AMERICAN SECURITIZATION FORUM[1] DISCUSSION POINTS
PRIVATELY-ISSUED STRUCTURED FINANCE PRODUCTS
PROPOSED INFORMATION REQUIREMENTS
FEBRUARY 1, 2012

- **Commission Proposal**. In connection with its "Regulation AB II" rule proposals, the Commission has proposed to condition the availability of the safe harbors for privately-issued structured finance products on an issuer's undertaking to provide to investors, upon request, the same information as would be required in a registered offering in connection with initial offers or sales and on an ongoing basis thereafter.[2]

- **ASF Concerns and SQIB Proposal**. ASF submitted a comment letter on August 2, 2010 detailing our significant concerns with this proposal, including the following:[3]

  - The proposed information requirements eliminate the regulatory distinction between public and private offerings of structured finance products, risk compromising the essential function of the private placement market as a means of efficient capital formation and would be tantamount to a determination by the Commission that a class of investors that are able to fend for themselves in the purchase of structured finance products does not exist.

  - The proposed information requirements also fail to recognize that an array of structured finance products that are offered and sold in the private placement market operate in that market because the disclosure framework for the registered market is too rigid and, therefore, ill-suited to the structure and terms of those products and transactions.[4]

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

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

[3] For the ASF Reg AB II Broad Comment Letter, see: http://www.americansecuritization.com/uploadedFiles/ASFRegABIICommentLetter8.2.10.pdf. Our views on the Commission's proposal are set forth in Section V of this letter, at pp. 88-97.

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

- Issuers operate in the private placement market for a number of other important and valid reasons. For example, (i) an issuer may not have access to all of the information required for a registered transaction, (ii) the underlying assets or transaction structure may not lend themselves to the delivery of information required for registered transactions, or (iii) the issuer's issuances may not be of a sufficient scale or the market for a particular product may be sufficiently limited that the costs and difficulties of compliance with the disclosure standards for a registered transaction make the private placement market the only viable alternative.

- The proposed information requirements will effectively extinguish the market for many types of financial products and will severely constrain the development of new asset types and financing techniques.

- The proposed information requirements will limit the private market to the same issuers that participate in, and the same products that are available in, the registered market. Consequently, the array of products that have previously had a place in the private market but no corresponding place in the registered market will no longer have a place in the capital markets.

- These deleterious consequences can be averted by the alternative proposal outlined in our previous broad comment letter. Our proposal builds upon nearly 80 years of legislation, case law and Commission regulations that recognize the ability of institutional investors to make investment decisions without the protections mandated by the registration and information-delivery requirements of the Securities Act. We strongly urge the Commission to adopt our proposal to establish criteria for identifying "qualified institutional buyers of structured finance products" (SQIBs) and avoid what we believe to be ill-advised attempts to define and apply a one-size-fits-all information-delivery standard across the vast array of products comprising the private market.

- We also note that our proposal is broadly supported by the ASF membership, including issuers and investors. Some investors are concerned that issuers that have historically operated in the registered market might seek to arbitrage the differing information-delivery standards between the registered and private markets. Our issuer members believe, however, that investor concerns about information arbitrage are overstated and unwarranted, noting that issuers have always had the option of choosing between the more heavily-regulated registered market and the private market, and that information arbitrage has never been an issue, even after the adoption of Regulation AB with its enhanced disclosure and reporting requirements. Issuers also observe that they have ample incentives to

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

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

- **ASF Alternative Proposal**. To the extent the Commission continues to have concerns about information gaps in the private market, it is imperative that any regulatory response appropriately balance those concerns with the competing concerns outlined above and detailed in our previous broad comment letter.[6] To that end, we outline here a modified version of our alternative proposal which seeks to balance these competing concerns:

  - The term "qualified institutional buyer" in Rule 144A would remain defined as it is today and there would not be a different version for purposes of the purchase of structured finance products.

  - The information-delivery requirements included in the Commission's rule proposals would be replaced with principles-based requirements intended to serve as workable disclosure standards across the array of structured finance products offered for sale in the private placement market other than asset-backed commercial paper (ABCP) issued by ABCP conduits, which would be subject to separate disclosure standards as detailed in our separate comment letter on August 2, 2010 submitted on behalf of ASF's ABCP sponsor, dealer and investor members.[7]

  - Under this approach, the availability of the safe harbors for privately-issued structured finance products would be conditioned on an issuer's undertaking to provide to investors, upon request:

    (i) in connection with initial offers or sales, the following information (which information shall be reasonably current in relation to the date of such initial offer or sale):

      (1) material information regarding the role, function and experience in relation to the securities and the asset pool of each material transaction party;

      (2) a brief description of material legal proceedings pending against the sponsor, depositor or issuer of the securities;

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

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

[7] For the ASF Reg AB II ABCP Comment Letter, see: http://www.americansecuritization.com/uploadedFiles/ASFRegABIIABCPCommentLetter8.2.10.pdf.

(3) material information regarding the terms of the securities, the structure of the transaction and the terms of the offering;

(4) material information regarding the characteristics, performance and servicing of the asset pool;

(5) material information regarding any enhancement mechanism associated with the securities; and

(6) copies of all instruments defining the rights of security holders and other material transaction documentation relating to the securities.

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

(1) material information regarding distributions on the securities and performance and servicing of the asset pool;

(2) a description of any material triggering events that accelerate or increase a direct financial obligation of the issuer of the securities;

(3) a description of any material modifications to the rights of security holders;

(4) material information regarding changes of servicers, trustees or enhancement providers; and

(5) copies of all instruments defining the rights of security holders and other material transaction documentation relating to the securities in their then-current form.

¤ For purposes of information provided in accordance with clause (i) above, the requirement that such information be *reasonably current* will be presumed to be satisfied if: (x) in the case of quantitative statistical data, the information is as of a date within 135 days of the date of such initial sale, (y) in the case of financial statements or summary financial data, the information is as of a date within the periods specified in Rule 144A(d)(4)(ii) in relation to such initial sale, and (z) in all other cases, the information is as of a date within 6 months prior to the date of such initial sale.

For purposes of information provided in accordance with clause (ii)(b) above, the requirement that such information be *reasonably current* will be presumed to be satisfied if: (x) in the case of information provided in accordance with clause (ii)(b)(1) above, (A) for resales that occur at any time before the 15th calendar day after a distribution date, the information is as of a date no later than the end of the distribution period preceding the most recently-completed distribution period and (B) for resales that occur on or after the 15th calendar day after a distribution date, the information is as of a date no later than the end of the most recently-

completed distribution period, (y) in the case of financial statements or summary financial data, the information is as of a date within the periods specified in Rule 144A(d)(4)(ii) in relation to such resale, and (z) in the case of information provided in accordance with clauses (ii)(b)(2), (3) and (4) above, the information is as of a date no more than 135 days prior to the date of such resale.

For the avoidance of doubt, while an issuer may agree to provide more information than that provided by registration, an issuer's information-delivery undertaking should in no event be interpreted as requiring an issuer to provide more information than would be required in a registered offering.

- If any of the information identified above is unknown or not reasonably available to the issuer, either because obtaining that information would involve unreasonable effort or expense or because that information rests peculiarly within the knowledge of another person not affiliated with the issuer, the issuer would not be required to provide that information, so long as the issuer provides the required information on the subject that it does possess or that is reasonably available to it, and the issuer provides information to investors showing that unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information.

- As noted above, there are a number of important and valid reasons why issuers that operate in the private placement market may not satisfy the information-delivery requirements that apply to registered transactions, and why, if the information-delivery requirements of the private placement safe harbors are expanded, a principles-based standard is necessary. We believe, therefore, that a note should be added to the relevant information-delivery provisions of each safe harbor to the following effect:

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

be sufficiently limited that the costs and difficulties of compliance with the disclosure standards for a registered transaction are too significant.

For the avoidance of doubt, while an issuer may agree to provide more information than that provided by registration, an issuer's information-delivery undertaking should in no event be interpreted as requiring an issuer to provide more information than would be required in a registered offering."

- **Investor Communication**. In addition to the information-delivery requirements described above, we also support including an effective mechanism to facilitate communication among investors, subject to verification requirements where appropriate. If the Commission were to include such an investor-communication mechanism, we encourage the Commission to permit alternative methods, which would allow transactions to continue to use current investor-communication processes, such as the voluntary investor registry maintained by the trustee or certificate registrar that is successfully employed in many commercial mortgage-backed securities transactions today, without imposing an additional layer of transaction obligations.[8]

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

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

[8] As you know, the Commission has recently revised and re-proposed certain registrant and transaction requirements in order for offerings of asset-backed securities to qualify for delayed shelf registration, including a requirement that such offerings include such an investor-communication mechanism. *See* Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, 76 Fed. Reg. 47948 (Aug. 5, 2011) (the "2011 ABS Re-Proposing Release"). In commenting on the 2011 ABS Re-Proposing Release, ASF strongly endorsed the inclusion of an effective investor-communication mechanism but, as is the case in this context, encouraged the Commission to permit alternative methods to allow investors to more easily communicate with each other.

accountable if it fails to do so. As a result, we believe that proposed Rule 192 should be eliminated, to remove the risk that an issuer could be challenged after the fact on the scope of its undertaking, separate and apart from a challenge to the quality of its disclosures.

If the Commission nevertheless determines to adopt Rule 192, as indicated in our previous broad comment letter, we request that the Commission clarify that the question of whether the failure to provide the required information upon request constituted a fraud would depend on the facts and circumstances surrounding such failure and, as a result, would not constitute a fraud *per se*.

- **Transition Issues**. As indicated in our previous broad comment letter, as a matter of transition it is imperative that any amendments to the safe harbors apply only prospectively, to issuances of structured finance products, and to resales of such products initially issued, on and after a specified effective date for those amendments. Conversely, structured finance products that are initially issued before the specified effective date, and resales of those products at any time, should be grandfathered in their entirety from the amendments and such transactions should continue to be exempt from the registration provisions of the Securities Act so long as they are undertaken in compliance with the exemption framework as in effect at the time those products were initially issued.

  Similarly, and by extension, we strongly believe that resecuritizations of legacy underlying securities (i.e., underlying securities issued before the effective date) should be grandfathered in their entirety from any amendments to the safe harbors. Issuers of those underlying securities will have no contractual obligation to provide the types of information contemplated by any expanded information-delivery standards, making it extremely difficult, if not impossible, for ABS supported by legacy underlying securities to meet such standards.[9]

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

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