March 28, 2011

By E-Mail: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy, Secretary

Re: Release No. 33-9186; 34-63874; File No. S7-18-08

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comment regarding Release No. 33-9186; 34-63874; File No. S7-18-08, dated February 9, 2011 (the "Proposing Release"),[2] relating to the removal of credit ratings in Commission rules and forms pursuant to Section 939A (Review of Reliance on Ratings) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). ASF supports appropriate reforms within the asset-backed securities ("ABS") market and we commend the Commission for seeking industry input regarding its proposed rules on these important issues. Over the past decade, ASF has become the preeminent forum for securitization market participants to express their views and ideas. ASF was founded as a means to provide industry consensus on market and regulatory issues, and we have established an extensive track record of providing meaningful comment to the Commission and other agencies on issues affecting our market. Our views as expressed in this letter are based on feedback received from our broad membership.

The Commission has proposed to remove rule and form requirements under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") for securities offering and issuer disclosure rules that rely on, or make

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

[2] See http://sec.gov/rules/proposed/2010/33-9148.pdf.

special accommodations for, credit ratings. The Commission made clear in the Proposing Release that these proposals were issued in response to Congress's mandate, set forth in Section 939A of Dodd-Frank, to remove credit ratings from the regulations of the various federal agencies as appropriate. Section 939A requires each federal agency to (i) review "any regulation issued by such agency that requires the use of an assessment of the credit-worthiness of a security or money market instrument; and any references to or requirements in such regulations regarding credit ratings" and (ii) "to modify any such regulations…to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate…." This letter provides our industry's views and comments on the Commission's proposals regarding references to credit ratings in the forms used for "shelf" offerings and permitted disclosures of credit ratings in "tombstone" advertisements.

Proposed Changes to Form S-3 and Form F-3

Pursuant to the current requirements for shelf registration set forth in Form S-3 and Form F-3, issuers of securities must meet the "Registrant Requirements" set forth in General Instruction I.A. and each offering of securities must meet the "Transaction Requirements" set forth in General Instruction I.B. The Commission's proposals with respect to Form S-3 and Form F-3 center around General Instruction I.B.2., which allows issuers to register primary offerings of non-convertible securities if they are rated investment grade by at least one nationally recognized statistical rating organization ("NRSRO"). Under the Proposing Release, General Instruction I.B.2. would be revised to replace the investment grade criterion with a requirement that the issuer have issued at least $1 billion of non-convertible securities in transactions registered under the Securities Act, other than equity securities, for cash during the past three years.

The proposed changes, in substance, do not impact the ABS market, as ABS issuers do not rely on General Instruction I.B.2. when conducting shelf offerings on Form S-3 or Form F-3. Additionally, the Commission made clear that the Proposing Release was not intended to address rules related to shelf eligibility for ABS offerings.[3] However, the Commission's proposed changes to General Instruction I.B.2. will have tangential, albeit unintended, effects on other parts of Forms S-3 and F-3, in particular General Instruction I.B.5, which specifically covers offerings of ABS. General Instruction I.B.5. requires, among other things, that the "securities are 'investment grade securities,' as defined in [General Instruction] I.B.2." However, the second sentence of General Instruction I.B.2., which defines "investment grade security," has been removed as part of the Commission's proposed changes to both Forms. For this reason, and to ensure that

[3] See Footnote 17 of the Proposing Release: "In April 2010 we proposed to remove references to credit ratings as a requirement for shelf eligibility for offerings of asset-backed securities. See Asset-Backed Securities, Release No. 33-9117 (Apr. 7, 2010) [75 FR 23328]. Among other things, the proposal would have required risk retention by the sponsor as a condition to shelf eligibility. Section 941 of the Dodd-Frank Act contains a requirement that we issue rules jointly with bank regulators regarding risk retention. In light of that requirement, we are not currently addressing rules related to shelf-eligibility for asset-backed offerings." And see Release Nos. 33-9117; 34-61858; File No. S7 08-10 (the "2010 ABS Proposing Release") at http://edocket.access.gpo.gov/2010/pdf/2010-8282.pdf.

General Instruction I.B.5. can continue to be relied upon by ABS issuers wishing to execute shelf offerings on Form S-3 or Form F-3, we recommend moving the definition of "investment grade security"[4] contained in existing General Instruction I.B.2. to General Instruction I.B.5. as well as making any necessary conforming changes.[5]

Finally, we note that the title of General Instruction I.B.2., "Primary Offerings of Non-Convertible Investment Grade Securities," appears in other sections of Form S-3 and Form F-3. If the changes to Forms S-3 and F-3 set forth in the Proposing Release are adopted, the various references within those Forms to the former title of General Instruction I.B.2. should be amended to conform to the Instruction's new title.

Proposed Change to Securities Act Rule 134

Rule 134 provides issuers that have filed a registration statement with a safe harbor from the gun-jumping provisions of the Securities Act by permitting the disclosure of certain specified information in communications that are deemed not to be a prospectus or a free writing prospectus. As the Commission points out in the Proposing Release, these disclosures generally appear in "tombstone" advertisements or press releases announcing offerings. Rule 134 provides a safe harbor for communications that are limited to information either *required or permitted* by the Rule.[6] Information that is permitted by the Rule includes, among other things, certain factual information about the identity and business address of the issuer, title of the security and amount being offered, the price or a bona fide estimate of the price, the names of the underwriters participating in the offering and security ratings issued or expected to be issued by NRSROs.[7]

The Commission has proposed to remove disclosure relating to credit ratings assigned by NRSROs from the list of disclosures permitted under Rule 134. This proposal runs contrary to the Commission's 2008 proposal on the same item, in which it proposed to *expand* the permitted disclosure of ratings in Rule 134 communications to those assigned by any credit rating agency, not just NRSROs.[8] However, in the Proposing Release, the Commission concludes that removing credit ratings from the protected information in Rule 134 is now appropriate because "providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A." We disagree with this conclusion.

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[4] See General Instruction I.B.2. on Forms S-3 and F-3: "A [security] is an "investment grade security" if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3-1(c)(2)(vi)(F) under the Exchange Act (§240.15c3-1(c)(2)(vi)(F) of this chapter)) has rated the security in one of its generic rating categories which signifies investment grade; typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade."

[5] As noted above, as part of the 2010 ABS Proposing Release, the Commission proposed to remove references to credit ratings as a requirement for shelf eligibility for offerings of ABS. We acknowledge that if final rules are adopted to implement that proposal before final rules are adopted to implement the changes to General Instruction I.B.2. set forth in the Proposing Release, these recommendations would be moot.

[6] See Release No. 33–3568 (August 29, 1955) at page 6523.

[7] See Footnote 80 to the Proposing Release and see Rule 134.

[8] See Release No. 33-8940 (July 1, 2008) at http://sec.gov/rules/proposed/2008/33-8940.pdf.

Section 939A requires the Commission to review and potentially remove credit ratings from "*any regulation* issued by [the Commission] *that requires the use of an assessment of the credit-worthiness* of a security or money market instrument; and any references to or requirements *in such regulations* regarding credit ratings." (emphasis added). Rule 134 does not *require* the use of a rating. By its terms, Rule 134 requires or permits the disclosure of various specified information. While the name and address of a person from whom a written prospectus for the offering may be obtained is, in fact, required, credit ratings issued or expected to be issued by NRSROs are part of a long list of specified information that the "communication *may* include." (emphasis added). Therefore, by the plain language of Section 939A, we do not believe that Rule 134 would fall under the regulations that the Commission is required to review to potentially remove ratings.

A credit rating disclosed in a Rule 134 communication is also not a "use of an assessment of the credit-worthiness of a security." We do not believe that a permissive disclosure item under a rule, involving *any* rating of a security, was intended by Congress to be subject to Section 939A. Instead, as per the language of the statute, we believe Congress intended to include situations where the regulation in question depended upon the credit rating as an assessment of credit worthiness, such as a minimum requirement of investment grade ratings to establish shelf eligibility or a requirement that risk based capital is calculated based on credit ratings. Indeed, in the 2010 ABS Proposing Release, the Commission proposed to eliminate the ability of ABS issuers to establish shelf eligibility by means of an investment grade credit rating and noted that the proposed requirements, like the existing requirement, "are designed to provide for a certain quality and character for asset-backed securities that are eligible for delayed shelf registrations."[9] We do not believe that disclosure, especially that which is *permitted* by rule, is included within the scope of regulations covered by Section 939A, as the disclosed credit ratings do not establish the quality, or credit worthiness, of the security for a regulatory purpose. In addition, we point out that the Commission has not proposed to substitute in Rule 134 a replacement "standard of credit-worthiness" as Section 939A would specifically require in such cases.

We also note that the Commission points out that the legislative history of Dodd-Frank indicates that Congress, in adopting Section 939A, intended to "reduce reliance on credit ratings."[10] However, for the reasons specified in the preceding paragraph, we do not believe that removing credit ratings from the permitted disclosure within a Rule 134 communication impacts the Commission's reliance on credit ratings in any manner. Additionally, the permitted disclosure set forth in Rule 134 was established "to provide an 'identifying statement' that could be used to locate persons that might be interested in receiving a prospectus."[11] Investments made by many institutions are subject to very detailed and strict internal investment guidelines, within which credit ratings continue to play a critical role. As ASF has indicated in other letters and testimony, credit ratings

[9] See 2010 ABS Proposing Release at page 23338.
[10] See Report of the House of Representatives Financial Services Committee to Accompany H.R. 4173, H. Rep. No. 111-517 at page 871 (2010).
[11] See Release No. 33-8591; 34-52056; (July 19, 2005) at http://www.sec.gov/rules/final/33-8591.pdf at page 83.

still play a major role in the market, and removing them from the permitted disclosures within a Rule 134 communication would only reduce the amount of information that is available to investors, without any countervailing benefit.

Finally, while the Commission notes that "removing the safe harbor for this type of information would not necessarily result in a communication that included this information being deemed to be a prospectus or a free writing prospectus,"[12] our members would be hesitant to include credit ratings in this type of communication absent a safe harbor. In our view, this would result in less information being communicated to the market at a time when increased disclosure and transparency permeates both investor wishes and regulatory and industry reforms.

ASF very much appreciates the opportunity to provide the foregoing comments in response to the Commission's Proposing Release. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me via telephone at 212.412.7109 or via email at esiegert@americansecuritization.com, or Tom Deutsch, ASF Executive Director, via telephone at 212.412.7107 or via email at tdeutsch@americansecuritization.com.

Sincerely,

Evan P. Siegert
Managing Director, Senior Counsel
American Securitization Forum

[12] See Proposing Release at page 37.