THE FINANCIAL SERVICES ROUNDTABLE
Financing America's Economy

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Via email to: rule-comments@sec.gov

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

Re: RIN 3235-AK37; Asset-Backed Securities Proposed Rule

The Financial Services Roundtable,[1] together with the Housing Policy Council ("Roundtable"), appreciates this opportunity to comment on the Securities Exchange Commission's ("SEC") Notice of Proposed Rulemaking ("Proposed Rule") to Increase Investor Protections in Asset-Backed Securities ("ABS"). The Proposed Rule was published in the Federal Register on May 3, 2010 (pages 23328 to 23514).

The Proposed Rule is an extensive and detailed proscription of all aspects of the ABS market. The Roundtable does not attempt to address every aspect of the Proposed Rule or all concerns being expressed by our individual members. Rather, this comment letter highlights some of the primary concerns raised by our members. Members of the Roundtable are actively engaged in facilitating the provision of credit to individual consumers, small and middle market businesses, and large corporations. They are the leaders in the securitization market. Through our members, securitization enables lending and allows for an efficient redeployment of capital and new credit creation. Accordingly, we commend the SEC's desire to improve the securitization market and fully understand the significant impact that the Proposed Rule will have on the secondary market.

I. General Comments

The Roundtable strongly believes that consistency across the governmental agencies on rules is essential. We urge the SEC to work with the other agencies to create rules that are not inconsistent with each other and to avoid regulatory fragmentation. As discussed in more detail below, we urge the agencies to look to the Dodd-Frank Wall Street Reform & Consumer Protection Act ("Dodd-Frank

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $85.5 trillion in managed assets, $965 billion in revenue, and 2.3 million jobs.

Act") for guidance on the rules to be followed. There is a great need for coordination among regulators due to the cumulative impact of this and other ongoing regulatory initiatives on securitization.

In creating multiple sets of regulations governing the same issues, the restoration of the securitization market will inevitably be frustrated. The imposition of numerous sets of onerous new requirements will likely have negative unanticipated consequences on the securitization process, rather than accomplishing the SEC's goal of improving the currently lagging securitization market. The Dodd-Frank Act addresses a number of the same issues addressed in this Proposed Rule, and calls for joint rulemaking by the agencies in order to avoid inconsistent, unworkable regulations. As such, the Roundtable urges the SEC to look to the Dodd-Frank Act for guidance. The securitization market needs predictability and uniformity in order to ensure stability returns to the marketplace. It is our belief that the Proposed Rule should be carried out alongside the mandates set forth by Congress in the Dodd-Frank Act, especially those regarding risk retention and disclosure requirements.

II. Specific Concerns

The Proposed Rule significantly changes the requirements for shelf registration of ABS. Under current requirements, shelf registration is available for issuers of ABS that are rated investment grade by at least one nationally recognized securities rating organization. Under the Proposed Rule, the rating condition would be replaced by four primary eligibility requirements: risk retention; third party review of representations and warranties; CEO certification; and ongoing Exchange Act reporting requirements. Furthermore, the Proposed Rule sets out onerous disclosure requirements, including asset-level disclosures. Lastly, the Proposed Rule includes amendments affecting the requirements for Rule 144A and Regulation D safe harbors. The Roundtable has several significant specific concerns associated with this Proposed Rule, including adequate transition time, the broad definition of ABS, risk retention, CEO certification, disclosure requirements, ongoing reporting, the waterfall computer program, private-issuances of structured finance products, grandfathering of vintage assets, incidental and implied recourse, and repurchase obligations.

a. Transition Time

The Roundtable is in favor of a workable time period for implementation of the final rule. It is likely that affected financial institutions will be required to implement new operational procedures and infrastructures to properly comply with the Proposed Rule. In addition to the significant costs associated with establishing these operation procedures and infrastructures, our members need sufficient time to implement processes and systems for compliance. Throughout the proposed disclosure changes, the SEC requests data that is either not currently available in the system or would require significant re-programming efforts to extract at a loan level. The SEC should consider the programming efforts required to extract data in to the appropriate reporting systems when contemplating implementation timeframes. The Roundtable requests that the SEC consider implementing different time tables for different aspects of the Proposed Rule. For example, a period of at least 12 to 18 months for asset-level disclosures would ensure more compliance and a smoother transition. As well, the Roundtable believes that, at a minimum, the transition and implementation period must be in line with the Dodd-Frank Act. For example, for risk retention, regulations are to be jointly prescribed within 270 days after enactment, with effectiveness one year after publication of final rules in the Federal Register for residential mortgage backed securities and two years after publication for other asset types.

b. Definition of an Asset-Backed Security

The Roundtable has some concern that the Proposed Rule's definition of asset-backed security has potential of limiting innovation, and it does not appear to be narrowly targeted to correct identified systemic market weaknesses that have contributed to investor losses. **The Roundtable requests that the SEC's definition of asset-backed securities be sufficiently narrow to restrict access to only those securities where sufficient and robust disclosure, including collateral pool disclosure, can be provided during the initial offering process.** At the same time, the definition should be calibrated to permit a reasonable degree of flexibility to accommodate innovation and new product development, the contours of which might not yet be fully conceived.

c. Risk Retention

The Roundtable believes that the risk retention standard should be withdrawn or, at a minimum, re-issued in a newly proposed rule. If the SEC pursues risk retention for shelf registration, the Roundtable urges the SEC to adopt the risk retention requirements in the recently enacted Dodd-Frank Act. Alternatively, we suggest the ratings of the credit rating agencies be utilized instead of a risk retention requirement.

It is the Roundtable's position that, where required, risk retention requirements should be consistent among regulatory agencies. Failure to harmonize mandatory risk retention standards across regulatory agencies may result in higher risk retention requirements than those called for in the Proposed Rule. For example, the Dodd-Frank Act, the FDIC Securitization proposed rule, and this Proposed Rule differ as to who retains the credit risk, the method for risk retention, and under what circumstances risk retention applies. Congress has spent much time considering how to deal with the concept of risk retention in securitization. The Congressional language provides exemptions for the risk retention requirement for qualified residential mortgages and certain government issued loans, while this Proposed Rule and the FDIC Securitization proposed rule do not. The effect of this would be a 5% risk retention requirement for securitizations exempted by the Dodd-Frank Act, which is not the intention of Congress. The requirements in the Proposed Rule should be consistent with those in the Dodd-Frank Act.

We note that the best method to ensure high quality securities is through good underwriting. The Dodd-Frank Act is resplendent with mandated underwriting requirements, all that Congress felt was necessary to create good loans. Strong underwriting standards are the best and most direct approach to producing high quality assets. If the SEC chooses to require the retention of credit risk, our members would support the use of the identical scheme as is found in subtitle D of Title IX of the Dodd-Frank Act. They are opposed to the creation by the SEC of a new risk retention scheme separate from that of the Dodd-Frank statute. Confusion can follow when more than one government process is mandated for the same event or activity, and this would be one such case if the SEC does not utilize the provisions of the Dodd Frank Act.

An alternative method to achieving the same goals is utilizing the credit rating agencies. The credit rating agencies received some complaints during the recent analyses of the economic downturn, because of the poor performance of many issues rated AAA by the rating agencies. Congress reviewed that performance and made substantial changes in the requirements that must be met by credit rating agencies. The entirety of Subtitle C of Title IX of Dodd-Frank is devoted to changes in how those agencies operate, the conflict rules under which they must perform, and the transparency and availability of data about their performance. Therefore, the credit rating agencies, operating under the new rules, are a good barometer of the quality of the issues.

The Roundtable urges the SEC to reconsider risk retention requirements. Whatever choice the SEC makes about risk retention, we urge the SEC to defer finalization of that position pending a Congressional review of the reports Congress has requested in the Dodd-Frank Act. One of the reports in Section 941 of Title IX must be completed within 90 days of the enactment of the Act, and includes in it the direction that GAO consider the impact on securities of the accounting changes in FAS 166 and 167. The report in sec. 946 must be completed in 180 days. Both of those report dates are sufficiently imminent that a delay of final action by the SEC pending the consideration of those reports will not delay the beneficial effects of the proposed Regulation AB.

d. CEO Certification

The Roundtable has concern about the CEO certification requirement. Our members are not reluctant to have an officer certify if he or she is in a position as a part of his or her primary duties to gather the underlying information necessary to reach a judgment about the matters to which they are certifying. However, most CEOs of our member companies are not in that position. As a result, this requirement, depending on an institution's corporate structure, is impractical and runs the risk of lacking meaningful implementation. The CEOs have responsibilities that extend beyond individual securities issues, and while they are responsible for, and should be accountable for, the performance of the entire company, they would be unable to do their job effectively if they were called upon to intently review the practices and performance of each business entity underlying each individual issuance of securities. In addition, we note that in many instances, the depositor is a common control affiliate of the transferor, and its CEO will also serve as an officer of the transferor. **We believe that this certification is highly inappropriate for standard securitization transfers.** Instead, the CEO certification should be adjusted to speak solely to the adequacy of the disclosure of the collateral, structure, and other elements of the transaction in question.

e. Disclosure Requirements

We recognize the desire to have full disclosures in the securitization market. However, in addition to the specific comments below, we note that several aspects of the disclosure requirements proposed by the SEC are different from those proposed by FDIC and Congress. We respectfully request that the SEC ensure consistency in disclosure requirements.

i. RMBS

While there are a very large number of Residential Mortage-Backed Securities ("RMBS") data points, the Roundtable believes that as long as (1) they can be submitted directly from reports that our members already generate, (2) do not require extensive systems manipulation to create or to maintain, and (3) are not changed over time as a matter of course, then our membership will support the desire to provide more data. At the same time, however, **our membership urges the SEC to include a transition period of at least 12 months to permit the covered institutions to upgrade and modify their systems and training to ensure that at the effective date of the proposal, they can generate the necessary data in the required without countless errors that will be costly and may result in non compliance.**

ii. Auto Loans and Equipment Leasing[2]

[2] The term equipment leasing includes installment loans and dealer wholesale (floor plan) loans.

The Roundtable has significant concern that the data requirements for auto securitizations and equipment leasing securitizations present data availability. Our members are concerned that the requirements will result in more disclosure than investors require, and in certain cases, disclosure that is inconsistent with the way the asset class is underwritten and serviced. In particular, loan level data is not appropriate for prime auto securitizations. Issuers in prime auto and prime equipment securitizations typically provide rating agencies and investor pool stratifications and rep lines, as opposed to individual loan tapes. Aggregating data creates information that is easier to digest and does not advantage larger and more sophisticated investors who may have more data processing capabilities to analyze granular loan data. The Roundtable also notes that applicable consumer privacy laws create difficulty in complying with the proposed disclosure requirements. Auto loans and equipment leases are non-public, and, therefore, providing detailed individual loan information may be a violation of privacy law. Furthermore, loan level data exposes issuers to disclosing proprietary information on underwriting scorecards and business strategies. The ability to link a vehicle model, make and dealership information to an obligor's financial data, location and credit score creates a robust dataset for competitors to utilize in reverse engineering issuer strategies.

We further note that certain disclosure requirements are not applicable to prime auto and equipment issuers. **We ask the SEC to reconsider the applicability of certain data requirements that appear to have been drafted utilizing a mortgage template.** In certain cases, an issuer will be unable to comply with the Proposed Rule if unchanged. As well, certain disclosure requirements proposed would require significant system re-programming.

iii. Credit Card

The Roundtable has similar concerns with regardd to credit card disclosure requirements. The detailed disclosure required in the Proposed Rule would require issuers to disclose proprietary information about origination, underwriting and pricing models that are central to the profitability of the business. This may potentially eliminate securitization issuance as a funding source, particularly for institutions that have other funding options. Moreover, compiling the extensive information and developing the infrastructure required to comply with the Proposed Rules would significantly increase the cost of securitization *versus* other funding sources. As a result, credit card ABS securitization volume likely will decrease and it will be difficult to rationalize securitization as a funding source for banks.

f. Ongoing Reports

The Roundtable generally supports the SEC's desire to provide investors with access to more information on an ongoing basis. However, the reporting burden must be manageable and not routinely result in shelf ineligibility. We believe that the proposal to require issuers in delayed shelf offerings to continue to file reports required under Section 15(d) of the Exchange Act as long as non-affiliates of the depositor hold any of the issued securities will create an undue burden on issuers without significantly enhancing protections already available to investors. For example, we note that some events that trigger such reporting are outside the control of the issuer and may not be known to the issuer prior to the reporting deadline. Accordingly, the loss of shelf use for one full year due to a single late Exchange Act report by the depositor or an affiliate produces a negative result. We believe the better approach is to maintain the current rules permitting Section 15(d) reporting to be terminated after one year. This will strike a balance between protecting the interests of the investor and the burden and expense to issuers in preparing and filing such reports.

g. Waterfall Computer Program

The Roundtable does not believe that the majority of investors will benefit from the requirement of filing a waterfall computer program Waterfall computer programs show the distribution of cash flows from a securitization. Waterfall computer programs are not predictive models. Item 1113(h) imposes characteristics of a predictive model onto a waterfall computer program. In order for a waterfall computer program to function as a predictive model it would have to take into consideration contractual variables not yet established. For example, a computer waterfall program is unlikely to capture all cash flows from a securitization's assets because not all cash flows are anticipated by the contractual provisions and not all cash flows are quantifiable prior to their occurrence.

Issuers do not currently possess waterfall computer programs as proposed by the SEC. The costs of requiring the filing of a waterfall computer program far outweigh the suspected benefits. For example, each ABS issuance is likely to have distinctive characteristics. Each waterfall scenario will therefore require additional design, programming, and maintenance costs connected to software development. Furthermore, the program will likely require updates to correct errors. Maintenance of the waterfall computer program, coupled with the implementation of the program will be very costly. In the end, these costs are likely to be incurred by borrowers in the form of higher interest rates.

Sophisticated purchasers are likely to develop their own waterfall program in order to analyze their risk. Marginally sophisticated users, on the other hand, who will rely on the supplied waterfall, may not fully understand how to use it, thus requiring additional costs to educate them. Unsophisticated users will not likely understand the waterfall, how to use it, or how to create scenarios to run through the waterfall program. Furthermore, it is possible that a majority of investors will rely on a waterfall program they do not wholly understand.

By expanding the waterfall computer program into a predictive model, the possibility for error increases. Thus, the Roundtable respectfully requests the SEC to provide clarity on the waterfall computer program's effect on issuer liability. We urge the SEC to adopt a 10b-5 standard for liability rather than strict liability for any possible disclosure violations associated with the waterfall computer program. Previous Regulation AB Item 1105 used a similar 10b-5 standard of liability for violations of certain static pool disclosures.

h. Privately-Issued Structured Finance Products

The Roundtable opposes the Proposed Rule's amendments affecting structured finance products. We believe that the proposed changes will negatively affect the securitization market and cause a decrease in liquidity. Rule 144A and Regulation D currently provide issuers a clear exemption from the SEC's registration requirements. These exemptions are only for limited issuances and resales to only certain, sophisticated investors. The disclosure requirements associated with these safe harbor provisions are not onerous like the disclosures required under the Proposed Rule. However, they provide the requisite information required of these sophisticated investors. In its issuance of the Proposed Rule, the SEC has made tracks away from their precedent in dealing with sophisticated investors and instead has determined that all levels of investors require Securities Act disclosure. It is the Roundtable's belief that institutional investors do not need the same protections as other, less sophisticated investors. There is no requirement that institutional investors must buy the securities if they do not think they were given adequate disclosures. Furthermore, they have the sophistication necessary to determine which disclosures they need in order to measure their risk.

Further, the Roundtable requests greater clarity in the definition of "structured finance product." As currently defined, the definition would likely capture covered bonds, hybrid capital instruments, structured notes, pooled investment vehicles, REIT securities, syndicated financings, and certain municipal products. These products do not pose regulatory concerns. Furthermore, the over broad inclusion of "structured finance products" may unintentionally capture esoteric ABS products (*e.g.* insurance premium loans, structured settlements, patent licensing royalties, middle market loans, mutual fund fees, *etc.*). **The Roundtable requests that the SEC narrow the inclusion of "structured finance products."** The lack of clarity may cause issuers to place too much reliance on the traditional statutory exemptions for private issuances and resales. These statutory exemptions are not as clear as the safe harbor provisions provided for in Rule 144A and Regulation D. Pushing issuers away from the safe harbor provisions may lead to decreased liquidity and further slow downs in the US securitization market.

i. Confirm that Undrawn Commitments are Grandfathered

Through securitization trusts, issuers often enter into transactions with asset-backed commercial paper conduits in which the commitment amount may be fully or partially undrawn at closing. This structure allows issuers to issue additional interests to the conduit during the term of the commitment, up to a specified maximum amount. A number of issuers utilize this structure to provide cost-effective contingent liquidity. It allows the bank to utilize this liquidity on as little as one to three days' notice to the conduit sponsor (agent). These undrawn conduit commitments do not represent an unfunded securitization structure, but rather a fully or partially unfunded tranche of a larger issuance trust, with many issuances to third parties outstanding. This securitization structure is viewed favorably by federal banking agencies as a source of liquidity.

We respectfully request modification of the Proposed Rule to allow for grandfathering of both existing securitizations and undrawn commitments that are entered into before the implementation date. If these undrawn conduits are not grandfathered under the Proposed Rule, issuers would lose their ability to draw on these facilities and, consequently, the contingent liquidity they provide to their business.

j. Incidental and Implied Recourse

The Roundtable notes that one of the beneficial characteristics of securitization is that it structurally bifurcates the credit risk associated with the transferring business organization from the credit risk associated with the transferred loans or assets. Several members of the Roundtable are concerned that certain aspects of the Proposed Rule do not adequately respect this bifurcation, and unnecessarily create features that might be viewed as credit enhancing representations and warranties or other forms of recourse. Generally speaking, credit enhancing representations and warranties include promises provided to external parties regarding the value or future performance of the collateral transferred. These features can place meaningful stress on legal true sale conclusions resulting in increased capital costs in transactions that otherwise qualify for off-balance sheet accounting results.

The Proposed Rule also creates greater recourse risks on transferors with the proposed treatment of repurchase situations. Representations and warranties, working together with repurchase remedies, are a tool used by buyers of goods (including financial instruments) to mitigate the inherent informational asymmetries that exist between buyers and sellers. Representations and warranties allow the buyer to obtain necessary information concerning the goods being purchased, and along with repurchase remedies, provide the buyer with a certain level of contingent recourse against the seller, which compensates the buyer for this irreducible informational imbalance.

Where the Proposed Rule conditions eligibility for Form SF-3 upon the provision of a third party opinion or certificate, the Roundtable notes that there is no market precedent for third party opinions of this nature. It remains very unclear what profession or organization could provide such opinions or certifications, suggesting that its provision should not constitute an absolute requirement for Form SF-3 eligibility. The Proposed Rule also states that disclosure of material financial information of certain parties obligated to repurchase assets should be required. **The Roundtable believes this disclosure is inappropriate because the repurchase remedy is merely incidental recourse that addresses operational risks, and is not meant to serve as direct credit support to the transaction.**

k. Obligation to Repurchase

The Roundtable strongly disagrees with the Proposed Rule's approach to require disclosure of historic loan repurchase activity. The Roundtable strongly urges the SEC to withdraw these aspects of the Proposed Rule in its entirety. The SEC should instead address repurchase claim concerns through the establishment of a process to resolve repurchase claim disputes by ensuring that transaction documents contain balanced and fair mechanisms to govern repurchase claim enforcement. Representations and warranties, along with repurchase remedies, are not unique to securitization and structured finance. Generally speaking, contractual representations and warranties, working together with associated remedies, are commonly used by buyers of goods (including financial instruments) to mitigate the inherent informational asymmetries that exist between buyers and sellers. Representations and warranties allow the buyer to obtain necessary information concerning the goods being purchased, and along with repurchase or other remedies, provide the buyer with a certain level of contingent or incidental recourse against the seller, which compensates the buyer for this irreducible informational imbalance. The repurchase remedy, however, should not constitute a direct credit substitute or credit enhancement. The suggestion that contractual representations and warranties, with associated remedies, operate as a type of transactional direct credit substitute or credit enhancement directly contravenes existing legal, accounting, and regulatory standards.

In addition, the Proposed Rule requires a three year look back period for repurchase experience without a grace period. Based upon feedback from our members, the Roundtable believes that many issuers, who previously have not had an obligation to track or maintain this data to a securities law strict liability level of confidence, will have difficulty recreating such data to this level. The analysis resulting from this proposed requirement would require subjective determinations, and allow for well informed and well intentioned parties to arrive at different conclusions. Due to these features, the disclosure of oversimplified quantitative metrics of the volume of total claims and corresponding repurchases result in useless information, and thus would be bad policy.

We also believe that the Proposed Rule's requirement that certain parties with obligations to repurchase assets upon breaches of representations and warranties provide financial information disclosure should be reconsidered. This standard is not appropriate because the repurchase remedy, as identified above, is merely incidental recourse that addresses operational risks, and does not provide credit or liquidity support to the transaction. Investors should not be encouraged, even indirectly, to rely on any perception of financial backing of an asset-backed securities transaction by the sponsor or another party merely due to the provisions of representations and warranties. Additionally, from a broader policy perspective, financial information disclosure should not be established as a barrier to entry for participation in the secondary markets and enjoyment of the resulting liquidity benefits. This is an unreasonably high bar for assuring liquidity in loan assets, particularly for smaller, private companies whose securities are not publicly traded.

III. Conclusion

We appreciate the opportunity to respond to the request for comments on the Proposed Rule.

Respectfully submitted,

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