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May 6, 2014

Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. S7-08-10
Release Nos. 33-9552; 34-71611
Re-Opening of Comment Period for Asset-Backed Securities Release

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 (the "**ABA**"), in response to the re-opening of the comment period on two Securities and Exchange Commission (the "**Commission**") proposing releases relating to asset-backed securities ("**ABS**") disclosures – Asset-Backed Securities, Securities Act Release No. 33-9117 (Apr. 7, 2010) (the "**2010 ABS Proposing Release**") and Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, Securities Act Release No. 33-9244 (July 26, 2011) (the "**2011 ABS Re-Proposing Release**") and, together with the 2010 ABS Proposing Release, the "**ABS Proposing Releases**") – in order to solicit public comment on an alternative approach to disclosure of asset-level information suggested by the Commission's Division of Corporation Finance ("**Division**") in a memorandum posted in the above-referenced Commission comment file, dated February 25, 2014 (the "**Staff Memorandum**").¹ In the Staff Memorandum, the Division recommends that (i) the Commission address privacy concerns raised by commenters on the ABS Proposing Releases by requiring that "potentially sensitive" asset-level data be made available to investors and potential investors through issuer Web sites, rather than through the Commission's EDGAR filing system, leaving it to the issuers to decide how to address privacy concerns by, for example, restricting access to potentially sensitive asset-level information; and (ii) certain asset-level data that was proposed to be disclosed by the ABS Proposing Releases only in coded ranges instead be disclosed with specificity on issuer maintained Web sites. This alternative approach would apply to information that otherwise would be included directly in prospectuses for public ABS offerings filed under the Securities Act of 1933, as amended (the "**Securities Act**"), and ongoing

¹ Available on the Commission's Internet Web at site at <http://www.sec.gov/comments/s7-08-10/s70810.shtml>.

reports filed under the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”)

The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA’s House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA’s Business Law Section, nor does it necessarily reflect the views of all members of the Committees.

The Committees are composed of lawyers from private practice, corporate law departments, trade associations and other organizations. Collectively, we have substantial experience in the securitization markets and in virtually all of the many asset classes that have been securitized. In addition, we have consulted with lawyers with substantial experience with United States privacy laws and our comments reflect their input.

The Committees thank the Commission for this opportunity to comment on the recommendations set forth in the Staff Memorandum. We recognize that the Commission has devoted a great deal of time and attention to the matters discussed in the Staff Memorandum, and we appreciate the difficulty of the legal and regulatory issues faced by the Commission in attempting to fashion rules that appropriately balance investors’ desire for more detailed information about obligors against the consumer privacy interests protected by a complex web of federal, state and local privacy laws and regulations in the U.S., as well as similar foreign laws. As the Staff Memorandum indicates, it would be helpful from a privacy-protection perspective if “potentially sensitive” asset-level data were not subject to mandatory public disclosure via EDGAR filing. Given the numerous reports in recent years of severe cybersecurity breaches, however, we are concerned about the ability of issuers adequately to safeguard such data without incurring substantial added cost and a heightened risk of liability exposure under applicable privacy laws. Our comments and suggestions with respect to how the Commission might strike an effective balance between important transparency and privacy objectives in this area are outlined below.

I. SUMMARY

As we discuss below, we have serious concerns that, given the rapid advances in technology, it will not be possible for issuers to create a web-based system for information delivery, as proposed, that will not have inherent security risks. We believe that the Commission has recognized the importance of those concerns by considering the alternative presented in the Staff Memorandum and re-opening the comment period to seek additional public comment. Any disclosures that lead to privacy breaches not only may harm consumers but also may subject the issuers and sponsors of securitizations that have legal obligations to protect personal financial information of obligors to significant financial liability and reputational damage.

The Commission has recently intensified its focus on cybersecurity issues, hosting a roundtable on cybersecurity, with statements by Chairman White and several Commissioners as to the importance of these matters to the Commission and to the

financial system as a whole. More recently, the Commission's Office of Compliance Inspections and Examinations sent out a notice indicating that cybersecurity preparedness is one of the Commission's top examination priorities for 2014. Last but by no means least, President Obama is urging U.S. companies to minimize the risks of cybersecurity breaches and adopt stronger measures to safeguard sensitive consumer data. We support these efforts and believe that the harms sought to be addressed by these measures equally are present in the disclosures of the loan-level data required of securitization participants under the approach espoused in the Staff Memorandum.

Whether issuer-sponsored Web sites can be made sufficiently secure so that data breaches are minimized requires technological expertise which the Committees' members and the privacy law experts with whom we have consulted do not possess. In our view, however, recent reports of massive cybersecurity breaches demonstrate that Web sites are inherently insecure; the data the Commission suggests would be required (such as loan identification numbers, zip codes, other geographic information, credit scores, borrower income, original date, original principal balance and other items), if provided on an asset-level basis, constitute non-public, personally identifiable information. These data are sensitive and collectively are highly susceptible to re-identification of individual consumers. In addition, the publication of personally identifiable information, *whether on EDGAR or access-restricted issuer Web sites*, will put consumers at greater risk of identity theft, fraud and financial harm. Required disclosure of such personally identifiable information places issuers and users of such data at greater risk of noncompliance with federal privacy laws and exposes them to reputational risk in the event of data breaches.²

In light of these significant costs, we urge the Commission to provide more specific guidance with respect to determining what asset-level or loan-level data are "necessary" to enable investors independently to perform due diligence for purposes of Section 7(c) of the Securities Act. More detailed interpretive guidance from the Commission would help issuers make judgments on such troublesome questions as:

- What types of restrictions on access will the Commission consider to be "reasonable", and to what extent will the Commission or its staff "second-guess" issuer judgments in this regard?
- What types of asset-level data should be deemed "material" to investors? When is potentially "material" information nevertheless unnecessary for investors' performance of independent due diligence within the meaning of Section 7(c)?
- What liability will an issuer have if an investor or proposed investor refuses to agree to the issuer's access and use restrictions?

² As recent events have made clear, significant data breaches have led to intense scrutiny by the media, consumer protection advocates and Congress itself. Such scrutiny could focus, as well, on whether the disclosure framework was sufficiently tailored to protect sensitive data.

- What liability will an issuer have if it mistakenly denies access to a real investor or if the issuer grants access to a person who is not an investor or has no intention of actually investing in the issuer's securities?

We recognize the strong interest the Commission has in assuring the provision of full and fair disclosure in offering documents, and we recognize too the Congressional determination that loan-level data should be provided to investors in securitizations where necessary. However, we believe the challenges the Commission has been struggling with in connection with amending Regulation AB—in seeking to protect the privacy of consumer information while mandating the disclosure of such information as a condition for accessing the securitization market—cannot be resolved solely by changing the means by which such information would be delivered. The Staff Memorandum reflects a high level of confidence in the ability of issuers to maintain secure Web sites and to separate *bona fide* investors from those who merely are seeking access to otherwise protected financial data. Indeed, the Staff Memorandum would require that “specific credit scores, income and debt amounts, instead of coded ranges”³ be disclosed, because the masking afforded by coded ranges would no longer be necessary. We respectfully submit that many issuers are not confident that they will be able successfully “to restrict access as necessary to comply with privacy laws.”⁴ On the contrary, we believe that the Commission should assume that sensitive loan-level data cannot be delivered in a secure manner to investors, even via access-restricted Web sites (however preferable this alternative might be to posting of such data on EDGAR), and recommend that the Commission focus instead on permitting issuers to use coded ranges, grouped data (either in place of loan-level data or in combination with a much reduced set of loan-level data) and other techniques suggested by commenters that would better protect the identities of the obligors of securitized loans without depriving investors of obligor information that is both material and “necessary” to informed investment decision-making.

In sum, while we support the recommendation in the Staff Memorandum to allow issuers to bypass EDGAR and provide investors with potentially sensitive asset-level information on issuer-sponsored Web sites, we do not support the Staff's additional recommendation that the Commission require that this sensitive information be disclosed at such a granular level as to permit identification of individual obligors. This is because, as noted, we do not believe that issuers will be able to utilize technology to protect obligor-specific data against breach and, therefore, possible violations of applicable privacy laws. In our view, a better balance of the competing privacy and disclosure interests at issue here would be for the Commission to allow issuers both to identify potentially sensitive data, as is currently proposed, and to make reasonable, good-faith judgments—facilitated by more fulsome Commission guidance—regarding the circumstances in which the disclosure of such information on an asset-level basis is not “necessary” to enable investors to perform adequate due diligence on a proposed investment. For at least some asset classes, we believe that grouped, aggregated or other anonymized disclosure is sufficient for informed investment decisions and would

³ Staff Memorandum, p. 14.

⁴ Id. (footnote omitted).

alleviate privacy concerns. Such grouped, aggregated or anonymized data then could be filed on EDGAR along with all other required data.

II. REGULATORY FRAMEWORK

We believe it may be helpful to examine the requirements of the applicable provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”)⁵ within the framework of federal and state privacy laws designed to protect the confidentiality of personally identifiable information. A review of these requirements will illustrate, in our view, why the alternative approach set forth in the Staff Memorandum still does not provide adequate consumer privacy protections.

A. Regulation AB Proposals

The 2010 ABS Proposing Release included requirements that issuers of ABS disclose certain specific data regarding individual assets underlying the ABS. The Committees provided comments⁶ to the Commission regarding certain aspects of those proposed data disclosures, including our concern that certain of the proposed data disclosures involved the disclosure of personally identifiable information relating to consumer-obligors, which disclosures may be subject to one or more privacy requirements.

Subsequent to the publication of the 2010 ABS Proposing Release, the Dodd-Frank Act became law. In its 2011 ABS Re-Proposing Release, among other things, the Commission re-proposed certain elements of its proposed revisions to Regulation AB and requested comment on certain matters, including the privacy concerns raised by us in our 2010 ABA Comment Letter and by others in their comments to the 2010 ABS Proposing Release.

In response to comments received in respect of its 2011 ABS Re-Proposing Release, the Division has described in the Staff Memorandum a proposed bifurcated disclosure model for the disclosure of asset-level data to investors. The Staff Memorandum proposes that (i) “non-sensitive” data be made available to investors by filing it with EDGAR and (ii) that “sensitive” data be made available to investors on an issuer-controlled Web site, where the issuer imposes its own access controls, and to the Commission in paper form, presumably as confidential filings.

B. Section 942(b) of the Dodd-Frank Act

Section 942(b) of the Dodd-Frank Act, which added Section 7(c) to the Securities Act, requires the Commission to adopt regulations requiring issuers of ABS to disclose information about the assets backing such ABS. Section 942(b) goes on, in relevant part, to require the Commission to set standards for the format of the data disclosed in order

⁵ Public Law No. 111-203, 124 Stat. 1376 (2010), as amended by Public Law No. 112-106, 126 Stats. 306 (2012).

⁶ Comment letter, dated August 17, 2010, available at <http://sec.gov/comments/s7-08-10/s70810-150.pdf> (hereinafter, the “**2010 ABA Comment Letter**”) and comment letter, dated November 16, 2011, available at <http://sec.gov/comments/s7-08-10/s70810-237.pdf> (together with the 2010 ABA Comment Letter, the “**ABA Comment Letters**”).

to facilitate, to the extent feasible, an investor’s comparison of data across securities in similar asset classes and to “require issuers of ABS to, at a minimum, disclose asset-level or loan-level data, if such data are *necessary* for investors to perform due diligence” (emphasis added).

Although Section 942(b) does not mention privacy concerns, the legislative history regarding this section of the Dodd-Frank Act indicates that Congress was mindful of such concerns. For example, the Senate report on hearings related to the Dodd-Frank Act contains the following statement regarding loan-level disclosures:

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.⁷

We appreciate the fact that some ABS investors have indicated a desire for extensive asset-level disclosure in all asset categories. However, we believe that it would be helpful for the Commission to consider how the Section 942(b) disclosure mandate may be limited by that section’s use of the phrase “necessary for investors to independently perform due diligence”, particularly in light of the legislative history evidencing a strong policy against disclosure of personally identifiable information and in the context of privacy laws.⁸

C. Privacy Laws

On the U.S. federal level alone, the Gramm-Leach-Bliley Act (“**GLBA**”)⁹ restricts disclosure of certain personally identifiable information and the Fair Credit Reporting Act (“**FCRA**”)¹⁰ restricts disclosure of certain consumer credit information, defines certain minimum operation requirements for persons operating as “consumer reporting agencies” and subjects such persons to regulation and fines for improper practices. In addition, the Commission, the Federal Trade Commission (“**FTC**”) and the federal banking agencies have promulgated rules regarding maintaining the confidentiality of certain personally identifiable information of consumers. At the state level, almost every state has adopted laws requiring notification of consumers when their personally

⁷ 15 Senate Report No. 111-176 at 131 (available at http://banking.senate.gov/public/_files/Committee_Report_S_Rept_111_176.pdf).

⁸ We are not aware that the Commission has made any determination that, with respect to consumer loan-backed ABS, disclosure of account numbers, zip codes, property addresses and other geographic information, credit scores, borrower income, original date, original principal balance and other similar personally identifiable information is “necessary” in order to permit investors to perform due diligence. As discussed more fully in the text above, we recommend that the Commission make such determinations to provide much-needed guidance to issuers on how to balance most effectively competing transparency and privacy concerns.

⁹ 15 U.S.C. Chapter 5.

¹⁰ 15 U.S.C. § 1681 et. seq.

identifiable information is compromised, and several states have adopted comprehensive requirements with regard to the secure collection, transmission, storage, and destruction of consumer personally identifiable information.

1. *GLBA*. In the GLBA, adopted in November 1999, Congress set out an essential policy statement:

It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information.¹¹

Moreover, a number of federal regulators, including the Commission, were given a mandate to:

establish appropriate standards for the financial institutions subject to their jurisdiction relating to administrative, technical, and physical safeguards

(1) to insure the security and confidentiality of customer records and information;

(2) to protect against any anticipated threats or hazards to the security or integrity of such records; and

(3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.¹²

Following this mandate, the Commission's Regulation S-P¹³ reproduced that statutory language essentially verbatim, requiring all brokers, dealers, investment companies and registered investment advisers to have written policies and procedures to provide such security, confidentiality and protections. Even though many participants in the securitization markets are not subject to regulation by the Commission, many participants are financial entities subject to regulation by federal regulators that have imposed similar mandates, as required by the GLBA.

We note that, although GLBA Section 502(e) provides that financial institutions' obligations to provide notices to consumers about such institutions' policies and procedures for disclosing nonpublic personally identifiable information and afford consumers the opportunity to opt out of such disclosures do not prohibit disclosure by financial institutions of nonpublic personally identifiable information in connection with a proposed or actual securitization, we understand that this permissive provision of the

¹¹ 15 U.S.C. Section 6801(a).

¹² 15 U.S.C. Section 6801(b).

¹³ Section 248.30.

GLBA is typically interpreted to permit narrow disclosure to a small number of other financial institutions and is not broadly interpreted to permit widespread dissemination to investors and potential investors in securities offerings. Indeed, where, as in a registered ABS securitization, the pool of investors and potential investors encompasses a large number of individuals, we are concerned that making available on an issuer Web site personally identifiable information to individuals would be tantamount to public disclosure of such information.¹⁴

2. *FCRA*. The Staff Memorandum indicates that delivery of consumer information to potential investors is excluded from the provisions of the *FCRA*.¹⁵ We do not believe this is a fair description of this provision. The *FCRA* specifically permits disclosure of consumer report information to potential investors in order for them to assess the credit or prepayment risks associated with an existing credit obligation,¹⁶ in accordance with and subject to the requirements of the *FCRA*. In other words, the *FCRA* establishes the conditions for delivery of such information and permits the use of a consumer report in this context. It does not exclude such delivery from the requirements of the *FCRA*.

A person subject to the *FCRA* may provide a “consumer report” to certain persons only for a statutory purpose. Those statutory purposes include disclosure to investors pursuant to the provisions of 15 U.S.C. 1681(a)(3)(E), but such provisions do not exempt the provider of the “consumer report” from the requirements of the *FCRA*. A person providing “consumer report” information to third parties may be considered to be a “consumer reporting agency” and thereby subject to the provisions of the *FCRA*, including requirements to (1) provide consumers with access to the information that the consumer reporting agency maintains; (2) provide consumers with an opportunity to dispute and correct information that the consumer reporting agency maintains and remove from the consumer reporting agency’s files any information that is determined to be inaccurate or incomplete; (3) maintain procedures to ensure the “maximum possible accuracy” of the information that is provided; (4) provide assistance to consumers who are victims of identity theft; (5) ensure that the consumer reporting agency provides consumer report information only to persons who have a legitimate permissible purpose, including by requiring each user of consumer reports to certify to that permissible purpose and performing a detailed investigation of each user before providing the user access to the consumer report information; and (6) ensure that no derogatory information older than seven years is included in any consumer report.

In addition to imposing detailed requirements on persons that provide consumer reports to others, the *FCRA* also imposes requirements on users of consumer reports (which, in this case, could include investors) and on the furnishers of data to the consumer reporting agencies (which, in this case, could include loan originators). For

¹⁴ See further discussion in Section III. B. below.

¹⁵ Staff Memorandum, p. 10, text at footnote 33.

¹⁶ 15 U.S.C. § 1681(a)(3)(E). We note, however, that states may have adopted their own credit reporting laws, which do not provide for the disclosure of credit reports, credit scores, or other consumer reports to investors. See, e.g., California Civil Code § 1785.11 (permissible purposes under California law do not include disclosures to potential investors).

example, users must have a permissible purpose to obtain data, may only use data for a permissible purpose, must provide notices to consumers when such users take “adverse action” against the consumer based on consumer report information, and must securely dispose of any consumer report information. Data furnishers must furnish accurate information to consumer reporting agencies, must correct and update any information that such furnishers determine is inaccurate, must investigate consumer disputes of information that is furnished to a consumer reporting agency, and must furnish certain specific information to consumer reporting agencies, such as the fact that information has been disputed by the consumer or the fact that an account has been voluntarily closed by a consumer.

Unlike the GLBA's data privacy and security rules, which are enforced administratively, the FCRA can be enforced by private plaintiffs, who can obtain statutory damages of \$100-\$1000 for each “willful” violation. Moreover, unlike other consumer credit laws, such as the Truth in Lending Act or the Equal Credit Opportunity Act, the FCRA does not limit the damages available in a class action. As a result, consumer reporting agencies and other companies governed by the FCRA—including users and data furnishers—risk the imposition of very large damages.¹⁷

III. ISSUER-MAINTAINED WEB SITES ARE NOT WORKABLE

A. Issuer-sponsored Web sites, even with access restrictions, may not be a practical solution for disclosure of personally identifiable information

Against this backdrop of privacy laws and regulations, we are very concerned that the proposed approach described in the Staff Memorandum cannot be implemented in a manner consistent with privacy laws unless the Commission allows some latitude for issuers to make good-faith, reasonable determinations on when asset-level data are not “necessary” to enable investors to perform the requisite due diligence for purposes of Section 7(c), aided by more specific Commission guidance. Among the concerns that we have are the following:

- Web sites are inherently insecure;
- if investors are allowed to copy or download information from such Web sites, the data may be stored and shared in ways that have significantly fewer protections than those built around issuer Web sites;
- issuers have no way to verify an end-user’s compliance with any data-sharing restrictions and other requirements of federal privacy laws, especially if data is accessed by unsophisticated investors;
- it may be impossible to distinguish between persons seeking to access the data because they have an investment objective and those who profess an investment objective in order to gain access to highly sensitive consumer data;

¹⁷ See *Stillmock v. Weis Mkts., Inc.*, 385 Fed. Appx. 267, 281 (4th Cir. 2010) (Wilkinson, J., concurring) (discussing the “annihilating liability” that can be imposed upon companies in the context of an FCRA class action).

- the data are highly valuable to, among others, data mining firms, providing an incentive to numerous parties to seek ways to harvest the data (including by lying about their investment objectives);
- the data are highly susceptible to re-identification of individual consumers even without the provision of personally identifiable information; and the large-scale dissemination of personal financial data, even with significant efforts to provide safeguards, will likely put consumers at greater risk of identity theft, fraud and financial harm.

Although Section 502(e) of the GLBA does allow disclosure of personally identifiable information without consumer consent in the context of securitizations, we do not believe that the provisions of the Dodd-Frank Act with respect to the disclosure of loan-level data in securitizations reflected a decision to deprive consumers of the privacy protections of the GLBA. We are concerned that, though unintended, the Commission's approach could have that effect.

We note that the Staff Memorandum indicates that it "identified significant legal and resource constraints related to modifying the existing EDGAR system, or creating a new system, to securely store and disseminate asset-level information to investors in a timely manner that complies with the privacy laws and other applicable laws,"¹⁸ noting, in particular, that any system utilized by the Commission would have to comply with the standards for privacy controls devised specifically for federal agencies.¹⁹ Furthermore, the Staff Memorandum states that it is the Staff's understanding that "it has been a longstanding market practice for issuers to post certain information about an ABS . . . on Web sites"²⁰ and, therefore, that issuers are capable of providing personally identifiable information to investors and potential investors with appropriate safeguards to comply with privacy laws.²¹ While we agree that issuers of ABS regularly use Web sites to make available to investors periodic reports and certain information regarding the underlying collateral, the extent of the asset-level information proposed to be made available by the ABS Proposing Releases exceeds that typically made available. As noted above, certain of the information proposed to be made available by the ABS Proposing Releases is personally identifiable information subject to protection under privacy laws. In general, maintaining personally identifiable information on a password protected Web site is not viewed as reasonable security; rather, encryption of such data is likely required.²²

In this regard, we note that it is becoming the regular practice of financial institutions that provide personally identifiable information to their service providers to require service providers to submit to information security audits, both before access is

¹⁸ Staff Memorandum, p. 9.

¹⁹ Id. at p. 9, footnote 31.

²⁰ Id. at p. 11, text at footnote 36.

²¹ Id. at p. 11.

²² See, e.g., "Protecting Personal Information, A Guide For Business", pages 11 and 12, available at <http://business.ftc.gov/documents/bus69-protecting-personal-information-guide-business>.

provided to the service provider and annually thereafter. These audits typically are lengthy processes that cover information security in some detail.²³ These security audits may cover such matters as (1) whether persons accessing the information have criminal backgrounds, (2) whether PIN and randomly generated token codes are required to access the information, (3) whether the information is maintained in encrypted form, (4) what restrictions are in place to prevent employees from accessing personal email accounts and social media sites,²⁴ (5) what restrictions are in place to prevent copies of such information being sent by email or otherwise copied, (6) whether permitted copies of such information, when emailed or otherwise copied from the third party's system, are encrypted and the level of encryption employed to protect the information, (7) whether outbound emails are scanned to prevent emailing personally identifiable information, (8) whether access to the information is restricted to persons with a "need to know", (9) what change-control policies and procedures are in place to prevent changes to access restrictions, (10) what privacy awareness training is in place and whether such training is mandatory for all employees on an annual basis and (11) what physical security measures are in place to protect the computer equipment on which the personally identifiable information is stored.

We also have taken note of the cybersecurity roundtable hosted by the Commission on March 26, 2014, to discuss the issues and challenges that cybersecurity presents for market participants as well as public companies.²⁵ We hope that the roundtable discussions help illuminate for the Commission the problems we believe issuers will face if they are required to establish and maintain Web sites that are accessible by large numbers of individuals who may not be subject to any existing privacy laws and regulations and who may have no systems and procedures in place to ensure the confidentiality of the data such individuals access.

B. Use of issuer-sponsored Web sites could compromise the securities offering process

The Staff Memorandum proposes the disclosure of potentially sensitive consumer data on access-controlled issuer Web sites. We believe that the access restrictions will not work in the context of registered ABS and that this method may result in public disclosure of such information, which is not what we believe the Commission intends.

The difference between EDGAR (*i.e.*, public disclosure) and an issuer Web site is that an issuer Web site would putatively permit access only after verification of identity and investors' agreement to terms of service and compliance with other privacy law-required procedures. In the case of registered offerings, the related ABS may be sold to

²³ We are aware of at least one financial institution that has an information security audit covering more than 700 separate items.

²⁴ If employees have such access, they are able to copy protected information to emails and download it to such sites, in violation of privacy requirements.

²⁵ The Opening Statement of Commission Chair Mary Jo White at the Roundtable refers to the "compelling need for strong partnerships between the government and the private sector," in sharp contrast to the Commission Staff's approach of putting the burden of addressing cybersecurity matters with respect to potentially sensitive consumer information squarely on issuers. The Opening Statement is available at <http://www.sec.gov/news/publicstmt/detail/publicstmt/1370541286468>.

any person, including individuals, without restriction, resulting in a potentially unlimited pool of investors and potential investors. Applying the Commission's requirement for universal investor and potential investor access in such a case would, therefore, seemingly require that any person, including all individuals, be granted access to the related Web site. If the proposed access-controlled Web site is available to all actual and potential investors, including all persons and all individuals, we do not see how this is different from public disclosure of the asset-level data.

In order to address these concerns, applicable privacy laws may require that access to issuer Web sites be limited and not be made available to all investors and potential investors. In our view, this may invite issuers to apply their own bias filters to public offerings and may result in public offerings being limited to institutional investors, which the Securities Act and related SEC offering rules do not require.

Issuers of ABS must disclose all material information regarding the ABS and the underlying assets as prescribed by statute and implementing rules, including the antifraud provisions of the federal securities laws. Neither the Staff Memorandum nor the ABS Proposing Releases discuss whether any of the asset-level data would be considered "material" (much less "necessary" for due diligence purposes) to an ABS investor's investment decision, such that issuers could be liable under the Securities Act for restricting access to such information. Such claims may come from investors that are denied access to an issuer's Web site, as well as investors that are unwilling to agree to an issuer's conditions to access or terms of usage.

We also are concerned about how issuers will know who is an investor or potential investor, at least in connection with registered offerings. Although the Staff Memorandum suggests that issuers are in the best position to identify investors and potential investors, that suggestion does not comport with our experience in the registered offering context. During the registered offering process, it is the underwriters or placement agents that market the securities and identify investors; after the closing of the transaction, the trustee or certificate registrar will know the identity of registered holders, but it is difficult to identify investors who hold through the book-entry system. The Staff Memorandum has provided no guidance with respect to what information issuers may rely on to make such determinations. For example, will a self-certification by an investor or proposed investor be sufficient? After the closing of a transaction, is self-certification sufficient or must the issuer confirm an actual investor's identity with the trustee or registrar for the securities?²⁶

C. Data that is provided to the Commission and also made available on issuers' private Web sites may not be protected from FOIA requests

²⁶ See the discussion in Section III.A., above, regarding whether a password-protected Web site would provide sufficient security for personally identifiable information. In addition, we note the recent decision in *Federal Trade Commission v. Wyndham Worldwide Corporation*, No. 13-1887, 2014 WL 1349019, — F. Supp. 2d — (D.N.J. Apr. 7, 2014)(or *FTC v. Wyndham Worldwide Corp.*, No 13-1887, 2014 U.S. Dist. LEXIS 47622 (D.N.J. Apr. 7, 2014)), in which the court held that the FTC has jurisdiction to enforce, as unfair or deceptive acts or practices, a company's data security policies and procedures relating to the protection of personally identifiable information.

The Staff Memorandum suggests that, in addition to filing the non-sensitive asset-level information publicly on EDGAR, a copy of the sensitive asset-level information disclosed on an issuer's Web site could be provided to the Commission in a non-public filing to preserve the information and enable the Commission to have a record of all asset-level information provided to investors. The Commission's Staff believes that the information is of the type that would be subject to an exemption from the release of information under the Freedom of Information Act (the "FOIA"), but it does not specify the exemption on which the Staff would rely.²⁷ If there is any possibility that such information might nonetheless not be subject to a FOIA exemption (for example, if the purported exemption could be found to be not applicable as a result of the disclosure of the same information on an issuer Web site), we believe the more prudent approach would be to allow issuers to provide sensitive data in aggregated, grouped or otherwise anonymized form which then can be filed on EDGAR.

Alternatively, we request that the final rules include more assurance that the Commission will treat such data as being confidential and/or proprietary information that is subject to appropriate FOIA exemptions.

IV. CONTENT OF DISCLOSURES

A. The solution to the issues posed by the competing privacy and disclosure policies must be content-based

In our view, the solution to the issues posed by the competing privacy and disclosure interests implicated by the Commission's proposals and the Staff Memorandum must be content-based. The Commission's original proposal to require loan-level data in securitizations generally would have required that all data fields be provided for each loan, rather than the current approach of providing aggregated data. We believe that a more nuanced approach is necessary. For example, in the context of mortgage loans, the original date of the loan, the property address, the original principal amount, and the identity of the borrower/property owner are typically filed with the county recorder in the county in which the property is located and are a matter of public record. It is therefore likely that a person with access to the original date of the loan, its principal amount, and the county in which the property is located—just those three items—will be able easily to obtain the borrower's name as well. Once that occurs, every other piece of information the Commission requires to be disclosed at the loan level—e.g., income, employment history, debt-to-income levels and FICO score—will have been fully disclosed with respect to that borrower to anyone with access to the loan-level data. If the loan-level data cannot be adequately secured, that means that this information will be available to a large number of people who may want to misuse it.

There are a number of possible content-based alternatives that would give investors enhanced disclosures but would not jeopardize borrowers to this degree. In the context of mortgage loans, for instance, it might be possible to identify the specific

²⁷ Staff Memorandum, p. 14 and footnote 44.

properties underlying the mortgage loans as well as any financial information linked to those properties in already publicly available county mortgage records, but provide all other information in aggregate form. The scope of those aggregate disclosures could also be increased significantly from what has historically been made available. It is possible that property valuation information could be included in the loan level data, as could information about actions the lender took—verification of employment and income status, for instance—that does not provide information specifically about the borrower. The privacy analysis would have to be done field by field, and would need to consider likely advances in technology and data-mining techniques.

With respect to other asset classes, such as auto loans, the answer may be that only grouped or aggregate information can be made available. As an alternative, it may be possible to match loan amount with the underlying make, model and year of the vehicle, on a loan-by-loan basis, but present borrower financial information only on a grouped or aggregate basis. We recognize that investors have indicated a strong desire for large quantities of loan-level data, and we are not in a position to assess how important such data would be to them. However, we suggest that the Commission explore additional stratifications and data elements in grouped data, rather than loan-level data, to the extent privacy concerns cannot be resolved.

B. If the final amendments to Regulation AB require disclosure of “sensitive” information on issuer Web sites, the Commission should permit issuers to decide whether the use of aggregated, grouped or anonymized data is necessary in order to comply with applicable privacy laws

As we discuss above, we believe that the final amendments to Regulation AB should not require disclosure of “sensitive” data on access-restricted issuer Web sites. However, if that approach is adopted by the Commission, we agree with the Commission that each issuer must decide for itself which data it will maintain on its Web site and which of the data will be made publicly available on EDGAR, inasmuch as the issuer accepts risk of whether it has struck the correct balance between the privacy laws and disclosure requirements. For the reasons described above, however, we believe that the Commission also must permit issuers the flexibility to determine whether applicable privacy laws would require the “sensitive” data to be provided only as aggregated, grouped or anonymized data. In this regard, as discussed further below, we recommend that the Commission provide more specific guidance on when it deems asset-level information to be “necessary” to investors’ ability to perform due diligence on a prospective ABS investment.

If, however, the Commission does not agree with our recommended approach, then we believe that the Commission should delineate which information constitutes “sensitive” data. We are concerned that issuers may be faced with second-guessing by the Commission’s Staff or by investors with respect to whether certain data should have been disclosed on EDGAR instead of an issuer’s Web site and, worse, by consumer suits (or suits brought by federal or state consumer protection agencies) asserting that data disclosed on EDGAR included personally identifiable information that should not have been disclosed. In addition, unless the Commission specifies which data is required to be disclosed on EDGAR and which data is to be disclosed on issuer Web

sites, we believe it will be hard to achieve the uniformity the Commission Staff sought in making the proposal.

C. The Commission should reconsider whether loan-level disclosure of certain consumer data is “necessary” for investor due diligence and should look to existing precedent regarding anonymizing potentially sensitive consumer data

Appropriate safeguards on investor access—even if they can be implemented—would still not resolve the serious privacy considerations and liability exposure facing issuers and investors unless the Commission also addresses the question of what information must be disclosed on issuer Web sites. While we agree with the Commission (and the Division) that issuers of ABS must disclose all material information regarding the ABS and the underlying assets as prescribed by statute and implementing rules, including the antifraud provisions of the federal securities laws, we continue to believe that such disclosures should not include personally identifiable information that is protected by applicable privacy laws (or that can be aggregated with other publicly available information so as to permit identification of actual borrowers) and that such disclosures should be made only in a manner that is in compliance with all applicable privacy laws. In other words, we believe that a delicate balance of competing legislative objectives must be struck.

Section 942(b) of the Dodd-Frank Act limits the disclosure of loan-level data to that *necessary* for investors to perform due diligence. We respectfully submit that the Commission can and should do more to determine what asset-level data is “necessary” to permit investor due diligence. We realize that a number of investors have requested (and continue to request) that the Commission adopt the broad loan-level data requirements set forth in the 2010 ABS Proposing Release. We believe, however, that nothing in Section 942(b) prevents the Commission from determining that certain of the data, while helpful to some investors, is not “necessary” and is so sensitive that it should not be required to be disclosed on a loan-level basis.

Since the Dodd-Frank Act was enacted and the ABS Proposing Releases were published, there have been numerous large data breaches, combined with heightened concerns about protecting consumer information. Because of the very real risk for data breaches and the potential for such information to be combined with other publicly available information to “re-identify” borrowers, we ask the Commission to reconsider whether such information as credit scores, borrower incomes and borrower debt can be presented as “grouped” or in “ranges” rather than individually for each asset, whether geographic information such as zip codes, can be limited to the first two digits, or whether this data can be anonymized in some other fashion so as to minimize the potential for re-identification.

The Staff Memorandum notes that, if it were to collect and disclose this information, the Commission would be required to follow the National Institute of Standards and Technology’s *Special Publication (SP) 800-53 Rv. 4, Security and Privacy*

Controls for Federal Information Systems and Organizations.²⁸ SP 880-53 includes as Appendix J a Privacy Controls Catalogue setting forth policies and procedures to be adopted by federal agencies in connection with the collection, retention and disclosure of personally identifiable consumer information. SP 880-53 includes the following recommendation:

The organization, where feasible and within the limits of technology, locates and removes/redacts specified [personally identifiable information] and/or uses anonymization and de-identification techniques to permit use of the retained information while reducing its sensitivity and reducing the risk resulting from disclosure.²⁹

The Commission is not alone in, nor is it the first governmental authority to be concerned with, assessing or interpreting the competing requirements of privacy laws and disclosure obligations. For example, the Department of Health and Human Services has determined that certain consumer data may not be disclosed because it is protected by The Health Insurance Portability and Accountability Act of 1996. That Department's regulations require removal of certain information in order to keep consumers' health information anonymous, and have limited disclosure of zip codes to the first three digits.³⁰ The Consumer Financial Protection Bureau ("CFPB"), in the context of its Dodd-Frank Act mandated revisions to Regulation C (the regulations implementing the Home Mortgage Disclosure Act ("HMDA")),³¹ is reviewing privacy law restrictions on required disclosures under the HMDA, including redaction of information that would permit identification of individuals, such as credit score and age.³² In its review, the CFPB has recognized the danger of disclosing, among other consumer information, credit scores and zip codes and other geographic information regarding the property.³³ We note, as well, that the CFPB is the agency charged with determining the applicability of the FCRA to the proposed disclosure mechanics and enforcing its provisions to the extent applicable.

The Staff Memorandum notes that the Bank of England has taken an approach similar to the one suggested in the Staff Memorandum—*i.e.*, to require disclosure of

²⁸ Staff Memorandum, p. 9 footnote 31.

²⁹ SP 880-53 at p. J-14, and noting that supplemental guidance on anonymization can be found in the NIST Special Publication 800-122.

³⁰ See 45 CFR 164.514(b).

³¹ We recognize that, in mandating revisions to Regulation C, Congress expressly required the CFPB to require such deletions as the CFPB determined appropriate to protect any privacy interest of an applicant for credit and to protect financial institutions from liability under any federal or state privacy law. See Section 1094 of the Dodd-Frank Act and 12 U.S.C. 2803(j)(2)(B). We are skeptical that, although Congress did not express those same concerns in Dodd-Frank § 942, it would be unconcerned with the protection of similar data in connection with required disclosures to ABS investors.

³² 12 U.S.C. 2803(h)(1)(E) and 12 U.S.C. 2803(h)(3)(A).

³³ See *Small Business Review Panel For Home Mortgage Disclosure Act Rulemaking, Outline Of Proposals Under Consideration and Alternatives Considered*, available at: http://files.consumerfinance.gov/f/201402_cfpb_hmda_outline-of-proposals.pdf.

asset-level information on an access-protected originator/sponsor Web site. Leaving aside the privacy and securities laws questions raised above, we note that there are significant differences between the Bank of England requirements, on the one hand, and those proposed by the Commission in the ABS Proposing Releases and the alternative approach recommended in the Staff Memorandum, on the other hand. For example, unlike the ABS Proposing Releases and the proposal, the Bank of England requires that “[l]oan level data made available will be anonymized – it should not directly or indirectly disclose the identities of individual borrowers.”³⁴ In addition, although the Bank of England requires that credit scores be made available, it notes that the UK credit bureaus have agreed to provide the credit scores.³⁵ In contrast, the disclosure framework proposed in the ABS Proposing Releases and the proposal outlined in the Staff Memorandum would require disclosure of all loan level data, without provision for “anonymization” of such information. For example, an obligor’s zip code would be required to be disclosed for all asset classes and issuers would be required to disclose FICO scores of individual obligors. Our understanding is that FICO scores are the property of the individual credit rating bureaus that create those scores and disclosure of the scores generally is prohibited by those bureaus.³⁶ In contrast to the Bank of England’s agreement with credit rating bureaus, the Commission’s proposals would seem to require each issuer to negotiate separately the use of individual credit scores with each credit rating bureau.

There are significant differences, as well, between the scope of the disclosures required by the Bank of England and the disclosures proposed in the ABS Proposing Releases and the alternative approach recommended in the Staff Memorandum. The Bank of England’s required disclosures fall well below the specificity of the Commission’s proposed disclosures and could easily account for the Bank of England’s comfort in requiring those disclosures. In addition, the Bank of England requires that “[i]nvestors accessing loan level data shall keep it confidential, use it only for the purposes of evaluating the security and its performance and shall not use it to seek to identify individual borrowers”.³⁷

³⁴ Paragraph 15, Bank of England Market Notice, “Market Notice - Detailed Eligibility Requirements For Residential Mortgage Backed Securities and Covered Bonds Backed by Residential Mortgages” available at: <http://www.bankofengland.co.uk/markets/Documents/marketnotice121002abs.pdf> (the “**BOE RMBS Market Notice**”). In particular, if the ABS are backed by consumer assets, geographic information is limited to the statistical region in which the property is located (the requirement is for only the first level, or largest, of the statistical regional designations within England, Wales, Scotland or Northern Ireland). See Residential Mortgages loan level data template, row 147 (the “**BOE RMBS data template**”); Auto loan ABS loan level data template, row 47; and Consumer loan ABS loan level data template, row 43. Each such loan level data template is available at <http://www.bankofengland.co.uk/markets/Pages/money/eligiblecollateral.aspx>. Note that neither the Auto loan ABS loan level data template nor the Consumer loan ABS loan level data template requires disclosure of the borrower’s postal code. In addition, if the ABS are RMBS, the “optional” geographic information is limited to the first or first and second digits of the related postal code. Postal code disclosure is specifically not required if disclosure would violate the UK Data Protection Act, or if the issuer does not have the code or does not use the code. See BOE RMBS data template, row 148.

³⁵ BOE RMBS Market Notice, paragraph 15.

³⁶ See information available at <http://www.fico.com/en/about-us/terms-of-use/copyright-usage-requirements>.

³⁷ Paragraph 15, RMBS Market Notice.

The European Securities and Market Authority (“ESMA”) also recently published a consultation paper that included draft templates for asset-level disclosures for asset-backed securities.³⁸ In Annex I to the ESMA Consultation Paper, the ESMA included draft asset-level disclosure templates for RMBS, auto-loan or lease-backed ABS, consumer finance ABS and credit card ABS, among others. None of those templates requires disclosure of a full zip (postal) code; in the case of RMBS, only the first 2 or 3 digits of the postal code, and in the cases of auto-loan or lease-backed ABS, consumer finance ABS and credit card ABS, only the geographic region of the consumer must be disclosed. In addition, none of those templates requires disclosure of any consumer’s credit score, age, sex, employer, any property address or any account number (although a loan number is required to be disclosed).

Accordingly, there is substantial precedent³⁹ that would support a decision by the Commission that certain of the required data could be presented as “aggregated” or “grouped” data or anonymized in some way. We believe the Commission also should consider either arranging for credit bureaus to provide such data notwithstanding contractual restrictions (similar to the Bank of England) or giving issuers an exemption from providing such data pursuant to Rule 409 under the Securities Act.

C. Significant re-identification and competitiveness issues apply to loan-level data for commercial obligors, and these issues also need to be addressed in the final rules

We also have concerns regarding the effect of disclosure of sensitive data on commercial obligors and the potential for those disclosures to compromise the competitive position of the related lenders. For example, individual transactions in commercial finance are often much larger and/or much more user specific than in consumer finance transactions. A zip code combined with equipment type may be the only information necessary to identify a particular customer, and other information disclosed about such customer’s contract could end up violating restrictions on private data and/or spotlighting business opportunities for competitors. In addition, asset-level information that is matched with other public data has an even greater potential to

³⁸ See, European Securities and Market Authority, *Consultation Paper On CRA3 implementation*, dated 11 February 2014, ESMA/2014/150 (the “ESMA Consultation Paper”).

³⁹ In addition, we note that, [as originally adopted by the Federal Reserve Board,] Appendix A to Regulation C, included public reporting requirements concerning certain mortgage loan information, including geographic information concerning the mortgaged property, required that such information be limited to the property’s MSA and state and, if the population of the county in which the property is located exceeds 30,000, requires that the county be disclosed, or if the population is 30,000 or less, requires that the census tract in which the property is located be disclosed. Zip codes are not required to be disclosed under Regulation C. 12 CFR Part 1003, Annex A, I.C., paragraphs 2 and 3.

Furthermore, at least two state supreme courts have found that a merchant’s requirement that individuals disclose their zip codes in connection with in-store credit card transactions is a violation of their state’s data privacy laws prohibiting merchants from requiring an individual to disclose personal identification information as a condition to accepting a credit card for payment. See *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 984 N.E.2d 737 (Mass. 2013) and *Pineda v. Williams Sonoma Stores, Inc.*, 51 Cal. 4th 524, 246 P.3d 612, 120 Cal. Rptr. 3d 531 (Cal. 2011).

allow a competitor to reverse engineer actual customer lists, origination channels and/or pricing practices, to the disadvantage of the securitizer providing the information.

Other examples include, (i) for an equipment finance transaction, the proposed requirement to disclose the booked residual value for each item of leased equipment (which is viewed as proprietary data that lessors do not want made available to customers or competitors because of the potential for competitive disadvantage) or (ii) in a trade receivables financing, a competitor, posing as a potential ABS investor, seeking to access confidential data as to anticipated merchandise returns, known as “dilution risk” data.

V. CROSS-BORDER ISSUES

Non-U.S. issuers face some special challenges under the proposed rule. Consumer privacy laws in foreign jurisdictions may differ significantly from U.S. privacy laws. Non-U.S. issuers may be prohibited from disclosing the requested information under foreign law. Moreover, since U.S. law is inapplicable in foreign jurisdictions, any deemed agreements or protections provided issuers by amended Regulation AB or other provisions of U.S. law are unlikely to be effective in connection with data stored on systems located in a foreign jurisdiction. Accordingly, any abuse by persons accessing sensitive information provided by a non-U.S. issuer on its Web site may expose the issuer to liability to domestic consumers.

The ability to identify borrowers from disclosed information will vary from country to country based on the characteristics of the country and the specific fields as implemented in the country. For example, a postal code may in some countries include a very small slice of the population. Sometimes there may be a postal code for a single building, or a rural postal code may include very few people. The level of granularity in the data necessary to protect individual identities may be quite different in different countries.

If an offering is made partly in the U.S. and partly in Europe, a non-U.S. issuer may need to provide two different sets of data to investors and the data will be located in different places; for the European offering, the data will be located in the European data warehouse or in the U.K. data storage and for the U.S. offering, the data will be located at both the Commission and on the issuer’s Web site. This a duplicative cost to the issuer and an aggravation to investors. Moreover, because the required data disclosure will be different in the U.S. and in Europe, issuers may find that it is necessary to disclose both sets of data to all investors.

In addition, the ability to identify investors, as we discuss above, becomes more complex for investments held through foreign depository systems.

One approach to the cross border issuance questions may be to follow the approach adopted in other provisions of the Securities Act⁴⁰ and to provide that non-

⁴⁰ See, e.g., Form F-10.

U.S. issuers may comply with the loan-level disclosure of Regulation AB by disclosing loan-level information required in their home jurisdictions. Alternatively, non-U.S. issuers could be required to disclose loan-level information required by Regulation AB, except to the extent that such disclosure would not be permitted under the laws of their home jurisdictions.

VI. CONCLUSIONS AND RECOMMENDATIONS

First and foremost, we recommend that the Commission re-examine the asset-level disclosures proposed in the ABS Proposing Releases with respect to consumer assets. We believe that this re-examination should be undertaken in light of (i) the statutory mandate that such information be limited to that information that is “necessary” to permit investors to perform due diligence, (ii) the express legislative history relating to Section 942(b) of the Dodd-Frank Act, which indicates that asset-level information should not include information with respect to which “disclosure might raise privacy concerns⁴¹ and (iii) privacy laws in general.

In connection with this re-examination, we believe that it would be beneficial if the Commission worked with other federal agencies, including the CFPB and the FTC, to determine what potentially sensitive consumer information should not be disclosed (whether on an issuer’s access restricted Web site or otherwise) and what potentially sensitive consumer information could be disclosed as grouped or aggregate data or otherwise anonymized such that disclosure of such information would not facilitate re-identification of consumers. If that is not possible, then we believe the final rules should permit issuers—that is, those with the ultimate responsibility for compliance with all applicable privacy laws—to decide which data should only be disclosed in grouped, aggregated or anonymized fashion, and the method of delivery of such disclosure. Data that is grouped, aggregated or otherwise anonymized, as most appropriate, can be published on EDGAR, thus avoiding the expense of (and increased risk of liability in connection with) implementing and maintaining issuer Web sites for the disclosure of such information. In addition, permitting issuer flexibility in the method of delivery, whether delivery is through EDGAR, issuer Web sites or otherwise, allows a principles-based framework for best practices to develop for the nuances that are present in each particular asset class, and further provides flexibility to the issuer to determine which method of delivery is most appropriate for potentially sensitive consumer or commercial information, which may change over time.

If the Commission nonetheless determines to adopt the asset-level information disclosures described in the ABS Proposing Releases (as modified by the proposal described in the Staff Memorandum concerning disclosures of individual consumer credit scores and income and debt levels) and the disclosure mechanism proposed in the Staff Memorandum, we respectfully suggest that the Commission include the following provisions in its final amendments to Regulation AB and/or the adopting release, as appropriate:

⁴¹ 15 Senate Report No. 111-176 at 131 (available at http://banking.senate.gov/public/_files/Committee_Report_S_Rept_111_176.pdf).

(1) delineation of what constitutes “sensitive” data and “non-sensitive” data;

(2) provide that any information delineated as “sensitive” (whether by the Commission or an issuer) may be disclosed (1) only if such disclosure is not in violation of any applicable data privacy or similar consumer protection law, rule or regulation, and (2) only in anonymized form, in each case, as determined by the issuer;

(3) coordinated guidance from the Commission staff and the CFPB regarding the applicability of FCRA to data posted on issuers’ Web sites;

(4) a coordinated rule-making to give issuers access to information at all levels of the book-entry holding system in order to facilitate identification of owners of securities;

(5) a regulatory safe harbor from liability for material omissions from disclosure as a result of investors not accessing an issuer’s Web site or the omission of “sensitive” data from EDGAR filings;

(6) assurance that any “sensitive” data filed in paper format with the Commission will be treated by the Commission as exempt from disclosure under FOIA;

(7) a provision to the effect that any investor or potential investor accessing any such Web site:

(a) will, by accessing such Web site, be deemed to have agreed that the investor is accessing the data on such Web site only for evaluating the security and its performance and shall not use the data to seek to identify individual borrowers;

(b) will have in place commercially reasonable policies and procedures designed to protect the data the investor accesses from other persons and private Web sites; and

(c) will, by accessing such Web site, be deemed to have agreed that the investor is aware of all applicable laws, rules and regulations concerning the confidentiality of such data and will maintain such data in accordance with the provisions of such laws, rules and regulations; and

(8) provisions that give consideration to the cross-border issues we discuss above.

In addition, we note that, in the 2011 ABS Re-Proposing Release, the Commission reiterated its belief that any final amendments to Regulation AB should include

compliance dates no later than one year after adoption.⁴² We are concerned, however, that, if the final amendments include a requirement for disclosure of sensitive data on issuer-maintained Web sites, one year may not be sufficient time for issuers to design, build out and test Web sites with the level of security necessary to comply with privacy laws and prepare and negotiate the related contractual arrangements with respect to the use of information owned by third parties and access to the Web sites. Accordingly, we urge the Commission to consider providing for a longer transition period for implementation of this requirement.

Finally, because the data points for commoditized asset classes such as residential mortgages, credit cards and auto loans are not readily adaptable to other, more specialized asset classes (e.g., export receivables, operating assets, trade receivables and equipment loans), we recommend that the Commission adopt loan-level disclosure in stages, beginning with the commoditized asset classes and then extending appropriate requirements to other classes as experience develops during the initial stages.

The Committees appreciate the opportunity to comment on the Staff Memorandum's proposal and respectfully request that the Commission consider the recommendations and concerns set forth above. Although we have tried to consider the Staff Memorandum's alternative recommendation in the detail it deserves, the breadth of requirements relating to the protection of personal identification information, the lack of clarity surrounding the overall scope of the data proposed to be disclosed and the lack of clarity regarding what parts of that data would be "sensitive" data have presented challenges to us in achieving the granularity of discussion we would wish to provide. We are prepared to meet and discuss these matters with the Commission and its Staff in more detail and to respond to any questions.

Respectfully submitted,

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⁴² 2011 ABS Re-Proposing Release at 47971.

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