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MORTGAGE BANKERS ASSOCIATION

March 28, 2014

Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
RIN: 3235-AK37

RE: Re-Opening of Comment Period for Asset-Backed Securities Release

To Whom It May Concern:

The Mortgage Bankers Association[1] (MBA) welcomes the opportunity to present the two attached comment letters that individually address MBA's residential and commercial members' perspectives regarding the Securities and Exchange Commission's (SEC) re-opening of the comment period for proposed amendments to Reg AB.

As the single voice of the real estate finance industry, MBA represents a broad and diverse range of member perspectives. In separating the residential comment letter from the commercial/multifamily comment letter, MBA hopes to allow its specific observations on the Staff Memo's suggested solution to reflect the perspectives of each industry sector.

MBA's residential comment letter will immediately follow this cover letter, and will be followed by the commercial/multifamily comment letter. Appropriate contacts are listed at the end of their respective letters.

Sincerely,

David H. Stevens
President and Chief Executive Officer

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

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On February 25, 2014, the Securities and Exchange Commission (SEC) re-opened[1] the comment period for its 2011 proposed rule to implement section 942 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank).[2] In doing so, the SEC sought comment specifically on a Staff Memorandum (the Staff Memo)[3] that offers a potential solution to the widely acknowledged privacy concerns with the 2011 proposed rule and its 2010 predecessor. The Staff Memo would require the issuer itself to bear the cost and legal and reputation burdens associated with developing, maintaining, and securing a website that would store loan level information, including a borrower's Personally Identifiable Information (PII) as required under proposed Schedule L.[4]

The Mortgage Bankers Association[5] (MBA) appreciates the opportunity to provide its comments on the residential housing finance impact of the solution offered by the the Staff Memo.

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[1] SEC, Re-Opening of Comment Period for ABS Release (Feb. 25, 2014) ("Re-Opening"), *available at* http://www.sec.gov/rules/proposed/2014/33-9552.pdf.

[2] 76 Fed. Reg. 47948 (Aug. 5, 2011) (the "Re-Proposal"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-08-05/pdf/2011-19300.pdf.

[3] Memorandum to Commission File No. S7-08-10, from Division of Corporation Finance, regarding Disclosure of Asset-Level Data (Feb. 25, 2014), *available at* http://www.sec.gov/comments/s7-08-10/s70810-258.pdf.

[4] *See* The 2010 Proposal, at 23454.

[5] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

BACKGROUND

In 2010, the SEC proposed amendments to Reg AB that would require issuers and servicers to report at issuance and on an on-going basis asset-level information consistent with proposed Schedule L through the EDGAR database (the 2010 Proposal).[6] While Schedule L does include some ranges for personal information, such as credit score, location, and precise financial information, the ranges are so narrow as to be but a minor burden to a determined identity thief – particularly in light of the ease with which this information could be cross-referenced with publicly available tax and real estate records. In light of this, however, the SEC stated its belief that information about credit scores, income and employment status of a borrower would permit investors to perform analysis of the assets underlying a mortgage- or asset-backed security (MBS and ABS, respectively).

MBA, along with many other stakeholders, commented that exposing this data to the public would give malicious parties the ability to "target borrowers and borrower groups in geographic areas for telemarketing, foreclosure rescue scams, refinancing, identity theft, and larceny."[7] Indeed, the World Privacy Forum along with four other consumer advocacy and privacy interest groups[8] declared that the disclosures required under the 2010 Proposal were "an unprecedented release of individual-level financial data and would greatly increase borrowers' risk for identity theft and other problems related to the public release of detailed financial information."[9]

Subsequent to the release of the 2010 Proposal, Dodd-Frank was enacted into law, requiring the SEC to update various provisions of the 2010 Proposal (the 2011 proposed rule, or the "Re-Proposal").[10] Specific to Reg AB, Section 942 of Dodd-Frank requires the SEC to adopt regulations to require "each issuer of an [ABS or MBS] to disclose, for each tranche or class of security, information regarding the assets backing that security." Statutorily-mandated disclosure of loan-level data was limited, however, to data "**necessary** for investors to independently perform due diligence," including:

- Data having unique identifiers relating to loan brokers or originators;
- The nature and extent of the compensation of the broker or originator of the assets backing the security; and

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[6] *See* 75 Fed. Reg. 23328 (May 3, 2010), *available at* http://www.sec.gov/rules/proposed/2010/33-9117fr.pdf.

[7] *See* MBA Comment Letter in Response to SEC File. No. S7-08-10, at 83 (August 2, 2010), *available at* http://www.mortgagebankers.org/files/Advocacy/2010/MBACommentLettertotheSEConRegAB.pdf.

[8] The World Privacy Forum was joined in its comments by the Center for Digital Democracy, Consumer Action, the Center for Financial Privacy and Human Rights, and Privacy Activism.

[9] Comments of the World Privacy Forum, *et al*, to the Securities and Exchange Commission (August 2, 2010), *available at* http://www.worldprivacyforum.org/wp-content/uploads/2010/08/WPFcommentsSEC_02August2010fs.pdf.

[10] *See* Re-Proposal, *supra* note 2. For instance, Dodd-Frank separately provided for risk retention requirements and on-going disclosure obligations under the Exchange Act.

- The amount of risk retention by the originator and the securitizer of such assets.[11]

The SEC included a series of questions in the Re-Proposal relating to the privacy concerns raised in response to the 2010 Proposal. However, the SEC also reiterated its belief that this information would "permit investors to perform **better** credit analysis of the underlying assets" of an ABS or MBS, and did not alter the data required to be disclosed.[12] As a result, the Re-Proposal's questions concerning the privacy impact and how the impact might be mitigated were more general in nature.[13]

On February 25, 2014, the SEC surprised many by briefly re-opening the comment period for Reg AB, specifically to solicit comment on a solution suggested in a Staff Memo.[14] The Staff Memo declined to solicit comment on, or to consider, a more limited disclosure burden, and the proposed Schedule L remains the operative menu of borrower data subject to disclosure. The suggested solution would alter the Re-Proposal by transferring the disclosure of sensitive borrower information from the EDGAR database to an issuer-maintained website. Additionally, under the solution suggested in the Staff Memo, the issuer would bear the burden of developing the website and maintaining security protocols, as well as identifying and granting access to "investors and **potential investors**."[15] Notably, the Staff Memo did not clarify what entities it meant to include as "potential investors." SEC staff cited the web-based disclosure method as better able to produce "uniformity and clarity" and "simplify compliance."[16]

GENERAL COMMENTS

The solution suggested in the Staff Memo falls far short of what is necessary to protect against the widely recognized privacy concerns raised by the 2010 Proposal or the Re-proposal. At the outset, the Staff Memo's comparison of the commercial and residential MBS markets in this context was inappropriate because the commercial MBS market does not have similar levels of consumer sensitivity surrounding loan-level data. What is workable for commercial properties, whose features are often already part of the public record, is substantially different when applied to sensitive consumer financial information. While some borrower-level information is indeed relevant to investor due diligence, Dodd-Frank only mandates the disclosure of that information which is necessary for an investor to perform due diligence. It is arguable whether investors truly need as opposed to simply desire as part of their due diligence, the entire menu of data contained in proposed Schedule L.

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[11] *See* Dodd-Frank, § 942(b). (emphasis added)
[12] Re-Proposal, *supra* note 2, at 47967. (emphasis added). Notably, the SEC did not conclude that the PII contained in proposed Schedule L was necessary for investors.
[13] *Id.*, at 47967–68.
[14] *See* Re-Opening, *supra* note 1. Despite the legal and technical complexity with the suggested solution, commenters were only given one month to respond.
[15] Staff Memo, *supra* note 3, at 8 (emphasis added).
[16] *Id.*, at 11.

The Staff Memo does not offer a solution to the technical and privacy concerns but merely shifts the legal, operational, and reputational risks to issuers. While the Staff Memo attempts to calculate the expense of establishing and maintaining a disclosure website based on time and materials, the total cost of ownership, including potential costs associated with intangibles such as a data breach, are not immaterial. Ultimately, these risks would drive many issuers from the market entirely without resolving the primary concern for those market participants who remain.

What follows are MBA's major concerns with the Staff Memo's suggested solution from both residential and commercial/multifamily perspectives, followed by suggestions for revising the Staff Memo if the SEC decides to continue along the path suggested in the Staff Memo. MBA notes that the Staff Memo left vague many key provisions, including the standards to which an issuer would be held under the various duties that would be established. Thus, while MBA does not believe there is enough information to fully review the potential implications, we look forward to working with the SEC through future notice and comment periods to develop a workable process for fulfilling the text and spirit of Section 942.

Residential Concerns

The SEC Should Allow Aggregated Disclosures

MBA's core concerns with the SEC's previous Reg AB proposals focused primarily on the information disclosed – disclosing borrower PII to unknown parties is unwarranted and inadvisable no matter the analytical potential of the information. Yet the SEC would require just that under its prior Reg AB proposals and the Staff Memo's suggested solution. Revising proposed Schedule L to allow the disclosure of sensitive information on an aggregated basis, rather than at the loan level, would better address privacy concerns while still providing investors with needed information.

The SEC can mitigate the risk to borrowers by allowing issuers to remove PII from the disclosure requirements, mirroring the level of disclosure currently done by Fannie Mae and Freddie Mac (the GSEs). As we describe below in the section entitled *The Gatekeeper Role*, this qualification function can be facilited under the current market structure by the deal's investment bank underwriter. Allowing issuers to mask the PII by providing aggregated data will serve the needs of investors without compromising borrower security or the needs of investors.

Significant Technical and Security Concerns Are Left Unresolved

MBA notes that the website is not the sole target for malicious entities. Investors and potential investors, however the latter may be defined, would likely seek to run analytical tests on the information disclosed, resulting in the download or copying of the information onto the parties' respective servers. Each of these parties would thus not only be provided with credentials for accessing the website, but would likely have a unique copy of the data contained therein. Thus, each credentialed party to the website

represents a potential target for malicious entities. This multiplies the potential for the data to be hacked for criminal use. The recent, successful attack on the Target Corporation is clear proof of the difficulties and risks faced in securely storing sensitive electronic information.

The investment industry view of loan-level information disclosures has also been shifting substantially since the 2010 Proposal was first issued for comment, largely in light of the prevailing security risks. Companies are increasingly evaluating the risks of having access to PII against any perceived benefits and choosing data security over expanded disclosure. Internal corporate security practices are becoming stronger where PII is potentially at risk, with access to such information generally not made available via web services.

In light of the above, the Staff Memo likely underestimates the overall cost in time and money required to create and maintain these websites and protect them against the significant risks described above. A website promising an intimate look at borrowers as well as the means to identify them would pose a promising target for malicious individuals, entities, or even rogue nations. Existing security protocols would need to be vastly improved to make this information more available to potential investors. Further, issuers would be faced with the burden of how to control the spread of the information once a credentialed entity accesses the website. Under the Staff Memo's solution, many of these parties will likely be unknown to the issuer at the time of initial visit to the site. In such circumstances, mere self-certification by users is wholly inadequate. In addition to the technical development costs, recurring maintenance of a data security program and the updating of disclosures, including data mapping, quality control and testing, will likely exceed the 10% maintenance costs cited in the Staff Memo.

Disclosure of Borrower PII is Not Required By Dodd-Frank

As mentioned above, the 2010 Proposal sought comment on disclosures consistent with Schedule L because of the perceived utility such information could have for investors who wish to analyze the assets underlying a security. While the Re-Proposal was issued in order to harmonize the proposed requirements with the requirements of Dodd-Frank, the justification for disclosing loan-level information pursuant to Schedule L remained substantially the same.[17] However, a close reading will show that the SEC's reasoning and proposed disclosure requirements go well beyond the bounds of Dodd-Frank. MBA strongly recommends that the SEC consider a more limited disclosure requirement, particularly if the information is required to be stored in a website that is a ready target for hackers.

Section 942 of Dodd-Frank requires the SEC to "adopt regulations . . . requir[ing] issuers of asset-backed securities . . . to disclose asset-level or loan-level data, if such data are **necessary** for investors to independently perform due diligence . . .."[18] As

[17] *Compare* 2010 Proposal at 23357 *with* 2011 Re-Proposal at 47967.
[18] Dodd-Frank §942(b) (emphasis added)

noted above,[19] Congress' examples of required disclosures concerned lender compensation, risk retention, and unique loan originator identification information tied to originator, not borrower-level data. This is telling, and indicative of a Congress' desire to focus loan level disclosures on the lender and origination process, not confidential borrower data.[20]

MBA believes that the PII required under proposed Schedule L is overly broad and unwarranted under Section 942. The SEC's proposed amendments to Reg AB should not require the disclosure of PII.

In the event the SEC continues down the path indicated in the Staff Memo, MBA strongly urges the SEC to develop an alternative process for doing so that would limit the number of parties who receive the information and allow issuers to fully qualify the investors and potential investors prior to making any disclosures. While borrowers may still be subject to identity theft and other data privacy risks, the risk will be far less than under the Staff Memo's solution.

Suggested Considerations

The Gatekeeper Role

One key omission from the Staff Memo was a consideration of the gatekeeper role currently fulfilled by securities underwriters. This role is critical to the modern securities market and serves two significant roles: 1) providing third-party validation of the integrity of the security being issued; and 2) finding parties who are able to invest in the security. In view of these two functions, the underwriter is in the best position for identifying legitimate investors.

Under the Staff Memo's suggested solution, this latter role would be performed by the issuer. Importantly, however, the Staff Memo also would have the issuer provide credentials and website access to "potential investors" in addition to investors, dramatically expanding the number of parties with access to borrowers PII.

A notable feature of § 942 is that it requires loan-level disclosures to be made available to "investors," and Dodd Frank is silent as to "potential investors." The Staff Memo's inclusion of potential investors in the class of entities meriting Schedule L disclosure is not only far beyond the requirements of Dodd-Frank or current securities rules, but is discussed without reference to any standard that could be used by an issuer or its agent to screen who should be considered a "potential investor."[21] The underwriter's gatekeeping role is fundamental to the modern securities market, providing expertise to ensure that only legitimate, known parties are allowed to see the sensitive information underlying an MBS offering. This role is reinforced by both internal procedural designs,

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[19] *Infra* at 2-3

[20] *See also* Dodd-Frank § 941, which set forth risk retention requirements for similar purposes.

[21] Notably, this ambiguity requires MBA to assume the least-stringent standard in order to fully consider the Staff Memo's impact.

and is tested for compliance by independent entities such as the Financial Industry Regulatory Authority (FINRA). Reducing this role to a mere password protected website, however secure, will place borrower's personal financial information at risk.

Alternatively, the SEC should allow the gatekeeping role to work and allow issuers and their agents to establish a relationship with a known, identifiable party before sensitive borrower information is disclosed. The Staff Memo did not address this possibility; however, MBA is eager to work with the SEC to develop and review potential solutions, including through notice and comment.

MBA points out, however, that providing PII to known, identifiable parties is not a panacea, since their respective databases are still subject to their own security risks.

Utilize Safe Harbors

If the SEC decides to re-propose the Reg AB amendments to require that the issuer be responsible for sensitive disclosures, MBA recommends that the SEC at least include a safe harbor to afford certainty in both the vetting of investors and the security protocols of the website. Data breaches happen; the increasing sophistication of criminals and rogue states make it increasingly difficult to manage security without *any* breaches. MBA notes that the SEC was unclear in defining what could constitute a breach under the Staff Memo's solution.

The increasing sophistication of criminals and rogue states and widespread availabilty of various forms of information should give pause to any requirement to provide loan-level disclosures on websites, absent further protections for borrower privacy and issuer liability. For example, county recording information is generally available to the public and in many jurisdictions, is available online. Such information is even for sale by information brokers. This information often includes sales prices, transaction dates, property addresses, and homeowner names. Malicious parties can take this information and match it with the proposed loan-level disclosures. With this combined information, a criminal would then have access to homeowner names, property addresses, credit scores, income and other valued information.

The potential harm to borrowers that would result if PII were breached presents untenable reputational and legal risks. If the SEC wishes issuers to remain in the MBS market, a safe harbor is necessary to clarify the duties owed by issuers and their agents, and to limit potential liability in the event the data security is compromised. As such, the SEC should establish a safe harbor whereby an issuer would be presumed to have satisfied all applicable privacy and data security obligations as well as Regulation FD requirements in connection with the development and maintenance of the website. Further, in order to reduce the significant risk that potentially malicious parties are granted access to the issuer-maintained website, the SEC should establish a safe harbor for purposes of identifying and either disclosing to or rejecting potential investors.

MBA notes that even with a satisfactory safe harbor in place, many issuers would likely remain on the sidelines for fear of a major Target Corporation-like breach and resulting impairment to the issuer's reputation with consumers. MBA further points out that a safe harbor would afford legal protection to issuers, but do nothing to protect the consumers.

CONCLUSION

The SEC admirably sought inspiration from existing market practices in crafting the Staff Memo. However, the requirement to disclose borrower PII to unknown and potentially malicious entities is an unworkable and inadvisable policy with serious risks for consumers. The SEC should have looked instead to the aggregated disclosures made by the GSEs in connection with their residential MBS. MBA strongly recommends that the SEC reconsider the level of detail contained in proposed Schedule L, and omit PII from any future securities disclosure requirements – much like the GSE disclosures cited by the Staff Memo.

MBA looks forward to commenting on the suggested solution. Please direct any questions to Dan McPheeters at ([redacted] or [redacted]; or Jim Gross at [redacted] or j[redacted].

Sincerely,

David H. Stevens
President and Chief Executive Officer

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Ladies and Gentlemen:

On February 25, 2014, the Securities and Exchange Commission (SEC) re-opened the comment period for its 2011 re-proposed rule[1] to implement section 942 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] (Dodd-Frank).[3] In doing so, the SEC seeks comment specifically on a Staff Memorandum[4] (Staff Memo) offering a potential solution to privacy concerns raised with both the 2010 proposed revisions to Reg AB[5] and the 2011 re-proposal of certain elements of the 2010 proposal. This potential approach would have the issuer, rather than the SEC itself, develop and maintain a website in which asset level data would be provided to investors on the proposed Schedules L (initial reporting) and L-D (ongoing reporting) that were part of the SEC's 2010 proposed revisions to Reg AB. Under the 2010 proposal, Schedule L and L-D asset level data would be electronically submitted by the issuer to the SEC's public Electronic Data-Gathering, Analysis, and Retrieval (EDGAR) website.

The Mortgage Bankers Association[6] (MBA) appreciates the opportunity to comment on the solution offered by the Staff Memo. MBA commends the SEC for recognizing in the Staff Memo that the commercial mortgage-backed securities (CMBS) industry has

[1] 76 Fed. Reg. 47948 (August 5, 2011).
[2] Public Law 11-23,124 Stat. 1376 (July 21, 2010).
[3] 79 Fed. Reg. 11361 (February 28, 2014).
[4] Disclosure of Asset Level Data, Security and Exchange Commission, Division of Corporate Finance (February 25, 2014).
[5] 75 Fed. Reg. 23327 (May 3, 2010).
[6] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

already provided a market-driven solution for data disclosure through the use of password protected websites for asset level CMBS data. When contemplating the potential requirement for other asset-backed security (ABS) categories to employ a similar website, the SEC should carefully examine the potential impact from the malicious use of such website data by unauthorized parties on consumers and businesses.[7]

MBA shares the SEC's goals to promote market efficiency and transparency through increased disclosure of standards and practices that assist investors' ability to make informed investment decisions. However, as a practical matter, the conceptual nature of the Staff Memo raises more technical, operational, and legal questions and concerns about the issuer-operated website than it addresses. Given these outstanding issues, a comprehensive evaluation of the Staff Memo and its implications cannot be made without the SEC providing greater specificity and refinement to the Staff Memo. In order to assist the SEC in this process, this section will address the Staff Memo from the commercial and multifamily real estate finance perspective.

We incorporate our prior recommendations and comments by reference and provide specific comments in this letter in response to the Staff Memo.[8]

SUMMARY OF RECOMMENDATIONS

Given the existing robust asset level data disclosure practices of the CMBS industry, the application of the Staff Memo's concept of an asset level disclosure website for asset-backed securities (ABS) would, at best, provide a *de minimis* amount of information that was not currently available to CMBS market participants while at the same time imposing potentially significant cost and legal risk to the industry. Given existing industry practices, we believe that imposing an additional and novel disclosure regime envisioned in the Staff Memo to the CMBS industry would be both unnecessary and redundant. Quite simply, the old adage, "if it's not broke, don't fix it", should govern in this case. Presented below is a summary of our observations and conclusions regarding the Staff Memo.

1. **Trustee Maintained CMBS Websites Provide Access to Monthly CMBS Operational Data**. Through existing reporting protocols, robust asset level CMBS reporting is provided on a monthly basis to CMBS market participants. An additional requirement for a similar website by the SEC would unnecessarily

[7] For the impact of the Staff Memo on residential mortgage-backed securities, please see the first comment letter of this submittal package, MBA's Re-Opening of Comment Period for Asset-Backed Securities Release (March 28, 2014).

[8] Mortgage Bankers Association, Proposed Revisions to Regulation AB, File Number S7-08-10 (August 2, 2010) and Mortgage Bankers Association, The Mortgage Bankers Association's Comments on Commercial/Multifamily Real Estate Finance Aspects of the SEC's Re-Proposal of Regulation AB Shelf Eligibility Conditions (File Number S7–08–10; RIN 3235-AK37) (October 4, 2011).

duplicate the existing CMBS infrastructure.

2. **The Staff Memo Could Expose CMBS Trustees to Unwarranted Legal Risk.** In terms of granting access to CMBS asset level ongoing reporting websites, the user is typically required to self certify that they will use the data in a manner specified by the website. Should this process extend beyond self certification, the Trustee, who typically operate CMBS websites, would be required to assume a role in which they are not typically qualified or compensated to assume. In addition, the Trustee possesses neither the technical expertise nor the forensic analytical capability to monitor or detect the unauthorized or malicious use and propagation of website data. Such a requirement would add greater complexity and cost to CMBS issuance and imposes a requirement that far exceeds the current responsibility of the Trustee.

3. **CMBS Offering Data on Website is Duplicative of Existing Data Disclosure Requirement.** As part of the public registration process, CMBS issuers are required to submit their prospectus to the SEC electronically through EDGAR, which makes the information contained within the prospectus publicly accessible. Included in the prospectus for CMBS is asset-level disclosure to investors on the schedules attached to the prospectus (typically called "Annex A"), MBA believes that a required website for asset level offering data is not necessary because such data is readily accessible through EDGAR.

4. **Website Offering Asset Level Data Should Conform to Existing Practices.** The Staff Memo appears to leave it to the issuer to determine what information gets filed publicly through EDGAR. For CMBS initial offerings, the appropriate data disclosure on EDGAR is the current practice of providing prospectus and Annex A information, which should also serve as the data requirements for Schedule L.

5. **Website Ongoing Reporting for Asset Level Data Should Conform to Existing Practices.** Existing CMBS reporting protocols should serve as the basis of Schedule L-D reporting on EDGAR. As recommended in MBA's 2011 comment letter, Schedule L-D reporting should exclude the disclosure of potentially sensitive information such as loan default workout information during the negotiation process. We are concerned that static regulatory mandates for ongoing asset level reporting would stifle the ability of investors to keep pace with the rapidly evolving CMBS market.

6. **Data Holding Period for Schedule L and L-D Data Should be Five Years.** The Staff Memo did not describe when the five year holding period commences. For offering data (Schedule L), MBA believes that the Trustee's website should maintain this data for five years after the date of CMBS issuance. For ongoing reporting (Schedule L-D), this data should be maintained on the Trustee website for five years after the monthly report was issued.

BACKGROUND

In 2010, the SEC proposed amendments to Reg AB that required issuers and servicers to report, among other things, asset-level information consistent with the proposed Schedule L through the EDGAR database at issuance and on an on-going basis through schedule L-D (the 2010 Proposal). On August 2, 2010, MBA provided extensive comments on the 2010 proposed rule that, among other things, addressed asset level disclosures.

Subsequent to the release of the 2010 Proposal, Dodd-Frank was enacted into law, requiring the SEC to update various provisions of the 2010 Proposal (the Re-Proposal).[9] Specific to Reg AB, Section 942 of Dodd-Frank requires the SEC to adopt regulations to require "each issuer of an [ABS or MBS] to disclose, for each tranche or class of security, information regarding the assets backing that security." Statutorily-mandated disclosure of loan-level data was limited, however, to data "**necessary** for investors to independently perform due diligence," including:

- Data having unique identifiers relating to loan brokers or originators;
- The nature and extent of the compensation of the broker or originator of the assets backing the security; and
- The amount of risk retention by the originator and the securitizer of such assets.[10]

Among other things, the SEC included in the Re-Proposal specific questions relating to asset level reporting. In its October 4, 2011 comment letter, MBA reiterated that asset level reporting for CMBS should be based on market-driven format requirements.

On February 25, 2014, the SEC re-opened the comment period for Reg AB specifically to solicit comment on a solution suggested in a Staff Memo.[11] The Staff Memo declined to solicit comment on or consider a more limited disclosure requirement, and proposed Schedule L remains the operative menu of borrower data subject to disclosure for initial offerings and Schedule L-D is applicable to ongoing reporting. The solution suggested would alter the Re-Proposal by transferring the disclosure of asset level data from the EDGAR database to an issuer-maintained website. Under the solution suggested in the Staff Memo, the issuer would bear the burden of developing the website and maintaining security protocols, as well as identifying and granting access to "investors

[9] For instance, Dodd-Frank separately provided for risk retention requirements and on-going disclosure obligations under the Exchange Act.
[10] *See* Dodd-Frank, § 942(b). (emphasis added)
[11] *See* SEC, Re-Opening of Comment Period for ABS Release (February 25, 2014). Despite the legal and technical complexity with the suggested solution, commenters were given only thirty days to respond.

and **potential investors.**"[12] SEC staff cited the web-based disclosure method as better able to produce "uniformity and clarity" and "simplify compliance."[13]

GENERAL COMMENTS

CMBS Existing Practice of Trustee Maintained Websites for Ongoing Reporting

Given the strong market acceptance of the CRE Finance Council Investor Reporting Package[14] (IRP), MBA strongly recommends that the SEC utilize the IRP as its benchmark for ongoing reporting of asset level CMBS data on a website that it is evaluating requiring. As required by the CMBS Pooling and Servicing Agreement, these websites are typically administered by the CMBS Trustee and contain, among other things, property level data specified in the monthly IRP. The IRP is a consensus standard; it encompasses the culmination of viewpoints from all CMBS industry participants, including primary servicers, master servicers, special servicers, trustees and the investors and has been widely adopted. Further, the IRP is an organic, living and evolving document, where the industry dictates changes to reflect the current market standards in reporting. The CMBS industry has and will continue to modify the IRP when data points and other information become more or less relevant to investors.

The IRP already provides extensive monthly reporting on asset performance. The CMBS industry will continue to provide all of the data points and information available in the IRP to the CMBS investors. This data is available up to 15 days prior to public 10-K filings on EDGAR. It is MBA's belief that CMBS investors will continue to look to the IRP and its third party data providers for information on asset performance. The SEC's proposed data points in the 2010 proposal significantly overlap the IRP, but the IRP offers substantially more information and gives investors a more robust look at the assets and in a more timely fashion. MBA reiterates its position from its 2010 comment letter that asset level Schedule L-D reporting should conform to standard codes established in the IRP, which fully addresses the data requirements of investors for both data uploads on EDGAR and the issuer website, if mandated.

Website User, Not Trustee or Issuer, is Responsible for Misuse of Website Data

In terms of granting access to CMBS asset level ongoing reporting websites, the user is typically required to self certify that they have provided the correct user identity information and that they will use the data in a manner specified by the website. This can happen in a variety of ways. One such example is a two step process. The first step would be to obtain a user name and password to the website providing the users business contact information and their type of business, this is accompanied by certain disclaimers to enter the website. The password and username provides access to a listing of CMBS issuances that are included on the website and in some instances

[12] Staff Memo, at 8. (emphasis added)
[13] Staff Memo, at 11.
[14] CRE Finance Council Investor Reporting Package Version 7.0.

publicly available information such as the prospectus and 10-D Reports. The second step involves an additional self certification for gaining access to asset level IRP information. Shown below is an illustrative example of the certification that the user must make in order to access this data:

Online Investor Certification

The [redacted] service permits you to certify your rights to access certain restricted reports online. The text below is substantially similar to that contained within the transaction documents. Please read completely prior to certifying. In acknowledging this agreement, you certify that you are signed onto this system using your own account, and that your account information is currently accurate as shown below.

Class(es):

In accordance with the requirements for obtaining certain information under the Pooling and Servicing Agreement with respect to the above-referenced certificates (the "Certificates"), the undersigned hereby certifies and agrees as follows:

1. The undersigned is a certificateholder, beneficial owner or prospective purchaser of the Class of Certificates identified above.

2. In the case of a Publicly-Offered Certificate, the undersigned has received a copy of the Prospectus.

3. The undersigned is not a Borrower, a Manager, an Affiliate of any of the foregoing or an agent of any of the foregoing.[15]

4. The undersigned is requesting access pursuant to the Pooling and Servicing Agreement to certain information (the "Information") on the Certificate Administrator's Website.

5. In consideration of the disclosure to the undersigned of the Information, or the access thereto, the undersigned shall keep the Information confidential (except from such outside persons as are assisting it in making an evaluation in connection with purchasing the related Certificates, from its accountants and attorneys, and otherwise from such governmental or banking authorities or agencies to which the undersigned is subject), and such Information shall not, without the prior written consent of the Depositor, be otherwise disclosed by the undersigned or by its officers, directors, partners, employees, agents or representatives (collectively, the "Representatives") in any manner whatsoever, in whole or in part.

6. The undersigned shall not use or disclose the Information in any manner which could result in a violation of any provision of the Securities Act of 1933, as amended (the "Securities Act"), or the Securities Exchange Act of 1934, as amended, or would require registration of any Certificate not previously registered pursuant to Section 5 of the Securities Act.

7. The undersigned shall be fully liable for any breach of this agreement by itself or any of its Representatives and shall indemnify the Depositor, the Certificate Administrator, the Trustee, the Master Servicer, the Special Servicer, the Operating Advisor, the Underwriters, the Initial Purchasers and the Trust Fund for any loss, liability or expense incurred thereby with respect to any such breach by the undersigned or any of its Representatives.

8. The undersigned agrees that each time it accesses the Certificate Administrator's Website, the undersigned is deemed to have recertified that the representations and covenants contained herein remain true and correct.

[15] MBA notes that certain information contained in public filings such as Distribution Data Statements are sometimes made available on the websites without additional self certification.

9. Capitalized terms used but not defined herein shall have the respective meanings assigned thereto in the Agreement.

BY ITS CERTIFICATION HEREOF, the undersigned shall be deemed to have caused its name to be signed hereto by its duly authorized signatory, as of the date certified.

In the above electronic form, the user is first required to certify that the "undersigned is a certificateholder, beneficial owner or prospective purchaser". The form requires the **user** to self certify that they are an eligible party to gain access to the portion of the site containing IRP data. Item 5 requires that the user "keep the information confidential" and item 6 refers to the standard of care that the user must employ in the use of the information under the Securities Act of 1933 and the Securities Exchange Act of 1934. Finally, item 7 places liability on the **user** for a breach of the agreement.

Clearly, the self certification process requires the user to appropriately utilize the data obtained from the Trustee website. In most cases, the Trustee is neither qualified nor compensated to authenticate website access for potential investors. In addition, the Trustee possesses neither the technical expertise nor the forensic analytical capability to monitor or detect the unauthorized or malicious use and propagation of website data. Adding such responsibilities through a government mandated website would call into question if the Trustee would have the ability to comply with the rule. Such a requirement would add greater complexity and cost to CMBS issuance and would far exceed the current responsibility of the Trustee. Consequently, to the extent that the SEC mandates websites for the disclosure of asset level information on an ongoing basis, MBA believes that the established practice of self certification is the appropriate method for providing access to CMBS websites.

CMBS Offering Data on Website is Duplicative of Existing Data Disclosure Requirement

As part of the public registration process, CMBS issuers are required to submit their prospectus to the SEC electronically through EDGAR, which makes the information contained within the prospectus publicly accessible.

Included in the prospectus for CMBS is asset-level disclosure to investors on the schedules attached to the prospectus (typically called "Annex A"), based on the specific types of commercial loans in the transaction. Annex A is submitted to EDGAR as an attachment to the Prospectus Supplement. As the commercial assets are unique, and are not generally uniform like many other asset types, the type of asset-level reporting may vary based on the properties and loans offered in the transaction. Often the issuer will provide additional separate spreadsheets to augment the general asset-level data to highlight unique attributes of its transaction, including for example, information on the debt service payment schedule for the largest loans, detailed reserve account information, detailed characteristics of the multifamily loans and/or information at the pooled level on the loans (including cut off balances, mortgage rates, terms to maturity, debt service coverage ratio (DSCR), cut off and maturity date loan to value (LTV), etc.). In addition, the CMBS industry typically will also provide significant details, including

asset-level data, on the top ten loans (by unpaid principal balance) in the prospectus. Clearly, in the prospectus, there is robust reporting of CMBS asset level data.

MBA believes that the requirement to include asset level data on an issuer website for offering data is unwarranted for the following reasons:

- The website would only duplicate information that was already made publicly available on EDGAR.
- Since such issuer operated websites are currently not required, it would add unnecessary cost to the CMBS transaction.
- Since CMBS offering information is already publicly available, it is at odds with the stated purpose of the website of "restricting access to sensitive information".[16]
- Although comprehensive data could not be assimilated during the 30-day comment period, our members' report that the cost associated with creating and maintaining a website described in the Staff Memo were significantly underestimated.

Should the SEC move forward with a requirement for asset level data to be contained on an issuer website, such information should be limited to the information requirement for Schedule L, as modified by our 2010 comment letter. MBA believes information contained in Schedule L should be linked to asset level disclosure in the prospectus; thereby allowing for flexibility in the marketplace to provide the information and data that is commensurate with the actual assets offered in the pool.

Data Content for EDGAR Not Specified in the Staff Memo

The Staff Memo appears to leave it to the issuer to determine what information gets filed publicly through EDGAR. For CMBS initial offerings, the appropriate data disclosure on EDGAR is the current practice of providing prospectus and Annex A information and should serve as the data requirements for Schedule L.

Current ongoing reporting on the Trustee's website includes the IRP. However, monthly reports filed on EDGAR are Distribution Date Statements that report aggregated CMBS pool data and are part of 10-D reporting. The introduction of Schedule L-D would require asset level data to be disclosed. The IRP should serve as the basis of Schedule L-D reporting on EDGAR. As recommended in MBA's 2011 comment letter, Schedule L-D reporting should exclude the disclosure of potentially sensitive information such as loan default workout information during the negotiation process. By utilizing an industry consensus standard for the release of asset level data, there remains flexibility for reporting standards to change as the CMBS market continues to evolve. We are concerned that static regulatory mandates for asset level reporting would stifle the ability of investors to keep pace with the rapidly evolving CMBS market.

[16] Staff Memo, p. 1.

Data Holding Period is Unclear in the Staff Memo

The Staff Memo indicates that "An issuer would be required to keep the information on the web site for at least five years and the information would be accessible free of charge."[17] For offering data (Schedule L), MBA believes that the Trustee's website should maintain this data for five years after the date of CMBS issuance. For ongoing reporting (Schedule L-D), this data should be maintained on the Trustee website for five years after the monthly report was issued.

MBA greatly appreciates the opportunity to comment on the Staff Memo and looks forward to working with the SEC to further refine and address unintended consequences of the potential website. Should you have any questions, please contact George Green at [redacted]

Sincerely,

David H. Stevens
President and Chief Executive Office

[17] Staff Memo, p. 14.