted to rely on the verification information if provided in a satisfactory form.

II. DISCLOSURE APPLICABLE TO PRIVATE OFFERINGS OF STRUCTURED FINANCE PRODUCTS

The 2010 ABS proposal was intended to modernize and reform the disclosure requirements for securities that are offered pursuant to Regulation AB and extend to privately placed ABS offered pursuant to Regulation D and Rule 144A the disclosure requirements of Regulation AB. We also note that Section 942 of the Act requires the Commission to adopt regulations requiring each issuer of an ABS security to disclose "asset-level or loan-level data *if such data are necessary for investors to independently perform due diligence"* [emphasis added].

As a general principle, ABA and ABASA continue to believe that "more" disclosure is not necessarily "better" disclosure for investors, and we reiterate the concerns set forth in our previous comment letter. In promulgating disclosure standards, we again urge the Commission to balance the likely realizable benefits to investors from the proposed disclosure requirements against the costs to issuers of providing the information, which costs must necessarily be passed on to investors and ultimately to consumers and small businesses. We are concerned that disclosures that may be of minor incremental value to investors may come with very high costs to issuers and consumers.

The 2010 ABS proposal would have extended to transactions that are currently exempt from registration in reliance on the regulatory safe harbors of Rules 144A and 506 the disclosure requirements that would be applicable to publicly offered ABS. These safe harbors are designed expressly for participants in the market who are sufficiently sophisticated so as not to need the extensive disclosure available for publicly registered securities. The Commission stated that extending these disclosure requirements to privately placed ABS would remedy concerns about the lack of transparency in this market.

In our previous comment letter, ABA and ABASA expressed our strong belief that this aspect of the proposal is a fundamental departure from the Commission's historic treatment of sophisticated investors. Rather, we believe that if adopted, issuers will simply turn to other statutory exceptions from registration requirements, such as under Sections

4(1) and 4(2) of the Securities Act of 1933, with the limitations attendant to those exceptions, or exit the market. Accordingly, for the reasons stated in our previous comment letter, we continue to oppose strongly any extension of registration or disclosure requirements to privately placed ABS; and we support the comments of SIFMA with respect to this issue.[15]

III. Economic Analysis

ABA and ABASA believe that the proposed changes to the rules for shelf eligibility will likely have a significant economic impact on the securitization markets because of the degree to which issuers rely on shelf eligibility for their transactions. Accordingly, as required by the Securities Act of 1933 and the Securities Exchange Act of 1934 (Exchange Act), it is incumbent on the Commission to undertake a proper analysis of the impact of its proposal on this market. As the Commission itself noted, section 23(a) of the Exchange Act requires the Commission to consider the impact on competition that the re-proposal would have, and prohibits the Commission from adopting any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act. In addition, the Securities Act of 1933 and the Exchange Act require that when the Commission undertakes a rulemaking in which it is required to consider whether an action is necessary or appropriate in the public interest, the Commission must consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.[16]

The Commission in its economic analysis superficially asserts that to the extent that the certification, independent review process and investor communications provisions "increase investors' trust in the fairness and security of the ABS markets, the result *could* be lower cost of capital and increased investor participation in the ABS markets, which should facilitate capital formation" [emphasis added].[17]

By contrast, the Commission recognizes the significant costs entailed in the proposal, not the least of which are the costs attendant to the independent review process which the Commission would impose on all classes of ABS regardless of repurchase history. Moreover, an issuer would incur significant costs should it determine to register on proposed Form SF-1 or issue ABS in the private markets, solely to avoid the shelf registration requirements.

Given the very real costs imposed by the re-proposal and the cursory cost-benefit analysis conducted by the Commission, ABA and ABASA believe that it is imperative that the Commission conduct a robust analysis of the costs and benefits of the re-proposal in order to fulfill its statutory mandate.

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[15] SIFMA Letter at page 23.
[16] 76 *Federal Register* 47948 at 47975-47976.
[17] *Id.*at 47975.

CONCLUSION

In conclusion, we believe that in formulating revisions to both the 2010 ABS proposal and the re-proposal, the Commission should balance the need for increased transparency and alignment of incentives within the securitization markets with the need to revitalize this market as a critical funding mechanism in our economy. ABA and ABASA believe that this overarching goal can be best achieved by specifically tailoring the necessary changes to each discrete asset class of ABS. Finally, we believe that a robust economic analysis that weighs the possible benefits to investors and whether the rule will promote efficiency, competition and capital formation is a necessary predicate to any final rule.

As always, ABA, ABASA and our members remain available to discuss these positions with the Commission and staff throughout their consideration of the proposal. In the meantime, if you have any questions on the foregoing, please contact the undersigned.

Sincerely,

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August 3, 2010

VIA ELECTRONIC MAIL

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

RE: Proposed Rule on Asset-Backed Securities
File Number S7-08-10, Release Nos. 33-9117, 34-61858
75 *Federal Register* 23328, May 3, 2010

Dear Ms. Murphy:

The American Bankers Association (ABA)[18] and the ABA Securities Association (ABASA)[19] appreciate the opportunity to comment on the notice of proposed rulemaking issued by the Securities and Exchange Commission (Commission) to amend the offering process, and disclosure and reporting requirements for asset-backed securities (ABS). Our members serve as originators, issuers, sponsors, underwriters, trustees and in corporate agency capacities across the broad spectrum of securitization transactions.

The proposal is intended to address deficiencies in the markets for ABS that were exposed during the recent financial crisis and that led to the subsequent lack of investor confidence that brought serious challenges to the ABS market. Accordingly, the proposal addresses two aspects of the securitization process, among others, that have drawn the most criticism: the lack of transparency in very complex transactions, and the misalignment of incentives between originators and sponsors on the one hand, and investors on the other.

The proposal would provide far greater transparency for ABS transactions by means of vastly expanded disclosures to investors in publicly offered ABS. In addition, the proposal would require issuers of ABS offered in reliance on the regulatory safe harbors for private offerings to provide to investors upon request, the same disclosure that would have been required had the securities been issued publicly. The proposal seeks to align better the economic incentives of participants in the securitization process who

[18] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.
[19] ABASA is a separately chartered affiliate of the ABA that represents those holding company members of the ABA that are actively engaged in capital markets, investment banking, and broker-dealer activities.

structure the transactions with those of the investors who purchase the securities by imposing on sponsors a risk retention requirement. Finally, the proposal would also modernize the offering process for ABS and eliminate the use of credit ratings as a criterion for eligibility for shelf registration.

Subsequent to the Commission issuing this proposal, on July 21, 2010, sweeping financial reform legislation was signed into law. The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or the Act) addresses some of the same issues as this proposal, including risk retention and disclosure requirements for ABS, and we presume that this regulatory effort will comprise part of the implementation of the Act by the SEC.

SUMMARY OF ABA POSITION

ABA and ABASA recognize and understand the concerns that have been raised about the role that securitization, and in particular securitization of residential mortgages, played in this crisis. We do not disagree that the additional transparency and appropriate alignment of interests will benefit ABS investors, and we generally support efforts to effect those changes.[20] However, we believe that certain guiding principles should inform the deliberative processes addressing securitization, whether as part of interagency rulemaking efforts mandated by the Dodd-Frank Act, or on the part of the Commission with respect to amendments to ABS offering and disclosure requirements.

First, there must be a single uniform regulatory regime that applies to all participants in the securitization market. Currently, there are outstanding two regulatory proposals—this proposal and that of the Federal Deposit Insurance Corporation with respect to that agency's securitization safe harbor—and legislation that would substantively reform the securitization process. All of these reforms address what are essentially the same issues but in different ways. Now that the Dodd-Frank Act has become law, ABA and ABASA believe it imperative that all reforms to this market comport with and adhere to the requirements of the legislation as part of the implementation of that statute. Thus, for example, any risk retention proposal must be developed through the interagency process specified in the legislation and not by individual agencies acting on their own initiative.[21]

Moreover, in the agency market for residential mortgage-backed securities (RMBS), the Federal Housing Finance Agency (FHFA) has proposed new, more robust reporting requirements with respect to mortgages to be securitized by Fannie Mae and Freddie Mac.

While we believe the FHFA requirements are similar to the Commission's proposed disclosure points for RMBS in substance, the proposed form in which the disclosure points are to be submitted to FHFA is incompatible with this Commission proposal. Our

[20] ABA and ABASA generally support the comments submitted by the American Bar Association and the American Securitization Forum.

[21] ABA and ABASA have expressed these same concerns directly to FDIC in our comment letter to the agency available at http://www.fdic.gov/regulations/laws/federal/2010/10c08AD53.PDF.

members originate mortgages for both the agency and private mortgage securitization markets, and the costs to comply with two separate disclosure regimes will necessarily either increase costs for the ultimate consumer or force originators to choose between the two markets rather than serve both. And the confusion will not aid investor understanding.

Second, in its deliberations the Commission should weigh the costs and benefits attendant to the proposed securitization reforms against the need for the return of a vibrant securitization market. It is beyond question that historically the securitization markets have provided a significant portion of this nation's funding and investment needs. It is also beyond question that in order to improve our economy, loan originations and securitizations must be increased. Indeed, both the Administration and Congress have consistently urged bankers to increase their lending to creditworthy individuals and businesses. Yet the uncertainty of the costs of complying with coming reforms—not simply in the securitization market, but also with respect to capital, liquidity and the myriad rules entailed in financial regulatory legislation—serves as a significant counterweight to increased lending. A robust securitization market is critical to meet those needs, and we are concerned that the costs that will necessarily be incurred to comply with this proposal may cause some issuers—particularly for smaller transactions—to withdraw from this market or curtail their lending.

Third, the regulations that will ultimately govern the various types of asset classes must reflect the unique characteristics of each class. Congress has clearly mandated such treatment with respect to risk retention requirements, and we believe that a close examination of the transaction structures, disclosure, risk retention aspects and representations and warranties among the various asset classes will reveal significant dissimilarities.

We believe it is important to recognize that both the proposal and the Act are a direct response to a financial crisis that was largely centered on housing-related issues. The remedial provisions of the several regulatory proposals and the Dodd-Frank Act are aimed squarely at the RMBS market and are intended to ensure that issuers and/or originators take responsibility for the underwriting standards of the mortgages underlying the securitization.

We believe fundamentally that any new or revised disclosure requirements should satisfy the traditional standard in the securities market—materiality to the investment decision. In addition, we strongly believe that any new requirements must be tailored to each asset class. We are concerned that (i) burdensome disclosure requirements that do not meet the materiality threshold and (ii) across-the-board imposition of disclosures and risk retention requirements, irrespective of asset-class differences, will needlessly stifle growth in the securitization market. Accordingly, to have a broad, economically viable securitization market across asset classes going forward, we strongly urge the Commission (and other agencies) to tailor the requirements for each asset class based on the specific characteristics of the class and materiality to investors.

Fourth, ABA and ABASA believe that "more" disclosure is not necessarily "better" disclosure for investors. In promulgating disclosure standards, we urge the Commission to balance the likely realizable benefits to investors from the proposed disclosure requirements against the costs to issuers of providing the information, which costs must necessarily be passed on to investors and ultimately to consumers and small businesses. We are concerned that disclosures that may be of minor incremental value to investors may come with very high costs to issuers and consumers.

Finally, Congress has clearly expressed its concerns about the impact of securitization reforms on the viability of the securitization markets and the availability of credit for new lending. Section 941 of the Dodd-Frank Act requires the Federal Reserve Board in consultation with the Commission and the other bank regulatory agencies to study and report within 90 days of enactment on the combined impact by asset class of the new risk retention requirements and Financial Accounting Statements l66 and l67, along with statutory and regulatory recommendations for eliminating any negative impacts of these requirements. ABA and ABASA strongly believe it would be unwise for the SEC to move forward with this proposal until the conclusions of this study are made available.

DISCUSSION

I. A UNIFIED REGULATORY REGIME FOR ALL PARTICIPANTS IS NECESSARY FOR EFFICIENT OPERATION OF THE SECURITIZATION MARKETS

That securitization has become a critical source of funding and liquidity for mortgage and consumer credit markets is widely accepted.[22] Both the Commission and the Obama Administration have affirmed the need to "restart" the securitization market because of its importance to our economy and, as a funding mechanism, to the housing market. At present, participants in the capital markets generally face substantial uncertainty about the future of the securitization market due to the impact of legislative changes and current accounting changes, as well as various regulatory rulemakings. Much of the uncertainty in the securitization market derives from the different schemes for risk retention and disclosure, among other things, being raised by the Act, the Commission, and the FDIC. We cannot emphasize enough that for the securitization market to serve its function as a robust, economically feasible source of funding, it is critical that a single set of standards be in place for all of its participants.

ABA and ABASA strongly believe that imposing differing regulatory regimes on securitization market participants, whether for bank versus nonbank sponsors or government agency markets, will increase costs to originators, sponsors and ultimately to

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22 American Bar Association, *Securitization in the Post-Crisis Economy: An ABA Business Law Section White Paper,* November 20, 2009, pg. 7, available at http://meetings.abanet.org/webupload/commupload/CL116000/newsletterpubs/BusinessLaw_AssetSecuritizationReforms.pdf.

investors. To the extent that the market contracts and/or that transactions become significantly more expensive, the costs of conflicting regulatory regimes will necessarily decrease the availability of credit, which would harm consumers and small businesses.

II. DISCLOSURE PROVISIONS OF THE PROPOSAL

Regulation AB, adopted in 2004, currently requires disclosure of material, aggregate information about the composition and characteristics of the asset pool underlying ABS. The current proposal is intended to modernize and reform the disclosure requirements for securities that are offered pursuant to Regulation AB and establish ongoing reporting requirements for such offerings. The proposal would also extend the disclosure requirements to privately placed ABS offered pursuant to Regulation D and Rule 144A which we discuss at Part III of this letter.

We also note that Section 942 of the Act requires the Commission to adopt regulations requiring each issuer of an ABS security to disclose "asset-level or loan-level data *if such data are necessary for investors to independently perform due diligence"* [emphasis added].

The proposal contemplates disclosure of general data about the transaction and underlying collateral as well as information about each loan or asset in the asset pool with respect to the terms of the asset, obligor characteristics, and underwriting of the asset. In addition, the proposal would require disclosure of any exceptions from the disclosed underwriting standards. The data would have to be updated when new assets are added to the pool underlying the securities, and on an ongoing basis. The proposal enumerates 46 general data points for all asset classes as well as specific data points for eleven identified asset classes including, for example, 137 data points for RMBS, and 61 data points for commercial mortgage-backed securities (CMBS).

As discussed below, ABA and ABASA have a number of concerns about the proposed disclosure requirements.

A. Accuracy of the Data

We are concerned that a number of the data points to be disclosed date from the time the loan was originated, with the result that they may be inaccurate by the time the loan is securitized. The borrower's employment situation or credit score may have changed, or property values may have changed, to name but a few such circumstances. To the extent that such a data point—for example, borrower's income—is used to calculate other data points—for example, debt-to-income ratio—the inaccuracies are compounded.

Moreover, in many credit card securitizations, the underlying accounts have existed for more than 60 months, making the original data not only stale, but largely irrelevant as a predictive measure of credit quality. In addition, a number of data points must be obtained through borrower representations that may be difficult to verify or that may change from time of origination. Accordingly, ABA and ABASA urge the Commission to clarify for liability purposes that such data are not part of the prospectus or registration statement.

With respect to liability for inaccurate disclosure of data points, ABA and ABASA urge the Commission to clarify that liability is based on their aggregate materiality in the context of the entire asset pool, the full offering disclosures and whether the securitization structure and documentation provide adequate remedies. We believe it inevitable that there will be errors in documents produced by even the most diligent issuer, if only due to human error. Such errors, even if material to a particular loan, should not subject the issuer to the potential remedy of rescission of the entire issuance. Rather, only errors in disclosures of facts that are material to the transaction as a whole should give rise to such a draconian remedy.

B. Availability of the Data, Competitive Concerns

1. Availability

Issuers should not be required to capture data required by the proposal, unless such data are material to investors. In addition, issuers of one category of ABS should not be required to capture data solely because such data are relevant to another class of ABS. For example, exceptions to disclosed underwriting standards, may have relevance in the residential mortgage market, due to the standardization of underwriting criteria by Fannie Mae and Freddie Mac; however, for other asset classes, like commercial mortgage loans, broad underwriting standards may not even exist. The underwriting of commercial mortgage loans collateralizing CMBS (which often involve a small number of very large properties) may be very specific to the property in question and may be a unique, highly negotiated loan where the concept of an “exception” is not particularly applicable.

2. Competitive Concerns

Moreover, we understand from our members that the proposal would require disclosure of proprietary information that could enable competitors to reverse engineer confidential pricing and underwriting strategies, thus undermining issuers’ business models. For example, in the case of prime auto ABS, the requirement to include zip codes could lead to identification of individual dealers and their pricing strategies. For many asset classes, underwriting strategies themselves are deemed to be proprietary information. We strongly urge the Commission to address appropriately these concerns so that the business models of issuers are not harmed.

As noted above, ABA and ABASA recognize that the various reform proposals and legislation are directed at the RMBS market. However, we strongly urge the Commission to ensure that any new or revised disclosure elements be material to investors, whether directed at the RMBS market or another asset class. We believe that rather than taking the broad position that disclosing a greater number of data points for all asset classes is always

better, the Commission should adopt a judicious approach that emphasizes the materiality of the information to investment decisions. In addition, disclosure in the form of narrative rather than data points may serve to address concerns about confidentiality.
Because of the enormous impact this proposal will have on the viability of the securitization markets, we urge the Commission to expend the time necessary to balance appropriately the need for enhanced disclosure to investors in particular asset classes with costs to issuers, both in terms of financial resources and competitive concerns. We note that the Act imposes no time frame in which disclosure rulemaking must be completed.

In summary, ABA and ABASA believe the Commission should take the time necessary to ensure that the resulting disclosure rules, have the intended impact of restoring investor confidence in and revitalizing ABS markets, rather than instead having the opposite impact of driving issuers from those markets.

3. Grandfathering

Finally, ABA and ABASA believe that the proposal should apply only to loans or assets *originated* after the effective date of the final rule. Holders of loans or other financial assets originated or acquired prior to implementation of a final rule may simply not have or be able to access the data points required by the proposal. The inability to comply with the proposal is further exacerbated in the case of loans that were originated by entities that are no longer in business.

D. Utility of the Data to Investors, Cost to Issuers

As stated above, while we generally support loan-level disclosure requirements that are material to investors, ABA and ABASA are concerned that the breadth of the proposed disclosures may be of little value to investors. For example, in securitizations that are collateralized by thousands of individual accounts or assets, detailed loan level information would likely be of little value to investors. The Commission has recognized this in the case of credit card securitizations and, accordingly, has proposed disclosure of grouped asset data. While we question the utility of providing grouped asset data for investors in credit card ABS, we believe that similar treatment should be afforded securitizations where individual loan level data are not material to investors.

ABA and ABASA believe the costs to provide the increased level of disclosure in many assets classes may well be completely disproportionate to the incremental value of that disclosure to investors. For example, while CMBS transactions typically involve fewer but larger assets, and consequently provide investors detailed loan level data, similarly detailed information for a securitization involving thousands of assets is prohibitively expensive and unreasonable. Congress has directed the Commission to require loan-level disclosure only to the extent it is necessary for investors to perform independent due diligence. We strongly question its utility and fear that it will significantly undermine the continued use of securitization as a funding mechanism.

Because this disclosure regime is generally untested in the marketplace, there are significant uncertainties both as to the costs to obtain and process the required data points as well as the usefulness of the data to investors. We urge the Commission to proceed cautiously until there is more clarity as to the impact of this proposed disclosure regime on the securitization market, and in particular, to each separate asset class.

To the extent that costs of providing the disclosure, the competitive impact on business models, or the potential legal risks outweigh the advantages of securitization as a funding mechanism, issuers may choose to leave the market or pass along increased costs to investors and borrowers. Either result clearly will negatively impact the cost and availability of credit. For these reasons, ABA and ABASA believe that the Commission should carefully tailor the disclosure requirements by asset class and require only that disclosure that can be obtained without undue cost and that is demonstrated to be useful to investors.

E. Waterfall Computer Program

The Commission has proposed that as part of an ABS offering, issuers provide a waterfall computer program of the contractual cash flow provisions of the securities in the form of downloadable source code in Python that would allow the user to input information from the required data points. Thus, the Commission believes investors would be better able to conduct their own evaluations of ABS and may be less likely to be dependent on the opinions of credit rating agencies.

First, ABA and ABASA disagree with the Commission's underlying premise that investors' lack of understanding of complicated securitization structures resulted in poor investment decisions. Our members have informed us that third-party vendors providing services similar to the proposed waterfall computer program were widely used in the RMBS market before the crisis unfolded. Providing investors with yet another model (at great expense) will have no impact on the validity of the assumptions that go into the model.

Moreover, the proposal describes the required waterfall computer program as one that not only models the cash flows set forth in the offering and transaction documents, but also offers predictive capabilities based on the investor's assumptions of future performance throughout the life of the transaction.[23] It then asserts that the issuer or the underwriter generally will have a computer model of the waterfall program.

To the contrary, ABA and ABASA believe that not all issuers currently have such waterfall computer programs. We understand that the existing models range from the very complex to simple spreadsheets, and that few, if any, of the existing models use the Python programming language. Furthermore, existing models are designed simply to allocate existing cash and losses among the various tranches on an aggregate, rather than loan-level basis.

[23] *See,* proposed definition of Item 1113(h) of Regulation AB, 75 *Fed. Reg.* 23328 at 23429.

In addition to the obvious costs required to develop the waterfall computer program, the proposal raises serious concerns about issuers' liability for errors in programming and errors by users, as well as the ability to obtain comfort from independent third parties as to potential liability, among others. We leave to others to address the technical complexities involved in developing and testing the proposed model. Suffice it to say, ABA and ABASA believe the waterfall computer program as proposed is unworkable, and the Commission should not go forward with this aspect of the proposal.

III. Disclosure Applicable to Private Offerings of Structured Finance Products

The proposal would extend to transactions that are currently exempt from registration in reliance on the regulatory safe harbors of Rules 144, 144A and 506, the disclosure requirements that would be applicable to publicly offered ABS. These safe harbors are designed expressly for participants in the market who are sufficiently sophisticated as to not need the extensive disclosure available for publicly registered securities. The Commission believes that extending these disclosure requirements to privately placed ABS would remedy concerns about the lack of transparency in this market.

Specifically, the proposal would condition the availability of the safe harbors on a covenant by the issuer of "structured finance products" to provide to investors and transferees, upon request, the same initial and continuing disclosures that would be available if the offering was publicly registered. The term "structured finance product" is broadly defined in the proposal and could reach transactions well beyond what we believe is intended by the Commission. Issuers would be required to notify the Commission of such initial offerings, and failure to abide by the covenant would be enforceable by the Commission.

ABA and ABASA believe that this aspect of the proposal is a fundamental departure from the Commission's historic treatment of sophisticated investors. We believe rather that if adopted, issuers will simply turn to other statutory exceptions from registration requirements such as under Sections 4(1) and 4(2) of the Securities Act with the limitations attendant to those exceptions, or exit the market. Accordingly, we strongly oppose any extension of registration or disclosure requirements to privately placed ABS.

A. The Proposed Disclosure Requirements Should Not Be Imposed on Privately Placed Securities

The legislative history of the Securities Act and subsequent judicial interpretations clearly demonstrate that the basis for the exemption from registration requirements in Section 4(2) of the Securities Act is that certain "sophisticated" investors did not need the information otherwise available in the prospectus and registration statement.[24] Rules 144, 144A and 506 are longstanding rules of the Commission intended to provide certainty to issuers and underwriters concerning the availability of the exemptions from registration under Sections 4(1) and 4(2) of the Securities Act for transactions by persons other than an issuer, underwriter, or dealer, or for transactions that are not offered to the public.[25] For example, the safe harbor for resales under Rule 144A was appropriately crafted to define the characteristics of investors who are sufficiently knowledgeable to make their own investment decisions without the need for prospectus-type information.

The Commission cites the lack of transparency in the market for collateralized debt obligations as a rationale for extending disclosure obligations to the private market. However, we reiterate our belief that there are great variances among the different asset classes and that concerns specific to one asset type should not dictate the requirements for all asset classes.

Importantly, ABA and ABASA do not believe it is likely that extending the proposed disclosure requirements to transactions conducted in reliance on the above safe harbors will achieve the desired result. Many of the investors who were most adversely impacted by losses from structured products, in fact, had all of the information required to analyze the transactions. We disagree with the premise that mandating extensive disclosures to sophisticated investors will necessarily improve their analyses of securitization transactions.

Rather, we believe that faced with the cost of complying with the proposed disclosure mandates, issuers who wish to avail themselves of the private market will do so in reliance on the statutory exemptions without the comfort provided by the regulatory safe harbors, or they will exit the securitization markets in the face of legal uncertainties.[26] Either alternative will increase costs for both investors and borrowers.

B. The Definition of "Structured Finance Products" Should Be Narrowed

[24] In its report on the 1933 Act, the House of Representatives stated that "Congress recognized that, under certain carefully limited circumstances, it might be unnecessary for an issuer to make available through the registration process all the information material to an intelligent evaluation of securities because certain persons in certain circumstances already have access to such information through other channels." H.R. Rep. No. 73-85 (1933). Similarly, the U.S. Supreme Court stated in *SEC v. Ralston Purina*, "Since exempt transactions are those as to which 'there is no practical need for * * * [the bill's] application,' the applicability of § [4(2)] should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'" 346 U.S. 119, 125 (1953) (ellipsis and brackets in the original). These statutory exemptions are unaffected by the proposal.

[25] *See*, Sections 4(1) and 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d.

[26] We note that should issuers rely on the Section 4(2) exemption, investors in such securities may not be able to sell the securities later because of the unavailability of the regulatory resale exemption of 144A. This would materially reduce liquidity for such investors.

The Commission would extend the proposed disclosure requirements to any securitization of "structured finance products" defined to include ABS as defined in Regulation AB, synthetic ABS, collateralized mortgage obligations, collateralized debt obligations, collateralized bond obligations, collateralized debt obligations of asset-backed securities, collateralized debt obligations of collateralized debt obligations, or *a security that at the time of the offering is commonly known as an asset-backed security or a structured finance product* [emphasis added].

We believe that this broad definition could conceivably extend to covered bonds, trust-preferred securities, and certain pooled investment vehicles. ABA and ABASA do not believe it is the Commission's intent that the proposal apply to such securities; therefore, we urge the Commission to define "structured finance product" more narrowly in any final rule.

IV. NEW CONDITIONS FOR SHELF ELIGIBILITY

A key goal of the Commission in developing the proposal is to reduce the potential for undue reliance on credit ratings by investors. In support of this objective, the proposal would eliminate as a condition for eligibility for offering ABS under a shelf registration statement the current requirement that the securities be rated investment grade at the time of the offering. In place of the ratings requirement, the proposal sets forth four new conditions for shelf eligibility:

- A 5 percent vertical risk retention requirement;
- Third-party opinions concerning repurchase obligations;
- A depositor CEO certification; and
- An ongoing undertaking to provide ongoing reporting under the Securities Exchange Act of 1934.

As a preface to our discussion of these conditions, we note the importance of shelf eligibility to participants in the securitization markets, and urge the Commission to ensure its continued availability in practice. This mechanism provides issuers with flexibility to access the market at the most optimum time at a reduced cost, while at the same time providing investors with disclosure that does not differ materially from that provided in offerings currently registered on Form S-1. Accordingly, we urge the Commission to ensure that the new eligibility criteria are neither so costly nor fraught with legal risk as to eliminate their use as a practical matter.

Following is a discussion of each of these conditions as impacted by the passage of financial regulatory legislation by Congress.

A. Risk Retention

The proposal would require sponsors of all asset classes of ABS or their affiliates to retain a minimum of five percent of the nominal amount of each tranche sold or transferred to investors. We recognize that one goal of both the proposal and the legislation is to align better the interests of originators and sponsors with those of investors. This risk retention condition to shelf eligibility reflects the prevailing view, based on the recent experience in the RMBS market, that a sponsor that has the potential to suffer losses alongside its investors is more likely to undertake the due diligence necessary to ensure that the assets underlying the securities are underwritten to high-quality standards.[27] This aspect of the proposal has now been superseded by enactment of financial regulatory legislation.

Section 941 of the Act similarly imposes a five percent risk retention requirement on "securitizers," but expressly provides a complete exemption from that requirement for "qualified residential mortgages," a term to be defined by the federal banking agencies, the Department of Housing and Urban Development, and the FHFA. In addition, the legislation provides that ABS that are collateralized by one or more assets that are *not* "qualified residential mortgages" may have a risk retention requirement that may be less than five percent. Section 941 also addresses possible forms of risk retention for CMBS.

The legislation requires the Commission, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation to jointly promulgate the risk retention rules by asset class, and the agencies must specify for each asset class the underwriting and loan characteristics that indicate reduced credit risk. The agencies are afforded significant authority to issue exemptions or adjustments for classes of institutions or assets from the risk retention requirement if such exemptions (1) help to ensure high-quality underwriting and encourage appropriate risk management practices, (2) improve customer access to credit, or (3) otherwise are in the public interest or protect investors. We urge the Commission to eliminate the risk retention element of its proposal and rely on the required interagency regulations to address this issue.

We note further that sponsors and originators can retain risk in many ways—not just simply in the form of a vertical slice. Accordingly, when addressing the possible forms of risk retention in the interagency discussions, ABA and ABASA believe it is critical to review the risk retention elements that may already be embedded in the structures of particular classes of transactions. Examples include overcollateralization generally, the seller interest in credit card securitizations, or a third-party purchaser's retention of the first-loss piece in CMBS transactions. We strongly believe that the form of risk retention should be based on asset class and not an across-the-board formulation applicable to the entire securitization market.

As discussed previously, the Act also requires the Federal Reserve Board in consultation with the Commission and the other bank regulatory agencies to study and report within 90 days of enactment on the combined impact by asset class of the new risk retention

[27] In the case of a revolving-asset master trust, the retention requirement is satisfied by retaining an owner's interest whose cash flows are at least equal to 5 percent of those paid to investors and represents a claim to the same pool of assets as the securities held by investors and an equivalent prior to those securities.

requirements and Financial Accounting Statements l66 and l67, along with statutory and regulatory recommendations for eliminating any negative impacts of these requirements. We note that, although the Commission believes that the accounting treatment for risk retention will not require consolidation of a securitization entity onto the sponsor's balance sheet, the Commission concedes that this is a "facts and circumstances" issue that does not have a single answer. Therefore, it is possible that a sponsor may incur increased capital charges as a result of the risk retention requirement. This is precisely the type of issue we hope will be addressed more fully in the study, and we further hope that the conclusions will inform the interagency rulemaking so that securitization can continue as a viable funding mechanism. Accordingly, ABA and ABASA reiterate our strong belief that it would be unwise for the agencies to move forward with any risk retention regulations until the conclusions of this study are made available.

B. Third-Party Review of Repurchase Obligations

To ensure that representations and warranties given by originators and sponsors offer meaningful protection for investors, the proposal requires as a condition for eligibility for shelf registration that the party making the representations and warranties furnish, on a quarterly basis, an opinion from a third party concerning any asset as to which the trustee has alleged a breach, but which was not repurchased or replaced because the representing party disputed the breach. We note at the outset that representations and warranties are not intended to serve as a guarantee of performance, but rather incidental recourse.

1. The Commission Should Defer to Market Participants to Resolve Issues Concerning Breaches of Representations and Warranties

While ABA and ABASA generally support efforts to provide investors with stronger enforcement of representations and warranties, we are concerned that the disclosure through third-party opinions concerning repurchase requests that are not honored will not resolve enforcement issues when the parties disagree on the legitimacy of a breach claim. The proposal does not specify who would be eligible to provide such an opinion; nor does it provide any standard for analyzing whether or not a material breach has occurred or been cured, or for ensuring that the trustee has actual knowledge of potential breaches. Importantly, the proposal does not require a mechanism for resolving disputes between the parties as to whether a breach occurred. Thus, as proposed, we believe this provision would merely exacerbate investor frustrations about ineffective repurchase provisions.

A major issue, as the Commission acknowledges, is that the representation and warranties provisions of existing transactions typically do not provide a process for determining whether a breach has occurred or a mechanism to compel the obligated party to provide the supporting documents to make such a determination. The lack of such provisions has made it difficult for investors and trustees to demonstrate the existence of a breach. Nevertheless, assuming that the proposal is properly developed with specificity and the third-party opinions are issued, it still fails to resolve a basic issue: what happens when the parties reach an impasse over the materiality of a breach. The Commission may wish to consider binding arbitration or a bidding process to determine materiality. Absent a mechanism, the third-party opinions, which will necessarily entail expenses for research and due diligence, will not resolve investor concerns and will simply increase the cost of the transaction to issuers.

We understand that the American Securitization Forum has begun work on model repurchase provisions that are intended to address the deficiencies that RMBS investors experienced during the financial crisis. ABA and ABASA believe that rather than impose a

costly system for producing third-party opinions that may, in the end, provide no real resolution to breach disputes, the Commission should defer to market participants to continue their negotiations to develop commercially reasonable solutions to repurchase issues.

2. Concerns of ABA Corporate Trustees

The Commission has asked whether it should condition shelf eligibility on receipt of a certification from the trustee in offerings of the same asset class by the depositor or its affiliates to the effect that all required opinions have been obtained or that the trustee provide notice if such opinions are not obtained. ABA's corporate trustee members adamantly oppose any suggestion that an issuer's eligibility for shelf registration be dependent on the actions of the ABS trustee. We believe it wholly inappropriate to condition ongoing eligibility for shelf registration on the actions of any party other than the issuer. Accordingly, we strongly recommend that the Commission *not* adopt any requirement that would condition shelf eligibility on a certification or notice by the trustee with respect to third-party opinions or any other issue.

The duties of trustees in asset-backed transactions are, prior to default, generally ministerial in nature. Trustees typically act in accordance with instructions set forth specifically in the transactions documents or in accordance with instructions of transaction parties that are within the scope of authority delegated to such parties in the transaction documents. As proposed, the requirement that trustees are to monitor and enforce breaches of the representations and warranties is totally lacking in specificity and runs counter to the types of activities explicitly undertaken by trustees in such transactions.

If the trustee must have a role in monitoring and/or reporting under the Securities Exchange Act of 1934 (Exchange Act) of notices of breach, demands for repurchase, actual repurchases and delivery of any required third-party opinions, the proposed rules need to make it clear that the trustee must have actual knowledge of each of these events and provide a conduit for receiving the information to be monitored and/or reported. Often, especially when the trustee serves in a nominal capacity, the trustee has no knowledge of an identified breach or that a repurchase demand has been asserted by another party against the obligated party. The trustee can only monitor and report on items/activities for which it has actual knowledge.

Therefore, for the proposal to be workable, the Commission must require that the transaction documents ensure that the trustee is in the chain of information with respect to every aspect of potential assertions of breaches of representations or warranties. Following are examples of specific areas that are of concern to trustees:

- In non-mortgage ABS transactions, the trustee typically does not prepare monthly holder reports or Exchange Act reports. Rather, the issuer or servicer is generally responsible for generating the monthly payment date reports, SEC filings and other required reports. As a result, the trustee will not have access to information pertaining to potential breaches.

- Most ABS have a monthly distribution report. To capture and report repurchase obligation information on Form 10-D, the obligated parties must have a contractual responsibility to provide the repurchase obligation information, as of a date prior to each distribution date, to the party responsible for filing the Exchange Act reports on behalf of the trust.

The proposed rules would also need to specify the level of information to be included on Form 10-D with respect to previous transactions/filings. Further clarification and guidance is needed for incorporation by reference to previous transaction filings.

In addition, the Commission will have to specify the type of third party that is competent to assess whether a breach has, in fact, occurred and whether it is material.

a. The Commission Should Issue Guidance for Breach Assessments

ABA and ABASA believe that the Commission should issue guidance on how to make an assessment of the alleged breach; and, if a breach has occurred, whether it is material. Such guidance should also describe the types of breaches that would always be material and adverse to investors. Alternatively, the Commission could mandate a process for determining materiality.

The guidance should further clarify the impact of a cure period on the determination that a breach has occurred. Currently, the process operates as follows:

- A notice of breach and request to cure or repurchase is delivered and the obligated party has a "cure period" as defined in the governing documents. This notice may be delivered by any party to the transaction (not just the trustee).
- If the breach is not cured or the loan repurchased by the expiration of the cure period, then a formal demand for repurchase is made by the party responsible for enforcing the repurchase obligation (which is typically the trustee or securities administrator).

It is unclear from the proposal whether the third-party opinion is required only in the case of breaches for which the cure period has passed, a formal demand has been made and repurchase has been refused, or whether the requirement for a third-party opinion is triggered before the end of the cure period.

b. Content of the Third-Party Opinion

The Commission should require that each third-party opinion should clearly state one of the following conclusions:

- The breach is material and the obligated party must repurchase the loan;
- The breach is not material and therefore the loan is not subject to repurchase; or
- The breach has been cured and therefore the loan does not have to be repurchased.

We recognize that the conclusion that the obligated party must repurchase the loan raises enforcement issues that are not addressed in the proposal. Nonetheless, if the provision is to have any efficacy in the market, we believe the option for such a conclusion is necessary. Moreover, the Commission should provide a mechanism to resolve impasses between the investor and the obligated party.

Finally, any assessment of a potential breach will require the independent third party to have access to sensitive/confidential information. The proposed rule should determine how privacy or confidentiality concerns with the third party will be addressed.

C. Depositor CEO Certification

The third new condition for shelf eligibility under the proposal is a requirement that the issuer file a certification signed by the chief executive officer of the depositor certifying that, at the time of each offering or takedown off a shelf, to such person's knowledge, "the securitized assets backing the issue have characteristics that provide a reasonable basis to believe that they will produce, taking into account internal credit enhancements, cash flows at times and in amounts necessary to service any payments of the securities as described in the prospectus," and that such person has "reviewed the prospectus and the necessary documents to make such certification."

ABA and ABASA are concerned that the proposed form of CEO certification, which cannot be altered, appears to require the officer to express an opinion as to the future performance of the particular assets. We believe that such a forward-looking statement is inappropriate and is akin to a personal guarantee. To the extent that this certification is intended as a substitute for the current investment grade rating requirement, it would be most appropriately provided by the registrant rather than an individual officer. Alternatively, an officer certification could be appropriate if limited to the disclosures made in the offering (in accordance with traditional materiality standards) and not the performance of the assets.

D. Undertaking to File Ongoing Exchange Act Reports

The fourth new criterion for shelf eligibility is a requirement to file ongoing Exchange Act reports, which has effectively been mooted by the enactment of financial regulatory legislation which eliminated the existing exemption for ABS issuers whose securities are held by fewer than 300 persons.

CONCLUSION

In conclusion, ABA and ABASA urge the Commission to coordinate action on its proposal within the context of financial regulatory legislation and other regulatory proposals to achieve a single uniform regulatory regime for all participants in the securitization markets. We believe that in formulating revisions to this proposal, the Commission should

balance the need for increased transparency and alignment of incentives within the securitization markets with the need to revitalize this market as a critical funding mechanism in our economy. ABA and ABASA believe that this overarching goal can be best achieved by specifically tailoring the necessary changes to each discrete asset class of ABS. Finally, we also have considerable operational concerns about the proposal and have addressed those which we deem to be the most significant.

As always, ABA, ABASA and our members remain available to discuss these positions with the Commission and staff throughout their consideration of the proposal. In the meantime, if you have any questions on the foregoing, please contact the undersigned.

Sincerely,

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