February 13, 2012

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

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

Re: Request for Public Comment Regarding Proposed Rule 127B Under the Securities Act of 1933, as amended (File Number S7-38-11)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA") [1] appreciates the opportunity to communicate its views with respect to proposed Rule 127B under the Securities Act of 1933 (the "Proposed Rule") that will implement Section 621 (Conflicts of Interest) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). As noted in our comment letter to the Securities and Exchange Commission (the "Commission") with respect to the implementation of Section 621 of the Dodd-Frank Act ("Section 621"), dated December 10, 2010 (the "2010 Comment Letter"), SIFMA appreciates the intent of Section 621 and agrees that certain reforms may be necessary to ensure that securitization transaction parties are not creating and selling asset-backed securities ("ABS") that are intentionally designed to fail or default and profiting from the failure or default of such ABS. In finalizing rules to implement Section 621, however, the Commission should create a framework that prohibits these "designed to fail" transactions while still allowing for the issuance of ABS without the uncertainty of overly broad or vague regulations or undue restrictions or prohibitions. The goal of this letter is to provide the Commission with constructive feedback and recommendations regarding the scope and substance of the Proposed Rule. SIFMA's comments reflect its continued goals of restoring capital flow to the securitization markets and increasing the availability of credit to American consumers and small businesses while giving effect to the legislative intent behind Section 621.

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1 SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

SIFMA appreciates that the Commission has acknowledged in the commentary to the Proposed Rule (the "Commentary") that potential and actual conflicts of interest are inherent in the ordinary course of securitization transactions and that certain basic elements of securitization transactions would not fall within the scope of the Proposed Rule. While we support many of the other clarifications and explanations provided by the Commission in the Commentary, we have a number of key concerns regarding the Proposed Rule. Each of these concerns is described briefly in this introductory section and discussed in further detail elsewhere in this letter.

- **The Proposed Rule would have a significant economic impact and the economic analysis set forth in the Commentary is insufficient.** The Commentary contains a section regarding the potential economic impact of the Proposed Rule, but does not reach any conclusions regarding that impact. The Commentary notes that financial firms might not be able to determine with a sufficient level of certainty that a conflict of interest exists or does not exist with respect to a transaction. This lack of clarity will provide significant disincentive for activity in ABS. The Commentary also notes that potential participants in ABS transactions could be conflicted out and, as a result, securitization markets in some situations could cease to function effectively. These impacts could be severe and detrimental to consumers of credit and the broader economy, as well as to investors. Securitization is a key component of long term, stable funding for banks and other lenders and provides investment diversification to investors. Rules should be crafted in a way that does not prevent the recovery of these markets and that presents clear guidance for a pathway to compliance. The Commission should endeavor to provide a thorough economic analysis quantifying the costs of the Proposed Rule and comparing these costs with a quantification of the benefits. In our view the costs of implementation of the Proposed Rule far exceed any benefits.

- **Intent should be a necessary element in determining the existence of a "material conflict of interest."** As seen through its legislative history, Section 621 was aimed at eliminating "designed to fail" transactions and ending conflicts of interest arising when financial institutions create a security, sell it to investors and bet on its failure. SIFMA therefore believes that intent should be an element of the test for a "material conflict of interest" under the rule. Instead of limiting prohibited conflicts to those related to "designed to fail" transactions, the Commentary has scoped within the Proposed Rule a broad range of transactions where a securitization participant has the potential to benefit but has not intentionally designed a transaction to fail. We believe that a securitization participant should only fall within the scope of the rule if such participant intended to profit from the securitization transaction to the detriment of investors. If the "material conflict of interest" test is not narrowed to include only "designed to fail" transactions, legitimate securitization activity will be prohibited.

- **The Proposed Rule will unduly constrain the ability of financial institutions to manage risk.** Securitization is an important component of many financial institutions' balance sheet risk management practices. The Proposed Rule and Commentary will make impossible customary, beneficial and safety-and-soundness enhancing risk management practices which utilize securitization.

- **The Proposed Rule should incorporate the Commentary.** We are concerned that the most descriptive and instructive elements regarding the proposal are found in the Commentary rather than in the text of the rule itself. The guidance in the Commentary should be incorporated into the text of the rule to prevent misinterpretation of the rule that could significantly curtail the use of securitization in the capital markets.

- **The Proposed Rule as clarified by the Commentary still poses significant challenges to compliance.** The Proposed Rule, even as clarified by the guidance in the Commentary, still poses significant compliance problems for our members. Compliance will be difficult due to the independent functioning of different trading desks and business units within a financial institution, existing information barriers or walls that are required by law to be maintained or are established to maintain independence of separate units, and the inability to monitor or police third party behavior. Compliance will be further complicated to the extent that the prohibitions of the rule are not clearly delineated. To that end, we believe that key terms used in the Proposed Rule must be defined in the rule. Referencing but not defining these terms will only lead to uncertainty in the securitization markets. We propose definitions for each of the key terms identifying affected parties in Section IV.A below and discuss our reasoning with respect to each such proposed definition.

- **The proposed definition of "asset-backed security" is overly broad.** "Asset-backed security" is defined in the Proposed Rule using the definition of such term in section 3 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The Exchange Act definition of ABS is broad and open-ended, giving the Commission the ability to expand the definition at its discretion. The Exchange Act definition of ABS may also bring within the scope of the rule securities not traditionally considered ABS, including municipal securities and tender option bonds ("TOBs"). Market participants may be reluctant to issue securities that are not either explicitly covered or excluded from the scope of the definition.

- **The scope of "covered persons" under the Proposed Rule is overly broad.** The Proposed Rule covers securitization participants as well as their affiliates and subsidiaries. In order to comply with the Proposed Rule, each of a securitization participant's separate business units, affiliates and subsidiaries would need to be aware of the securitization participant's activities. Large financial institutions are made up of many business units and different legal entities, some of which may already be subject to existing rules and regulations requiring the use of information barriers. These information barriers create serious obstacles to the sharing of information among different areas in a particular institution and make it very difficult for one entity or business unit to be aware of (or monitor) the activities of other entities or business units. In other cases, separate legal entities may operate wholly independently from one another. We propose that the rule should apply to those business units within a financial institution that are directly involved in structuring an ABS transaction, but should not apply to business units that are not involved in the securitization process. We believe that the rule should also include a safe harbor that permits each financial institution to design its own policies and procedures to restrict the spread of information regarding securitization transactions from the business unit or units structuring the ABS or selecting the assets underlying the ABS to other parts of the institution.

- **The use of disclosure should be permitted to mitigate potential and actual conflicts of interest.** Historically, disclosure has been used to address potential conflicts of interest in securities offerings. In addition, the rule proposed to implement Section 619 of the Dodd-Frank Act (the "Proposed Volcker Rule") includes provisions that permit securitization participants to mitigate conflicts of interest if certain requirements are met. We believe that disclosure must be taken into consideration in a conflicts of interest analysis and that provisions permitting its use as a mitigant should be included in the final rule. We suggest that detailed, fact-specific disclosure be permitted to be used to inform investors of potential material conflicts of interest and present the information needed to make an informed investment decision in light of such conflicts of interest.

I. Background

Section 621 of the Dodd-Frank Act was proposed by Senator Jeffrey Merkley and Senator Carl Levin to address what they described as blatant conflicts of interest in the underwriting of ABS. Senator Levin stated in Congressional testimony that "[t]he intent of Section 621 is to prohibit underwriters, sponsors, and others who assemble asset-backed securities from packaging and selling those securities and profiting from the securities' failures."[2] In a 2010 letter addressed to the Chairman of the Commission, Mary Schapiro, and the heads of various other government agencies, Senators Merkley and Levin stated that the main objective of Section 621 is to "[e]nd the conflicts of interest that arise when a financial firm designs an asset-backed security, sells it to customers, and then bets on its failure."[3] Senators Merkley and Levin further added that the directive set forth in Section 621 "provided the [Commission] with sufficient authority to define the contours of the rule in such a way as to remove conflicts of interest from these transactions, while also protecting the healthy functioning of our capital markets."[4]

It is clear from the legislative history and letters submitted by the sponsors of Section 621 that it is intended to prohibit an entity that participated in the creation of an ABS transaction from taking advantage of investors who, prior to investing in ABS, may not have received information they would have taken into account in making their investment decisions and improperly profiting from the failure of that transaction. SIFMA acknowledges that the Commission has made an effort to address the conflicts that were highlighted in the legislative history and urges the Commission to consider and give deference to this legislative history and intent in finalizing a rule to implement Section 621. The final rule should not create unnecessary or prohibitive

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2 156 *Cong. Rec.* S 5899 (July 15, 2010) (statement of Sen. Levin).

3 Letter from Senator Merkley and Senator Levin dated August 3, 2010, page 2, addressed to, *inter alios*, the Honorable Mary Schapiro, Chairman of the Commission, regarding the implementation of the Merkley-Levin provisions of the Dodd-Frank Act.

4 *Id.* at page 5; *see also* 156 *Cong. Rec.* S 5899 (July 15, 2010) (statement of Sen. Levin).

restrictions on the securitization and derivatives markets, which are integral parts of the United States capital markets.

Section 621 adds a new Section 27B to the Securities Act of 1933, as amended (the "Securities Act") entitled "Conflicts of Interest Relating to Certain Securitizations." Section 27B(a) states that "[a]n underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security . . . which for purposes of this section shall include a synthetic asset-backed security, shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity." For purposes of this letter, we refer to each of an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security as a "Securitization Participant." Under Section 27B(b), the Commission was directed to issue rules implementing Section 27B(a). The Commission released the Proposed Rule on September 19, 2011. At the meeting at which the Proposed Rule was considered by the Commission, Chairman Schapiro stated that the Proposed Rule "is designed to ensure that those who create and sell asset-backed securities cannot profit by betting against those same securities at the expense of those who buy them." Chairman Schapiro also remarked that the Proposed Rule "is not intended to interfere with traditional securitization practices."

II. Impact on Common Activities of Financial Firms, Including Lending and Hedging

Section 621 was intended to prevent abusive securitizations, but we are very concerned that the Proposed Rule could impinge upon common activities of large financial institutions that are vital to our markets. We are particularly concerned by the uncertainty that arises from the test to determine the existence of a material conflict of interest as proposed in the Commentary, as the test takes into account whether a Securitization Participant would "directly or indirectly" benefit from the "actual, anticipated or potential" adverse performance of, or losses or decline in value with respect to, the related ABS.[5] The Proposed Rule could force large financial institutions to weigh their ability to engage in basic lending and hedging activities, investment management activities and trading activities against being a participant in securitization transactions.

For example,[6] the investment banking affiliate of a large financial institution could act as an initial purchaser or placement agent for a collateralized loan obligation ("CLO") transaction where one of the assets is a loan made to an auto company. Three months after the closing of the CLO, the commercial bank affiliate of the investment bank might, based on a separate, independent credit decision, decide to participate in a syndicated loan to the auto company and shortly thereafter, to manage its exposure to the auto company, the commercial bank might buy

[5] *See* Prohibition Against Conflicts of Interest in Certain Securitizations, Proposed Rule, Release No. 34-65355 (September 19, 2011), 76 Fed. Reg. 60320, 60329 (September 28, 2011) (the "Proposed Rule Release").

[6] We note that the examples provided in this Section II are non-exclusive and intended only to describe potential adverse or uncertain consequences of implementing the rule as currently proposed in a few relatively simple, commonplace scenarios.

credit default swap ("CDS") protection referencing the auto company (possibly through its investment banking affiliate). Would that hedging activity be prohibited under the Proposed Rule? If so, ***the Proposed Rule could inhibit both lending activities by banks and the formation of CLO transactions which provide essential market support for such lending activities***. In the absence of clarification from the Commission, the Proposed Rule could similarly inhibit unrelated lending and hedging activity where the securitization pool of assets is comprised of corporate bonds rather than loans.

Another set of concerns arises in connection with the activities of investment management affiliates of Securitization Participants. After a broker-dealer acts as an underwriter or placement agent for an ABS issuance, an affiliated investment manager, acting on behalf of a client, might take a position in the ABS that is contrary to the position of investors in the ABS. The investment manager would have fiduciary duties to its advisory client and could have investment aims distinct from those of the investors in the ABS. In order for the investment manager to fulfill its obligations it may be appropriate to recommend to a client a position that would benefit from the adverse performance of the ABS or underlying assets. In addition, an information barrier would likely be in place to restrict the flow of information between the Securitization Participant and the affiliated investment manager. This type of activity could be prohibited without recognition of information barriers under a final rule, as financial institutions would have great difficulty complying with the Proposed Rule while acting in accordance with existing prohibitions on sharing information between their investment management business and other unrelated businesses.

In another scenario, a foreign trading desk of a large financial institution takes or facilitates a short position in an ABS at the request of a customer three months after an affiliated U.S. broker-dealer acted as a co-manager in connection with the distribution of that ABS. The foreign trading desk would have no special knowledge regarding the structure of the transaction or its assets and would be acting on behalf of a customer, but its activities could nonetheless be prohibited by the Proposed Rule.

We note that one of the conditions of the Proposed Rule is that the conflict must arise as a result of or in connection with the related ABS transaction. Further clarification of how the Commission thinks this requirement would be interpreted in the context of actions taken independently of, and not connected to, the securitization transaction is needed in order for financial firms to understand the scope of the Proposed Rule.

III. The Rule Should Incorporate Interpretive Guidance From the Commentary

The Proposed Rule is succinct and generally mirrors the text of Sections 27B(a) and (c). However, SIFMA believes that the Proposed Rule, as currently drafted, is overly broad. The Commentary is a lengthy discussion preceding the Proposed Rule and includes descriptions of certain conditions that must be present for the rule to apply, as well as certain exceptions from the rule. The Commentary indicates that the Commission proposes to provide interpretive guidance to market participants regarding the nature and scope of activities that would be prohibited under the final rule. The guidance provided in the Commentary is a significant attempt to achieve a workable framework for application of the Proposed Rule. While we will provide our feedback on the proposed interpretive framework set forth in the Commentary in the sections that follow, ***a fundamental concern with respect to the Proposed Rule and the Commentary is that the framework set forth in the Commentary is not a part of the Proposed Rule itself***.

SIFMA is concerned that the Proposed Rule does not, and that a final rule might not, explicitly include the Commission's interpretive guidance. In general, the Proposed Rule as currently drafted creates uncertainty that will only increase instability in the ABS and derivatives markets and create ambiguity as to compliance. The language of the Proposed Rule is broad enough to encompass a wide range of conflicts that are common to typical securitization transactions and it is only through the interpretive guidance that many of those potential conflicts are stated to fall outside the scope of the Proposed Rule. While it is not uncommon for market participants to look to interpretive guidance for assistance in understanding the scope of a rule, the guidance typically addresses nuances or issues at the margins of the relevant rule. With respect to the Proposed Rule, however, the guidance provided in the Commentary significantly defines the scope of the rule rather than simply clarifying aspects of the rule that are unclear. We respectfully suggest that some, if not all, of the Commission's commentary and guidance be memorialized in the final rule. Guidance that would prove especially helpful in providing clarity to market participants would include the entire five-factor analysis laid out by the Commission (Covered Persons, Covered Products, Covered Timeframe, Covered Conflicts and Material Conflicts of Interest). SIFMA's views on the proposed guidance with respect to each of these areas are set forth in Sections IV.A through IV.E below. Adding these provisions to the final rule itself would help Securitization Participants and investors to better understand the nature and scope of the rule and achieve a level of comfort that actions they may take will be in compliance with the final rule.

The Commentary recognizes that certain actions or activities create inherent conflicts of interest in securitization transactions and acknowledges that some of these actions and activities do not fall within the scope of the Proposed Rule. The Commentary states that the Commission believes that "activities associated with the typical structuring of a non-synthetic ABS would not be prohibited by the proposed rule."[7] The Commentary further states that the Commission "preliminarily agree[s] that most activities undertaken in connection with the securitization process would not be prohibited by the proposed rule, including but not limited to: providing financing to a securitization participant, deciding not to provide financing, conducting servicing activities, conducting collateral management activities, conducting underwriting activities, employing a rating agency, receiving payments for performing a role in the securitization, receiving payments for performing a role in the securitization ahead of investors, exercising remedies in the event of a loan default, exercising the contractual right to remove a servicer or appoint a special servicer, providing credit enhancement through a letter of credit, and structuring the right to receive excess spreads or equity cashflows."[8] SIFMA appreciates that the Commission has attempted to clarify that these activities are outside the scope of the Proposed

[7] Proposed Rule Release at 60340.

[8] *Id.*

Rule and, to the extent that any such determination is a "preliminary" position of the Commission, SIFMA supports the inclusion of these clarifications in a final rule. Market participants will need certainty and finality regarding the scope of the Proposed Rule before they are comfortable proceeding with securitization transactions.

The Commentary indicates that this list is non-exclusive, and we believe that there are other activities that should be explicitly acknowledged as not being prohibited by the final rule in guidance or in the final rule itself. The Commission has specifically invited commenters to provide feedback as to whether "certain transactions in swaps, caps, CDS and derivatives should fall outside the proposed rule's prohibition."[9] At the very least, SIFMA strongly believes that interest rate swaps and caps, currency swaps and other similar derivatives should be included in the Commission's list of typical activities undertaken in connection with a securitization transaction that do not fall under the scope of the Proposed Rule.[10] These derivatives are part of many traditionally structured securitization transactions and are often necessary for hedging purposes within the transactions themselves. Many of these transactions are also already subject to disclosure and reporting requirements such as Regulation AB, where information about the transaction participants, including derivative counterparties, is required to be disclosed. We propose that roles and activities that are already subject to disclosure requirements pursuant to existing rules and regulations should be viewed as activities associated with the typical structuring of a non-synthetic ABS and therefore not within the scope of the Proposed Rule. In addition, SIFMA suggests that the following activities also be addressed: instructing a trustee or servicer to take certain actions with respect to the collateral underlying the ABS or against an issuer or other transaction party, exercising voting rights or other contractual rights (such as call or put options) in a transaction in any capacity other than as an investor, providing financing (e.g., a warehouse line or financing investors' purchase of ABS) and adding assets to, or removing assets from, an issuing entity in accordance with the related transaction documents.

IV. Even as Narrowed By the Commentary, the Proposed Rule Remains Overly Broad, Presents Significant Challenges to Compliance and Should Be Revised

The Commentary sets forth five key conditions that define the circumstances under which a conflict of interest may be prohibited by the Proposed Rule. In order for the Proposed Rule to apply to a particular conflict, each of the tests described in this Section IV must be met. SIFMA's interpretation and analysis of, and concerns with respect to, each of the five factors is detailed below.

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[9] *Id.*

[10] We note that the Proposed Volcker Rule includes provisions permitting certain covered fund activities, including sponsoring or owning an ownership interest in a covered fund that has assets limited to loans and related rights, as well as:

> "(3) Interest rate or foreign exchange derivatives that:
>
> > (A) Materially relate to the terms of such loans or contracted rights or assets; and
> >
> > (B) Are used for hedging purposes with respect to the securitization structure."

See §__.13(d) and §__.14(a)(2)(v).

A. Covered Persons

The Proposed Rule would apply to "an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, of an ABS." The Commentary points out that these persons "typically have substantial roles in the assembly, packaging and sale of ABS."[11] According to the Commentary, these parties are specified because they have roles in structuring and controlling transactions, and thus have the opportunity to engage in activities that may be prohibited under the Proposed Rule. The Commentary also discusses potential definitions for certain of these terms but does not go so far as to provide definitive guidance as to their meanings.

1. Key Terms Should Be Defined

SIFMA believes that the final rule should specify a definition for each of the key terms identifying the affected parties, especially given that these terms may have different meanings under various securities laws. As emphasized throughout this letter, we believe that the final rule must be definitive to avoid interpretive issues and uncertainty in the securitization markets. And while we recognize the Commission's concern that relying on existing definitions could result in over- or under-inclusive definitions, we believe that this concern is outweighed by market uncertainty where multiple definitions of terms exist under securities laws or no clear definition exists for a given term. Market practice may have given certain generally accepted meanings to the terms "underwriter," "placement agent," "initial purchaser" and "sponsor," but we believe that these meanings should be memorialized by defining these terms within the rule. The definitions should be refined in such a way as not to inadvertently subject third parties such as trustees, servicers, custodians, accountants, law firms and diligence providers, all of whom may have direct or indirect roles in structuring or managing ABS, to compliance with the rule. An entity considering undertaking a role in a securitization transaction, as an issuer or an underwriter of the securities or in other capacities, will need to be able to determine with certainty whether the prohibitions of the rule will apply to its activities. The following paragraphs provide suggested definitions and our rationale for recommending a definition for each term. For ease of reference, the definitions are also listed separately on Appendix A attached hereto.

In this section we suggest definitions for the terms "underwriter," "placement agent" and "initial purchaser" that are intended to clarify that the rule should only apply to those persons having direct involvement with the issuer in the structuring of the ABS or the selection of the assets underlying the ABS. We believe that parties who take a more passive role in securitization transactions, including members of an underwriting syndicate with no role in structuring ABS or selecting the underlying assets, should be outside the scope of the rule. As noted in the Commentary, the intent of Section 621 is to prohibit conflicts of interest among Securitization Participants and investors because

[11] Proposed Rule Release at 60325.

the Securitization Participants "structure the product and control the securitization process."[12] This is often not true of more passive participants, such as co-managers, underwriters, initial purchasers or placement agents who are not lead managers. In testimony supporting Section 621, Senator Levin stated that "sponsors and underwriters of the asset-backed securities are the parties who select and understand the underlying assets, and who are best positioned to design a security to succeed or fail."[13] As a general rule, we believe that a co-manager, underwriter, initial purchaser or placement agent who does not structure a securitization transaction or select the underlying assets should not be subject to the prohibitions of the rule.

A securitization transaction could have multiple lead managers but only one lead manager who acts as structuring agent and selects or participates in the selection of the assets and controls the deal. A sponsor may engage this lead manager at the inception of the transaction to be primarily responsible for assisting with the structuring of the securitization, interacting with the rating agencies and reviewing the offering materials. Other managers may engage in marketing activities and take sales orders. While a lead manager will often act as a structuring agent for an ABS transaction, co-managers may be identified shortly prior to the offering of securities and may not have participated in asset selection or the structuring of the securities. Some of these transaction participants may be given only a small allotment of the securities to sell, and some in the end may not sell any securities for a particular offering at all. ***In any case, we believe that co-managers who have not sold securities in a transaction's initial offering should be outside the scope of the rule***.

The Commentary notes that the Securities Act already contains a definition for "underwriter."[14] Section 2 of the Securities Act says that terms used in the Securities Act will have the meaning given to them in Section 2 "unless the context otherwise requires." In the context of Section 27B, we believe that the definition of "underwriter" under Section 2(a)(11) of the Securities Act is over-inclusive. Among other things, the Securities Act definition could encompass "statutory underwriters" under Rule 140. The following definition of "underwriter" is more appropriate in the context of the Proposed Rule, which is intended to address behavior by parties who have an active role in structuring a transaction. We suggest that the term "underwriter" be defined as a person

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12 *Id.*

13 156 *Cong. Rec.* S 5899 (July 15, 2010) (statement of Sen. Levin). Also see the comment letter regarding the Proposed Rule submitted to the Commission by Senators Merkley and Levin on January 12, 2012, available at http://www.sec.gov/comments/s7-38-11/s73811-15.pdf (the "Merkley-Levin Comment Letter"). "The rule should make it clear that the test for whether a person is covered by the rule will depend not just on the person's job title, but the party's economic involvement in the securitization." Merkley-Levin Comment Letter at 3.

14 The term "underwriter" is defined in Section 2(a)(11) of the Securities Act as any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission.

who, in connection with a public offering of securities, (i) has agreed with an issuer or selling security holder to (a) purchase securities for distribution, (b) distribute securities for or on behalf of such issuer or selling security holder or (c) manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder and (ii) is directly involved with structuring the relevant ABS or selecting the assets underlying the ABS.

The term "placement agent" should be defined as a person who, in connection with a private offering of securities, (i) has agreed with an issuer or selling security holder to (a) distribute securities for or on behalf of such issuer or selling security holder or (b) manage or supervise the placement of securities for or on behalf of such issuer or selling security holder and (ii) is directly involved with structuring the relevant ABS or selecting the assets underlying the ABS.

The term "initial purchaser" is typically used in Rule 144A transactions to mean one or more broker-dealers who perform a role equivalent to that of an underwriter. Because the term "initial purchaser" could also be interpreted to mean an initial investor in ABS, we suggest that the final rule define "initial purchaser" such that it relates solely to entities acting in a role similar to underwriters, but in private transactions. We suggest that the term "initial purchaser" be defined as a person who, in connection with a private offering of securities, (i) has agreed with an issuer or selling security holder to (a) purchase securities for distribution, (b) distribute securities for or on behalf of such issuer or selling security holder or (c) manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder and (ii) is directly involved with structuring the relevant ABS or selecting the assets underlying the ABS.

We strongly believe that the term "sponsor" should be defined in the final rule in order to clarify the vague discussion of the term in the Commentary. The term "sponsor" should be defined as a person who organizes and initiates an ABS transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer in accordance with the definition of that term under Regulation AB. This is a commonly used and understood definition in the securitization industry. The Commentary states that, in addition to entities that would be included as sponsors under the Regulation AB definition of that term, the Commission preliminarily believes that a collateral manager should be considered a "sponsor" based on the collateral manager's role in structuring the transaction and selecting assets. We do not support this expansion of the term "sponsor" to include collateral managers. The Regulation AB definition of the term "sponsor" is well understood by market participants and is used in other contexts. We believe that defining the term "sponsor" to mean anything other than what it means in Regulation AB could lead to unnecessary confusion. While we believe that a collateral manager for a CLO or collateralized debt obligation ("CDO") would not fall within the definition of "sponsor,"[15] we interpret prong 1(B) of the material conflicts of interest test

[15] *See* pages 68 and 69 of SIFMA's comment letter to the Commission and other federal agencies in response to the proposed rule for credit risk retention (the "SIFMA Risk Retention Comment Letter"), available at *(cont'd)*

(discussed at length in Section IV.E.2 below) as prohibiting a Securitization Participant from allowing third parties, such as collateral managers, to engage in activities in which a Securitization Participant would not itself be able to engage if the Securitization Participant would benefit.

2. The Inclusion of Affiliates and Subsidiaries is Overly Broad and Creates Cross-Border Issues; The Use of Information Barriers Should Be Permitted to Restrict the Flow of Information Within a Financial Institution

While underwriters, placement agents, initial purchasers and sponsors (assuming these terms are defined or clarified as suggested above) may have direct roles in structuring and assembling securitization transactions or selecting assets underlying the ABS, affiliates and subsidiaries of such entities, who fall within the scope of the Proposed Rule, generally do not have such roles. In the case of a large financial institution, a Securitization Participant may have a large number of affiliates and subsidiaries around the globe. Large financial institutions may include separately regulated legal entities that are banks, insurance companies or investment managers, each operated independently. It is often the case that one business unit of an institution will not be aware of the actions of another unit, regardless of whether the units exist in one legal entity or multiple legal entities. Given the exceedingly broad scope of the Proposed Rule, Securitization Participants and their affiliates and subsidiaries face an enormous compliance burden in the absence of reasonable limitations on the scope of the rule.

SIFMA is very concerned that the broad scope of the Proposed Rule may have unintended consequences for separate business units, trading desks, affiliates and subsidiaries of Securitization Participants. Financial institutions engage in a variety of investment and hedging activities in many contexts and at many levels throughout an organization comprised of many business units, offices, trading desks and funds, each of which may be engaged in separate transactions that, in some cases, are walled off from other parts of the financial institution. These walls, or information barriers as they are referred to in the Commentary, have been put in place to comply with other laws, including federal securities laws, and to avoid or mitigate conflicts of interest. By their nature, these information barriers create serious obstacles to the sharing of information among different areas in a particular institution because they are intended to impede the flow of information within an institution and make it very difficult for one entity or business unit to be aware of (or monitor) the activities of other entities or business units. In order to comply with the Proposed Rule, each of a Securitization Participant's separate business units, affiliates and subsidiaries would need to be aware of the activities of the Securitization Participant. As a practical matter, this is often not feasible because of the

(cont'd from previous page)
http://www.sec.gov/comments/s7-14-11/s71411-79.pdf, in which we argue that there is no "securitizer" in a CLO.

scope of diverse activities and businesses involved, and is further (and deliberately) restricted by compliance procedures and information barriers in place, whether between a public and private side of a financial firm, an investment management unit and investment banking personnel, an insurance affiliate and others at a financial firm or among individual business units.

SIFMA believes that the focus of the rule should be on the business unit or units structuring and controlling the ABS transaction or selling the related securities, rather than on a Securitization Participant as well as all of its affiliates and subsidiaries. Many financial institutions identify their business units by function rather than by legal entity. One business unit may therefore conduct business through multiple legal entities, and one legal entity may encompass multiple business units. As an example, each of the New York-based securitization desk of a financial institution and the same institution's London-based derivatives desk is a separate business unit. We believe that a business unit that had no role in the structuring of the ABS or the selection of the assets underlying the ABS should not be a covered person under the rule. We propose that only business units involved in creating the security would be subject to the rule. Derivative counterparties, trading desks and other business units playing active roles in the structuring of the ABS or the selection of the assets underlying the ABS would fall within the scope of the rule. We believe that the originators of the underlying assets should only be subject to the rule if they not only originate the assets but also play another role in structuring the ABS or selecting the underlying assets for inclusion in the ABS.

We believe that the final rule should also be limited in scope to the business unit or units involved in the securitization process if those business units are separated from other business units by effective information barriers. We have had conversations with representatives of several of our member firms to discuss the practical application of the Proposed Rule given each firm's current compliance policies and procedures. In many instances, a large financial institution is divided between a public side and a private side. The private side may include business units engaged in the structuring or underwriting of ABS, while traders of those same ABS would typically be on the public side. Acknowledging that most financial institutions already have information barriers in place to comply with other rules and regulations, we suggest that the final rule acknowledge the existence of, and provide exemptive relief for, activities on the other side of information barriers that are a part of a firm's effort to comply with existing legal and regulatory requirements. ***The final rule should also explicitly allow for the creation of new policies and procedures as appropriate to prevent the flow of information with respect to the relevant ABS transaction between business units for purposes of compliance with the rule.*** In the absence of such relief, financial firms may be left with no way to satisfy the requirements of the rule while maintaining compliance with other legal and regulatory requirements and could be forced to choose not to act as a Securitization

Participant in connection with ABS. We encourage the Commission to consider and find alternatives that would avoid this outcome.[16]

The Commentary recognizes that information barriers, in the form of written, reasonably designed policies and procedures, are used in other areas of federal securities laws and rules to mitigate potential conflicts of interest or other restricted activities. For example, Section 15(g) of the Exchange Act ("Section 15(g)")[17] requires registered broker-dealers to implement written policies and procedures designed to prevent the misuse of material, nonpublic information. Section 15(g) also requires broker-dealers to regularly review and vigorously enforce the information barriers they put in place. A 1990 study by the Commission of the information barriers maintained by broker-dealers resulted in a determination by the Commission that self-regulatory organizations ("SROs") were in the best position to oversee these policies and procedures.[18] In 1991, the NASD and the NYSE issued a joint memorandum discussing the minimum elements necessary to formulate an adequate information barrier. Those elements identified by the Commission and the SROs as necessary to create an effective information barrier include adequately memorialized policies and procedures, including a "need to know" policy, wall-crossing procedures, restricted and watch lists and information and education and training of employees.

We believe that the final rule should include a safe harbor that permits each financial institution to design its own policies and procedures to restrict the spread of information regarding securitization transactions from the business unit or units structuring the ABS to other parts of the institution. Information barriers would be created between those entities or business units engaging in securitization transactions and those that are not. Of course, if a Securitization Participant involved any other previously uninvolved business unit in structuring or selecting assets for the ABS, that business unit would be subject to the rule. The rule should not, however, apply to anyone in a business unit who is on the other side of an information barrier constructed to sufficiently restrict the flow of information to such business unit from the individuals or business units engaging in the structuring of the ABS or the selection of the assets underlying the ABS. This approach would potentially eliminate many issues that arise with respect to a large institution attempting to ensure compliance by each of its many business units that have no role in structuring a securitization transaction, including business units of overseas entities.

Information barriers that are established, maintained and monitored pursuant to a prescribed framework would restrict business units, and other areas of a financial institution, including affiliates and subsidiaries, outside of the business unit or units

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16 We note that the Proposed Volcker Rule, designed to eliminate conflicts of interest in the context of banking entities and covered funds, permits the use of information barriers as mitigants to certain conflicts of interest.

17 Formerly Section 15(f) of the Exchange Act but redesignated by the Dodd-Frank Act.

18 This 1990 study is available at http://www.sec.gov/divisions/marketreg/brokerdealerpolicies.pdf.

involved with the ABS, from acquiring the knowledge about a particular ABS that would enable them to engage in the types of activities that the Proposed Rule is intended to restrict. We propose that, in order to avail itself of the information barrier safe harbor, an institution would be required to develop, institute and enforce new information barriers that include the following characteristics:[19]

1. adequately memorialized internal policies and procedures reasonably designed to restrict and monitor the flow of information between the business unit or units structuring the ABS or selecting the assets underlying the ABS and other business units;

2. implementation of a "need-to-know" policy of only sharing information concerning the structuring of ABS or selection of assets underlying the ABS among employees and across business units when necessary;

3. periodic internal audits of compliance with the policies and procedures, provided that the group performing the audit is independent of the business unit or units engaging in the securitization activity; and

4. a program for training of employees to ensure sufficient employee understanding of the controls put in place to restrict the flow of information outside of business units structuring the ABS or selecting the assets underlying the ABS, which training may be included in programs regarding information barriers and compliance generally.

The automatic inclusion of affiliates and subsidiaries within the scope of the Proposed Rule could result in the rule having an unnecessary and highly burdensome global reach. SIFMA is concerned that the Proposed Rule may apply U.S.-based securities regulations to ABS transactions entirely bought and sold overseas, with only the Commission's regulation of affiliates of an issuer or other transaction party as the jurisdictional nexus. We believe that the Proposed Rule should in any event be modified so that it would not apply to the conduct of Securitization Participants with respect to non-U.S. offerings, absent a substantial effect in the U.S. or on U.S. persons. The broad range of covered persons under the Proposed Rule would subject these entities that are not otherwise subject to U.S. securities laws to the significant restrictions and compliance burdens of the rule. Consistent with relief granted to nationally recognized statistical rating organizations with respect to Exchange Act Rule 17g-5(a)(3), we believe that an issuer of ABS that is not a U.S. person and is not offering or selling securities into the

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[19] These characteristics have been compiled through a review of Section 15(g), Rule 14e-5 and Regulation M under the Exchange Act, the Commission's 1990 study and the NASD/NYSE 1991 joint memorandum.

U.S. should not be subject to the Proposed Rule even if the issuer is an affiliate or subsidiary of a U.S. person.[20]

B. Covered Products

The Proposed Rule applies to any asset-backed security, as such term is defined in section 3 of the Exchange Act, but then goes further to also include synthetic asset-backed securities for purposes of the rule.

1. The Exchange Act Definition of Asset-Backed Security Is Overly Broad and Will Chill Legitimate Market Activity and Credit Creation

SIFMA is concerned that the Exchange Act definition of "asset-backed security" is overly broad and open-ended and, unlike the Regulation AB definition, there has been little time to determine its scope.[21] The breadth of the Exchange Act definition of "asset-backed security" will make it impossible for market participants to draw a dividing line between asset-backed securities subject to the Proposed Rule and securities that are excluded. Securities that may be collateralized by self-liquidating assets but do not function as securitizations or raise the issues that the Proposed Rule is intended to address may nonetheless be picked up by the broadly worded Exchange Act definition. Market participants will err on the side of caution by not executing transactions when they cannot be sure of the applicable rules. This will reduce legitimate, beneficial securitization and other market activity, and ultimately hinder credit creation.

The Exchange Act definition of asset-backed security contains a catch-all that expands the definition to include "a[ny] security that the Commission, by rule, determines to be an asset-backed security . . ." We believe that this discretion is limited to identification of securities that meet the basic requirements of the definition. Nonetheless, if the Commission has the ongoing ability to expand the scope of the products covered by the rule, market participants may be reluctant to issue securities that are not either explicitly covered or excluded from the scope of the definition.[22] We therefore request that the Commission establish appropriate transition periods to allow for compliance with the rule if the Commission expands the scope of the Exchange Act definition to include products that do not fall within the scope of clauses (A)(i) through (v) of such definition.

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[20] Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations From Requirements of Rule 17g-5 Under the Securities Exchange Act of 1934 and Request for Comment, Release No. 34-65765 (November 16, 2011).

[21] For a detailed discussion of SIFMA's concerns regarding the breadth of the Exchange Act definition of ABS and the inclusion in such definition of products not typically categorized as ABS, we refer you to pages 93-96 of the SIFMA Risk Retention Comment Letter. *See supra* note 15.

[22] We strongly believe that any expansion of the Exchange Act definition should be done through a formal rulemaking process in order to allow for a comment period and appropriate cost-benefit analysis.

2. The Rule Should Not Apply to Transactions Not Traditionally Recognized or Regulated as ABS Transactions

Transactions that have not traditionally been regarded as ABS transactions should not fall within the scope of the rule. These types of transactions include those relating to securities issued by municipalities, including municipal tax lien transactions, and TOBs.[23] In addition, the rule should not apply to corporate debt repackagings (as further described below), which have not traditionally been considered asset-backed securities and are generally unmanaged, untranched pass-through transactions dissimilar to most traditional asset-backed securities.[24] These transactions also include secured transactions such as covered bonds and enhanced equipment trust certificates that are essentially corporate-credit-based, secured transactions rather than securitizations and securities for which the sponsor or an affiliate is obligated to make payments (in addition to any payments that may be made from the proceeds of financial assets held by the issuing entity) or is providing a payment guaranty. Furthermore, they include insurance linked securities[25] and securitization or securities transactions issued by wholly-owned subsidiaries that may be collateralized by self-liquidating assets, where the primary purpose of the transaction is to provide liquidity and not to effect risk transfer of the underlying assets. ***Potential conflicts occurring in connection with these types of transactions were not of the type intended to be regulated by Section 621 and are largely mitigated by the transactions' structure, particularly with respect to TOB transactions.*** Also, the broad Exchange Act definition of "asset-backed security" should not be read to encompass securities issued by other types of fixed income investment vehicles such as registered or private bond funds, mutual funds, exchange traded funds or exchange traded notes or other similar products, as these are investment products that have not traditionally been thought of or classified as ABS. We request that the Commission confirm in the final rule that the securities referenced in this Section IV.B.2 would not be treated as ABS for purposes of the rule. If in the Commission's view any of these products would be treated as ABS, then we urge the Commission to use its exemptive authority to clarify that these products will not be subject to the rule by providing an explicit exemption.[26]

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23 For a more in-depth discussion of TOBs, please see SIFMA's August 1, 2011 comments on the Credit Risk Retention Release, available at http://www.sifma.org/workarea/downloadasset.aspx?id=8589934920. For a more in-depth discussion of municipal securities in the context of Exchange Act ABS, please see SIFMA's (along with other associations) November 15, 2010 comments on the Asset-Backed Securities Release, available at http://www.sec.gov/comments/s7-24-10/s72410-37.pdf.

24 SIFMA members have also raised concerns that security-based swaps could potentially be characterized as ABS. SIFMA does not believe that security-based swaps should be categorized as ABS, but regardless of their ultimate characterization under the securities laws, we believe it would be inappropriate for such instruments to be subject to Section 621 or the final rule adopted pursuant thereto.

25 We note that many sections of the Dodd-Frank Act exclude the business of insurance from the scope of the act to avoid interfering with the ability of insurance companies to conduct their business. Insurance linked securities are a common way for insurance companies to hedge or reinsure their risks.

26 Section 28 of the Securities Act provides that ''the Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or

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Clarification is needed as to the scope of "Covered Products" given the extensive policies and procedures that would need to be put in place in order to attempt to comply with the Proposed Rule and, absent such clarification, current activity related to the facilitation, creation and marketing of these products and any relating hedging would be chilled significantly.

SIFMA believes that corporate debt repackagings should be excepted from the rule and that including such transactions within the scope of the rule would adversely affect capital market liquidity. As discussed in Section VII.B below, corporate credit obligations of reporting companies or companies for which information is otherwise publicly available have a higher degree of transparency and other characteristics that differentiate them from traditional ABS.

3. Application of the Proposed Rule to Securities Issued by Government Sponsored Enterprises and Government Owned Enterprises

The Exchange Act definition of "asset-backed security" could include securities issued by government sponsored enterprises such as the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" and together with Fannie Mae, the "GSEs"), or guaranteed by the Government National Mortgage Association ("Ginnie Mae"). Under their charters, the core business of the GSEs is to pool conventional mortgage loans and to issue securities backed by these mortgage loans that are fully guaranteed as to payment of principal and interest by the issuing GSE. Ginnie Mae guarantees the principal and interest payments on mortgage-backed securities ("MBS") issued by private lending institutions approved by Ginnie Mae and Ginnie Mae's guaranty is explicitly backed by the full faith and credit of the United States. As discussed in Section IV.B.1 above, we believe that the use of the Exchange Act definition of an "asset-backed security" in the context of the Proposed Rule could result in certain types of securities that were not intended to be covered by the Proposed Rule becoming subject to its restrictions, including MBS issued by the GSEs ("GSE Securities") and MBS guaranteed by Ginnie Mae ("Ginnie Securities"). Notably, the proprietary trading prohibitions of the Proposed Volcker Rule do not apply to obligations of the United States or any agency thereof, obligations, participations or other instruments issued by Fannie Mae, Freddie Mac or Ginnie Mae or obligations issued by any state or political subdivision thereof.[27] By including the exemption set forth in §__.6(a)(1) in the Proposed Volcker Rule, the Commission, along with the other regulatory agencies who drafted the Proposed Volcker Rule, has acknowledged that these types of securities merit different treatment than other securities. ***Accordingly, the Commission should ensure that GSE Securities and Ginnie Securities, as well as***

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transactions, from any provision or provisions of this title or of any rule or regulation issued under this title, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.'' 15 U.S.C. 77z–3.

[27] *See* § __.6(a)(1) of the Proposed Volcker Rule.

obligations of other government agencies, the United States or any state, are also outside of the scope of the final rule relating to material conflicts of interest.[28]

As noted in the Commentary, Section 621 was not intended to curtail the legitimate functioning of the securitization markets. Including GSE Securities and Ginnie Securities within the scope of the final rule would have a significant economic and market impact. The role of the GSEs in securitizations is vital to the housing market and we are concerned about the impact the Proposed Rule would have if GSE Securities or Ginnie Securities were "covered products" under the rule. The current role of the GSEs and Ginnie Mae in the housing markets is tremendous – they finance more than 90% of mortgage lending; this is the highest proportion on record. While there is much debate on the future of our housing finance system, most commentators, including our members, agree that the role of private capital must increase in proportion to the role of government-supported funding. However, this must be done in a judicious and carefully planned manner, not as a result of collateral damage from a rulemaking that was intended to address problems not found in the GSE Securities and Ginnie Securities markets.

It must be kept in mind that this dominant market share of the GSEs and Ginnie Mae indicates that the housing finance system, for the time being, is critically dependent on the liquidity and capital that the GSE Securities and Ginnie Securities markets attract. The markets for single-class GSE Securities and Ginnie Securities are the largest and most liquid fixed-income markets outside of the U.S. Treasury market, and are well understood by market participants.[29] Their multi-class securities markets are also large and liquid, and are critically important to lenders and banks, among other investors. Taken together the GSE Securities and Ginnie Securities markets attract vast sums of global capital, and have significantly mitigated the contraction of credit availability that has occurred over the last four years. Therefore, in all respects, we must be careful not to harm the function of those markets until an alternative market is able to replace their reduced capacity.

We note that under the terms of their conservatorships, neither GSE has independent control over its activities. Upon the initiation of the conservatorship in 2008, the Federal Housing Finance Agency "succeed[ed] to the (1) rights, titles, powers, and privileges of [Fannie Mae and Freddie Mac], and any stockholder, officer, or director of [Fannie Mae or Freddie Mac] with respect to [Fannie Mae or Freddie Mac] and its assets, and (2) title to all books, records and assets of [Fannie Mae and Freddie Mac] held by any other

[28] We note that the exemption for GSE ABS under the proposed credit risk retention rules is limited to the period during which the GSE or an equivalent entity operates under conservatorship or receivership of Federal Housing Finance Agency with capital support from the United States. We would support such a construction for the purposes of this rulemaking.

[29] For more information on the markets for GSE and Ginnie Mae mortgage-backed securities, including the critical To-Be-Announced market, please see pages 4-21 of SIFMA's testimony on this topic to the House Financial Services Committee Subcommittee on International Monetary Policy and Trade (the "SIFMA Testimony"), available at http://financialservices.house.gov/UploadedFiles/101311dorfman.pdf.

custodian or third-party."[30] As such, the GSEs may be compelled to take actions which result in benefits to themselves, but are detrimental to investors in their MBS. Similarly, such actions of a GSE could impact the performance of an investment, hedge or other transaction entered into by a Securitization Participant in a manner not contemplated or intended by that participant, which could give rise to concerns if the scope of the final rule were so broad as to include GSE Securities and Ginnie Securities.

We also note that the very nature of the GSE Securities and Ginnie Securities markets, particularly the To-Be-Announced (TBA) market, creates significant complications for an analysis under Section 621. This is because by its nature, the TBA market is a cheapest-to-deliver market. That is, the seller on a TBA transaction will select the least costly and likely least attractive security from the functionally homogeneous pool of securities which still fulfill the terms of the trade. This is well known, understood and accepted by all participants in the market, and has been so for the last 35 years. In the agency securities market, by its nature, unlike the private label MBS market, credit risk is not a factor for sellers or buyers. This factor, combined with the massive trading volumes in these markets,[31] due to their great liquidity, renders compliance with the framework of the Proposed Rule fundamentally impossible. Broker-dealers would face immense difficulty in compliance given their roles in the multi-class securities business and in market-making activities with respect to single-class securities, which serve as collateral for their multi-class business.

GSE Securities and Ginnie Securities can be viewed as government-backed securities rather than asset-backed securities. SIFMA believes that GSE Securities and Ginnie Securities can be distinguished from private-label ABS because payments of principal and interest on the GSE Securities and Ginnie Securities are guaranteed. Because these securities are guaranteed by the GSE or Ginnie Mae itself, investors will receive payments of principal and interest to which they are entitled regardless of whether underlying obligors have defaulted (assuming no default by the GSE or, to the extent applicable, the United States as guarantor). In other words, the GSE or Ginnie Mae, rather than the investors, bears the credit risk.

As discussed further in Section IV.E below, we strongly believe that conflicts covered by the rule should only include those where the financial firm selecting the underlying assets intended to profit from the adverse performance of the asset pool. With GSE Securities and Ginnie Securities, there is less concern regarding adverse selection of the underlying assets because the investor will receive payments of principal and interest to which they are entitled pursuant to the GSE or Ginnie Mae guarantee. Because these transactions

[30] Federal Housing Finance Agency Fact Sheet – Questions and Answers on Conservatorship, available at http://www.fhfa.gov/webfiles/35/FHFACONSERVQA.pdf.

[31] The average daily trading volume of agency MBS by primary dealers in the second quarter of 2011 was approximately $300 billion per day, compared with less than $100 billion in the agency debt, corporate and municipal markets combined. SIFMA Testimony at 13.

cannot be "designed to fail" in the way that private label securities could be, they should not fall within the scope of the final rule.

We are also significantly concerned that the Proposed Rule would create great difficulty for the GSEs and the Federal Housing Finance Agency in effecting transactions to share GSE credit risk with private investors, especially through synthetic structures such as credit linked notes. Indeed, we believe that efficient structures would be deemed impermissible by the Proposed Rule, specifically pursuant to the interpretation of Example 3(B) in the Commentary (which we discuss further in Section IV.E.1 and Section V.A of this letter). We support the comments provided by Fannie Mae in its January 17, 2012 comment letter[32] and additionally note that any involvement in such transactions would result in a highly complicated analysis for broker-dealers under the Proposed Rule given the large market-making businesses in GSE Securities in which most dealers are involved, potentially forestalling the development of structures desired by the GSEs, regulators and investors. At a minimum, the Commission should discuss this issue with the Federal Housing Finance Agency, given the broad public policy implications of the potential prohibitions.

4. Application of the Proposed Rule to Synthetic Asset-Backed Securities

The Commentary states that the Commission proposes not to define the term "synthetic asset-backed security" because the term is commonly used and understood by market participants. SIFMA believes, however, that while there may be some degree of apparent common usage and understanding, it is not sufficiently precise or consistent for a rule as significant as this one, and that the term needs to be defined in the final rule in order to provide sufficient clarity with respect to the rule's application. We propose that "synthetic asset-backed security" be defined as "a fixed-income or other security that (i) entitles the holder to receive payments made pursuant to one or more derivative instruments that substantially reference or replicate the payments made on a portfolio of one or more ABS, excluding a reference portfolio consisting solely of one or more published indices of ABS, and (ii) is collateralized primarily by such derivative instruments and financial assets securing such derivative instruments."[33]

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[32] *See* Fannie Mae's comment letter, available at http://www.sec.gov/comments/s7-38-11/s73811-16.pdf. Note that we support Fannie Mae's comments generally, but given the roles many of our members play as market-makers and liquidity providers in the GSE and Ginnie Mae MBS markets, our request here goes beyond that of Fannie Mae. The complications faced by participants who take on multiple roles, as many of our members do, make Section 621 compliance fundamentally impossible in these markets.

[33] Under this definition, swap and other derivative transactions entered into directly with investors, synthetic or other securities with exposure to corporate credits, equities, indices, interest rates, currencies, commodities and other economic measures and securities relating to insurance or reinsurance risks (such as "catastrophe bonds" or "mortality bonds") would not constitute "synthetic asset-backed securities."

(a) The Benefits of Synthetic ABS Transactions

The Commentary acknowledges that the Proposed Rule might have unintended effects, including prohibiting investment activities that may otherwise be made for bona fide purposes such as certain types of synthetic ABS transactions; we agree and believe that the most significant impacts will be to limit investor choice and diminish the ability of securitization parties to manage risk. For example, a Securitization Participant and an investor may simply have different objectives or views on the market, with the investor looking to take a specific investment position and the Securitization Participant looking to take the other side of that position. The investor may request that the Securitization Participant structure an ABS transaction, which could be a synthetic ABS transaction, to provide the investor with an opportunity to make a desired investment or take a desired risk position. To the extent that the Proposed Rule prohibits forms of synthetic ABS that could be used to facilitate this type of transaction, it will limit the ability of investors to achieve their investment objectives.

The tools used in synthetic securitizations provide many advantages that are appreciated by market participants, including investors who request and buy synthetic ABS. For example, they allow an investor to acquire credit exposure to a financial asset without the issuer actually acquiring the asset, or to acquire partial credit exposure in a manner that would not be possible or practical with the actual asset. In addition, the investor can acquire such credit exposure without acquiring other risks associated with the reference asset (such as interest rate, currency exchange rate, prepayment and duration). They also allow an investor to obtain credit exposure to an asset that might not be readily available (or available at all) to be acquired in the market on a cash basis, or to tranche such credit exposure in a way that could not be done with cash assets. These attributes allow for more flexible, timely, efficient, customized and certain execution, to the mutual benefit of both Securitization Participants and investors. Synthetic securitizations are also important tools for lending institutions to manage portfolios of credit risk; we are very concerned that the Proposed Rule will eliminate the ability of lenders to utilize this critical risk management tool. The credit derivatives market relating to ABS generally increases the overall liquidity and efficiency of the capital markets and the soundness of financial institutions.

Recognizing that credit derivatives inherently involve long and short positions, so long as a Securitization Participant is not deliberately designing an ABS transaction to fail, such synthetic ABS transactions should not be subject to prohibition under the final rule. In the alternative and as discussed in further detail in Section VII below, we believe that the use of these derivatives should be permitted with clear, comprehensive and specific disclosure such that an investor would be able to evaluate the risks of the particular transaction and the roles of all parties involved in the portfolio selection process.

Given that synthetic ABS is often substantially equivalent to an investor entering into a derivative contract with a third party, there is no compelling reason why an investor should not be able to purchase a synthetic ABS. The synthetic ABS is simply another form of derivative transaction, but the economic substance of such transaction is essentially the same as entering into a derivative contract. The synthetic ABS may offer more liquidity and present less of a burden than assembling a portfolio of individual derivative contracts. In addition, there is typically more disclosure provided to an investor in a synthetic ABS transaction than in a derivative transaction between two parties. As an example, some Securitization Participants use synthetic ABS to hedge portfolios of assets that they have accumulated. We are concerned that the Commission's preliminary interpretation of Example 3(B) in the Commentary, as discussed in further detail in Section IV.E.1 below, would effectively eliminate a Securitization Participant's ability to hedge risk associated with a retained portfolio of assets by using a synthetic ABS structure. In Example 3(B), the sponsor of a synthetic ABS transaction and the special purpose entity ("SPE") issuer are parties to a CDS contract, where the sponsor has the short exposure and the SPE has the long. The sponsor's purchase of the CDS protection offsets its long investment exposure to the assets underlying the synthetic ABS. The Commission's preliminary view in the Commentary is that this fact pattern would involve a prohibited conflict because the sponsor could be viewed as benefiting from a decline in the ABS at the expense of the investors. We request clarification with respect to these types of transactions, as we believe that this prohibition would force financial institutions into other structures for this type of risk-mitigating transaction and would have a negative impact on the capital markets as a whole. Again, we note that prohibiting the SPE from entering into a derivative transaction, like a CDS, with a Securitization Participant is the same as prohibiting synthetic ABS.

C. Covered Timeframe

The Proposed Rule establishes the covered timeframe as "any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security." The Commentary notes that the Commission specifically did not include a commencement point for the covered timeframe. Though the Commentary seems to indicate that the Commission intends the rule to apply to transactions effected prior to the date of the first closing of the sale of the ABS, the Commission has also asked commenters for input on the establishment of a commencement point. ***An indeterminate commencement point would contribute significantly to concerns about the breadth of the rule.*** An institution attempting to comply with the rule will need to determine whether any existing transactions that it or any of its affiliates or subsidiaries has entered into would be viewed as constituting a short transaction in relation to an issuance of ABS or otherwise might constitute a material conflict of interest under the rule with respect to the proposed issuance of ABS. If a financial institution considering acting as a Securitization Participant has to evaluate all of its existing positions to identify any potential conflict, the burden of such analysis may outweigh the benefit of participating in the securitization transaction. A practical approach to addressing this concern would be for the Commission to select a certain date in the securitization process (e.g., the date of the first marketing or offering materials or the pricing date for the ABS) to be the commencement point for application of the rule. We strongly support the use of a bright line date over the vague and uncertain covered timeframe in the Proposed Rule.

D. Covered Conflicts

The Commission proposes to limit the scope of covered conflicts through four conditions. First, to comport with Section 621's focus on protecting investors, the conflicts prohibition would only apply to those conflicts between a Securitization Participant and an investor. The prohibition would not apply to conflicts arising solely among Securitization Participants acting in their capacity as such.[34] We believe that this portion of the covered conflicts of interest analysis should explicitly exempt conflicts with an investor if the investor has selected, or was significantly involved in the selection of, the assets or reference portfolio or if the investor expressly consented to or ratified the portfolio. An investor who selects the assets or structures the relevant ABS is analogous to a Securitization Participant regardless of whether the investor invests in a long or short position. Since the investor is structuring its own investment, the investor does not need the extra protection that Section 621 is meant to provide to an investor who does not have the opportunity to select the assets for or structure the securitization transaction in which it invests.

Second, the prohibition would not extend to conflicts arising solely among investors in the ABS (where investors could include Securitization Participants but which conflicts arise only from their interests as investors). Significantly, the Commentary states that "the proposed rule is not intended to prohibit the multi-tranche structures commonly used in ABS offerings, even though those structures may involve conflicts between the interests of various classes of investors in the offering by virtue of the different risks and rewards associated with such tranches."[35] It is our understanding, based on the Commentary, that if a Securitization Participant is an investor in ABS, any conflicts with other holders of those ABS arising solely among investors in the ABS would not be prohibited under the Proposed Rule as they would not be viewed as conflicts between a Securitization Participant and an investor, but rather as conflicts between investors. SIFMA supports this approach and would like confirmation that, consistent with this approach, a Securitization Participant would not be prohibited in any circumstances under the Proposed Rule from acquiring or disposing of a long position in the ABS (i.e., holding ABS issued in the transaction as opposed to issuing CDS or taking another form of short position with respect to the asset pool underlying the ABS).

In addition, in our 2010 Comment Letter we had expressed concerns regarding a Securitization Participant's ability to exercise control, voting or other contractual rights for a particular transaction. The Commentary lists exercising a contractual right to remove a servicer or appoint a special servicer as activities that would not be prohibited by the rule, but we also believe that exercising a clean-up call or voting rights as a security holder in a transaction would be outside the scope of the Proposed Rule because

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[34] An example given by the Commission in the Commentary states that conflicts between a sponsor and a collateral manager of an ABS are not the focus of the proposal. *See* Proposed Rule Release at 60328.

[35] Proposed Rule Release at 60340.

these actions are taken by a Securitization Participant in its capacity as a servicer or an investor rather than as a securitization participant.[36]

Third, the prohibition would apply only to those conflicts between a Securitization Participant and investor "that arise as a result of or in connection with the related ABS transaction." Therefore, the Proposed Rule would not cover conflicts arising between these parties that are unrelated to their status as a Securitization Participant or investor, respectively. As an example of a transaction that would not be covered by the Proposed Rule, the Commentary cites a scenario where an underwriter of ABS also underwrites a common stock offering and where an investor purchases securities in both the ABS and common stock offerings. If the underwriter engaged in activities that undermined the value of the common stock offering, while possibly covered by existing federal securities laws and rules, such activity would not fall within the scope of the Proposed Rule.

We seek additional clarification as to what it means to "arise as a result of or in connection with a related ABS transaction." Given our understanding of the third condition, we believe that an issuer or sponsor of ABS backed by auto loans or leases would not be prohibited from creating a marketing program that could result in increased prepayments and early terminations on securitized loans and leases and therefore adverse results for investors. We also believe that entering into or advising on a merger, acquisition or restructuring that could be adverse to securitization activities would not be prohibited by the Proposed Rule because this conduct does not arise in connection with engaging in a securitization transaction.

We also believe that hedging activity or short positions taken by an institution not directly related to the ABS should not be viewed as arising as a result of or in connection with a related ABS transaction. Hedging by a Securitization Participant in the form of an investment in an index comprised of a number of securities (whether or not including the related ABS) should not fall within the scope of the Proposed Rule, as the investment is not an activity that arises out of or in connection with such ABS. SIFMA believes that the Commission should issue guidance that would clarify that the use by a financial firm of a market index like the ABX to hedge exposure to a segment of the ABS market generally should not be interpreted as prohibited under the Proposed Rule, even if the financial firm was a Securitization Participant with respect to one or more of the securities underlying the index. Indices like the ABX and the CMBX are not meant to track the performance of one deal, but are instead broad-based indices intended to follow a range of similar deals in the market. Thresholds could be set, such that, for example, the use of an index for hedging would be not prohibited so long as any class of interests in the related ABS comprised less than ten percent of such index and all classes of

[36] Note that though the Commentary did not include providing financing to investors as one of the typical securitization activities that would not be prohibited by the Proposed Rule, we maintain the position set forth in our 2010 Comment Letter. Potential conflicts arising from providing financing to investors are already addressed by Section 11(d)(1) of the Exchange Act and, therefore, should not be prohibited pursuant to this rule, since such activity is already subject to existing regulation.

interests in such ABS comprised less than twenty percent of such index. We note that the proposed credit risk retention rules use similar thresholds to determine whether hedging using an index is permitted or prohibited under those proposed rules.[37] In addition, it should be permissible under the final rule for a financial firm to go short in a segment of the ABS market even if the short instrument is highly correlated to ABS for which the financial firm acted as a Securitization Participant but where the short position does not involve a specific ABS for which the financial firm was a Securitization Participant. We request that the Commission confirm in the final rule that the activities discussed in this paragraph would not fall within the scope of the rule as they do not arise as a result of or in connection with the related ABS transaction.

Fourth, the conflict of interest must arise as a result of or in connection with "engag[ing] in any transaction." To clarify the requirements of the fourth condition, the Commentary cites effecting a short sale of, or purchasing CDS protection on, offered ABS or the assets underlying such securities and having the Securitization Participant directly or indirectly select assets for sale to the SPE in the transaction as examples of "engag[ing] in any transaction." The Commentary goes on to list the issuance of investment research as an activity that may be performed by a Securitization Participant but that would not be a transaction covered by the Proposed Rule.

SIFMA requests additional clarification on the third and fourth conditions, including, for example, whether having a more limited role in a transaction, such as approving assets that have been selected by a third party, would fall within the scope of the Proposed Rule. The Commission also requests input as to whether other activities should be explicitly excluded from the range of prohibited activities. While the Commentary indicates that the Commission believes most of the activities listed in pages 5 through 11 of our 2010 Comment Letter would not be prohibited by the Proposed Rule,[38] it leaves open for interpretation whether additional activities would be within the rule's scope.

E. "Material Conflicts of Interest"

The Commission acknowledges in the Commentary that "[p]erhaps the most challenging issue in implementing Section 27B is to identify those conflicts of interest involving securitization participants and investors that are 'material' and intended to be prohibited under Section 27B and [the] proposed rule."[39] The Commission also states that it is "not aware of any basis in the legislative history of Section 621 to conclude that this provision was expected to alter or curtail the legitimate functioning of the securitization markets, as opposed to targeting and eliminating specific types of improper conduct."[40] The

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[37] *See* Credit Risk Retention, Proposed Rule, Release No. 34-64148 (March 30, 2011), 76 Fed. Reg. 24090, 24116 (April 29, 2011).

[38] *See* Proposed Rule Release at 60340-60341.

[39] *Id.* at 60329.

[40] *Id.*

Commentary offers a two-prong test to determine whether an ABS transaction is viewed as "involving or resulting in material conflicts of interest." SIFMA believes that the two-prong test is very helpful in defining the scope of the Proposed Rule and is generally consistent with the intent of the rule. ***As noted above, it is critical that any final rule provide clarity with respect to the meaning of "material conflict of interest" for purposes of the final rule. Therefore, this two-prong test, as refined in response to comments, along with the other elements of the five factor test, should be included in the text of, or as an appendix to, the final rule.***

1. Prong 1(A) of the Material Conflicts of Interest Test

The Commentary states that, under prong 1(A) of the material conflicts of interest test, it would not be necessary for a Securitization Participant to intentionally structure an ABS or select assets underlying the ABS such that the Securitization Participant would profit from the failure of the ABS. Instead, the Proposed Rule would prohibit the Securitization Participant from profiting from the adverse performance or decline in market value of the ABS regardless of whether the Securitization Participant intended the transaction to perform poorly or decline in value. The Securitization Participant need not actually profit from the transaction in order to violate the Proposed Rule; the rule would be breached if the Securitization Participant had the potential to benefit if the value of the ABS were to decline. It is important to look back to the legislative intent of Section 621 in formulating a definition of a "material conflict of interest." Senators Merkley and Levin emphasized that Section 621 is aimed at preventing Securitization Participants from structuring transactions and selling securities to investors while betting against those same securities. Instead of limiting prohibited conflicts to those related to "designed to fail" transactions, the Commentary also scopes within the Proposed Rule a broad range of transactions where a Securitization Participant has the potential to benefit but has not intentionally designed a transaction to fail. Inherent in the concept of a transaction "designed to fail" is intention on the part of the financial firm selecting the underlying assets to profit from its failure. SIFMA believes that intent should be an element of the test for a "material conflict of interest."

While prong 1(A) states that intent is not a necessary element to having a material conflict of interest, Examples 3(B) and 3(C) provided in the Commentary suggest otherwise. As described briefly in Section IV.B.4(a), in Example 3(B), the sponsor of a synthetic ABS transaction and the SPE issuer are parties to a CDS contract, where the sponsor has the short exposure and the SPE has the long. The sponsor's purchase of the CDS protection offsets its long investment exposure to the assets underlying the synthetic ABS. The Commentary states that a prohibited conflict would be present in this example because the sponsor could be viewed as benefiting from a decline in the ABS at the expense of the investors, who now have the exposure to the underlying asset. The Commentary also states that this scenario would not be eligible for the risk-mitigating hedging exception because the CDS transaction is providing a hedge for an existing long position rather than assets associated with underwriting activities. In Example 3(C), the sponsor has accumulated a long position on the underlying assets solely in anticipation of creating and selling the synthetic ABS and enters into the CDS to offset exposure to the underlying reference portfolio that it acquired to effect the synthetic ABS transaction. According to the Commentary, this scenario would fall under the risk-mitigating hedging exception and would not be prohibited under the Proposed Rule, assuming that there was no significant net basis risk and that the potential gains and losses from the CDS protection and the long position accumulated by the sponsor offset each other.

The Commentary seeks comment on its interpretation of these examples as well as input regarding the practicality of determining a sponsor's intent. We note that the focus on intent in these examples is contrary to the notion in prong 1(A) that intent is irrelevant in determining the existence of a material conflict of interest. While we believe that intent should be an element of the test under prong 1(A), we also believe that financial institutions need the ability to hedge their existing portfolios, including through securitization, through transactions like the example provided in Example 3(B), and we are concerned that the Proposed Rule and Commentary may curtail legitimate risk management activity. ***We strongly request that the rule or guidance clarify that hedging of existing portfolios that is done in the form of a securitization would not be prohibited by the rule, and that Example 3(B) be amended to reflect this or removed from the final rule.***

Prong 1(A) tests whether a Securitization Participant "would benefit directly or indirectly from the actual, anticipated or potential (1) adverse performance of the asset pool supporting or referenced by the relevant ABS, (2) loss of principal, monetary default or early amortization event on the ABS, or (3) decline in the market value of the relevant ABS."[41] We believe that the use of the phrase "benefit directly or indirectly" is overly broad and vague and may unintentionally scope in activities which would otherwise be outside the scope of the Proposed Rule. ***We suggest that the test in prong 1(A) be refined to test only whether a Securitization Participant would "benefit directly" from any of the specified short transactions.*** Application of the Proposed Rule to transactions in which a Securitization Participant would "indirectly" benefit would be extremely problematic, as Securitization Participants have no way to ascertain the scope or meaning of "benefiting indirectly" from a specified short transaction. We also suggest that the words "actual, anticipated or potential" be removed from this prong of the material conflicts of interest test.

With respect to clause (2) of prong 1(A) we believe that the phrase "or early amortization event" should be deleted. A securitization with a revolving period, such as a credit card securitization, might start repaying principal early upon the occurrence of an "early amortization event." As a result, the sponsor's interest in the pool (the "<u>Seller's Interest</u>") would grow as the investor's interest declines. This could potentially be viewed as a direct or indirect benefit to the sponsor. We therefore believe that this phrase should be removed or that the final rule should include explicit clarification that the resulting growth of the Seller's Interest would not be viewed as a direct or indirect benefit to the

[41] *Id.* Items (1)-(3) are referred to in the Commentary as "short transactions."

sponsor under the rule. We also note that a Securitization Participant may enter into a repo transaction with an investor in the ordinary course of its business. If the market value of ABS pledged to the Securitization Participant as repo counterparty were to decline, the investor could be obligated to post additional collateral to the Securitization Participant in the form of cash or securities. The final rule should clarify explicitly that the right to demand posting of additional collateral in this circumstance is not a direct or indirect benefit to the Securitization Participant that is intended to be prohibited by the rule.

We also note that prong 1(A) of the test does not place any limitation on acquiring or disposing of long positions.

We note that the language in prong 1(A) could also be broad enough to include a Securitization Participant acting as an interest rate swap or currency swap counterparty for a transaction where default by the issuing entity, which could result from poor performance of the underlying pool, could result in a significant termination payment to the swap counterparty. ***As noted above, we believe that interest rate swaps and currency swaps should be viewed as acceptable "traditional securitization practices"*** and that any potential upside from the failure of a deal is not a significant motivation for entering into such a swap and in any event would be dependent upon market conditions at the time of termination. The potential benefit to the Securitization Participant is one that we believe would not be material to the investors under the second prong of the test.

In addition, prong 1(A) does not provide an explicit, objective way for determining and measuring a Securitization Participant's "short position." In particular, there is no guidance on whether or how a position relating to the ABS is to be netted across an entity's operations, or whether or how changing trading positions should be included in such determination.

Another concern is the lack of clear flexibility to allow Securitization Participants to function as intermediaries. The Commission seems to countenance as acceptable and proper "receiving payments for performing roles in the securitization." This general precept should be expanded to cover bona fide intermediation in respect of affected securitization transactions, such that so long as a Securitization Participant is performing customary functions of intermediating trades between and among securitization issuers and other market participants, such activity is permitted, notwithstanding that the Securitization Participant may at any time be net short (or net long) with respect to the relevant ABS, and may at times indefinitely maintain a short position (so long as on customary market terms and specifically disclosed as a possible scenario in the offering document for the affected securitization).

2. Prong 1(B) of the Material Conflicts of Interest Test

Prong 1(B) is designed to deter Securitization Participants from collaborating with third parties and is intended to prevent third parties from engaging in activities that the

Securitization Participant would not itself be permitted to engage in under prong 1(A). As an example, the Commentary refers to a scenario where a Securitization Participant might benefit (through compensation, the promise of future business or other forms of remuneration from either the third party or the ABS) by permitting a third party to select assets for an ABS transaction where the third party later profits from a related short transaction.

The Commission requests input on whether the phrase "as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS" is appropriate. ***We are concerned about this vague phrase, and are not sure what exactly it means to allow a third party to indirectly structure the relevant ABS or select the underlying assets.*** While there may be instances where an investor in a long position or provider of a short position actively participates in selecting a pool of assets, any investor or provider of a short position would undertake some level of analysis of a pool before committing to a transaction. An investor or provider of CDS may indicate unwillingness to participate in a transaction based on a review of a proposed pool of assets. If that pool is subsequently modified and becomes more palatable, would the provider of CDS then be viewed as having been allowed directly or indirectly to select assets? There is a significant gray area in this formulation. We prefer the phrase "as a result of allowing a third party directly to substantially influence the structure of the relevant ABS or the selection of assets underlying the ABS."

The Commission recognizes that there may be practical challenges associated with determining whether prong 1(B) has been breached and suggests that Securitization Participants may need to ensure compliance by receiving contractual assurances from relevant third parties where a prohibited conflict may exist. The burden of compliance would still fall on the Securitization Participant rather than the third party and the Securitization Participant would then be liable for the actions of that third party. This is a potentially burdensome requirement that creates a multiplier of responsibility under the Proposed Rule. A Securitization Participant would have little or no access to actions taken by the third party (which might itself be a financial institution with many affiliates or internal units) on or after the closing date of an ABS transaction and therefore would have difficulty knowing whether a third party is shorting an ABS or otherwise benefiting from a transaction in an impermissible manner under the test and would have to rely on assurances from that third party. An ABS transaction would typically have multiple Securitization Participants and it may be difficult to determine which Securitization Participant would have the burden of ascertaining compliance, or bear the consequences of a failure to comply, by the third party. The Commentary suggests that a Securitization Participant could rely on contractual covenants or representations to determine compliance with the proposal, but is unclear what consequences would follow from a breach by a third party if a Securitization Participant had obtained a contractual agreement by the third party not to engage in a short transaction. It would only be reasonable to rely on such a covenant if the final rule is clear enough that participants in ABS transactions, and relevant third parties, understand which transactions are prohibited under the rules. Additionally, third parties that are large financial institutions would have difficulty providing the required covenants and representations for the same reasons that a Securitization Participant would be unable to do so.

3. Prong 2 of the Material Conflicts of Interest Test

The second prong of the "conflicts of interest that are material" test requires that there be a substantial likelihood that a reasonable investor would consider a conflict important to its investment decision. The Commentary states that while the same materiality standard is used in federal securities laws to determine whether disclosure is necessary, the use of this standard should not imply that a prohibited conflict would be permitted if adequately disclosed by a Securitization Participant. Our views on the use of disclosure to mitigate conflicts of interest are detailed in Section VII below. We note here, however, that any disclosure of a potential conflict should not be viewed as evidence that the conflict rises to the standard of the second prong of the test.

V. Statutory Exceptions

Consistent with Section 27B, the Proposed Rule includes three statutory exemptions to the conflicts prohibition. These exceptions are for risk-mitigating hedging activities, liquidity commitments and bona fide market-making, and have been modeled on the exceptions described in Section 27B. SIFMA's position with respect to each of the exemptions is discussed below.

A. Risk-mitigating Hedging Activities

Under this exception, a Securitization Participant would be permitted to engage in "[r]isk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks" to such Securitization Participant. The Commentary describes risk-mitigating hedging as being "effected to reduce risk from an existing position or a position about to be taken."[42] The proposed exception "is not intended to permit speculative trading masked as risk-mitigating hedging activities"[43] and "does not include trading to establish new positions designed to earn a profit,"[44] which the Commission views as a possible indicator of speculation. Given the scope of the Proposed Rule, as clarified through the five factor test set forth in the Commentary, we believe that the buying and selling of long positions in the ABS is not intended to be restricted by the Proposed Rule, but note that some of the Commentary related to risk-mitigating hedging activities and bona fide market-making suggests that there may be circumstances where a long investment in the ABS transaction could be a prohibited activity. SIFMA believes that it is consistent with the stated intent of the rule that any investment in the relevant ABS or subsequent sale

[42] *Id.* at 60334.

[43] *Id.*

[44] *Id.*

thereof would not be prohibited by the Proposed Rule under the five factor test set forth in the Commentary.

The Commentary also states that the risk-mitigating hedging exception would permit a series of hedging activities, based on the price movements of the underlying assets, in order to remain delta neutral. As noted in our 2010 Comment Letter, the text of Section 27B allows risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security but does not explicitly address general hedging activity by a Securitization Participant. Financial institutions engage in hedging activities across business units, legal entities and offices which may be transacted for purposes other than betting against the specific ABS that is sponsored or underwritten by that financial institution or its affiliate, often in cases where one entity is unaware of the actions another entity is taking. Curtailing such hedging activities – which are unrelated to the actual ABS sponsored or underwritten by financial institutions and their affiliates and are entered into as part of their risk management practices and not as a bet against that ABS – would have adverse and unintended effects on everyday operations and risk management practices of financial institutions and their affiliates. We are similarly concerned that an underwriter who desires to hedge ABS it acquires as part of permitted market-making activity within a year of such acquisition would be prohibited from doing so under the Proposed Rule. Impeding risk-mitigating hedging will ultimately curtail market-making and reduce market liquidity. ***We think it is important to focus on Section 621's emphasis on eliminating "designed to fail" transactions in ensuring that the Proposed Rule does not halt business activities unrelated to the issuance and sale of the ABS.***

We note that "risk-mitigating hedging" is not defined in the Proposed Rule, which may lead to some uncertainty among market participants. We are also concerned that neither the Proposed Rule nor the guidance suggests how being "delta neutral" will be calculated. It is unclear whether this assessment will be made by reference to a single ABS transaction, across financial institutions as a whole, or by looking at individual entities or business units. We also request that the final rule makes clear that a financial institution may use the risk-mitigating hedging exception not only at the initial issuance of the ABS but throughout the period during which the Proposed Rule would be applicable.

In addition, as noted in Section IV.E.1 above, we agree with the Commission's concern that distinguishing a Securitization Participant's initial long position in assets acquired for investment purposes and a similar long position acquired solely for purposes of creating the ABS (as described in Examples 3(B) and 3(C) provided in the Commentary) may not be practical, or sufficiently clear, especially given the multi-segment businesses of many Securitization Participants and the internal movements of assets and recharacterizations of the reasons or purposes for which assets are being held. ***However, we believe that the transaction described in Example 3(B) should in any event be permitted because it represents an appropriate risk-mitigating hedging activity, and should expressly be recognized as such by the rule.*** Securitization is a valuable mechanism for Securitization Participants and their affiliates to manage their balance sheet exposure to various types of credit, including ABS. This benefits not only the relevant institution but also governmental bodies (and ultimately taxpayers) who may be required to devote financial and other resources to support institutions that have not prudently hedged the risks of all types of assets on their balance sheets. To the extent the rule is implemented in the manner suggested by Example 3(B), it might also result in higher prices being paid for the relevant asset credit exposure or otherwise impede the execution of transactions desired by both Securitization Participants and investors. We believe that clear and comprehensive disclosure is the best approach to the situations described in Examples 3(B) and 3(C), regardless of whether they occur for bona fide balance sheet hedging purposes or solely for purposes of creating ABS.

The Proposed Volcker Rule contains limitations on risk-mitigating hedging that would apply to Securitization Participants that are banking entities. Some of our members have indicated that compliance with two distinct risk-mitigating hedging tests would be burdensome and we preliminarily believe that it would be detrimental to have a set of rules for risk-mitigating hedging under the Proposed Rule that is different from the rules ultimately adopted under Section 619 of the Dodd-Frank Act (the "Final Volcker Rule"). However, we are reluctant to express a definitive view as to this issue due to the high degree of uncertainty surrounding what the Final Volcker Rule exception may include. Because both the Proposed Rule and the Proposed Volcker Rule are merely proposals as of the date of this letter, we are unable to state with certainty that we think the risk-mitigating hedging exception (and accordingly the bona fide market-making exception) should be the same in the final rule and the Final Volcker Rule. As also discussed in Section VI and Section IX below, we request that the final rule not be put in place until the Final Volcker Rule has been completed.

B. Liquidity Commitments

Pursuant to the Proposed Rule, "[p]urchases or sales of asset-backed securities made pursuant to and consistent with commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, to provide liquidity for the asset-backed security" would not be prohibited by Rule 127(a). While the exception in the Proposed Rule specifically refers to "purchases or sales" of ABS, the Commentary acknowledges that market participants may view liquidity commitments as encompassing a broader range of activities, including providing financing to an asset-backed commercial paper conduit or entering into repo transactions. The Commentary, however, does not clearly express whether these other activities would be excepted from the conflicts prohibition.

In a traditional asset-backed commercial paper program, liquidity may be provided through means other than purchases and sales of ABS. The liquidity facility provided by financial institutions to an asset-backed commercial paper conduit may be structured as a commitment to provide loans to the conduit to enable it to make payment of the conduit's commercial paper as the commercial paper matures. SIFMA believes that a standard liquidity facility structured as an agreement to make loans should be explicitly covered by any liquidity commitment exception. As discussed elsewhere in this letter, to the extent commitments to provide liquidity reference a commitment to buy securities, we do not believe that any such purchases of securities would be prohibited by the Proposed Rule as narrowed by the five factor test. The five factors only prohibit short transactions entered into or facilitated by Securitization Participants and do not prohibit the acquisition or disposition of long positions. We think that this interpretation is consistent with the stated intent of Section 621 and the spirit of the exceptions for both liquidity commitments and bona fide market-making transactions.

C. Bona Fide Market-Making

The Proposed Rule would also provide an exception for "[p]urchases or sales of asset-backed securities made pursuant to and consistent with bona fide market-making in the asset-backed security." The Commission sets forth a number of principles to aid in determining whether an activity qualifies as bona fide market-making, including whether the activity includes purchasing and selling the ABS from or to investors in the secondary market, is driven by customer trading, customer liquidity needs, customer investment needs or risk management by customers of market-makers, does not include activity related to speculative selling strategies, does not generally include actively accumulating a long or short position other than to facilitate customer trading interest and does not include accumulating positions that remain open and exposed to gains or losses for a period of time instead of being closed out promptly. The Commentary states that, depending on the facts and circumstances, an activity need not meet all of the principles, though it also states that meeting only one of the criteria may not be sufficient to qualify for the exception.

Our understanding of the Commentary is that the framework for the Proposed Rule is aimed at prohibiting short transactions and does not prohibit a Securitization Participant from holding any long position on an ABS.[45] Given this proposed framework, we fully support the inclusion of a bona fide market-making exception to permit short transactions that may otherwise be prohibited by the rule. In a 2005 description of short selling and Regulation SHO,[46] the Commission recognized that naked short selling is not necessarily a violation of federal securities laws or the Commission's rules and may, in certain circumstances, contribute to market liquidity. The Commission noted that a broker-dealer that makes a market in a security is generally prepared to buy and sell the security on a regular and continuous basis, even when there are no other buyers or sellers. A market-maker must then sell a security to a buyer even when there are temporary shortages of that security available in the market. ***It may take a market-maker considerable time to purchase or arrange to borrow the security, such that the market-maker may need to sell the security short without having arranged to borrow shares. The Commission also recognized that it may be especially difficult to purchase or borrow illiquid***

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45 The Commentary states "[n]othing in the proposed interpretation would prevent a securitization participant from taking positions in which its economic interests would be aligned with the investors in the ABS it has created and sold – such as by purchasing the ABS." *Id.* at 60330.

46 This description is available at http://www.sec.gov/spotlight/keyregshoissues.htm.

securities. We seek confirmation from the Commission that this type of market-making activity (including through the use of derivative instruments) would qualify for the bona fide market-making exception.

VI. Relationship to Volcker Rule

The Commentary requests input regarding the interplay between the Proposed Rule and the Proposed Volcker Rule. The Proposed Rule and the Proposed Volcker Rule both include exceptions for risk-mitigating hedging and bona fide market-making. The Proposed Volcker Rule also includes provisions for the mitigation of potential conflicts of interest through the use of disclosure and information barriers, while the Commentary includes a limited discussion of, and questions relating to, the use of disclosure and information barriers for purposes of mitigating conflicts intended to be prohibited by Section 621. As noted in Section V.A above, it is difficult for us to make a determination at this time as to whether provisions of the Proposed Rule should be modified to conform with those in the Proposed Volcker Rule or ultimately adopted in the Final Volcker Rule.

We note that SIFMA will be providing its views on the Proposed Volcker Rule, including those with respect to its impact on securitization, in response letters to the Commission, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve and the Federal Deposit Insurance Corporation. As we will also propose in our letter on provisions of the Proposed Volcker Rule that impact securitizations, we believe that the final rule to implement Section 621, as modified to include the proposals in this letter, will adequately address conflicts of interest with respect to securitizations. Accordingly, a securitization transaction that satisfies the requirements of the final rule should be deemed to have complied with §__.8 (Limitations on permitted proprietary trading activities) and §__.17 (Other limitations on permitted covered fund activities) of the Final Volcker Rule (if applicable to the securitization). In any case, as a general matter, we would prefer that the risk-mitigating hedging and bona fide market-making exceptions in the final rule be interpreted in the same way as are the corresponding exceptions in the Final Volcker Rule, as differing interpretations would create additional compliance burdens for market participants that are banking entities, though we would again like to emphasize the uncertainty surrounding the provisions that may ultimately be part of the Final Volcker Rule.

VII. The Use of Disclosure Should be Permitted to Mitigate Potential Material Conflicts of Interest

As noted in the Commentary, the Proposed Rule's lack of reliance on disclosure is a departure from the historic practice of using disclosure to address potential conflicts of interest in securities offerings.[47] In fact, it belies the principal purpose of the Securities Act, which is "to provide full and fair disclosure of the character of securities sold." As a result of this historic standard, Securitization Participants in ABS transactions disclose conflicts of interest between investors

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[47] At the September 19, 2011 Commission open meeting to discuss the Proposed Rule, Commissioner Troy A. Paredes recognized that, as written, the rule has no provisions for disclosure but also suggested that disclosure may be a way to allow investors to review the risks associated with a transaction and make an informed choice.

and transaction participants that Securitization Participants believe would be material to investors in the offering document for a security. We submit that it would be much more consistent with the history and design of the Securities Act and regulations thereunder to provide for enhanced disclosure requirements, rather than substituting the government's judgment for that of fully informed investors.

SIFMA believes that the final rule should permit disclosure as a remedy to cure otherwise prohibited material conflicts of interest. The Commission has acknowledged in the Commentary that certain conflicts of interest are inherent in securitization but yet are not of the type of conflicts intended to be prohibited by the Proposed Rule. In its most basic form, a securitization transaction can be simply viewed as an agreement between a seller of securities and a buyer for those securities. The buyer and seller may have different views regarding the security or different objectives for engaging in the transaction, but these differences are fundamental to the transaction. The same principle holds true for counterparties in a derivative transaction. In transactions involving the sale of securities, buyers who are provided with detailed and fact-specific disclosure should be permitted to make their own investment decisions, consistent with the historical standard established by the Securities Act.

In the legislative history and comments made with respect to Section 621 and the Proposed Rule, emphasis has been placed on protecting unsuspecting investors from potential abuse at the hands of Securitization Participants. As an example, the "Covered Conflicts" section of the Commentary explicitly states that the Proposed Rule is intended to cover conflicts arising between an investor and a Securitization Participant, and not among Securitization Participants or investors themselves. In the context of Section 621 and the Proposed Rule, reference has also been made to transactions designed to fail and "rigged ABS products," as well as to transactions in which Securitization Participants have allegedly failed to provide investors with information necessary to make an informed investment decision.[48] Given this focus on the lack of information provided to investors in certain past securitization transactions, we strongly support the inclusion of provisions regarding disclosure to mitigate potential material conflicts of interest in the final rule in order to eliminate scenarios where an investor may not have received necessary information.

A. The Proposed Volcker Rule Includes Disclosure Provisions

We support the use of detailed, fact-specific disclosure to mitigate conflicts of interest under the Proposed Rule. We believe this is not only most consonant with historical practice, but would also make the final rule more durable and workable for all market participants, including investors. We note that the Proposed Volcker Rule includes disclosure provisions pursuant to which a banking entity may address and mitigate all

[48] *See generally* the Merkley-Levin Comment Letter, citing a transaction where investors were not informed of "aggressive shorts" (page 9), a CDO transaction for which the offering materials included "vague and generalized risk factors [and] failed to inform investors that the CDO was specifically designed to offset risky assets" on the arranger's balance sheet (page 11), another CDO transaction where "[n]one of [certain enumerated] views, risks, or conflicts was disclosed to investors" (page 11) and "rigged ABS products" (page 13).

conflicts of interest that are otherwise prohibited under the rule. In the context of their application to this rulemaking, we support the majority of the requirements of the disclosure provisions set forth in the Proposed Volcker Rule. First, the Proposed Volcker Rule requires clear, timely and effective disclosure of the conflict or potential conflict to be made and any other necessary information to be provided prior to effecting the transaction that may result in the conflict. Such disclosure must be provided in reasonable detail and in a manner sufficient to permit a reasonable client, customer or counterparty to meaningfully understand the conflict. Second, according to the Proposed Volcker Rule, the disclosure must be made explicitly and effectively,[49] sufficiently close in time to the decision to engage in the transaction or activity and in a manner such that the client, customer or counterparty (entities that are analogous to investors in securitization transactions covered by the Proposed Rule) has the opportunity to negate, or substantially mitigate, any material adverse effect that was created or would be created by the conflict or potential conflict. While we recognize that Senators Merkley and Levin have stated their belief that disclosure is not a cure for structuring and selling securities that are designed to fail, we do believe that clear and specific disclosure is useful to mitigate a potential conflict of interest in that such disclosure enables the investor to decide for itself whether it wants to buy a security.

B. Availability of Information With Respect to Certain ABS

The final rule should not apply to ABS and synthetic ABS transactions for which the underlying assets or reference assets are highly transparent, such as corporate credit obligations of reporting companies or companies for which relevant information is readily available through Bloomberg or similar services. While investors have had concerns about access to information with respect to pools of consumer receivables such as mortgages, an investor in ABS, whether or not synthetic, relating to corporate debt that is publicly registered or sold in the 144A market would in most circumstances have access to the same information with respect to the underlying debt and the company issuing the debt that would be available to the entity or entities putting together the pool (whose role or roles would be fully disclosed). Investors in these types of transactions have the ability to research the underlying assets, value these assets and assess the level of risk. In addition, many of these transactions are done to satisfy investor demand, either with the investor selecting the underlying assets itself or the Securitization Participants structuring the transaction to meet the investor's specifications or preferences. It is also the case in these transactions that, relative to other types of securitization transactions, the Securitization Participants are likely to have less control over the credit outcome of the security.

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[49] While we agree with the concept of explicit and effective disclosure in principle, we request that the final rules include a clear explanation of the necessary elements that would make disclosure in an ABS offering document or marketing materials "explicit and effective" such that Securitization Participants are able to easily determine compliance with the provisions of the rule.

We also believe that the final rule should include an exemption for certain securities that would or might otherwise fall within the definition of "asset-backed security" or "synthetic asset-backed security" but with respect to which the investor or investors have selected or were significantly involved in the selection of the relevant asset or reference portfolio, or expressly consented to or ratified the portfolio selected by one or more other persons or expressly consented to the manner of selection of the portfolio. Such exemption would be conditioned on full and timely disclosure of the actual portfolio selection process (as opposed to overly generic/hypothetical disclosure about such process), including who was and/or would be responsible for or involved in, or otherwise substantially influenced, such selection process (and specifying any other existing or contemplated role in the transaction of any such persons during the covered timeframe of the rule).

VIII. The Commission's Economic Analysis Highlights Potential Problems That May Result from the Implementation of the Proposed Rule and Indicates the Need for Significant Revision

The Commentary includes a discussion regarding economic analysis of the implementation of the Proposed Rule which concedes that the Proposed Rule may curtail certain types of transactions altogether – for example, certain types of synthetic ABS transactions that the Commission notes would generally be prohibited by the Proposed Rule – which could lead to increased costs to the securitization markets as Securitization Participants and investors would have to consider alternative transaction structures that may be less efficient. The Commentary further recognizes that certain potential participants in an asset-backed securitization transaction could be conflicted out and, as a result, the securitization markets in some situations could cease to function effectively. The Commission acknowledges that monitoring the activities of affiliates or subsidiaries for conflicts could be difficult, especially where there are existing information barriers between affiliated entities, and that actual and perceived conflicts may also result in firms losing clients or clients having to seek out new firms to do business with and possibly forego an investment in ABS. Any institution that is structured to limit the flow of information from private side personnel to public side personnel within the same entity or across business units will struggle to find a framework capable of assuring compliance with the Proposed Rule. An entity could choose either to refrain from acting as a Securitization Participant with respect to any security that might be viewed as an asset-backed security or to refrain from entering into hedging or other transactions that could be viewed as short transactions with respect to a given security that might be viewed as an asset-backed security. Either approach to compliance would result in great cost to the securitization markets and financial institutions and would significantly limit investment options for investors.

Under the guidance provided by the Commentary there is not sufficient clarity for market participants to determine whether certain transactions, such as credit linked notes or other transactions involving CDS, would be prohibited under the rule. The examples set forth in the Commentary highlight the difficulty in drawing lines between transactions that would be prohibited and those that would not, but do not provide clear and actionable guidance for market participants. We also note that the examples are simplistic in that they present scenarios arising around a specific ABS transaction but do not address a wide variety of scenarios that would arise for financial institutions, such as one or more short positions taken by trading desks of foreign affiliates at the request of one of their customers months after an ABS closing in which a domestic broker-dealer acted as a co-manager, or a series of hedging transactions that do not at all times remain delta neutral (e.g., due to market movements).

The Proposed Rule will cause ABS transactions to be subject to a unique and cumbersome set of restrictions that will provide significant disincentive for activity in ABS. For example, the compliance with the Proposed Rule would necessitate the implementation of specialized and significant compliance procedures. These procedures would require financial institutions to create internal checks and protocols and will be extremely costly and complex, especially if the final rule is so broad that it covers business units, affiliates and subsidiaries who do not participate in the securitization process. SIFMA is concerned that the impact to ABS will be severe and detrimental to consumers of credit and the broader economy. Securitization is a key component of long term, stable funding for banks and other lenders. The recovery of the private mortgage securitization market and other segments of the ABS market is critical to the provision of credit, the long term health of the banking system and the broader financial markets. Rules that seek to address past problems should be crafted in a way that does not prevent the recovery of these markets and that presents clear guidance for a pathway to compliance. We have asked for certain exceptions with respect to ABS backed by corporate credits in this letter because placing restrictions on transactions backed by corporate obligations could create liquidity issues for certain corporate names, which could in turn have a negative impact on the value of those obligations. We are also concerned that the Exchange Act definition of ABS is overly broad and, with the inclusion of synthetic ABS under the scope of the rule, could potentially encompass many types of securities that are not generally considered asset-backed securities. In addition, the Proposed Rule and the Proposed Volcker Rule, viewed together, will curtail all kinds of securities transactions by creating barriers and restrictions for market participants.

The combination of a lack of clarity as to the application of the rules, and the lack of intent as a determinative factor for violations of the rules, creates a circumstance where SIFMA cannot estimate with any degree of specificity the cost of the Proposed Rule in terms of dollars to be expended for compliance or economic activity lost due to the overly broad and unclear nature of the Proposed Rule. However, it is quite clear that, as proposed, the rule would have an impact that will significantly affect the functioning of the securitization markets and the risk management practices of financial institutions, both of which are critical to the economy. Those are the costs. We recognize that the goal of the Proposed Rule is to eliminate certain behavior which likewise is perceived to have a negative impact on securitization markets and the broader economy. This is the benefit. ***However, as proposed in such an overly broad formulation, the costs of the rule in terms of implementation and curtailment of legitimate activity far exceed the benefits. Therefore, we strongly believe the Proposed Rule must be amended and reproposed in order to better balance the costs and benefits of its implementation. Additionally, the amended rule proposal (or if the Commission chooses not to repropose, the final rule) should contain a detailed analysis of these costs and benefits, including a discussion of assumptions and calculation methodologies used in their estimation. While the Commission may not have discretion in terms of whether or not to implement the rule, it has***

critical discretion as to how the statute is turned into a rule and how the rule is implemented, and a responsibility to ensure that the rule does not curtail legitimate securitization activity. As proposed, the Proposed Rule will not meet those requirements, and is therefore materially defective.

IX. SIFMA Supports Reproposal and a Transition Period

Given the significant impact that any rule promulgated under Section 621 could have on financial institutions, the securitization and derivatives markets and other sectors of the financial markets and given our comments and concerns regarding the Proposed Rule, we strongly believe that the Commission should repropose a rule to implement Section 621 after reviewing comments received with respect to the initial proposal and taking into account the costs and benefits of its actions.

The Proposed Rule and Commentary say only that Section 27(B) is not effective until the adoption of final rules by the Commission and do not address whether the final rule would apply to outstanding ABS. SIFMA believes that any final rule should include a transition period of at least twelve months after publication in the Federal Register to provide sufficient time for issuers of ABS and other Securitization Participants to implement procedures and systems to facilitate compliance with the requirements of the final rule. Whether Securitization Participants will need more than a year to ensure compliance will depend on the actual requirements of the final rule. We also request that the final rule not be finalized until the Final Volcker Rule is also finalized. On its effective date, the final rule should only apply to transactions that close on or after the effective date of the rule and should explicitly state that it would not apply to transactions that closed in the one year preceding the effective date.

We greatly appreciate your consideration of the views set forth in this letter, and we would be pleased to have the opportunity to discuss these matters further with the Commission and its Staff. If you have any comments or questions, please feel free to contact Richard Dorfman at (212) 313-1359 or rdorfman@sifma.org, Chris Killian at (212) 313-1126 or ckillian@sifma.org, or Andrew Faulkner of Skadden, Arps, Slate, Meagher & Flom LLP at (212) 735-2853 or afaulkner@skadden.com.

Sincerely,

Richard A. Dorfman
Managing Director
Head of Securitization

Christopher B. Killian
Managing Director

Appendix A

Proposed Definitions

"Initial Purchaser" shall mean a person who, in connection with a private offering of securities, (i) has agreed with an issuer or selling security holder to (a) purchase securities for distribution, (b) distribute securities for or on behalf of such issuer or selling security holder or (c) manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder and (ii) is directly involved with structuring the relevant ABS or selecting the assets underlying the ABS.

"Placement Agent" shall mean a person who, in connection with a private offering of securities, (i) has agreed with an issuer or selling security holder to (a) distribute securities for or on behalf of such issuer or selling security holder or (b) manage or supervise the placement of securities for or on behalf of such issuer or selling security holder and (ii) is directly involved with structuring the relevant ABS or selecting the assets underlying the ABS.

"Sponsor" shall mean the person who organizes and initiates an ABS transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer of the ABS.

"Synthetic Asset-Backed Security" shall mean a fixed-income or other security that (i) entitles the holder to receive payments made pursuant to one or more derivative instruments that substantially reference or replicate the payments made on a portfolio of one or more ABS, excluding a reference portfolio consisting solely of one or more published indices of ABS, and (ii) is collateralized primarily by such derivative instruments and financial assets securing such derivative instruments.

"Underwriter" shall mean a person who, in connection with a public offering of securities, (i) has agreed with an issuer or selling security holder to (a) purchase securities for distribution, (b) distribute securities for or on behalf of such issuer or selling security holder or (c) manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder and (ii) is directly involved with structuring the relevant ABS or selecting the assets underlying the ABS.