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U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
Attention: Ms. Elizabeth M. Murphy, Secretary

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

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee and the Securitization and Structured Finance Committee (the "Committees") of the Business Law Section of the American Bar Association in response to the request for comments by the Securities and Exchange Commission (the "Commission") in its August 5, 2011 release referenced above (the "Re-Proposing Release").[1]

The comments expressed in this letter represent the views of the Committees only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the American Bar Association (the "ABA"). In addition, this letter does not represent the official position of the ABA Business Law Section.

I. INTRODUCTION

The financial crisis has led to a significant reevaluation of the rules and regulations affecting financial entities and markets. Even before passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[2] which mandated a review of the use of ratings in federal regulations as an indicator of creditworthiness, the Commission had proposed an approach to the registration of asset-backed securities ("ABS") that would not rely on the availability of an investment-grade rating as the key criterion for access to shelf registration.[3] That earlier proposal would have required, as conditions to shelf

1 Asset-Backed Securities, 76 Fed. Reg. 47948 (Aug. 5, 2011) (hereinafter, the "Re-Proposing Release").

2 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (hereinafter, the "Dodd-Frank Act").

3 Asset-Backed Securities, 75 Fed. Reg. 23328 (May 3, 2010) (hereinafter, the "2010 ABS Proposals").

access, certain enhanced commitments that, with the enactment of the Dodd-Frank Act, have now become obligatory for *all* ABS registered offerings, in particular the retention of risk by the sponsor or originator of the securitization and ongoing reporting obligations under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). In addition, the 2010 ABS Proposals required an officer certification and an enhanced approach to investor remedies, each of which has been preserved in modified form in the Re-Proposing Release. The Commission also requests in the Re-Proposing Release additional comment on certain aspects of its earlier proposal to amend Regulation AB's required disclosures.

We recognize the Commission's need to move away from credit ratings as a criterion for shelf registration. We also appreciate the belief that increased disclosures with respect to residential mortgage-backed securities ("RMBS") will be needed to rehabilitate that sector of the market. At the same time, we are committed to a revitalization of the ABS markets. Timely market access is a critical component of such a revitalization, and those issuing ABS in the public markets have relied heavily on the availability of shelf registration. Each regulatory hurdle or compliance expense placed on issuers of ABS, or enhanced liability placed on their officers, makes them less likely to view ABS issuance as a prudent and cost-effective means of accessing the capital markets.[4] We consider it essential to the resurgence of this market that new eligibility criteria for shelf access and new disclosure requirements support rather than hinder this market, and we have tried to direct our comments to those key aspects of the proposed regulations that, if not carefully tailored, may impede the ABS markets.

II. THE CEO CERTIFICATION

A. General

Under existing rules, an ABS offering is not eligible to use the Commission's expedited shelf registration process unless the classes of securities to be offered pursuant to the shelf registration statement are rated investment grade by one or more nationally recognized statistical rating organizations ("NRSROs"). The current proposal for replacement criteria focuses on the officer certification as a mechanism to enhance enforcement of the obligated party's asset representations and warranties. We appreciate the Commission's efforts to address certain concerns raised by commenters on the original form of the certification. However, as we discuss below, we continue to have significant concerns about placing this significant obligation on an officer of the depositor, rather than on the depositor itself. Moreover, we continue to have concerns about the content of the certification.

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[4] The regulatory framework that governs ABS issuances will be very different in coming years than it has been in the past, with changes including mandatory risk retention; requirements for loan-level disclosures, where appropriate; Volcker rule compliance issues; modifications of the ratings process; adoption of final Section 621 conflict of interest regulations; possible changes to Rule 3a-7 and other Investment Company Act exemptions on which securitizations often rely; new challenges in the use of swaps to hedge interest and currency rate exposure; and the recent revisions to the FDIC's safe harbor for achieving legal isolation of transferred assets.

The Commission has proposed the following certificate to be signed verbatim by the chief executive officer of the depositor or the depositor's senior executive in charge of securitization:

I. 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;

II. 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;

III. 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

IV. 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 registration statement.

The first three paragraphs of the proposed certification are not qualitatively different from other certifications that have been required under the Sarbanes-Oxley Act and related Commission regulations. They require, essentially, that an executive officer with relevant responsibility have sufficient familiarity with the offered securities to be able to evaluate the disclosure, and certify that he or she has done so.[5] Although we have comments on the first and third paragraphs, as detailed below, we believe they can be revised in an acceptable manner. The fourth paragraph, however, requires an analysis of the security itself and an attestation as to its quality, and represents a significant departure from the ways in which officer certifications have been

[5] Re-Proposing Release at 47951.

previously used in the regulatory system. As we noted in our comment letter on the 2010 ABS Proposals, [6] we do not believe an individual officer of the registrant should bear the obligation to assess and validate the quality of the offered securities as a condition for shelf eligibility.

The Commission has spent a significant amount of time and effort over the past several years evaluating the rating process for asset-backed securities, the conflicts of interest inherent in that process and appropriate procedures and safeguards.[7] Notwithstanding the issues involving ratings that have been identified, rating agencies are *independent organizations* with extensive experience evaluating the risks of offered securities, databases of historical performance, carefully tested systems and internal procedures intended to ensure consistent application of articulated standards. The CEO of the depositor, or the senior officer in charge of securitization, has no such independence and is unlikely to bring to bear a comparable level of experience, process, and support systems. Put another way, an officer certification intended to reflect the payment risk inherent in the securities is wholly inferior to an independent third-party rating by a qualified rater.

Moreover, we do not believe that an officer of the depositor should be made responsible for this type of analysis. If the Commission is seeking assurances as to the structure and cash flows of the securitization, we continue to believe that such assurances should come from the issuer and not its officers. The CEO of the depositor, especially where such depositor is an insured depository institution, may well be too removed from the process to be able to make such a certification. The senior officer in charge of the securitization should understand the material terms of the securitization but will likely have relied on a team of analysts, treasury staff, accountants, attorneys and others to establish the actual structure, select and diligence the asset pool and conduct any relevant analysis or modeling. In other words, a securitization is a team endeavor, and one that may not leave any one person in a position to evaluate all of the securitization's material attributes. The issuer may be able to make the certification on the basis that it had in place the relevant procedures and personnel to structure the security, even where that cannot be certified at the level of an individual. But where the relevant officers of the depositor are not comfortable making the required certification, either the issuer will lose access to shelf registration or the senior officer in charge of the securitization may be unduly pressured by the organization to sign a certification for which he or she does not have all relevant knowledge. We do not believe either of these outcomes would serve the Commission's goals or address the needs of investors.

We discuss more specific aspects of the proposed certification below. We have included in this letter a proposed revision that makes certain language changes and also bifurcates the certification so that the fourth paragraph is made in an organizational capacity. For your

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6 Comment letter, dated August 17, 2010, of the Committee on Federal Regulation of Securities and the Committee on Securitization and Structured Finance of the Section of Business Law of the American Bar Association, *available at* http://sec.gov/comments/s7-08-10/s70810-150.pdf (hereinafter, the "2010 ABA Comment Letter"), pp 75-8.

7 *See* SEC Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets (2003); Amendments to Rules for Nationally Recognized Statistical Rating Organizations, 74 Fed. Reg. 63832 (Dec. 4, 2009); Nationally Recognized Statistical Rating Organizations, 76 Fed. Reg. 33420 (proposed Jun. 8, 2011).

convenience, we have attached as Exhibit A a revised version of this certification blacklined against the text set forth in the Re-Proposing Release and incorporating our proposed changes.

B. Paragraph 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.*

In keeping with the concept that the certifications are based on the officer's review of the prospectus, we believe that the officer's statements should relate to the structure of the transaction as described in the prospectus. We believe the phrase "including without limitation" makes unclear the scope of the certification, and thus is not appropriate as required language. In addition, consistent with customary disclosure principles, including the requirements of Regulation AB as currently in effect, we believe the officer's certificate should be more explicit that the certifying officer is responsible only for knowing material characteristics of the assets and material terms of the internal credit enhancement and securitization agreements.

We would revise paragraph 1 to read as follows:

> *I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered]* ***(the "Securities")*** *and am familiar with the structure of the securitization* ***described therein****, ~~including without limitation~~ the* ***material*** *characteristics of the securitized assets underlying the offering* ***(the "Assets")****, the* ***material*** *terms of any internal credit enhancements and the material terms of ~~all~~* ***the material*** *contracts and other arrangements entered in****to*** *to ~~the~~ effect the securitization.* ***In making this certification, I have relied on oral and written information from other officers and employees of the Company and from third-party advisors to the extent I have deemed appropriate.***

C. Paragraph 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.*

We have several recommended language changes (some of which are definitional) with respect to paragraph 3. First, we believe the term "fairly presents" standard is customarily used by experts such as accountants certifying as to the audited financial statements of a corporation or lawyers certifying as to the description of laws in a prospectus. In the context of the federal securities laws, the signing officer is not considered to be an expert, and as such, we believe that it would be more appropriate for the officer to state that the prospectus "discloses" the material information regarding the characteristics and the risks of ownership of the securities being offered pursuant to the prospectus. In addition, we believe that the prospectus disclosure of risks of ownership of the ABS is not limited to the discussions under the heading "risk factors" in the prospectus but would include information presented in other parts of the prospectus as well. For example, the registrant's historical static pool "loss" data, the structuring assumptions underlying the decrement and yield tables and those tables themselves should be considered to form a part of the disclosure of risks even to the extent not appearing under the caption "risk factors." Finally, as in the case of paragraph 1, we believe that this paragraph should be subject to a materiality standard with respect to credit enhancements. Our suggested revisions to this paragraph would take the following form.

> *Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part,* ~~*fairly present*~~ ***disclose fairly*** *in all material respects the characteristics of the* ~~*securitized asset underlying the offering*~~ ***Asset****s described therein and the risks of ownership of the* ~~*asset-backed securities described therein*~~ ***Securities****, including all* ***materia****l credit enhancements and all* ***material*** *risk****s*** ~~*factors*~~ *relating to the* ~~*securitized assets underlying the offering*~~ ***Assets*** *that would affect the cash flows sufficient to service payments on the* ~~*asset-backed securities*~~ ***Securities*** *as described in the prospectus.*

In addition, we believe the officer providing certifications with respect to a shelf registration of ABS should be able to rely on all of the defenses under federal securities laws available to the officers who certify the underlying registration statement. We therefore propose the addition of the below statement to the form of certification.

> ***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 who signed the registration statement of which the prospectus referred to in this certification is a part.***

D. Paragraph 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 registration statement.*

Our primary concerns with respect to the proposed officer's certification relate to paragraph 4. As we discuss above, we do not believe it would be appropriate to require an officer of the depositor to make this certification in his or her individual capacity, rather than on behalf of the organization. In addition, we believe the language of the fourth paragraph of the re-proposed certification continues to pose significant substantive issues that would not, in its current form, support certification even by the depositor.

We appreciate the efforts the Commission has made to revise the certification in several important respects in response to comments received on the earlier proposal. First, the Commission has clarified that the certification is not intended to be a guarantee by the signing person that cash flows from the collateral backing the ABS *will* be sufficient to make payments on the ABS; second, the revised language limits the certification to the classes of ABS offered pursuant to the registration statement (rather than including all securities that form part of the overall structure); and third, the certification shifts from a statement that the cash flow "will be" sufficient to make payments on the ABS to a statement that the characteristics of the assets and structure of the ABS transaction are *designed* to produce sufficient cash flow to service the registered ABS. These changes are appropriately responsive to many of the comments previously made; however, we believe there are continuing issues with respect to the substance of the certification.

As with prior paragraphs, we believe the paragraph should relate only to material information about the assets, structure, credit enhancement and other terms. We also believe that the word "structured" is better understood than "designed" in the context of these transactions, and we suggest using that term instead, reflecting the nature of these securitizations as a type of structured finance. Our primary concern, however, is the statement that the securitization is designed (or structured) to produce "cash flows at times and in amounts sufficient to service expected payments on the asset backed securities."

First, we are not sure what the "expected payments" would be with respect to any particular securitization. For mortgage-backed securities, the payments are typically pass-throughs of collections, sometimes with adjustments made for servicer advances. The prepayment speed on the mortgage loans will affect the rate of payment of the securities. Moreover, the expectation of each investor as to the time and amount of each payment is a subjective determination, based on the investor's assumptions about prepayment speed and other matters. The assumptions made by the sponsor in structuring the securitization transaction may not be the same as the assumptions an investor uses in evaluating the ABS for purchase. Although the prospectus includes a payment "waterfall" with priorities of payment for various classes, actual payments on the classes may vary under various prepayment and loss scenarios and be subject to the other risks disclosed in the prospectus. Credit card securitizations, where the issuer has a greater ability to set the payment schedule, are rated based on the presumption that early amortization will be triggered early enough after the development of a problem with the performance of the assets so that the securities will be repaid before the credit enhancement is fully utilized. In such structures, a certification as to the availability of cash flows "at times and in amounts sufficient to service expected payments" would miss a key structuring issue.

When credit rating agencies evaluate the likelihood of the receipt of payments on classes of ABS, they generally refer to "scheduled payments" of interest and "ultimate" repayment of principal. Such a formulation is particularly important in the case of ABS structured as "pass-through" securities where no fixed principal payments are required to be made.[8] Using that phraseology is consistent with the general premise that the certification is intended to function as a substitute for credit ratings on the ABS. Our suggested language also takes into account that some types of ABS, for instance lease securitizations, do not provide for payments denominated as "interest" or "principal."

Finally, we believe the certification should clearly reflect the effect on cash flows (and corresponding payments on the ABS) of the risks described in the prospectus. We are concerned that the Commission's proposed form of certification could be read to suggest that the adverse effects of potential risks had been essentially negated through the structuring, and that is not the case. The securitization will have been enhanced based on assumptions about those risks and their severity, but we believe any certification needs to be clear about the potential effects of such risks, should they come to pass. Our proposed revised language is as follows, with the bracketed language of the knowledge qualifier reflecting our recommended change to a depositor certification:

> [*Based on my knowledge,] taking into account the* ***material*** *characteristics of the ~~securitized assets underlying the offering~~* ***Assets****, the structure of the securitization, ~~including~~* ***the material terms of any*** *internal credit enhancements, and any other material features of the transaction,* [9] *in each instance, as described in the prospectus, 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~~* ***support scheduled payments of interest and the ultimate repayment of principal on the Securities (or other scheduled or required distributions on the Securities, however denominated) in accordance with their terms as described in the prospectus; provided that the risks described in the prospectus may adversely affect such cash flows****.*

A complete form of the certification, reflecting these changes and shifting responsibility for paragraph 4 to the depositor, is set out below:

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8 An alternative phrasing that refers to the making of contractually required payments would not capture what we believe to be the Commission's intent, as many of these structures require payment only to the extent of cash flows actually received and available in accordance with the priority of payments waterfall.

9 We note that, by referring to "other material features of the transaction," the certification will effectively include external credit enhancements even if not specifically named.

Certification

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] (the "Securities") and am familiar with the structure of the securitization described therein, the material characteristics of the securitized assets underlying the offering (the "Assets"), the material terms of any internal credit enhancements and the material terms of the material contracts and other arrangements entered into to effect the securitization. In making this certification, I have relied on oral and written information from other officers and employees of the Company and from third-party advisors to the extent I have deemed appropriate.

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, disclose fairly in all material respects the characteristics of the Assets described therein and the risks of ownership of the Securities, including all material credit enhancements and all material risks relating to the Assets that would affect the cash flows sufficient to service payments on the Securities as described in the prospectus.

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.

Date:____

____
[Signature]
____
[Title]

[Based on my knowledge,] taking into account the material characteristics of the Assets, the structure of the securitization, the material terms of any internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, the securitization is structured to produce, but is not guaranteed by this certification to produce, cash flows at times and in amounts sufficient to support scheduled payments of interest and the ultimate repayment of principal on the Securities (or other scheduled or required distributions on the Securities, however denominated) in accordance with their terms as described in the prospectus; provided that the risks described in the prospectus may adversely affect such cash flows.

DEPOSITOR

By__________________________
Name
Title

III. CREDIT RISK MANAGER

In addition to the proposed requirement for an officer's certificate, the Re-Proposing Release would require, as a condition to ABS shelf registration, that the underlying transaction documents contain provisions for the trustee to appoint a credit risk manager. Upon the occurrence of certain events, pursuant to the documents, the credit risk manager would be required to review the underlying assets for compliance with the representations and warranties made pursuant to the transaction documents. These triggering events would include (i) the failure of "the credit enhancement requirements, as specified in the underlying transaction agreements," to be met or (b) an investor request for review "pursuant to the processes provided in the transaction [documents]."

We generally support the proposed requirement to establish an independent review process by a credit risk manager as a condition for shelf eligibility for RMBS and certain other asset classes, subject to our recommendations for modifications described below. For asset classes that have no history of repurchase demands, however, we believe the requirement will add costs for which there will be no concomitant investor benefit. Accordingly, we believe that the proposal should exempt those classes.

A. Certain Asset Classes Should Be Exempt

As the Commission knows, the issues around enforcement of representations and warranties have primarily arisen in the context of RMBS. Credit card and auto securitizations, however, use different structures and have different processes for addressing problem assets. In credit card securitizations, for example, transactions typically include provisions for returns and fraudulent charges to be excluded from the trust balances and absorbed by a reduction in the seller's interest. In January, the Commission will begin receiving reports that will reflect the history of repurchase demands in these asset classes. In most instances, we expect that issuers in these classes will have nothing to report.

Adding a transaction party to a securitization always involves expense. The Commission's proposal appears to require that the credit risk manager be identified at the time of the securitization, and thus contractual arrangements would have to be in place at that time. We think it likely that the credit risk manager would receive an upfront fee for agreeing to be named and for negotiating the terms and conditions on which it would act if necessary. For asset classes where these provisions are unlikely to ever be used, we do not believe these costs are justified in light of the fact that there is no added benefit to investors in these classes of ABS. We therefore ask that the Commission not require the appointment of an independent credit risk manager for transactions in asset classes that have no meaningful history of repurchase demands.

B. Credit Enhancement Trigger

We agree with the Commission that the review by a credit risk manager should be triggered by an objective and quantifiable test that is specifically tailored to the relevant securitization. Such a test should be designed to trigger review when the performance of the underlying assets falls materially below expectations after the closing of the transaction. This trigger should reflect the unique structural elements of the transaction, the unique characteristics of the underlying assets, and the baseline assumptions about asset performance that were made in structuring the transaction.[10]

Although we agree with the approach articulated by the Commission in concept, we do not believe the proposed language for Form SF-3 will work as intended. In particular, the credit enhancement requirements for securitization transactions frequently specify only the *initial* amount of credit enhancement that must be in place for the transaction, rather than the remaining amount of credit enhancement over time. For example, in most traditional private-label RMBS transactions involving prime mortgage loans, there is no ongoing "credit enhancement requirement" that must be satisfied after the closing of the transaction. Credit enhancement is structured as the subordination of more junior securities, with no over-collateralization or reserve account. These classes are intended to absorb losses, resulting in a write-down of their principal and a reduction in available credit enhancement below initial levels. However, this is the intended and expected result and generally would not signify the type of poor performance that should trigger a credit risk manager review. For these types of transactions, a trigger tied to a decline in credit enhancement would be overly sensitive and lead to unnecessary credit risk manager review of each loss. We believe a better approach would be for the final rule to require that the transaction documents provide for review "if the loss, delinquency, credit enhancement-based or other specified trigger levels, as applicable, set forth in the documentation have been breached."[11] Such an approach would allow the issuer (with input from investors) to tailor these triggers to the transactions and facilitate the development of market standards for a decline in performance that mandates such a review.

C. Investor-Directed Trigger

We believe that the proposal for an investor-triggered review is unnecessary in light of the objective standards to be included. In particular, we are concerned that such a review would allow a minority of investors to impose costs on other transaction parties (including other investors) at a time when no objective credit risk manager review event has occurred.

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[10] RMBS investors and issuers, through the American Securitization Forum, have recently engaged in active dialogue resulting in a set of model repurchase provisions for RMBS transactions (the "ASF Model Provisions") that embrace a similar approach. The ASF Model Provisions would allow the issuer and investors to establish credit risk manager review triggers that reflect investors' concerns about the securitized portfolio. We believe the Commission's revised proposal was intended to achieve the same result. Accordingly, the ASF Model Provisions may provide a guide to industry-accepted approaches to these issues.

[11] In addition, we believe that the Commission should make clear that the securitization documentation need only include *one* performance-based trigger (*e.g.*, if a transaction has a loss-based trigger, it need not have a delinquency or credit enhancement-based trigger). In other words, we believe that the Commission should allow the parties to any particular transaction to establish the appropriate trigger or triggers for the pool of assets.

Particularly when the transaction and underlying assets are performing as expected, not all investors will have the same interest in requiring a credit risk manager to conduct a review. For instance, investors in senior securities may oppose a credit risk manager review if adverse results from a review could reduce the market value of their securities; the cost of the review, if not paid by the requesting investors, would reduce overall cash flow available to securityholders; or a review could accelerate prepayments by requiring repurchase of performing assets in a declining interest rate environment. If parties to a particular transaction wish to negotiate for investor-directed triggers, they may do so, but we do not believe such triggers should be mandated.[12]

The requirement for mandatory investor-directed reviews without any specific limitations on such reviews is particularly troublesome. For example, without any limitations in the documents, an asset (or even the entire pool) could be subjected to multiple reviews over the course of the transaction—at substantial cost to the trust and with little benefit to the investors as a whole. If the Commission nonetheless decides to require a mandatory investor-directed review even when objective performance triggers have not been breached, we believe either that the final rule should include some specific parameters around such a review or the rule should permit the transaction documents to provide appropriate limitations on investor-directed reviews. The rule or the transactions documents could provide that such a review could only be conducted once during the term of the transaction with respect to the pool as a whole. With respect to requests for review of particular loan files, investors could not be permitted to make such requests more frequently than annually to avoid undue cost and disruption to the transferor's and servicer's business.[13] Such a restriction would be consistent with the market standard for privately negotiated audit rights in transactions where there has not been a default. In addition—and again, for clarity, only in circumstances in which no performance trigger has been breached but investors have nonetheless requested a review—the transaction documents could be permitted to specify that the review will be conducted at the requesting investors' expense unless a material number of valid repurchase claims are identified. This would ensure that other investors that did not request the review, or the issuer, will not be disadvantaged by the cost of an unnecessary review, and would also serve to eliminate the potential over-use of a "riskless option" by investors. Finally, it would be appropriate, in our view, to require that some specified minimum percentage of the investors in each class of publicly registered securities would be required in order to request the review. This would, in our view, mitigate the risk that certain investors, who have different rights and interests than other investors, could request a review that is not desired by other investors.

D. Review Process

We agree with the Commission's preliminary determination that "transaction parties should have the flexibility to tailor the credit risk manager review procedures to each ABS

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[12] We note, as well, that with the elimination of the ability to terminate reporting for transactions with fewer than 300 investors, investors will now have the benefit of the annual assessment of servicing compliance required for ABS issuances as part of Form 10-K, which will provide them with additional insight into any issues developing around the servicing of securitized assets.

[13] We note that such a restriction should not apply to reviews as a result of breaches of performance-based triggers.

transaction, taking into account the specific features of the transaction and/or asset class." The appropriate nature and scope of review will depend on the asset class, the transaction structure, and the circumstances under which the need for review arose. Further, as described in footnote 10 above, issuers and investors are already actively engaged in negotiating the nature and scope of these reviews. We believe that a prescriptive set of Commission-mandated requirements will not provide sufficient flexibility for market participants to determine the most appropriate level of review in light of the circumstances triggering such review, the asset class and the cost of such review, and we thus urge the Commission to leave these matters to the transaction parties.

E. Appointment Should not be by Trustee

The Commission's proposal requires that the credit risk manager be appointed by the trustee upon the occurrence of a trigger event. This requirement poses several issues. First, we believe this is inconsistent with the proposed disclosure requirements that would require the issuer to disclose the identity and experience of the credit risk manager in the relevant prospectus, as reflected in the proposed revisions to Item 1109(b) of Regulation AB. This disclosure requirement presumes that the credit risk manager has been identified and the terms on which it will serve have been negotiated prior to the commencement of the offering. Second, in our experience trustees are generally unwilling or unable to make the sort of discretionary judgment inherent in identifying and appointing a suitable credit risk manager, particularly on a post-closing basis. Finally, except as noted above with respect to asset classes for which we believe no credit risk manager should be required, we believe that all parties to an ABS transaction would prefer the certainty of having an identified credit risk manager at closing. To the extent a credit risk manager is required for a particular transaction, we believe such credit risk manager should be identified and engaged prior to the closing of the transaction, even though the credit risk manager may never need to conduct a formal review of the assets.

IV. INVESTOR COMMUNICATION

We support the Commission's proposal to require issuers using shelf registration to agree to facilitate investor communications. We believe the proposal strikes the proper balance between investor objectives and issuer responsibilities. In particular, we believe the limited disclosure proposed—specifically the identity of the investor requesting communications from other investors, the date of the request, and a means for other investors to contact the requesting investor—provides sufficient information to support these communications without unduly burdening the issuer. We would not favor requiring the filing party to disclose the substance of the communication the investor intends to make to fellow investors or even disclosure as to the "type" or "category" of the matter the investor wishes to discuss. We believe such information is more appropriately conveyed directly by the investor itself and should not be given an imprimatur of the issuer (or trustee) involved in facilitating the request.

We believe the Commission should not mandate that the notice that an investor wishes to communicate with other investors be included on periodic reports on Form 10-D. We note that many trustees maintain websites where they post payment date statements for investors, and we understand that some trustees, particularly in the case of commercial mortgage-backed securities ("CMBS") transactions, allow investors to communicate with each other through such websites.

We believe that investors may prefer the convenience of trustee websites, rather than being required to search EDGAR filings. In any event, we believe that the Commission should allow the parties to determine the most appropriate and effective method of communicating an investor's request to communicate, and that the final rule should merely require that the transaction documents must provide a mechanism to facilitate investor communications.

With respect to Exchange Act filings, we believe that Form 10-D filings would be preferable to Form 8-K, because Form 10-D filings are made with respect to each payment date for the ABS. Requiring the disclosure of such investor communication requests on Form 8-K would, in our view, be inconsistent with Commission precedent for the use of Form 8-K, which is typically reserved for the disclosure of material, time-sensitive developments rather than more ordinary course communications. Indeed, the Commission created Form 10-D in part to refocus the use of Forms 8-K for securitization on such events, rather than allowing Form 8-K to continue to serve as the form for disclosure of distribution reports. Thus, if the condition relating to facilitating investor communication is to be satisfied by including the notice in the reports filed with the Commission, we believe the filing should be made on Form 10-D.

We believe that issuers should be able to obtain some verification that investors requesting such communications have, in fact, invested in the relevant securities. However, we believe the Commission's proposed process, which would require that the investor obtain a written statement from the actual record holder that the investor beneficially owns the related ABS, would likely be too cumbersome. As the Commission has noted, The Depository Trust Company ("DTC") serves as the ABS record holder and the investor may hold its interest in the ABS through one or more layers of intervening brokers. The same separation of record ownership and beneficial ownership that has made ABS investor communication difficult in the past may well make it difficult for the investor to obtain the required written statement from DTC. In circumstances in which rapid verification of investor status has been required, trustees have accepted screen shots from DTC, letters from registered broker-dealers affirming the identity of the beneficial owner on whose behalf they hold a position, and copies of trade confirmations. We believe that one or more of these items, together with a written certification by the investor that it holds the position, would provide a more efficient means of establishing the investor's status. We believe the transaction documents should be permitted to specify the necessary combination of these certifications and materials for investors to establish their status, with a written statement for the record holder only functioning as one of several options. We further recommend that the text of proposed Item 1121(g) be revised to reflect that the issuer is permitted to include such verification requirements in the transaction documents as a condition to facilitating investor communication.

V. FILING NEAR-FINAL TRANSACTION AGREEMENTS WITH RULE 424(h) PROSPECTUS

In the 2010 ABS Proposals, the Commission proposed amending Item 1100(f) of Regulation AB to require that agreements and other documents specified to be filed as exhibits to an ABS registration statement would have to be so filed no later than the date on which the final prospectus was required to be filed under Rule 424. The Re-Proposing Release essentially proposes retaining this requirement (although changing the reference from "agreements or other documents” to “final agreements”) but also adds a new timing requirement: agreements "in substantially final form" would have to be filed by the date on which the Rule 424(h) prospectus is required to be filed. As proposed in the 2010 ABS Proposals, Rule 424(h) would require an ABS issuer using a shelf registration statement on proposed Form SF–3 to file a preliminary prospectus with transaction-specific information at least five business days before the pricing date (i.e., the first sale of securities in the offering), and Rule 430D would provide that a material change in the information provided in the Rule 424(h) filing, other than offering price, would require a new Rule 424(h) filing and, therefore, a new five-business-day waiting period. The Re-Proposing Release states that the Rule 424(h) and Rule 430D proposals “remain outstanding.” Taken together, proposed Item 1100(f) and proposed Rules 424(h) and 430D would seem to provide that any material change in the terms of an ABS offering requires the re-filing of a new Rule 424(h) preliminary prospectus and revised transaction agreements and triggers a new five-business-day waiting period.

Although we generally support the concept of a brief waiting period between the issuance of the Rule 424(h) prospectus and the pricing date in order to give investors adequate time to analyze an ABS offering, we believe the proposed periods are unnecessarily long. For the reasons stated on pages 79-82 of our 2010 ABA Comment Letter, we would encourage the Commission to consider a more tailored approach to arrive at appropriate initial and subsequent waiting periods. We therefore reiterate the recommendations set forth in Part V of the 2010 ABA Comment Letter, including our recommendation that the required minimum waiting period be reduced to one business day for widely followed, programmatic ABS issuers and two business days for all other ABS offerings qualifying for shelf registration on proposed Form SF-3. The length of any restarted waiting period should, we believe, be left to the discretion of the issuer and the underwriter but should not be required to exceed the applicable initial minimum waiting period. As we noted in the 2010 ABA Comment Letter, longer waiting periods expose issuers to changes in the market and, because originators must take into consideration the length of time needed to complete securitizations, may increase the costs of originating the underlying assets. The additional costs are likely to be passed on to the asset obligors.

As to the proposed revision to Item 1100(f) itself, we are concerned that in some instances the requirement will impose unnecessary costs and timing constraints on the issuer, as well as introduce inefficiencies into the offering process, without a corresponding benefit to investors. In particular, where the relevant registration statement includes forms of agreement that closely resemble the final versions of the agreements to be executed, we do not believe that an additional pre-pricing filing will add value to the process. Moreover, to the extent deal-specific terms are being reflected in the documentation, revising both the underlying documents and the disclosure documents concurrently can lead to greater inconsistencies between them than allowing one to come to rest and then conforming the other.

We believe that, to the extent that deal-specific terms create significant changes to or clarifications of the forms filed with the registration statement and the Commission believes that the current documentation should be filed before pricing, such documentation should be made available to investors one business day before they are asked to make an investment decision. Because all material terms of these agreements will have been described in the prospectus, we expect investors to use the agreements for incremental analysis and to evaluate any differences between the legal language of the agreements and the plain English descriptions included in the prospectus. Staggering the filing dates benefits investors as well as issuers because it enhances the likelihood that final changes to the preliminary prospectus will be properly and clearly conformed in the transaction agreements.

Finally, we note that certain documentation aspects are highly dependent on the pricing of the transaction and generally cannot be finalized before then. For instance, swap agreements are generally negotiated after the transaction has priced to reflect pricing terms and market conditions on the date of entry. In addition, we understand that some of the technical real estate mortgage investment conduit ("REMIC") provisions that must be added into RMBS and CMBS documentation cannot be provided within the proposed time frame (but also have little relevance for investors, so long as they are properly drafted). We believe that, where aspects of documentation cannot be included in the disclosure package on the proposed time frame, the Commission should allow such documentation to be updated without restarting any relevant waiting periods.

VI. LOAN-LEVEL DISCLOSURES

The Commission has requested additional comment with respect to its proposals for loan-level disclosures and certain other aspects of its 2010 ABS Proposals. In our 2010 ABA Comment Letter, we commented extensively with respect to such matters, and do not feel it generally advisable to repeat such comments here. We are, however, including further comment with respect to disclosures for equipment loans and leases, credit card receivables and auto loans and leases. In addition, we are responding to the Commission's request for additional responses with respect to exempt offerings made in reliance on Rule 144A and Regulation D. Finally, we note, as we have previously, that providing significant additional disclosures will require substantial lead time and such disclosures should only be required after a lengthy compliance period and only with respect to transactions after the applicable effective date.

A. Equipment loans and leases

The equipment finance sector is characterized by a large number of highly competitive providers of loan and lease financing, both to small businesses and to larger enterprises. We believe, and several issuers in the equipment ABS sector have confirmed, that both the 2010 ABS Proposals and the revised proposals in the Re-Proposing Release are likely to adversely affect the cost and availability of credit to the commercial obligors which comprise the overwhelming majority of underlying lessees and borrowers in equipment ABS. Similarly, we believe that investors in equipment ABS have the marketplace power to force disclosure, both in due diligence meetings and in placement memoranda or prospectuses, of any data which investors deem material--and hence that certain aspects of the proposed revisions to Regulation AB are both unnecessary and counterproductive.

For over 25 years, the private placement marketplace has functioned as a laboratory for securitization of new asset classes which are not yet sufficiently developed to be marketed through the marketing process of a registered public offering. In the 1980s, securitization of equipment leases, with their status as "executory contracts" under the Bankruptcy Code, was developed almost exclusively in the private placement arena, with the exceptions being programs sponsored by nationally recognized banking institutions. Whether public or private, equipment finance ABS transactions during the 1985-1995 period typically required lengthy due diligence (including loan level due diligence where appropriate) and structuring discussions, as well as detailed negotiations with potential institutional investors.

The adoption of Rule 144A in the mid-1990s energized the ABS marketplace by streamlining the process of marketing equipment ABS to institutional investors. By facilitating investor resales of these securities and reducing related transaction costs, Rule 144A provided much-needed liquidity to equipment ABS. The Commission's proposal to condition the availability of the Rule 144A and Regulation D safe harbors upon compliance with Regulation AB asset-level disclosure requirements, we believe, would have significant adverse effects on these transactions.

Equipment ABS participants have expressed concern that the proposed disclosure requirements could have the unintended and undesired effect of limiting the private marketplace to the larger issuers that possess the visibility and resources to participate in the registered public marketplace. The costs of producing loan-level disclosure, as well as the other disclosures required under Regulation AB, could eliminate private equipment ABS as a viable source of capital for many smaller originators of equipment leases. We are very concerned that it also could reduce the overall availability of equipment leases and therefore hinder the ability of small companies to obtain financing for equipment purchases.

Moreover, we believe the Commission's proposals for equipment ABS do not adequately capture the distinctions between this class and other asset classes, such as auto ABS. Auto assets form a relatively homogeneous class consisting of limited variants of contracts (either retail installment sales, secured loans or operating leases) for a smaller range of equipment (private passenger auto, light trucks/delivery vehicles, heavy trucks). By contrast, the assets underlying equipment ABS can include, among others, contracts in the form of secured loans, leveraged lease loans, single investor "true" leases, rental agreements, lease-purchase contracts, rent stripping transactions, sale-leasebacks, and equipment finance agreements. The assets themselves may be as small as swipe card machines and as large as ocean-going vessels and jumbo jet aircraft. Equipment ABS obligors range from AAA-rated corporations to unrated middle market companies to small businesses which may or may not have a Fair Isaac credit score. This diversity does not lend itself well to a uniform set of loan-level disclosure requirements.

Our 2010 ABA Comment Letter provided substantial background on the confidentiality issues that the 2010 ABS Proposals would present for equipment ABS.[14] We will not reiterate the detailed analysis of the problems which would result from the Commission's proposals, but we wish to emphasize the following:

[14] 2010 ABA Comment Letter, pp. 20-3.

- Asset level data, even data grouped by credit quality (which as noted above may not be feasible for many equipment ABS asset classes), may enable competitors to derive the originator's proprietary pricing and underwriting practices. In addition, it may allow competitors and others to derive confidential information about the customers of a particular equipment finance business, which may harm both the customer and the asset originator.

- Obligor credit ratings and other proposed disclosure regarding ability to pay are not as pertinent to equipment ABS as in other asset classes. An equipment lessor or lender considers several subjective factors, such as whether the equipment is "mission critical" to the obligor's business operations; how readily the equipment can be repossessed and remarketed; and whether the equipment is likely to produce meaningful resale or re-lease revenues at lease expiration.

- A breakdown of data by true lease versus a loan-type contract has generally not been required, because of the subjective analysis which is used to distinguish between the two kinds of contracts. As the American Bar Association Annual Survey of Uniform Commercial Code: Leases has demonstrated over the years, courts have struggled with this question, reaching inconsistent and occasionally erroneous conclusions. It would be improper to impose upon equipment ABS issuers the burden of representing whether each contract in the securitized pool constitutes a true lease or a lease intended for security, when courts of law and academic commentators have been unable to agree upon how to classify a particular contract.

B. Credit card receivables and auto loans and leases

Credit card receivables and auto loans and leases consist of pools of thousands of assets. Any single line-item represents a fraction of the asset class so small that it is insignificant to the performance of the securitization, and therefore line-item disclosure is meaningless to investors. The Senate report on hearings related to the Dodd-Frank Act makes clear that Congress never intended to mandate loan-level disclosure for these asset classes, stating that:

> 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.[15]

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[15] Senate Report No. 111-176 at 131 (available at http://banking.senate.gov/public/_files/Comittee_Report_S_Rept_111_176.pdf).

With no legislative intent to impose new and significant reporting burdens on issuers of securitizations of credit card receivables and auto loans and leases, and because of the complete lack of utility of providing loan-level data to investors, we strongly urge the Commission to exclude these asset classes from any requirement for disclosure of loan-level data for securitizations.

C. The Rule 144A and Rule 506 safe harbors

The Rule 144A and Rule 506 safe harbors were adopted to provide certainty that specified transactions are not considered distributions of securities to the public and thus are exempt from registration under Sections 4(1) and 4(2) of the Securities Act of 1933, as amended (the "Securities Act"). The criteria for determining eligibility under these safe harbors focus on the nature of the transferor, the nature of the transferee and the means by which an offering or resale of securities takes place. The proposed amendments to Regulation AB to require asset-level disclosure as a condition to eligibility under Rule 144A and Rule 506 are wholly unrelated to the safe harbor criteria centered on the definition of a "distribution". The Commission should not use its authority to amend the safe harbors as a means to require issuers of structured finance products to make additional asset-level disclosures outside of the purpose of the safe harbors of providing certainty with respect to the statutory exemptions.

The Commission has requested comments on whether asset-level disclosures in transaction documents should be required specifically by issuers of "asset-backed securities" (as defined in Item 1101(c) of Regulation AB) offered in reliance on the Rule 144A and Rule 506 safe harbors. Although this is a narrower proposal than that made by the Commission in its 2010 ABS Proposals, as we discuss above, we do not believe that adding asset-level disclosure as a condition to the availability of the Rule 144A and Rule 506 safe harbors for any class of securities is appropriate. Although we appreciate that the scope of asset-backed securities covered by Item 1101(c) is limited to RMBS, CMBS, automobile loans and leases, equipment loans and leases, student loans, floorplan financings, corporate debt and resecuritizations–asset classes for which line-item disclosure is currently required under Regulation AB in the context of public offerings–adding clarity around a requirement that private issuers cannot meet without undue cost does not alleviate the issue for these transactions. We believe that established ABS issuers in the public markets will continue to conduct their transactions as public offerings unless the cost or competitive harm of providing loan-level data eliminates the value of securitization to them as a source of funds. We further believe that smaller entities that currently do not issue into the public markets may lose market access entirely because they do not have the resources to provide public-type disclosures.

D. Securities with no current line-item disclosure requirements

Although we strongly recommend, as discussed above, that the Commission not condition the Rule 144A and Rule 506 safe harbors on asset-level disclosure in transaction documents, if the Commission nonetheless adopts such a requirement, it should in any event exempt securities that are not otherwise intended to be covered by Regulation AB. As the Commission notes in the Re-Proposing Release, there are no clear information requirements for structured finance products that are not defined in Item 1101(c) as "asset-backed securities". In addition, the broadly defined term "structured finance products," as used in the proposed amendments to the safe harbors, could be interpreted to cover a range of securities that are not generally considered to be asset-backed securities, and would thus create confusion as to the scope of the requirements for a broad range of issuances. To preserve the certainty intended to be provided by the Rule 144 and Rule 506 safe harbors, the Commission should exempt from any asset-level disclosure requirements all securities that are not included in the more narrowly defined term "asset-backed securities" under Item 1101(c).

VII. ECONOMIC COSTS AND BENEFITS ANALYSIS

The volume of term ABS offerings under shelf registration statements dwarfs the volume of ABS offerings under Rule 144A and other private offering exemptions.[16] Given the sheer size of the term ABS market and its instrumental role in supplying affordable credit across the full spectrum of consumer and business activity, the economic impact of *any* substantial changes to the rules governing the use of shelf registration statements by ABS issuers will necessarily be profound.

The Re-Proposing Release contemplates the most substantial changes to the rules for shelf eligibility for ABS issuers in years.[17] In addition, the 2010 ABS Proposals contemplate some of the most dramatic changes to disclosure rules and the offering process ever proposed by the Commission. In its commentary to the Re-Proposing Release and in the 2010 ABS Proposals, the Commission offers a rather limited assessment of the costs and benefits and the Re-Proposing Release seeks comment on all aspects of the Commission's economic analysis. The Commission also seeks comment on whether its proposals would promote efficiency, competition and capital formation.

A. The Commission's Economic Analysis is Insufficient

1. Re-Proposing Release

As noted in Part VII.A. of the Re-Proposing Release, Section 23(a) of the Exchange Act requires the Commission to consider the impact on competition that the Re-Proposing Release 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.[18] In addition, the Securities Act and the Exchange Act require the Commission, when engaged in rulemaking where it is required to consider or determine whether an action is necessary or

16 For a detailed review of historical issuance activity, including a comparison of issuance activity in the public and private markets, see Board of Governors of the Federal Reserve System, *Report to the Congress on Risk Retention* (October 2010) (the "FRS Report"), pp. 27-40.

17 The changes to ABS shelf eligibility requirements contemplated by the Re-Proposing Release are much more significant than even the substantial principles-based revisions to the shelf eligibility requirements contained in Regulation AB.

18 *See* Re-Proposing Release, at 47974.

appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.[19]

In its economic analysis, the Commission concluded that the depositor certification, credit risk manager and investor communications provisions constitute investor protections that might increase investors' trust in the fairness and security of the ABS markets. According to the Commission, this increase in investors' trust could result in a lower cost of capital and increased investor participation in the ABS markets, which could facilitate capital formation.[20]

Against this rather modest and speculative assessment of possible benefits, the Commission itself notes the far more tangible and weighty costs associated with ABS sponsors choosing to avoid the shelf registration process altogether by either registering instead on proposed Form SF-1 or issuing ABS in the private markets.[21] The Commission finds that under those circumstances, the costs imposed by the Re-Proposing Release "will have the effect of reduced efficiency and impeded capital formation."[22] As to the impact on competition, the Commission notes that "[t]he ability to pass costs on to borrowers would be constrained by competition from non-securitizing lenders, which would weaken the competitive ability of firms that solely rely on securitization for funding relative to other financial firms that have other sources of funding."[23]

In light of the Commission's own reckoning of the costs and benefits of the Re-Proposing Release, it is difficult to see how the Commission could conclude that the benefits outweigh the costs. In order for the Commission to ultimately reach such a conclusion, a much more robust assessment of the costs and benefits would need to be made by the Commission. The Commission should make available for comment this more robust assessment, especially given that the Commission's own preliminary conclusions strongly suggest that the costs of the Re-Proposing Release outweigh the benefits of the Re-Proposing Release.

2. 2010 ABS Proposals

The 2010 ABS Proposals contain a vast array of transformative requirements for ABS offerings. Most notable among these requirements are the asset-level disclosure, the cash flow

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[19] *See* Section 2 of the Securities Act and Section 3 of the Exchange Act.

[20] *See* Re-Proposing Release at 47975.

[21] *Id*. at 47976. Even the weighty costs identified by the Commission are understated. For example, the Commission asserts that it has mitigated the costs of the credit risk manager by "requiring that a credit risk manager be involved in the transaction only upon the occurrence of certain triggering events." *Id*. at 47975. However, information regarding the credit risk manager also must be disclosed in the prospectus, which, in our view, would require the credit risk manager to be engaged as of the closing date. As we discuss in more detail earlier in this letter, if the credit risk manager requirement is adopted as proposed, it is highly likely that market participants will be responsible for filling the credit risk manager role at closing and that credit risk management fees, even if on a "stand-by" basis, will be required to be paid from the closing date, in much the same way that a backup servicing fee is expected by a backup servicer even before it steps in as servicer.

[22] *Id*.

[23] *Id*.

waterfall program, ongoing Exchange Act filing, and the use of public-style disclosure in private offerings of ABS.

In summarizing the benefits of these proposals, the Commission states that the proposals are "designed to improve investor protection, reduce the likelihood of undue reliance on ratings, and increase transparency to market participants."[24] The Commission goes on to state that the proposals "would improve investors' confidence in asset-backed securities and help recovery in the ABS market with attendant positive effects on efficiency, competition and capital formation."[25]

The Commission does not attempt to quantify these hoped-for benefits. For example, in assessing the specific benefits of its dramatic proposal to require public-style disclosure for offerings of structured finance products under Rule 144A and Regulation D, the Commission states in conclusory fashion that such proposal will:

- "provide investors in [ABS typically sold in private transactions], which can have complex incentive structures among various parties and whose valuation is dependent on an understanding of the assets in the underlying pool, with better information than they currently receive";[26] and

- "promote efficiency by bringing transparency to formerly opaque private structured finance product market[s], particular[ly] for CDOs and similar products."[27]

The Commission notes that cost of compliance with its 2010 ABS Proposals will be significant.[28] The Commission goes on to note that:

> "If sponsors/issuers bear the costs discussed above, this could put private-label RMBS sponsors/issuers at further disadvantage relative to government sponsored enterprises whose RMBS are exempt from SEC registration (e.g., Freddie Mac, Fannie Mae and Ginnie Mae). Increasing the costs of securitization may give a competitive advantage to residential mortgage originators who can securitize through government sponsored enterprises and may increase the cost of non-conforming loans to borrowers. Such GSEs are not required to disclose loan-level information and/or commit to the requirements of SEC registration. If the proposed costs are sufficiently high relative to the resulting benefits of these regulations to investors, originators could receive a better price from

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24 *See* 2010 ABS Proposals at 23417.

25 *Id*.

26 *See* 2010 ABS Proposals at 23411.

27 *Id*. at 23417.

28 For example, see the 2010 ABS Proposals at 23414 (acknowledging that the requirement of public-style disclosure in private transactions will be significant to ABS issuers).

> selling conforming loans to these agencies as opposed to private conduits, thus increasing the competitive advantage of GSEs. In addition, the better selling price of conforming loans to GSEs could adversely affect originators' incentives to underwrite non-conforming loans, since these cannot be securitized through GSEs. The combined effect might be a reduction in the number of assets available for securitization by non-GSE ABS issuers and could provide GSEs with greater market power at the expense of conforming loan lenders and non-conforming borrowers. We believe that to the extent the consideration of risk and return makes non-GSE more attractive than GSEs, this competitive advantage could be reduced."[29]

Given the urgent public policy considerations at stake, such a frank assessment of the impact of the 2010 ABS Proposals on the GSEs and mortgage underwriting should give the Commission pause. Indeed, in noting this particular but very serious concern, the Commission has only scratched the surface of what a comprehensive analysis of the costs of the 2010 ABS Proposals would show. For example, with its focus on the RMBS market, the Commission has not addressed the impact on capital formation with respect to the many asset classes that did not contribute to the financial crisis. For these asset classes, the costs of compliance, the potential reach of data privacy requirements, and the risk of competitive harm from disclosing proprietary information about credit granting and pricing processes may eliminate securitization as a viable funding option. We urge the Commission to engage in a comprehensive analysis of the costs and benefits of those provisions of the 2010 ABS Proposals that remain open and outstanding as well as the re-proposals included in the Re-Proposing Release.

B. The Commission Should Conduct a Regulatory Flexibility Analysis under the Regulatory Flexibility Act

The Regulatory Flexibility Act[30] generally requires that, in connection with a notice of a proposed rulemaking, an agency must prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. However, this analysis is not required if an agency certifies that the rule will not have a significant impact on a substantial number of small entities and publishes its certification and an explanatory statement with the proposed rule.

In Part IX of the Re-Proposing Release, the Commission certifies that the Re-Proposing Release will not have a significant impact on a substantial number of small entities. Therefore, in the view of the Commission, the regulatory flexibility analysis described above is not required with respect to the Re-Proposing Release. In support of this conclusion, the Commission focuses exclusively on the size of the sponsors that would be required to comply with the rules contemplated by the Re-Proposing Release. The Commission comes to the same conclusion with respect to the 2010 ABS Proposals.[31]

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29 *Id*. at 23417.

30 Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (1981) (the "Regulatory Flexibility Act").

31 *See* 2010 ABS Proposals at 23417.

The analysis of the impact of the Re-Proposing Release and the 2010 ABS Proposals on small entities should extend well beyond the impact on small entities solely in their capacities as sponsors of securitization transactions. For example, the FRS Report notes that:

- many types of loans to small businesses are routinely securitized in the private market;[32]

- among the types of securitization transactions conducted in the market are securitizations of insurance premium finance loans that are extended to small businesses to enable them to pay their property and casualty insurance premiums;[33]

- small businesses use credit cards to finance purchases of a wide variety of services or merchandise;[34]

- middle-market CLOs are collateralized by loans to relatively smaller borrowers;[35] and

- securitized “small ticket” equipment loans tend to be loans taken out by smaller businesses.[36]

Given securitization’s pervasive role in our economy and the importance of securitization to the availability of credit to small businesses, it is difficult to fathom how the 2010 ABS Proposals, as revised by the Re-Proposing Release, if adopted, would not have a significant impact on a substantial number of small entities. Therefore, the Commission should provide a regulatory flexibility analysis pursuant to the Regulatory Flexibility Act with respect to all aspects of the 2010 ABS Proposals and the Re-Proposing Release.

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Once again, the Committees appreciate the opportunity to submit these comments. Members of the Committees are experienced in the securitization of various asset classes and

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32 *See* FRS Report at 3.

33 *Id*. at 8 (footnote 10).

34 *Id*. at 19.

35 *Id*. at 22.

36 *Id*. at 23.

structures; we would be happy to share our experience, not as industry representatives, but as experienced practitioners, in helping shape the final rules. We are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin
Chair, Federal Regulation of Securities Committee

Martin Fingerhut
Martin Fingerhut
Chair, Securitization and Structured Finance Committee

Drafting Committee:

Ellen L. Marks, Chair

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cc: Hon. Mary L. Schapiro, Chair
Hon. Luis A. Aguilar, Commissioner
Hon. Daniel M. Gallagher, Jr., Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Elisse B. Walter, Commissioner
Meredith Cross, Director, Division of Corporation Finance
Paula Dubberly, Deputy Director, Division of Corporation Finance

Exhibit A

Revised Certification

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

~~I.~~ 1. I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] (the "Securities") and am familiar with the structure of the securitization described therein, ~~including without limitation~~ the material characteristics of the securitized assets underlying the offering (the "Assets"), the material terms of any internal credit enhancements and the material terms of ~~all~~the material contracts and other arrangements entered ~~in~~into to ~~the~~ effect the securitization~~;~~. In making this certification, I have relied on oral and written information from other officers and employees of the Company and from third-party advisors to the extent I have deemed appropriate.

~~II.~~ 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~~;~~.

~~III.~~ 3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, ~~fairly present~~disclose fairly in all material respects the characteristics of the ~~securitized assets underlying the offering~~Assets described therein and the risks of ownership of the ~~asset-backed securities described therein~~ Securities, including all material credit enhancements and all ~~risk factors~~material risks relating to the ~~securitized assets underlying the offering~~Assets that would affect the cash flows sufficient to service payments on the ~~asset-backed securities~~Securities as described in the prospectus~~; and~~.

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 who signed the registration statement of which the prospectus referred to in this certification is a part.

Date:____

____

[Signature]

____

[Title]

~~IV.~~ [Based on my knowledge,] taking into account the material characteristics of the ~~securitized assets underlying the offering~~Assets, the structure of the securitization, ~~including~~ the material terms of any internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, 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~~support scheduled payments of interest and the ultimate repayment of principal on the Securities (or other scheduled or required distributions on the Securities, however denominated) in accordance with their terms as described in the prospectus; provided that the risks described in the prospectus may adversely affect such cash flows.

~~Date:~~____

DEPOSITOR

____

~~[Signature]~~

____

By____________________________

Name

~~[~~ Title~~]~~