July 12, 2004

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

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attn: Jonathan G. Katz, Secretary

Re: Release Nos. 33-8419; 34-49644 (File No. S7-21-04)

Ladies and Gentlemen:

The American Securitization Forum (the "ASF") submits this letter in response to the request for comments made by the Securities and Exchange Commission (the "Commission") in Release Nos. 33-8419, 34-49644 dated May 3, 2004 (the "Proposing Release") relating to the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act").

The ASF seeks to promote the efficient growth and development of the securitization markets by engaging in a variety of legal, regulatory, accounting, market practice and educational initiatives. Members of the ASF include investors, issuers, underwriters, servicers, trustees, rating agencies, law firms, accounting firms and other professional participants in the asset-backed securities market.[1] The ASF, therefore, is uniquely positioned to provide the Commission with comprehensive, balanced and practical recommendations reflecting a true consensus among the various market participants, including investors and issuers. We believe we have provided such recommendations in this letter.

This letter is the product of an unprecedented effort by the securitization industry to respond, in a very limited amount of time, to proposals intended to establish the future framework for participating in what may be the most sophisticated and complex capital market in the world. We undertook this challenge by establishing a membership task force (the "Task Force") to review the Proposing Release and develop our comments. Approximately 140 individuals from over 50 ASF member firms (representing approximately one-third of all member firms) directly participated in the comment process as part of the Task Force.

We divided the Task Force into four principal sub-groups, according to the four major sections of the Proposing Release. Certain additional sub-groups were organized to address particularly

[1] A list of the ASF's membership is available at its website, www.americansecuritization.com/membership.html.

important issues. ASF members co-chaired the Task Force and chaired or co-chaired each sub-group. Members of the Task Force and its sub-groups participated in more than 30 meetings, including full Task Force meetings, and collectively devoted thousands of hours to develop, draft and review this letter. During this process, when divergent views developed, such as between issuers and investors, further meetings were held and special efforts were made to find common ground and reach a practical compromise that effectively addressed the competing concerns. The recommendations presented in this letter, therefore, are the product of an intense and successful effort by representatives of all segments of the securitization market, including investors, to offer the Commission a consensus response to the Proposing Release.

We applaud the extraordinary efforts of the Commission staff to address comprehensively the treatment of asset-backed securities under the Securities Act and the Exchange Act. The more rational and transparent the regulatory regime for issuing asset-backed securities, the more efficient the market for those securities and the greater the benefits to consumers, businesses and investors, and so to the U.S. economy. We hope that our comments assist the Commission in creating a regulatory regime that is viewed as rational and transparent by all participants in the securitization industry.

PRELIMINARY COMMENTS

Impact of Securitization

Securitization has in many ways transformed the American economy. Asset-backed securities ("ABS")[2] provide safe and secure investments to mutual funds, investment management companies, pension plans, banks, insurance companies and other businesses, as direct investors, as well as to millions of Americans who invest in funds that invest in ABS. Securitization enables businesses to obtain funding at more favorable rates than they could obtain through other financing methods and to access a broader base of investors. This in turn enables finance companies and financial institutions to extend more credit, at more favorable rates, to home owners and other consumers as well as to corporate borrowers.[3] Securitization has had a clear and positive effect on businesses and investors, but the enormous benefit to consumers in particular should not be overlooked. Consumers probably will have the least opportunity to comment on the Proposing Release, but may well be the most negatively affected by the costs of any increased regulatory compliance burdens, as such costs are likely to be reflected in increased costs of credit. We urge the Commission, therefore, to carefully consider these potential consequences to consumers, as well as our other concerns discussed below, before imposing more than "incremental" changes to the existing regulatory framework.

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[2] Unless otherwise specified, in this letter we use the term "asset-backed securities," or "ABS," to include mortgage-backed securities, or "MBS."

[3] As of December 31, 2003, total MBS outstanding was $5.3 trillion and total non-mortgage ABS outstanding was $1.7 trillion (TBMA Bond Market Research Quarterly, February 2004). At the end of the same period, outstanding residential and commercial mortgage debt totaled $9.4 trillion, and outstanding consumer credit (including both revolving and non-revolving debt) totaled $2.02 trillion. (Federal Reserve Board). Based on this data, it appears that a very significant percentage of both mortgage and non-mortgage consumer debt is securitized.

Changes from Current Practice

As noted by the Commission, to date only a few of its initiatives have directly related to ABS,[4] and the Commission staff has otherwise regulated ABS through the filing review process and, in some areas, through no-action letters or interpretive statements. From the very inception of the modern securitization market in the 1970s, the Commission staff has worked together with industry participants to establish meaningful and flexible guidelines that recognize and address the unique attributes of ABS and the ABS offering process. The rapid development of the ABS market as a dominant component of the U.S. capital markets is testimony to these extraordinary, collaborative efforts, which have yielded a workable, albeit informal, regulatory framework.[5] At the same time, the Commission correctly recognizes that such an informal framework decreases transparency and contributes to uncertainty and inefficiency, and we agree with the Commission that the ABS market has developed and matured to the point where codification of this regulatory framework is now appropriate.

This accumulated informal guidance has, in fact, served as the foundation for the development and evolution of the ABS market, including an array of current market practices widely understood to be acceptable to, and in fact accepted by, the staff. As such, while this informal framework has the limitation of diminished transparency, we cannot overstate the equally important observation that an enormous market in publicly-registered ABS has developed on the basis of that framework, and that the transition to greater transparency should be implemented primarily through codification of existing staff and market practices, with incremental requirements imposed only where evidence conclusively indicates that such requirements are both necessary and practical from the standpoint of compliance burden.

In commenting, therefore, we have focused particularly on those rule proposals that introduce markedly greater and increasingly difficult or impractical compliance burdens as compared with current market practice. In most of these instances, we believe that the proposed requirements go well beyond "incremental" change without compelling evidence that the departure from current practice is warranted. Moreover, these rule proposals, if implemented as proposed, would significantly expand the amount of time, effort and expense involved in the preparation by asset-backed issuers of prospectuses and ongoing periodic reports. ABS issuers do not currently

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[4] *See* Proposing Release, Section II. In connection with the Secondary Mortgage Market Enhancement Act of 1984 ("SMMEA"), Pub. L. No. 98-440, 98 Stat. 1689, the Commission permitted shelf registration for SMMEA-eligible MBS. *See* Release No. 33-6499 (Nov. 17, 1983) [48 FR 52889] and Securities Act Rule 415(a)(1)(vii) (17 CFR 230.415(a)(1)(vii)). In 1992, the Commission extended shelf registration to other mortgage and non-mortgage investment grade ABS (*see* Release No. 33-6964 (Oct. 22, 1992) [57 FR 48970], and also adopted Rule 3a-7 under the Investment Company Act of 1940, as amended, to exclude ABS transactions under specific conditions from the definition of an investment company. *See* Release No. IC-19105 (Nov. 19, 1992) [57 FR 56248] and Investment Company Act Rule 3a-7 (17 CFR 270.3a-7). More recently, the Commission tailored rules for ABS in its implementing rulemakings under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"), 15 U.S.C. 7201 et seq.

[5] In 2003, the aggregate issuance of ABS, including securities of government-sponsored entities ("GSEs"), was over $3.75 trillion, surpassing the aggregate issuance of U.S. government and corporate bonds combined, which was $1.489 trillion for the same period. As of December 31, 2003, aggregate outstanding ABS, including GSE securities, was approximately $7.0 trillion, as compared with $4.4 trillion of corporate bonds and $3.6 trillion of U.S. government bonds. (TBMA Bond Market Research Quarterly, February 2004).

have the systems in place, do not have access to some of the information required, and, in many instances, would have to significantly increase staff, to comply with these proposals.[6]

Possible Re-proposal

The Proposing Release has a hybrid character: it sets forth a comprehensive series of rule proposals that are accompanied in nearly every instance by questions, often numerous and detailed, seeking comment on alternative approaches for the regulation of ABS. As a result, the Proposing Release is, in part, a body of rule proposals and, in part, a concept release inviting comments, such as ours, that include extensive recommendations concerning alternative principles and rules. We strongly encourage the Commission to re-publish its proposed rules, affording notice and an opportunity for meaningful public comment thereon, prior to the adoption of final rules.

Further Review

As noted above, by virtue of its broad-based membership, the ASF is uniquely positioned to formulate and reflect a consensus response to the rule proposals and has gone to significant lengths to do so in this comment letter. We would, therefore, be very interested in convening one or more meetings with the Commission staff to review our comments on this Proposing Release as the Commission progresses toward adoption of final rules and regulations. Should you desire a meeting or if you otherwise have any questions concerning our comments, please do not hesitate to contact George Miller of the ASF at 646.637.9216.

Organization of Letter

We have organized this letter into four primary sections, according to the four primary regulatory areas addressed in the Proposing Release: Securities Act registration; disclosure; communications during the offering process; and Exchange Act reporting. We introduce those sections with an Executive Summary that provides an overview of our key concerns and recommendations with respect to the Commission's proposals. Following the discussion of the four primary sections of the Proposing Release, we address the Commission's other miscellaneous proposals and, importantly, the Commission's proposals concerning a transition period for implementation of the new rules and regulations. We have also included as exhibits to this letter the following:

- Exhibit A — Selected requests for comment included in the Proposing Release accompanied by annotations to the specific section of the ASF's comment letter where a response to such request is provided.

- Exhibit B — Proposed text for selected definitions contained in Item 1101 of proposed Regulation AB.

[6] Given the limited amount of time to respond to the Proposing Release and the large number and diverse nature of our issuer members, we are unable to provide estimates of increased compliance costs for purposes of this letter. The ASF, however, would welcome the opportunity to organize a project with our membership to attempt to calculate such costs in response to any specific questions the Commission staff may have.

Supplemental Letter

We do not, however, include in this letter any discussion of the Commission's proposals concerning the disclosure of static pool data. As indicated above, the ASF task force was organized into four principal sub-groups, according to the four major sections of the Proposing Release, and certain additional sub-groups were organized to address particularly important issues. One of those additional sub-groups was organized to address the Commission's proposals concerning disclosure of static pool data. Because of the complexity of the issues surrounding this part of the Proposing Release, and because it is the most significant proposed change to current market practice respecting disclosure, we are actively engaged, as of the date of this letter, in developing balanced and practical recommendations reflecting a true consensus on this issue. We are, therefore, in the process of preparing a supplemental comment letter limited to addressing the Commission's proposals concerning disclosure of static pool data. We expect to submit this supplemental comment letter on or before July 30, 2004.

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EXHIBIT B PROPOSED TEXT FOR SELECTED DEFINITIONS

EXECUTIVE SUMMARY

SECURITIES ACT REGISTRATION

With its elevated function as a gateway to the alternative regulatory regime, we urge the Commission to adopt a more flexible and inclusive principles-based definition of the term "asset-backed security." The proposed bright-line tests would arbitrarily exclude some structured securities even though they possess all of the characteristics of ABS.

- Regardless of any bright-line thresholds, ABS supported by delinquent and non-performing pool assets, lease-backed securitizations supported by residual assets, and securitizations that make liberal use of prefunding and revolving periods continue to function as, and have the characteristics of, ABS.

- In addition, it is unclear whether the definition as proposed would include securitizations supported by asset pools comprised of (i) balloon loans, such as automobile balloon loans, (ii) insurance premium finance loans, (iii) revolving credit lines with no term limits but that can be terminated at any time and (iv) dealer floorplan loans that are payable on demand.

- The definition of "asset-backed security" should also embrace synthetic securitizations while recognizing that additional disclosure concerning the reference asset or index would be necessary.

- The use of "series trusts" seems entirely consistent with the fundamental principles underlying the definition of "asset-backed security" and there appears to be no compelling reason to preclude their use under the alternative regime. In addition, the Commission's stated view could be viewed as precluding a significant array of common securitization structures, including stacked transactions, multi-tiered REMICs, "origination" or "titling" entities, and multiple pool issuance trusts. Many of these securitization structures have been used for a decade or more and a prohibition on their use would have an immediate, adverse impact on a significant portion of the ABS market.

We understand that the Commission may wish to continue to use a more restrictive definition of the term "asset-backed security" for purposes of Form S-3, though even in that context we strongly recommend that the proposed bright-line tests be relaxed, revised or, in some cases, eliminated altogether. In addition, we have provided a number of specific comments and observations concerning the application of these bright-line measures in various circumstances.

We strongly urge the Commission to revise the proposed Form S-3 eligibility criteria to eliminate the proposed extension of the reporting compliance requirements to issuing entities established by a common sponsor as we believe this proposal would carry with it unworkable, unjust and, at times, draconian results. We also request that the Commission establish certain exemptions from the timely reporting requirement in the case of good faith immaterial, inadvertent or involuntary delinquencies. In addition, we ask the Commission to clarify and confirm, consistent with long-standing practice and existing rules and regulations, that these

reporting compliance requirements are applicable only in connection with the filing of a registration statement or post-effective amendment thereto and do not intervene to prevent a takedown off a currently-effective Form S-3 registration statement.

Finally, we encourage the Commission to exempt market-making transactions from the registration provisions of the Securities Act or, at a minimum, to exempt any such transactions where the subject ABS are rated investment grade as of the date of such resale or the purchaser is an institutional investor. In addition, we urge the Commission to affirm long-standing staff guidance concerning the maintenance of a current market-making prospectus.

DISCLOSURE

We strongly agree with the Commission's view that a principles-based approach provides the best framework for disclosure in the context of ABS. While we agree with the general focus of the disclosure requirements included in proposed Regulation AB, we believe that some of the disclosure standards are much too rigid and specific for a principles-based approach, even when prefaced with "if material" or "to the extent material." We are very concerned that the rules, as drafted, would require or encourage excessive information and detail that goes well beyond current disclosure practices and appropriate standards of materiality.

Proposed Regulation AB would also substantially increase disclosure relating to third parties unaffiliated with ABS issuers. By comparison to corporate issuers, ABS issuers are uniquely dependent upon information provided by unaffiliated third parties in order to satisfy disclosure requirements arising under the Securities Act and the Exchange Act. As a result, we are requesting that the Commission adopt a rule recognizing that an ABS issuer may reasonably rely on any information provided by unaffiliated third parties in connection with the preparation of any prospectus, report or other material filed with the Commission. Additionally, we are requesting that the Commission clarify and confirm that its opinion concerning the unenforceability of certain indemnification provisions does not apply in any case where an ABS issuer or underwriter, on behalf of itself, or its directors, officers or controlling persons, seeks indemnification from an unaffiliated third party for liabilities arising under the Securities Act in connection with the use by such issuer or underwriter of information provided by such unaffiliated third party. We believe that these indemnification arrangements do not raise public policy concerns and, in fact, serve to advance public policy by holding responsible the party who controls and provides the information.

Our principal comments on proposed Regulation AB are summarized as follows:

- We request that the Commission revise Item 1100(b)(1) to allow for the presentation of delinquency experience data in 30-day increments until an asset is 90 days or more delinquent.

- We request that the Commission amend the Form S-1 registration statement to permit incorporation by reference for the purpose of updating the registration statement to include exhibits executed after effectiveness.

- We request that Item 1102 be revised to permit class-specific information to be presented in the summary, or in a separate table appearing immediately preceding the summary, instead of the outside front cover page to the prospectus.

- We propose that certain revisions be made to the definition of "sponsor," and that an instruction to the definition be included, to ensure that the person or persons that actually organize and initiate an ABS transaction are identified as such.

- We request that the Commission eliminate in its entirety Item 1106(i) (regarding disclosure of the "amount paid" for the pool assets) as not being a meaningful concept in many securitizations and, in any event, not relevant to investors.

- We request that the definition of "servicer" be revised to distinguish traditional servicing from bond administration and to significantly reduce the level of information required in the latter case.

- We propose that the disclosure requirements included in Item 1107 should apply only to those servicers and master servicers that are contractually responsible to the issuing entity for the performance of servicing activities and that the appropriate threshold triggering the more detailed disclosure set forth in Item 1107 should be increased from 10% to 25%. We also urge the Commission to revise Item 1107 to reflect a more principles-based approach to servicer disclosure requirements.

- We request that a definition of "master servicer" be added to proposed Regulation AB and that a significantly reduced level of information be required in the case of master servicers that perform only a monitoring or oversight function regarding the activities of servicers who are servicing pool assets.

- We propose a definition of "originator" and that the appropriate threshold triggering disclosure requirements for originators should be increased from 10% to 25%.

- We request that the Commission revise Item 1108 to distinguish between indenture trustees, which have fiduciary obligations to holders of ABS, and owner trustees, which typically have no such obligations and which have only ministerial responsibilities.

- We request that the instruction to Item 1110(a)(6) be revised to limit the disclosure requirement to the material potential effects of such state or local laws, and then only to the extent that such effects are not otherwise disclosed in respect of such laws generally.

- We request that Item 1110(b) relating to material characteristics of an asset pool be revised to remove several provisions that are excessively detailed or overly-inclusive.

- We urge the Commission to eliminate Item 1112(d)(1) (relating to residual or retained interests) because such information is immaterial and proprietary in nature.

- We request that the Commission clarify that references in Item 1113 to enhancement or other support are not intended to include any arrangements obtained by the underlying obligors or lenders in connection with the original extension of credit.

- We request that the requirement in Item 1113(a) that any agreement with regard to enhancement or other support be filed as an exhibit be limited to material agreements.

- We strongly urge the Commission to codify and preserve in Item 1113(b) a more flexible, principles-based disclosure standard, including a standard that recognizes that in certain instances only non-GAAP financial information may be available. We also request that the Commission adopt a similar approach in the case of significant obligors under Item 1111(b).

- We strongly urge the Commission to adopt in Item 1113(b)(2) a materiality assessment regarding derivative contracts that includes a probability assessment. We also propose a ratings-based approach for disclosure regarding derivative counterparties.

- We request certain revisions to Item 1117 to take account of instances where a sponsor is unaffiliated with the subject depositor and issuing entity, and to remove an ill-suited application of the disclosure concept underlying Item 1117.

COMMUNICATIONS DURING THE OFFERING PROCESS

We support the Commission's efforts to codify and simplify the procedures for the use and filing of ABS informational and computational material and strongly encourage the Commission to adopt a more flexible, principles-based description of such material, consistent with the descriptions of that material in the no-action letters. We also strongly recommend that the Commission extend the proposed exemption permitting use of this material to ABS registered on a Form S-1 registration statement.

We request that the Commission amend Rule 134 to include items of information about ABS and ABS issuers that correspond to the items listed for corporate securities and issuers, and also to permit the announcement of limited factual information concerning the scheduling of an offering.

We request that instructions be added to Rule 167(b) indicating that (i) the limited legend prescribed thereby is not exclusive and that other legends may be included to the extent appropriate and as otherwise required by law and (ii) a failure by any party to the ABS transaction and any person authorized to act on their behalf to cause the filing of ABS informational and computational material in connection with an offering does not affect the ability of any other party who has complied with the procedures to rely on the exemption.

We also review the filing requirements and liability framework under the federal securities laws as applied to ABS informational and computational material, and outline specific recommendations to promote a richer flow of timely and useful information to investors. In particular, these recommendations would distinguish material prepared by or at the direction of

the issuer, on the one hand, and derived information prepared and provided by underwriters or dealers without issuer involvement, on the other hand.

We request that the Commission amend Regulation S-T to allow ABS informational and computational material to be filed in PDF direct output format and to recognize such filings as satisfying any filing requirements and, until that time, to continue to allow ABS issuers to file certain ABS informational and computational material under cover of Form SE.

With regard to ABS research reports, we support the Commission's efforts to codify the ABS no-action letter on this subject but urge the Commission to include within Rule 139a an alternative standard, comparable to the more streamlined standard in Rule 139 applicable to seasoned corporate issuers, so long as certain prescribed conditions are satisfied. We also ask the Commission to revise the current conditions for the use of ABS research to eliminate the condition that would require a broker-dealer to make qualitative assessments concerning the adequacy of an unaffiliated issuer's public disclosures. We believe this condition is entirely redundant of regulations such as Regulation FD, Regulation AC and the rules of various SROs, all of which have been adopted since the original no-action letter was issued and each of which allocates responsibility more appropriately.

ONGOING REPORTING UNDER THE EXCHANGE ACT

The asset-backed industry, since its inception, has operated under a modified reporting system developed through Commission exemptive orders and numerous no-action letters. Generally the ongoing reporting system involves the filing of periodic distribution information, reporting of material events by Form 8-K and the filing of an annual report on Form 10-K. We appreciate the Commission's development of the new Form 10-D and rules designed specifically for the ABS industry and the attention that has been given to the special nature of ABS. The proposed rules, while continuing much of the modified reporting system with which the industry is familiar, also introduce new layers of reports and substantially expand the amount and detail of information to be reported on an ongoing basis. The proposed rules also add new provisions relating to servicer compliance assessments and attestations. In Section IV of this comment letter, we address many of the ongoing reporting issues and provide detailed comments.

Our principal comments are summarized as follows:

- We request that ABS issued prior to or within 12 months after the publication date of the new rules be grandfathered and that the current modified reporting system continue to apply to such securities until they mature.

- We propose that the Form 10-D be used only for filing the periodic distribution reports. Other events would continue to be reported on Form 8-K in accordance with the current modified reporting system except that the period within which to report such events would be 15 calendar days from the occurrence of the event.

- We propose that the Exchange Act reports be signed by the depositor or, in the alternative, by the servicer, master servicer, trustee or bond administrator.

- With respect to the assessment of compliance with the servicing criteria, we believe the appropriate way to ensure the consistent scope of the assessment is to apportion the assessment responsibilities. The Commission should place responsibility for the actual assessment directly with each entity responsible for those servicing, master servicing and bond administration functions. We would then expect that the accountants' attestations would relate to the assessments of compliance prepared by those respective entities.

- We do not believe that a registered public accounting firm would be able to attest to the assessments of compliance if the assessments are made by the responsible party in reliance upon assessments made by unaffiliated third parties, which would commonly be the case under the Commission's proposal.

- It is difficult for issuers to prepare and file information through the EDGAR system and it is difficult for investors to use EDGAR. The system should be improved. One way in which it could be improved would be to expand the use of other informational sources and thereby relieve the need to provide extensive filings through EDGAR.

- We strongly support the Commission's suggestion that ABS issuers be permitted to post periodic distribution reports on a website in lieu of filing with the Commission. We note that such a system would be most beneficial if the reports were not required later to be filed with the Commission, but could be covered by the Sarbanes-Oxley certification by reference to the website.

- Overall we find the proposed interpretive rules relating to Section 15(d) reporting to be appropriate, but request that with respect to ABS issued in a year in which no distribution occurs, no Form 10-K should be required for that year.

- We strongly believe that the ability to suspend filing of Section 15(d) reports should not be modified. We do not see any reason to interpret the statutory reporting scheme as applied to ABS more restrictively than as applied to the fixed-income markets generally.

- We request that the Commission continue to recognize combined periodic reports for all issuing entities of a common depositor and that the depositor be permitted to file one Form 10-D for each distribution period with an index allowing the report for any given issuing entity to be readily located.

- The proposed ongoing reporting rules, at numerous places, would require updated information concerning significant obligors or other parties with a specified level of participation in the transaction. We request clarification that such determinations are made at the time of closing and do not change over time with fluctuations in the asset pool.

- We find much of the information proposed to be reported on Form 10-D to be far more in quantity and in detail than is currently the norm in ABS transactions and propose specific changes and the addition of a materiality standard.

- We believe Item 1119(n)(2) of Regulation AB as it is incorporated into Form 10-D goes far beyond current practices and this provision, as well as others requiring extensive, detailed, updated information, is overly broad and should be eliminated.

- We suggest that there should be a recognition with respect to Item 1119(n)(2) and also with respect to other provisions throughout the reporting scheme, that asset pools change over time – due to "organic" or natural causes, and as a result of additions and removals occurring in the ordinary course – and such changes should not cause a complete restatement of the composition of the pool.

- We respectfully request that the Commission revise Item 1100(c)(2) relating to financial information of a significant obligor to provide the required financial information only to the extent such information is known or reasonably available to the issuer.

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COMMENTS REGARDING THE PROPOSALS

I. SECURITIES ACT REGISTRATION

A. Definition of Asset-Backed Security

1. Basic Definition

Currently, the term "asset-backed security" is defined only for purposes of Form S-3 qualification and has worked reasonably well to afford the benefits of shelf registration to a subset, but only a subset, of securities within the structured finance market. Under the proposed rules, the term would continue to be defined for purposes of Form S-3 qualification but would also be defined for the broader purposes of access to the ABS offering regime in its entirety, including applicable disclosure standards and permitted communications practices. Only those securities that satisfy the new definition of ABS would be subject to the alternative regulatory regime.

With its elevated function as a gateway to the alternative regime, the proposed definition would purport to circumscribe the entirety of the registered market for structured securities. It is imperative, therefore, that the definition be flexible and principles-based, capturing the fundamental characteristics that distinguish structured securities from other fixed income securities.[7] We believe that the proposed definition fails to accomplish this important objective and, instead, applies the same restrictive bright-line tests, though modestly relaxed, used for purposes of Form S-3. The Form S-3 definition of "asset-backed security," however, has never been viewed by the market as attempting to define, or otherwise establish parameters for, the entirety of the structured finance market. By employing these bright-line tests for its broader purposes, the proposed definition would, in fact, represent a significant step backwards for the industry by:

(i) relegating some structured securities to the corporate regime or, at best, to the twilight regime currently occupied by ABS, even though these securities function as, and have the characteristics of, an asset-backed security and are otherwise ill-suited to that corporate regime; and

(ii) forcing certain structured securities into the unregistered market and impeding the migration of other structured securities from the unregistered to the registered market.[8]

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[7] As noted by the Commission in Section II of the Proposing Release, fundamental characteristics that distinguish asset-backed securities from other fixed-income securities include a focus on:

(i) the characteristics and quality of the underlying assets, the standards for their servicing, the timing and receipt of cash flows from those assets, and the structure for distribution of those cash flows;
(ii) the legal and structural nature of the issuing entity and the transfer of assets thereto;
(iii) the characteristics and quality of credit enhancement and other support for the underlying assets; and
(iv) the absence of business activities or management of the issuing entity.

[8] The Commission has acknowledged the size and significance of the structured finance market. In 2003 alone, the aggregate issuance of non-GSE ABS grew to approximately $1.05 trillion, and the portion thereof that was U.S. registered was approximately $675 billion, or 64% of the aggregate issuances. (Estimate based on Thomson financial data and TBMA Bond Market Research Quarterly, February 2004).

In the 1992 Release[9] that established the current definition of "asset-backed security," the Commission indicated that a "broad standard has been adopted in order to provide sufficient flexibility and to accommodate future developments in the asset-backed marketplace." We have seen since that time that the Form S-3 definition has not been flexible enough to encompass some of the more significant developments in the ABS market, such as lease-backed securitizations. We believe that the bright-line tests of the proposed definition may restrict innovation in the public ABS market.

We strongly encourage the Commission, therefore, to eliminate any bright-line tests and to adopt a more flexible, principles-based definition of "asset-backed security" for the broader purposes of establishing access to the alternative regulatory regime. We have included a proposed definition in Exhibit B to this letter. This proposed definition would replace the definition set forth in the Proposing Release *in its entirety* (including the additional conditions thereto set forth in Item 1101(c)(2) and (c)(3) of proposed Regulation AB).[10] While we believe that a more flexible, principles-based definition of "asset-backed security" is necessary for its broader purposes, if the Commission decides to continue to use a more restrictive definition employing bright-line and quantitative tests for purposes of Form S-3, we strongly recommend that those bright-line tests be relaxed, revised or, in some cases, eliminated altogether, as described later in this Section I.A.[11]

The following examples illustrate how securities that function as, and have the characteristics of, ABS under a principles-based standard would nonetheless be excluded from access to the alternative regulatory regime.

- *Delinquent Pool Assets:* The Commission's proposed definition of ABS would exclude a security where delinquent assets constitute 50% or more, as measured by dollar volume, of the asset pool at the time of issuance. We agree with the Commission that as the concentration of delinquent assets comprising an asset pool increases, payments on the related structured securities may become more dependent on the entity providing collection services. However, this increased dependence on collection services, while potentially calling for enhanced disclosure with respect to the entity providing such services, does not alter the fundamental nature of the transaction as a structured financing, implicating all of the traditional disclosure standards relevant to an ABS offering. The information that would be material to prospective investors would continue to include information pertaining to the underlying assets, the standards for their servicing and statistical data relevant to the timing and receipt of cash flows, as well as information focusing on the legal and structural nature of the issuing entity and the transfer of the pool assets (*i.e.*, all of the information contemplated by proposed Regulation AB). Conversely, application of the corporate disclosure regime to an issuing entity with no business activities or management, and to a security which by its terms is

[9] Release No. 33-6964 (Oct. 22, 1992) [57 FR 48970] (the "1992 Release").
[10] In presenting our proposed definition, we wish to emphasize the importance of our proposed instruction to that definition, which would make clear that a lease constitutes a "financial asset" for all purposes under the definition, regardless of its treatment under other regulatory regimes. For example, for accounting treatment, certain leases may not necessarily be treated as financial assets.
[11] If the Commission does not adopt our alternative definition of "asset-backed security," these comments would apply to the Commission's proposed definition as used for its broader purposes as well.

non-recourse to any entity with such business activities or management, would not operate to provide any of the information that investors would want to know in making an informed investment decision. In short, while the Commission has applied, and under the proposed regime would continue to apply, a delinquency concentration threshold as a condition to shelf registration for ABS, we do not believe that any such threshold should apply more broadly under the proposed ABS regime.[12]

- *Non-Performing Pool Assets, Lease-Backed Securitizations and Residual Values, Exceptions to "Discrete" Requirement:* We strongly believe that the principles underlying the above illustration apply with equal force in the context of structured securities supported by pools comprised of non-performing assets, lease-backed securitizations (regardless of the percentage of the cash flows servicing the securities that arise through disposition of the residual underlying asset), and securitizations employing master trusts, pre-funding accounts and revolving periods (regardless of the percentage of additional assets which may be added to the asset pool or the duration of the addition period). In each of these cases, while enhanced disclosure may be warranted concerning specific attributes of the asset pool, the transaction structure or the parties to the transaction, under any principles-based analysis the securities continue to function as, and have the characteristics of, ABS.[13]

- *"Synthetic" Securitizations:* We believe that the principles illustrated above should also apply to so-called "synthetic" securitizations. While we believe the Commission has correctly identified characteristics of such structured securities that distinguish them from their non-synthetic counterparts, their exclusion from the entirety of the ABS offering regime seems unwarranted. Synthetic securities clearly raise special disclosure considerations concerning the reference asset or index but, again, these securities continue to function as, and have the characteristics of, ABS.

  In addition, in the case of synthetic securitizations, the Commission appears to be focused on the payment terms of the structured securities, which are typically contingent upon the performance of the reference asset or index. However, the definition of ABS, both currently and as proposed, focuses on the characteristics of the asset pool and not on the

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[12] We believe it is worth noting that, while enhanced disclosure concerning the entity providing collection services may be required, any such offering would be registered on Form S-1, thereby affording the Commission staff the opportunity under its selective review system to review the registration statement and prospectus in advance of sale.

[13] In the case of structured securities supported by non-performing assets, as the percentage of non-performing assets comprising an asset pool increases, payments on the related structured securities may become more dependent on the entity providing collection services (similar to delinquent assets), prompting enhanced disclosure concerning the entity performing such services but in no way altering the fundamental character of the security as an ABS. Similarly, in the case of structured securities supported by leases and the residual value of underlying collateral, as the percentage of cash flows anticipated to come from residual values increases, payments on the related structured securities may become more dependent on the capability and performance of the entity responsible for converting the residual value into cash, but the fundamental character of such securities as ABS is not altered. Lastly, in the case of structured securities involving master trusts, pre-funding accounts and revolving periods, as the percentage of the asset pool that is permitted to change increases, payments on the related structured securities may become more dependent on the eligibility criteria for additional assets and the capability and performance of the entity responsible for generating assets in accordance with such criteria, but the fundamental character of such securities as ABS remains constant.

absolute or contingent nature of the payment terms on the ABS.[14] In most synthetic securitizations, consistent with the definition of "asset-backed security," the primary pool assets, including the swap or other derivative instruments comprising the asset pool, are self-liquidating assets and, at all times during the life of the ABS, operate as the source of payment on the ABS. We respectfully submit, therefore, that the definition of "asset-backed security" should embrace synthetic securitizations while recognizing that additional disclosure concerning the reference asset or index would be necessary.

- *Other Examples:* Securitizations supported by asset pools comprised of (i) "balloon" loans, such as automobile balloon loans, which are similar to leases and permit the obligor to satisfy the balloon payment by returning the vehicle, (ii) insurance premium finance loans, which are one-year loans that are typically securitized using a multi-year revolving period, (iii) revolving credit lines with no term limits but that can be terminated at any time and (iv) dealer floorplan loans that are payable on demand, should also be included within the definition of "asset-backed security" but it is unclear whether they would be so included under the definition as proposed.

2. Discretionary Authority Regarding ABS Definition

After more than a decade, experience has shown all of us that the definition of "asset-backed security," even though intended to be read flexibly, may operate to exclude a structured security if for some reason the securities technically do not meet the definition.[15] While this is all the more likely in the context of a definition comprised of bright-line tests, it is also possible under a principles-based definition. We are at a juncture where the ABS market would move from a twilight regulatory regime comprised largely of informal guidance and interpretations to a codified alternative regulatory regime comprised of specific rules, regulations and forms. We respectfully request, therefore, that the Commission incorporate into the definition of "asset-backed security," or adopt by separate rule, a provision that operates to delegate to the Commission staff the authority and discretion to permit any issuer or class of issuers, upon such terms and conditions and for such period as it deems necessary or appropriate, to treat any security issued by such issuer or class of issuers as an "asset-backed security" for some or all purposes under the alternative regime, including use of Form S-3.[16]

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[14] In making this observation, we are by no means suggesting that the definition of "asset-backed security" should focus on the payment terms of the securities as a defining characteristic. As the Commission has recognized, the payment terms of ABS, as with many corporate debt instruments, run along a spectrum from fixed obligations to pay sums certain to highly contingent residual interests in variable future cash flows. An investor's investment return and the issuer's payment obligations evidenced by these instruments often are contingent on, and highly sensitive to, changes in the values of underlying assets, indices, interest rates and cash flows. *See* Release No. 33-7086 (Aug. 31, 1994) [59 FR 46304].

[15] The Commission itself recognizes this in Section III.A.1. of the Proposing Release where it observes that offerings are sometimes registered on Form S-1 or Form S-11 ". . . if for some reason the securities technically do not meet the definition of 'asset-backed security'. . . ."

[16] The Commission staff exercised similar authority by means of a no-action letter relating to the current definition of "asset-backed security" for purposes of compliance with the disclosure certification requirements contemplated by Section 302 of the Sarbanes-Oxley Act and Exchange Act Rules 13a-14 and 15d-14. *See* Mitsubishi Motors Credit of America, Inc. (Mar. 27, 2003).

3. Nature of the Issuing Entity

a. "Passively" Owning or Holding Pool Assets

As set forth in the Proposing Release, the definition of "asset-backed security" is comprised of a "core" definition, as supplemented by a series of staff interpretations that would be codified as additional conditions to the proposed definition. One of these conditions would require that the activities of the issuing entity be limited to "*passively* owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto." [Emphasis added.]

We acknowledge and agree that the activities of an issuing entity are typically restricted to those that relate to one or more ABS transactions. We are, however, surprised by the proposed requirement that the issuing entity own or hold the pool of assets "passively," as we have never been aware of any such staff interpretation, implied or otherwise, and are uncertain of its intended meaning in this context.[17]

If, for example, the Commission intends the term "passively" to restrict the issuing entity from actively managing the pool assets (*i.e.*, for the purpose of realizing gain or decreasing loss resulting from market value changes), this matter would seem to be fully addressed by codification of the first staff interpretation set forth in the Proposing Release – that neither the depositor nor the issuing entity be an investment company under the Investment Company Act of 1940.[18]

We respectfully request, therefore, that the term "passive" be omitted from the proposed condition to the definition of "asset-backed security," as being more restrictive than the current requirements for registered ABS offerings. We also believe that omission of the word "passive" does not diminish the effectiveness of the proposed condition in limiting the activities of an issuing entity to those related to one or more ABS transactions.

b. "Series Trusts"

In footnote 63 to the Proposing Release, the Commission sets forth its view that "series trusts," which are recognized under the Delaware Statutory Trust Act,[19] would not qualify as

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[17] It seems appropriate, on the one hand, to conclude that an issuing entity is "passive" where its activities are limited to (i) owning or holding the pool of assets, (ii) issuing the ABS supported or serviced by those assets, and (iii) other activities reasonably incidental thereto. On the other hand, we do not understand what is intended by a requirement that the pool of assets be owned or held "passively." In the former case, "passive" is used to describe the issuing entity as a result of its restricted activities; in the latter case, "passive" is used to describe the activities themselves.

[18] In addition, while we are expecting that it is not the case, if the term "passively" is also intended to modify the phrase "issuing the asset-backed securities supported or serviced by those assets," we are similarly unaware of any staff interpretations to such effect and are uncertain of its intended meaning. If the term "passively" is retained (a result to which we strongly object), and if the term is intended to also modify the clause concerning issuance of the ABS, we believe that, in addition to general clarification, confirmation should be provided that this requirement does not preclude master trust structures that issue ABS from time to time or amortizing trusts that issue ABS at more than one time through prefunding, revolving periods or otherwise.

[19] 12 Del.C. §3806(b)(2).

"asset-backed securities" under the proposed definition, apparently because the activities of the issuing entity are not limited to owning and holding one asset pool and issuing securities backed by that pool. We believe that this interpretation of the limitations on the activities of the issuing entity is unnecessarily restrictive. The issuance by one issuing entity of separate series of securities, one or more of which are backed by one asset pool while others are backed by other pools, seems entirely consistent with the fundamental principles underlying the definition of "asset-backed security," including the restriction on the general character of the issuing entity's activities. In addition, each outstanding series of securities would be backed by a discrete, self-liquidating pool of financial assets, without management or business activities. As a result, there would appear to be no compelling reason to preclude the use of such issuing vehicles under the alternative regime.

On a more practical level, series trusts represent a further step in the market's efforts to produce increasingly efficient structures by which a sponsor can conduct multiple issuances from a single platform, thereby enhancing market recognition and branding under a single program name and eliminating redundant fixed costs that would otherwise arise through the maintenance of separate platforms and issuing vehicles. We respectfully submit, therefore, that series trusts should be included within the definition of ABS so long as the issuing entity's activities are limited to owning or holding one or more pools of assets, issuing ABS supported or serviced by the assets of one or more of such asset pools, and other activities reasonably incidental thereto.

Moreover, as illustrated below, we are very concerned that the language in footnote 63 could be read to preclude a significant array of common, current securitization structures, most of which have been used for a decade or more and are completed "off the shelf" currently. While we encourage the Commission to embrace the concept of series trusts generally, we in any event request that the Commission confirm that securitizations of the type described below are not considered "series trusts" and that such securitizations are not otherwise intended to be excluded from the definition of "asset-backed security" or the shelf registration system. We believe that any other interpretation would have an immediate, adverse impact on a significant portion of the ABS market.

- *Stacked Transactions:* The language in footnote 63 could be read to preclude a number of common, current structures in the commercial mortgage-backed, residential mortgage-backed and home equity loan-backed securities markets, where a single trust or other issuing vehicle issues securities backed by a loan pool that is comprised of two or more discrete loan groups. Those structures include securities where (i) each class of the highest-rated classes is payable primarily from the cash flows from one loan group but the excess cash flows from each loan group cross-collateralize the other groups of comparably-rated securities for losses or other shortfalls, (ii) each class of the highest-rated classes is payable primarily by one loan group but the credit enhancement is in the form of subordinated securities that represent interests in all loan groups, (iii) each class of the highest-rated and lower-rated securities is payable primarily from the cash flows from one loan group with limited cross-collateralization for specified types of losses or other shortfalls, and (iv) each class of securities is payable only from the cash flows from one loan group with no cross-collateralization.

- *Multi-Tiered REMICs:* The language in footnote 63 could also be read to preclude a common structure used in the commercial mortgage-backed and residential mortgage-backed market for securities where multiple REMIC elections are made with respect to a single trust or other issuing vehicle in order to structure the desired classes of securities in a manner that complies with the REMIC rules. In multiple REMICs, for tax purposes, the loan pool will be designated as a REMIC, which REMIC may form interests that in turn comprise another pool of assets designated as another REMIC, which in turn may form interests that are structured in the desired manner for offering to the public (a double REMIC) or may comprise another pool of assets that forms interests that are structured in the desired manner for offering to the public (a triple REMIC), and so on. The interests that are formed by one REMIC and that comprise the assets of another REMIC are rarely, if ever, certificated.[20]

- *"Origination" or "Titling" Entities:* As noted by the Commission in Section III.A.6.c. of the Proposing Release, in some motor vehicle lease transactions, the motor vehicle leases and titles often are originated in the name of a separate trust, limited liability company or other entity, often referred to as an "origination" or "titling" trust, to avoid the administrative expenses in re-titling the vehicles underlying the leases in connection with securitizations and other funding transactions. The origination trust issues to the issuing entity for the ABS a certificate, often called a "special unit of beneficial interest" or SUBI, representing a beneficial interest in a discrete pool of leases and automobiles held by the origination trust that is to constitute the asset pool for the ABS. The origination trust will repeat this arrangement for each securitization and, as a result, the same origination trust will be comprised of multiple asset pools and will issue multiple SUBIs, each of which is backed by a discrete asset pool. Based on the Commission's discussion and treatment of these origination trusts in Section III.A.6.c. of the Proposing Release, we do not believe the Commission intended to exclude such securitization structures from the definition of "asset-backed security" or from the shelf registration system.

- *Multiple Pool Issuance Trusts:* As further noted by the Commission in Section III.A.6.c. of the Proposing Release, some credit card master trust structures, as well as some dealer floorplan structures, have incorporated an "issuance trust" structure, where a previously existing master trust or limited liability company issues to such issuance trust an interest often referred to as a "collateral certificate," representing a beneficial interest in the pool of credit card receivables or floorplan receivables held by the master trust or limited liability company. The issuance trust then issues its own ABS backed by the collateral certificate and, therefore, indirectly by the asset pool of the master trust or limited liability company. Most of these issuance trusts are currently structured to allow the issuance trust to create additional asset pools and to issue multiple series of ABS, each of which is backed by a discrete asset pool, or where one or more of such series are linked by means of one or another form of cross-collateralization among two or more of the asset pools. While the asset pool initially created for the issuance trust consisted of a

[20] These REMIC interests have no force and effect for any purpose, other than for tax purposes as a mechanism to satisfy technical requirements under the REMIC rules.

collateral certificate representing a beneficial interest in a particular master trust, asset pools subsequently created for the issuance trust may consist of, *e.g.*, credit card receivables or other "whole" assets, a collateral certificate representing a beneficial interest in another trust, or a combination of the two.[21] Based on the Commission's discussion and treatment of issuance trusts in Section III.A.6.c. of the Proposing Release, we do not believe the Commission intended to exclude such securitization structures from the definition of "asset-backed security" or from the shelf registration system.

4. Delinquent and Non-Performing Pool Assets

Two additional conditions to the proposed definition of "asset-backed security" would require that no "non-performing" assets be a part of the original asset pool at the time of issuance of the ABS and that "delinquent" assets not constitute 50% or more, measured by dollar volume, of the original asset pool at the time of issuance of the ABS. For purposes of Form S-3, the threshold for delinquent assets would be reduced from 50% to 20%.

For the reasons set forth above in Section I.A.1. of this letter, we respectfully submit that such conditions to the proposed definition are unwarranted and unduly restrictive for the broader purposes of determining access to the ABS regime. However, if the Commission decides to continue to use a more restrictive definition employing bright-line and quantitative tests for purposes of Form S-3, we offer the following observations and comments on these conditions to the definition of "asset-backed security."

a. Non-Performance/Delinquency Tests Performed on "Original" Asset Pool at Time of ABS Issuance

The rule proposals contemplate that the non-performance and delinquency tests would be applied to "the original asset pool at the time of issuance of the [ABS]." Footnote 66 to the Proposing Release indicates that a cut-off date may be employed as the date on which non-performance and delinquency levels may be established and suggests that a "cut-off date" may include "the date on and after which collections on the pool assets accrue for the benefit of the ABS holders." We have the following comments on these provisions.

- The reference to the "original" asset pool in these provisions is unclear, particularly in the context of master trusts, where additional assets may be assigned to the issuing vehicle from time to time, independent of the timetable for the issuance of any particular series of ABS. We respectfully submit that this ambiguity could be most easily addressed by simply deleting the word "original." In light of the subsequent reference to "the time of issuance of the [ABS]," this deletion would not appear to alter the intended effect of the provision.

[21] The issuance trust structure includes this flexibility for important business reasons. For example, in the context of a credit card securitization platform, the underlying older master trust may take several years to wind down (as its outstanding series of ABS amortize) while the newer issuance trust is ramping up. During this period, the common depositor may seek to designate receivables arising in newly-originated credit card accounts to one asset pool in the issuance trust while the collateral certificate from the master trust is designated to another asset pool.

- The textual and footnote discussions referenced above, which indicate that a "cut-off date" is a proper measuring date for non-performance and delinquency, should be clarified, particularly as applied in the context of master trusts. Most master trust transactions do not employ the concept of a "cut-off date" in relation to the issuance date of any particular series of ABS. In addition, the date on and after which collections on the pool assets accrue for the benefit of a master trust series of ABS, which is the standard suggested in footnote 66 to the Proposing Release, is often the date of, or a date immediately prior to, the closing date for the transaction. As the offer and sale of the subject master trust securities in reliance on the ABS regime would have already occurred by such a determination date, it would be highly impractical to use such date as the reference point for determining eligibility for the ABS regime. We would propose, therefore, that in the context of master trusts, the proper measuring date for non-performance and delinquency should be the date as of which such information is disclosed in the prospectus or, if applicable, the date as of which such information is disclosed in the most recent distribution report relating to the subject asset pool that is delivered to security holders in accordance with the transaction agreements, whichever is later.

- We also request clarification generally about whether dates other than cut-off dates may be used as the measuring date for non-performance and delinquency. Footnote 66 to the Proposing Release seems to suggest that a cut-off date is a proper, but not necessarily an exclusive, reference point for these measures. As noted above, at a minimum, we believe the approach described above for master trusts should be acceptable.

b. Definitions of "Non-Performing" and "Delinquent"

With regard to the defined terms "non-performing" and "delinquent," we have the following comments.[22]

- Policies relating to the treatment of an asset as "non-performing" or "delinquent," as well as policies for grace periods, re-aging, restructuring and the like, vary across asset categories and within asset categories from one sponsor to the next.[23] The proposed definitions for "non-performing" and "delinquent," however, each include one or more provisions intended to establish uniform benchmarks across the ABS market for delinquency and re-aging practices.

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[22] As applied to a pool asset, the term "non-performing" is defined in proposed Item 1101(g) of Regulation AB as ". . . a pool asset if any of the following is true: the pool asset meets the requirements in the transaction agreements for when a pool asset should be charged-off; or the pool asset meets the charge-off policies of the sponsor. A pool asset that is more than one payment past due cannot be characterized as not non-performing if only partial payment on the total past due amount had been made unless the obligor had contractually agreed to restructure the obligation, such as part of a workout plan."
As applied to a pool asset, the term "delinquent" is defined in proposed Item 1101(d) of Regulation AB as ". . . a pool asset . . . if any portion of a contractually required payment is 30 days or more past due. A pool asset that is more than one payment past due cannot be characterized as not delinquent if only partial payment on the total past due amount had been made unless the obligor had contractually agreed to restructure the obligation, such as part of a workout plan."

[23] For example, some originators would not consider an obligor to be delinquent if the obligor has paid at least 95% of the amount due or if the obligor is not more than two months behind in payment of the amount due.

All banks and thrifts that are supervised by the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of Thrift Supervision are subject to the Uniform Retail Credit Classification and Account Management Policy promulgated by the Federal Financial Institutions Examination Council (the "FFIEC Guidelines") and adopted by each such agency.[24] The FFIEC Guidelines establish uniform policies for re-aging, restructuring, extending, deferring, and charging-off open-end and closed-end consumer credit, including loans secured by one to four family residential real estate. More specifically, the FFIEC Guidelines address circumstances in which (i) a potential payment may be treated as a full payment and (ii) a sub-standard, or delinquent, account may be re-aged and returned to current, or performing, status.[25]

For entities that are not subject to the FFIEC Guidelines, re-aging and restructuring practices are typically determined by reference to, and permitted to the extent of, the customary policies and practices of such entity, which in many (but not all) cases are based on the customary policies and practices of entities subject to the FFIEC Guidelines.

As a result, it would be highly impractical to impose a single and, in most cases, alternative standard across all ABS transactions, and in many cases would result in the extraordinarily onerous requirement to track and capture data for the same factor (*e.g.*, non-performance or delinquency) by multiple measures, in order to satisfy different regulatory requirements. It is not possible to accurately estimate the costs associated with implementation of such a requirement across the entire marketplace. However, based on informal feedback from member organizations of the ASF, it is clear that the costs – which would relate to, among other things, the re-programming of computer systems to track and record data regarding non-performance and delinquency on an alternative or additional basis – would be considerable and, therefore, highly impractical. In addition, sponsors that are themselves public companies, and that have reported portfolio delinquency and loss information in their corporate filings based on a different standard than that proposed would have to track the data by multiple measures, and multiple measures may in any event confuse investors in both the ABS and corporate markets.

In light of these impracticalities, we respectfully submit that sponsors should not be required to change their methods of determining non-performance and delinquency, or their policies concerning re-aging and restructuring of non-performing or delinquent assets, and that such methodologies and policies may be effectively monitored through the proposed requirements concerning disclosure of such methodologies and policies, and material modifications, extensions or waivers thereof.

- As a related point, some securitizations include loans that have prior outstanding delinquencies, but as to which recent payment activity meets specified criteria, even

[24] [65 FR 36903] (Jun. 12, 2000).

[25] The FFIEC Guidelines differ in important respects from the benchmarks included in the proposed definitions of "non-performing" and "delinquent." For example, in contrast with the proposed definitions, the FFIEC Guidelines allow open-ended accounts to be re-aged and returned to current status in the context of certain workouts without requiring the borrower to enter into a contractual agreement with respect thereto. *See id*. at 36905.

though a written repayment plan or other formal modification of the loans' payment terms may not be in place. For some loans the relevant criteria would be that the three most recent monthly payments have been timely made. For these loans, the rights to receive the past delinquent payments would be excluded from the issuing entity. As long as these criteria are fully disclosed and the loans with these attributes were quantified, we respectfully submit that such loans should not be considered "delinquent" or "non-performing" for purposes of the definition of "asset-backed security," including Form S-3 eligibility.

- The last sentence of the proposed definition of "non-performing" provides: "A pool asset that is more than one payment past due cannot be characterized as not non-performing if only partial payment on the total past due amount had been made unless the obligor had contractually agreed to restructure the obligation, such as part of a workout plan." This provision, which tracks the substance of a provision in the definition of "delinquent," appears to address the "re-aging" of non-performing assets.

  While we are familiar with, and appreciate the Commission's attention to, re-aging in the context of delinquent assets, we are not familiar with the concept of re-aging in the context of assets that have been charged off. In addition, we believe that the definition of "non-performing" is internally inconsistent in that, on the one hand, an asset is first treated as non-performing only after it has been charged off (generally, when such asset is 180 days or more past due) and, on the other hand, such asset may not be characterized as not non-performing (*i.e.*, as performing) if such asset is more than one payment past due and only partial payment on the total past due amount had been made. As a result of these uncertainties, we are unable to assess entirely the intended effect of the definition and, therefore, we are unable to comment fully on the potential ramifications thereof. Subject to these limitations, on the basis of the observations we have provided, we believe that the last sentence in the definition of "non-performing" should be deleted as unnecessary and as otherwise conflicting with the definition's meaning.

- In some securitizations, particularly those involving revolving assets and master trust structures, the transaction agreements contemplate that the account or other pool asset may remain designated to the pool after being charged off. This is typically done to avoid the administrative expense of "re-flagging" the charged-off asset and also to aid in the identification and proper allocation to the issuing vehicle of "recoveries" on such assets (*i.e.*, amounts collected thereon post-charge-off). In these instances, consistent with their charged-off status, the assets are assigned a zero balance and are not considered in the calculations of future allocations of cash flows under the transaction agreements. The Commission staff has previously confirmed that the presence of a charged-off asset in the asset pool under these circumstances would not cause a security to fail the definition of "asset-backed security." We respectfully request that the Commission provide guidance confirming this staff interpretation in any final rules adopted by the Commission. Any other interpretation could have significant adverse implications for a number of existing securitization platforms and the ABS outstanding thereunder.

In addition, it is often the case for perfection purposes that an originator or sponsor cannot segregate the cash flow from defaulted or delinquent assets from the cash flow from the rest of an asset pool. As a result, some securitization platforms contemplate a higher percentage of delinquent receivables in the asset pool than would otherwise be permitted under the definition as proposed, although no receivables in excess of the percentage threshold permitted under the definition would be funded through the issuance of registered ABS. The Commission staff has previously confirmed that this practice would not cause a security to fail the definition of "asset-backed security." We respectfully request that the Commission provide guidance confirming this staff interpretation in any final rules adopted by the Commission.

- The definition of the term "non-performing" includes the concept of "charge-offs," as the reference point for when an asset becomes non-performing. While the concept of charge-offs is relevant for some asset classes, it is not clear how the concept should be applied in the context of, for example, loans secured by real property or other tangible property, where remedies such as foreclosure or repossession exist. For ABS supported by residential and commercial mortgage loans, the loans continue to be carried as assets and, in general, are not written off in whole or in part until the underlying collateral is liquidated. This is also true for motor vehicle loans and leases, which are generally written off only after the vehicle is repossessed and sold. In many cases, the period of time over which the underlying collateral may be liquidated depends on state foreclosure law. We respectfully submit, therefore, that the definition of "non-performing" should be revised to clarify that, in the context of pool assets secured by underlying collateral, non-performing means a pool asset where there has been a disposition or other liquidation of the underlying collateral following a foreclosure, repossession, or other similar proceeding or action.

5. Lease-Backed Securitizations and Residual Values

The proposed definition of "asset-backed security" would include securitizations backed by leases where a portion of the cash flows supporting the securities will come from the disposition of the assets subject to the leases. Through additional conditions to the proposed definition, the "portion of the cash flow" supporting the ABS that is "anticipated to come from the residual value" of the assets underlying the leases may not constitute, in the case of automobile leases, 60% or more, as measured by dollar volume, of the asset pool "at the time of issuance of the ABS" and, in the case of all other leases, 50% or more, as measured by dollar volume, of the asset pool "at the time of issuance of the ABS." For purposes of Form S-3, the threshold for leases other than automobile leases would be reduced from 50% to 20%.

For the reasons set forth above in Section I.A.1. of this letter, we respectfully submit that such conditions to the proposed definition are unwarranted and unduly restrictive for the broader purposes of determining access to the ABS regime. Lease securitizations, although they involve the additional aspect of disposing of the physical property in the ordinary course and not just after default and foreclosure, are viewed by the market as asset-backed securities. However, if the Commission decides to continue to use a more restrictive definition employing bright-line and quantitative tests for purposes of Form S-3, we offer the following observations and comments on these conditions to the definition of "asset-backed security."

a. Bright-Line Test and Evolving Lease Structures

The Commission indicates that the bright-line tests reflected in the proposed definition are based on current automobile leasing practices, but we respectfully disagree. The proposed bright-line residual value percentage tests are too stringent to encompass all lease-backed products in the market currently, and do not allow flexibility for further market innovation or changes in the industry resulting from consumer preferences and financing technologies. We respectfully request that the Commission reconsider its approach and dispense with any specific residual value percentages and adhere to a "principles-based" approach to ABS with appropriate disclosure tailored to the particular assets and structure.

b. Uncertainties in Calculation of the Percentage Tests

If bright-line residual value percentage tests are retained by the Commission, we have the following comments and requested revisions concerning the calculation of the tests.

- The phrase "portion of the cash flow to repay the securities anticipated to come from the residual value" raises several questions for interpretation. We request clarification that the phrase is not intended to alter the meaning of the two following clauses that specify the maximum percentage of residual value as measured by the "dollar volume of the asset pool at the time of the issuance of the ABS." We also request clarification that the phrase "portion of the cash flow" does not require an analysis of the likely source of the cash flow that will be applied to pay each particular class of securities issued by the issuing entity to determine whether that class constitutes an "asset-backed security." Such an interpretation is likely to create the anomalous result that some but not all classes of securities issued by an issuing entity could constitute ABS. Similarly, interpreting the phrase to apply to all classes issued could result in a triple-A class of securities qualifying as ABS if it were the only class issued, but, if a larger amount of securities (*e.g.*, including lower-rated classes) were issued, a larger portion of the cash flow from the residual assets could be required to pay all of the securities, with the result that none of the securities would qualify as ABS.

  In addition, the term "anticipated" seems to introduce the concept of an analysis of the asset pool based on expected credit losses, expected residual losses and expected purchase rates (where the lessee exercises the purchase option to buy the vehicle at a price equal to the stated residual). Similarly, "cash flow" applied to repay securities in most securitizations includes payments from excess spread and a reserve account and, in some cases, an interest rate swap. We believe the calculation is unnecessarily complex. A requirement to analyze the pool to take into account all these variables, including variables such as excess spread that would not be known until pricing, would mean many lease securitizations will move to the private market to avoid the uncertainty over whether securities issued in a particular lease securitization would qualify as ABS.

- As proposed, the portion of the cash flows supporting the ABS anticipated to come from the residual value of the assets is measured at the time of issuance of the ABS. However, the portion of the outstanding balance of a lease attributable to the residual value of the leased asset increases over the term of the lease as monthly rental payments are made.

The proposed rule would create a bias against the inclusion of older, more seasoned leases with better established payment records in the pool because the inclusion of those leases would increase the portion of the total cash flows derived from the residual value of the leased assets. As such we believe that for purposes of any percentage test the residual value of the leased asset should be measured at the inception of the lease and not at the time of issuance of the ABS.

- In calculating the amount of securities that may be issued against the lease balance of a specific pool, many lease securitization transactions limit the residual value of the leased asset to the lesser of the residual value of the leased asset as set forth in the lease contract and the residual value for that vehicle as determined by an independent third party (*e.g.*, The Automotive Lease Guide ("ALG")). We respectfully submit that the residual value used to determine compliance with any bright-line percentage test should give effect to the same limitations on residual values as are used in the transaction to determine the amount of securities that may be issued against the pool.

We strongly believe that all bright-line percentage tests for residual values should be eliminated. However, if the Commission determines to retain a percentage test, we suggest that the residual value limitation be measured simply as not more than 85% (determined by the method used in the securitization) of the aggregate original lease balances.

c. Residual Value Percentages

- The proposed thresholds for automobile leases of 60% and for all other leases – 50% for Form S-1 and 20% for Form S-3 – would preclude many lease securitizations from the public markets.[26] For example, in commercial vehicle "fleet" lease securitizations, the lease term for the vehicle is typically 12 months (often extendible by the lessee), causing the percentage of the cash flows supporting the ABS that comes from the disposition of the vehicles to exceed 80%. Any such residual value percentage test should be revised to an 85% threshold. In addition, we respectfully request that any such threshold apply for all leases, regardless of the nature of the assets underlying the leases, and for all purposes under the alternative regime including use of Form S-3, as there would appear to be no compelling reason to use a broader definition for only one class of lease products.

- Residual values differ widely by industry. Computer and other high-tech equipment leases tend to have lower residuals due to the risk of obsolescence. Construction equipment agricultural equipment and machine tools tend to have significantly higher residuals. It seems arbitrary and inappropriate to us to deny some assets the ability to be financed through the public securitization markets, or to deny shelf registration to otherwise qualifying issuers, solely because the related equipment tends to hold its value over a longer period of time.

- In addition, we respectfully wish to advise the Commission that the proposed bright-line test may discriminate against smaller originators of vehicle leases in favor of larger

[26] Previous auto lease securitizations on Form S-1 have had contract residual values greater than 60% of the asset pool, measured as the sum of the lease payments and the residuals.

originators. Compliance with the bright-line test will require careful selection of the leases to be included in the pool rather than a random selection. Larger lease originators will have larger portfolios from which to select the pools for securitization transactions. These large originators frequently need to finance only a small portion of their portfolio using term securitizations in the capital markets. By contrast, small originators must frequently finance substantial portions of their lease portfolio with securitizations, either in the public capital markets or in the private market or the asset-backed commercial paper market. Accordingly, smaller originators will not have the same flexibility as larger originators to select pools for securitization in order to satisfy the bright-line tests and may be at a competitive disadvantage in accessing the public markets.

d. Scope of the Term "Automobile Lease"

In footnote 72 to the Proposing Release, the Commission indicates that automobile leases would include motorcycle leases but not leases for leisure craft such as watercraft or snowmobiles. We respectfully request that the Commission clarify that automobile leases would include sport utility vehicle, van, truck, motorcycle and other motor vehicle leases, as the characteristics of the vehicles underlying such leases are comparable to those of automobiles, particularly as they relate to resale values (and, therefore, the need for a higher threshold for the residual value percentage).

e. Status of Leases as "Financial Assets"

The proviso to the proposed definition of "asset-backed security" is limited to "financial assets that are leases," creating what we believe is an unintended implication that some leases might not be financial assets. Our proposed definition of "asset-backed security" in Exhibit B addresses this point.

f. Exclusion of Guaranteed Residuals

Some leases provide that the lessee is obligated at lease termination to pay any shortfall between the sale proceeds of the vehicle and the contract residual. Other lessors may obtain residual value insurance where, for a premium, a third party is obligated to pay the shortfall. In both these cases a securitization of such leases would ultimately bear the credit risk of the party obligated for the shortfall, not the residual value risk of the assets themselves, and we respectfully request the Commission clarify that these structures are excluded from any residual value test.

6. Exceptions to the "Discrete" Requirement

A final set of interpretations set forth in the Proposing Release would codify certain exceptions to the requirement in the definition of ABS that the asset pool be "discrete." These exceptions relate to master trusts, prefunding periods and revolving periods and are intended, in general, to restrict the extent to which the makeup of the asset pool may change from its original composition.

For the reasons set forth above in Section I.A.1. of this letter, we respectfully submit that such limitations on changes to the composition of the asset pool are unwarranted and unduly restrictive for the broader purposes of determining access to the ABS regime. However, if the

Commission decides to continue to use a more restrictive definition employing bright-line and quantitative tests for purposes of Form S-3, we offer the following observations and comments on these conditions to the definition of "asset-backed security."

a. Master Trusts

The proposed definition of "asset-backed security" includes a provision that deems the assets of a master trust to satisfy the "discrete" asset pool requirement so long as the subject ABS offering "contemplates adding additional assets to the pool . . . in connection with future issuances of asset-backed securities backed by such pool." We have the following comments and requested revisions concerning master trusts.

- In most master trusts the depositor is permitted, and in some cases is required, to assign additional assets to the issuing vehicle from time to time irrespective of the timetable for the issuance of any particular series of ABS.[27] As such, we respectfully request that proposed Item 1101(c)(3)(i) of Regulation AB be revised to eliminate references which link the addition of additional assets to the pool with future issuances of ABS backed by such pool. An alternative that would address our concern could read: "The offering related to the securities contemplates adding additional assets to the pool that backs such securities, in anticipation of future issuances of asset-backed securities backed by such pool or otherwise from time to time, and removing assets from time to time, in the ordinary course of administering the pool."

- As indicated by the Commission in the Proposing Release, the proposals would allow master trust structures to meet the definition of "asset-backed security" without any pre-determined limits on the addition of assets. We respectfully request, therefore, that the Commission revise General Instruction I.B.5 to Form S-3 to clarify that ABS offered for cash under master trust structures are eligible for registration on Form S-3, regardless of whether the underlying assets are fixed or revolving in nature. We believe that such an instruction is particularly necessary to avoid the potential confusion that might otherwise arise by virtue of General Instruction I.B.5.(e), which we understand to apply in the context of securities supported by fixed assets that do *not* employ a master trust structure. We respectfully submit that, absent this result, the very reason for employing a master

[27] For example, assume that a credit card master trust with a current asset pool comprised of $5 billion in principal receivables has registered ABS outstanding in an aggregate principal amount equal to $4.5 billion. A residual interest in the asset pool, which fluctuates with the changing balance of principal receivables in the asset pool, would be equal to $0.5 billion on this measuring date. This residual interest is typically retained by the depositor and is often referred to as the "transferor's interest." The depositor to the trust, or the sponsor acting through the depositor, may at any time and from time to time, upon satisfaction of certain conditions, designate additional eligible credit card accounts and transfer the receivables arising therein to the trust in one or more account additions, regardless of whether or when it may conduct another ABS issuance. In addition, in the event that the transferor's interest in the asset pool were to decrease below a minimum level, the depositor would be required to designate additional accounts and receivables to the trust. In each of these instances, the addition of receivables arising in additional accounts would operate to increase both the balance of principal receivables comprising the asset pool and the size of the transferor's interest by a like amount, but such addition of receivables would not otherwise be made "in connection with" any future issuance of ABS.

trust structure – preserving the flexibility to effect multiple issuances of ABS "on demand" from a single issuing entity – will have been eliminated.[28]

b. Prefunding Periods

Another exception to the "discrete" asset pool requirement would permit the use of prefunding accounts, if the prefunding account does not involve in excess of 50% of the proceeds of the offering and the duration of the prefunding period does not extend for more than one year from the initial date of issuance of securities backed by the asset pool. For purposes of Form S-3, the threshold for the prefunded amount would be reduced from 50% to 25%. We have the following comments concerning this provision in the definition of "asset-backed security."

- While the proposed limit on pre-funding for purposes of Form S-3 is consistent with the existing no-action letters on this subject,[29] the Commission staff has previously permitted use of Form S-3 for transactions with pre-funding in amounts well in excess of the 25% limit (and even in excess of 50%) and for prefunding periods of indefinite duration. We respectfully request that the Commission revise the proposed definition to accommodate larger prefunded amounts and longer prefunding periods, and that such revisions be made in a manner that, at a minimum, accommodates existing market practice in the context of shelf registration. In particular, we request that the Commission, at a minimum, eliminate any limitation on the use of prefunding in the context of Form S-1 and revise the limitations in the context of Form S-3 to allow for prefunding periods of up to one year and a prefunded amount of up to 50% of the proceeds of the offering.

  In addition, we respectfully request that the Commission adopt a graduated scale whereby the prefunded amount may be further increased as the prefunding period is shortened. Specifically, in the context of Form S-3, such a graduated scale would permit a prefunded amount not in excess of 50% where a prefunding period may last up to one year, a prefunded amount not in excess of 75% where a prefunding period may last up to nine months, and a prefunded amount not in excess of 100% where a prefunding period may last up to six months.

  We believe that any concerns the Commission may have with a more flexible use of prefunding in the context of Form S-3 should be eased by the following mitigating factors: (i) Item 1110(g) of proposed Regulation AB would require that the prospectus for the subject ABS offering describe the acquisition or underwriting criteria for the additional pool assets to be acquired during the prefunding period and (ii) the subject securities will in each case be rated investment grade by a nationally recognized statistical rating organization ("NRSRO").[30] We believe that these two factors, coupled

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[28] A master trust structure would be stripped of its utility if it were subject to the limitations on revolving periods and the addition of assets contemplated by General Instruction I.B.5.(e).

[29] *See* Letters re Rule 15c2-8(b) No-Action Position from The Bond Market Association (Dec. 15, 2000) (position extended indefinitely); The Bond Market Association (Nov. 20, 1998) (position extended through Dec. 15, 1999); The Bond Market Association (Nov. 14, 1997) (position extended through Dec. 15, 1998); and the Public Securities Association (Dec. 18, 1995) (initial position expiring on Dec. 15, 1997).

[30] As noted by the Commission, the term "NRSRO" would continue to have the same meaning as set forth in 17 CFR 240.15c3-1(c)(2)(vi)(F).

with more than a decade of experience in the use of prefunding, support a more flexible treatment of prefunding under the proposed ABS regime.

- In the context of master trusts, from time to time in the ordinary course, additional assets are added to the asset pool, additional series of ABS are issued, and outstanding series of ABS amortize and terminate. As a result, we believe two interpretations concerning the use of prefunding in the context of master trusts would be both reasonable and appropriate. We respectfully request that the Commission adopt and codify these interpretations.

  First, as the Commission is aware, each series of ABS issued by a seasoned master trust is supported by a pre-existing asset pool the aggregate size of which, measured by dollar volume, is typically many times larger than the principal amount of any one series. Because the rationale underlying the Commission's position on prefunding is based on concerns over the extent to which the composition of an asset pool may change from its original composition, we respectfully submit that, in the context of master trusts,[31] the limitation on the prefunded amount in connection with the issuance of a particular series of ABS should be determined in relation to the aggregate size of the then-existing asset pool, rather than by reference to the offering proceeds of the specific issuance of ABS.[32]

  Second, as noted above, in the context of master trusts, from time to time in the ordinary course additional series of ABS are issued, and outstanding series of ABS amortize and terminate. It is sometimes the case, where an outstanding series of ABS will amortize and be paid in full over the course of several upcoming months, that the depositor may seek to issue a new series of ABS prior to the completion of the amortization and payment in full of the outstanding series, and "prefund" 100% of the receivables balance pending the amortization and payment of the outstanding series of ABS. Similarly, it is sometimes the case, where an outstanding series of ABS will be "defeased" and paid in full in a single month at maturity, that the depositor may seek to issue a new series of ABS prior to the defeasance and "prefund" 100% of the receivables balance as of the date

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[31] Our request that the standard be revised is limited to master trusts. We believe that the standard proposed by the Commission – measuring the prefunded amount in relation to the offering proceeds of the subject ABS issuance – is appropriate for non-master trusts.

[32] By way of illustration, using the example set forth in footnote 27 above, assume that a credit card master trust with a current asset pool comprised of $5 billion in principal receivables has registered ABS outstanding in an aggregate principal amount equal to $4.5 billion. The depositor anticipates adding receivables arising in additional credit card accounts to the master trust over the course of the next six months with an aggregate principal receivables balance equal to or greater than $1 billion, after which the asset pool is expected to be comprised of at least $6 billion in principal receivables (*i.e.*, the current $5 billion plus the additional $1 billion). As a result of favorable market conditions, the depositor would like to issue ABS today "off the shelf" in an aggregate principal amount equal to $1 billion and would do so by pre-funding 50% of the receivables balance required to support the ABS (the other 50% would be funded by the remaining $0.5 billion of principal receivables already comprising the current asset pool that is in excess of the principal amount of the outstanding ABS). Under the proposed prefunding limitations, the depositor would be precluded from completing the transaction off the shelf, since the prefunded amount ($0.5 billion) as a percentage of the offering proceeds ($1 billion) exceeds the 25% threshold. However, the impact of the addition of receivables in additional accounts ($1 billion) on the overall asset pool ($5 billion) represents only a 20% change. We respectfully submit, therefore, that the appropriate measure for the limitation on the prefunded amount for a particular issuance of ABS should be determined in relation to the aggregate size of the then-existing asset pool, rather than by reference to the offering proceeds of the specific issuance of ABS.

of defeasance. In each of these cases, even though a prefunding feature is technically used, the composition of the asset pool as of the issuance date of the new series of ABS and the composition as of the end of the prefunding period would be the same (*i.e.*, prefunding in this case is used to "re-fund" receivables arising in existing credit card accounts as the outstanding funding source amortizes and terminates, rather than to "prefund" receivables arising in additional accounts anticipated to be designated to the asset pool). We respectfully request, therefore, that the Commission confirm that any limitations with respect to prefunding are inapplicable in any context where such prefunding operates merely to "re-fund" the balance of revolving assets already comprising the asset pool.

c. Revolving Periods

The final exception to the "discrete" asset pool requirement would permit the use of revolving periods on an unrestricted basis for receivables or other financial assets that by their nature revolve but, for receivables and other financial assets that by their nature are fixed (*i.e.*, non-revolving), would limit the amount of additional assets that may be acquired during the revolving period to no more than 50% of the proceeds of the offering and the duration of the revolving period to no more than one year from the date of issuance of the subject ABS. For purposes of Form S-3, the threshold for the amount of additional assets that may be acquired would be reduced from 50% to 25%. We have the following comments concerning this provision in the definition of "asset-backed security."

- The use of revolving periods allows issuers to create ABS with longer maturities and weighted average lives than would otherwise be possible because principal collections are reinvested in additional receivables or other financial assets rather than paid to investors on a periodic basis. Without the use of revolving periods, the maturities of any given ABS would be entirely dependent upon the maturity characteristics of the underlying pool assets. ABS backed by assets of naturally shorter maturity, such as insurance premium finance loans (which are one-year loans), of necessity, would be restricted to shorter maturities.

  As noted above, the Commission staff permits the use of revolving periods on an unrestricted basis for receivables or other financial assets that by their nature revolve, thereby allowing issuers to structure some ABS with more flexible maturities to satisfy investor preferences and, indirectly, promoting portfolio diversification. However, investors also have a significant interest in purchasing ABS supported by non-revolving assets (*e.g.*, auto loans, equipment loans and student loans) with longer maturities than are possible without the use of revolving periods. The proposed limitation on the use of revolving periods for non-revolving assets effectively prohibits issuers from issuing publicly-registered ABS matching investor preferences. As a result, this investor demand is met by ABS issued in transactions exempted from registration under the Securities Act. From an investor perspective, the distinction drawn in the rule proposals between revolving and non-revolving assets simply means that the investor may purchase ABS of like maturity, and in only some cases enjoy the benefits of Securities Act registration, including enhanced liquidity.

Moreover, with the enhanced disclosure requirements contemplated by Item 1110(g) of proposed Regulation AB, including in particular disclosure concerning the acquisition or underwriting criteria for the addition of additional pool assets, the proposed restrictions on the use of revolving periods seem wholly unnecessary.

In sum, there is strong investor demand for ABS supported by non-revolving assets with more varied maturity options and such demand is currently met in the unregistered market using disclosure conventions comparable to those contemplated by Item 1110(g). We respectfully request, therefore, that the Commission revise the definition of "asset-backed security" to eliminate *any* restrictions on the use of revolving periods, including for purposes of Form S-3 qualification. If for any reason the Commission is unwilling to accommodate this request, we respectfully request in the alternative that the Commission liberalize the restrictions on the use of revolving periods to the greatest extent possible. In this regard, we request that the Commission, at a minimum, eliminate any limitation on the use of revolving periods in the context of Form S-1 and revise the limitations in the context of Form S-3 to allow for revolving periods of up to three years where the amount of additional receivables or other financial assets to be acquired during the revolving period is determined by reference to a graduated scale. Specifically, in the context of Form S-3, such a graduated scale would permit an amount of additional assets not in excess of (i) 100% of the principal amount of the pool assets (as of the related cut-off date) during the first year of any revolving period; (ii) an additional 75% of the principal amount of such assets during the second year of any revolving period; and (iii) an additional 50% of the principal amount of such assets during the third year of any revolving period, with any unused capacity from one year eligible to be carried forward into subsequent years provided that the aggregate amount of additional assets for such three-year period is not exceeded.

d. General Comment Regarding Exceptions to "Discrete" Requirement

We have the following general comment concerning application of the Commission's exceptions to the "discrete" asset pool requirement in the definition of "asset-backed security."

- The Commission indicates in Section III.A.2.e. of the Proposing Release that "a transaction could employ one or more of these features and still qualify as an "asset-backed security" (referring to the use of master trusts, prefunding periods and revolving periods). We respectfully request confirmation from the Commission that in the case of an ABS where two or more of these features are present, in evaluating whether a depositor has complied with the threshold established by the Commission for each such feature, a depositor may evaluate the impact of each such feature independently rather than cumulatively.[33]

[33] For example, in the case of ABS supported by assets that do not by their nature revolve, and where a depositor intends to use both a revolving period and a prefunding period, we request confirmation from the Commission that a depositor seeking to offer and sell such ABS off the shelf may add additional assets to the asset pool during the prefunding period in an amount up to 25% (or such other amount as the Commission may approve in its final rules) of the offering proceeds and may add additional assets to the asset pool during the revolving period in an amount up

B. Securities Act Registration Statements

1. Presentation of Disclosure in Base Prospectuses and Prospectus Supplements

The Commission proposes to codify in the General Instructions to Form S-3 its current position that, in connection with shelf registration statements where a base prospectus and form of prospectus supplement is included, a separate base prospectus and form of prospectus supplement must be presented for each asset class, and for each country of origin or country of property securing pool assets, that may be securitized in a discrete pool in a takedown of ABS under the registration statement. We have the following observations and comments concerning this proposed requirement.

- The proposed instruction requiring separate base prospectuses and forms of prospectus supplements when multiple asset types may be securitized under a single registration statement is generally consistent with the stated position of the Commission staff as set forth in comment letters during the course of their review of one or another shelf registration statement. However, the Commission staff has from time to time, through various informal interpretations, clarified these requirements as applied in particular cases. We respectfully request that these interpretations be expressly adopted and codified by the Commission and, therefore, be accorded a degree of transparency comparable to that of the proposed rule itself, in order that long-standing market practices developed in reliance on such interpretations be preserved. The staff interpretations referenced above include:

  i. A single base prospectus and form of prospectus supplement relating to all loans secured by residential real estate, regardless of the composition of any particular asset pool, may be prepared for filing as a part of a registration statement. The use of a single base prospectus and form of prospectus supplement for multiple types of residential mortgage loans has been a long-standing market practice, the origins of which pre-date the 1992 Release.[34]

  ii. A single base prospectus and form of prospectus supplement relating principally to a particular asset class, but which also describes one or more additional asset classes that may comprise a portion of the asset pool for a specific takedown transaction, may be prepared for filing as a part of a registration statement. While we are unaware of a set percentage applied by the Commission staff for this purpose, we respectfully request that a 20% threshold be adopted, in order that the rule afford a reasonable degree of flexibility and avoid the unnecessary expense of preparing multiple versions of the prospectus for filing as a part of the registration statement, particularly where any actual asset pool will consist principally (*e.g.*, 80% or more) of the subject asset class. The base prospectus and prospectus supplement prepared in connection with a specific takedown transaction would, of course, include a description of the specific pool assets being securitized.

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to 25% (or such other amount as the Commission may approve in its final rules) of the offering proceeds, calculated independently rather than cumulatively.

[34] *See* footnote 9 above.

iii. A single base prospectus and form of prospectus supplement prepared for filing as a part of a registration statement may describe more than one asset class, provided that the descriptions of each such asset class and any related discussions are presented "in the alternative" and are clearly designated as such (*e.g.*, through the use of brackets around the alternative narrative descriptions and discussions, or through the use of alternative pages describing and discussing each such asset class). The base prospectus and prospectus supplement prepared in connection with a specific takedown transaction would, of course, include a description of the specific pool assets being securitized.

iv. For purposes of this General Instruction to Form S-3, in determining whether two or more asset types comprise a single "class," if the assets in question will be pooled together in a takedown transaction, then they constitute a single class.

v. Where the particular assets in question will not necessarily be pooled together in a takedown transaction, a non-exclusive factor considered by the staff in establishing whether one or more asset classes are involved is the extent to which, were separate prospectuses prepared for each such asset, the disclosure contained therein would remain the same in each such prospectus (other than, of course, the description of the specific terms of the subject asset). The more consistent the disclosure would be, the more likely that the assets will be deemed a single class for purposes of this General Instruction to Form S-3.

- Separate and apart from the staff interpretations described above, but consistent with such interpretations, we respectfully request that the Commission recognize that a single base prospectus and form of prospectus supplement may be prepared for filing as a part of a registration statement for all assets originated, or secured by property located in, jurisdictions sharing similar legal systems (*e.g.*, Australia and the United Kingdom), since the required disclosure concerning each such legal system would be so overlapping.

  In addition, we request that the Commission recognize that a single base prospectus and form of prospectus supplement relating principally to assets originated or secured by property located in one jurisdiction, but which also describes assets originated or secured by property located in one or more additional jurisdictions that may comprise a portion of the asset pool for a specific takedown transaction, may be prepared for filing as a part of a registration statement provided such additional assets do not exceed 20% of the subject asset pool.

2. Legality Opinions for Shelf Offerings

Footnote 85 to the Proposing Release sets forth the Commission's views concerning the filing procedures for tax and legality opinions in connection with offers and sales of securities on a delayed basis "off the shelf." In the case of such delayed offerings, the legality opinion contained in the registration statement as of its effective date often includes assumptions regarding the issuance of the securities that are necessary due to the length of time that may arise between the effective date for the underlying registration statement and the date on which the

related securities are sold.[35] Certain of these assumptions regarding the issuance of the securities have been determined by the Commission staff to represent legal conclusions necessary to the ultimate legality opinion to be rendered.

According to footnote 85, the Commission staff has permitted a legality opinion that contains these legal assumptions to be included in a Form S-3 shelf registration statement as of its effective date, subject to an undertaking by the registrant that it will cause to have filed by means of a post-effective amendment or Form 8-K (and thus incorporated by reference into the underlying registration statement) an "unqualified" legality opinion (*i.e.*, a legality opinion eliminating each legal assumption) and a related consent of counsel with respect to each takedown of securities from the subject registration statement, regardless of the number and frequency of such takedowns.

We respectfully request that the Commission reassess this filing requirement, which we believe results from an unnecessarily rigid interpretation and application of Item 601(b) of Regulation S-K and which introduces additional offering expense to issuers with virtually no marginal benefits to investors.[36] As noted above, the legality opinion contained in a shelf registration statement as of its effective date often includes necessary assumptions regarding the issuance of the securities. In connection with each takedown, however, the underwriting or other purchase agreement requires as a condition to purchase, among other things, that each action or condition underlying these legal assumptions shall have been satisfied, and that the ABS to be issued are legal, valid and, in the case of debt securities, binding obligations of the issuer. In addition, the prospectus clearly discloses to investors that the securities will upon issuance be legal, valid and, in the case of debt securities, binding obligations of the issuer.

We respectfully submit, therefore, that investors are fully protected and that the filing requirements of Item 601(b) of Regulation S-K should be viewed as fully satisfied by including in a shelf registration statement as of its effective date a legality opinion which contains customary assumptions regarding the issuance of the securities, including those necessary due to the length of time that may arise between the effective date for the underlying registration statement and the date on which the related securities are sold. We respectfully request that the Commission confirm that no additional filing requirements with respect to such legality opinions are required if (i) the subject underwriting or other purchase agreement requires as a condition to purchase that the actions or conditions underlying each legal assumption shall have been satisfied and (ii) the prospectus discloses that the subject ABS will upon issuance be legal, valid and, in the case of debt securities, binding obligations of the issuer.

If the Commission is unwilling to adopt the approach described immediately above, we respectfully request in the alternative that the Commission recognize, in lieu of the unqualified legality opinion described in footnote 85, the filing of an opinion (and related consent) of counsel that addresses each legal assumption regarding the issuance of the securities that rendered the

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[35] These assumptions may include, for example, that as of the time of issuance and sale of the subject securities (i) all requisite corporate action will have been taken to authorize the issuance and sale of the securities, (ii) the registrant will be validly existing under applicable state or federal law and (iii) the registrant will have all necessary corporate power and authority to cause the issuance and sale of the securities.

[36] For some more frequent issuers it is estimated that the cost of compliance with this filing procedure may exceed $200,000 annually.

legality opinion contained in the registration statement as of its effective date a "qualified" opinion. In our view, a qualified legality opinion contained in a Form S-3 registration statement as of its effective date, as supplemented at the time of each takedown by an opinion filed on Form 8-K addressing each legal conclusion necessary to such legality opinion for which an assumption was initially taken, is the functional equivalent of the practice described in footnote 85 and is otherwise consistent with the letter and spirit of the rules and regulations of the SEC. In effect, the legal opinion filed in connection with each takedown would operate to release the qualifications contained in the legality opinion filed as a part of the registration statement, resulting in an unqualified legality opinion as it relates to each discrete takedown.

While we strongly believe our initial proposal to eliminate these filing requirements altogether is the superior approach, this alternative filing procedure would at least provide an opportunity for issuers to file an opinion of corporate counsel, rather than special outside counsel, in connection with each takedown transaction, thereby reducing the cost of compliance with this filing requirement without compromising investor protection in any manner.[37]

3. Market-Making Registration

Footnote 86 to the Proposing Release contains a brief discussion regarding the registration of market-making transactions on Form S-3. The subject of market-making registration is not otherwise addressed in the Proposing Release. In footnote 86, the Commission indicates that, as with non-ABS transactions, incorporation by reference of subsequently-filed Exchange Act reports is important in maintaining a current prospectus. The Commission goes on to state that, to the extent such reports do not include current asset pool disclosure, such as pool composition tables, such information should be kept current in the market-making prospectus by filing a new prospectus under Securities Act Rule 424 or through the filing of a Form 8-K with the updated information that is incorporated by reference.

Over the years, the subject of market-making registration has generated substantial dialogue and debate among market participants in both the ABS and non-ABS arenas, as well as between such market participants and the Commission staff. The March 1996 Report of the Task Force on Disclosure Simplification (the "Task Force Report") recommended elimination of the affiliated broker-dealer's prospectus delivery obligation in "regular way" market making transactions in outstanding securities of a Section 12 reporting company.[38] While the Commission has not yet acted on this recommendation, it has acknowledged that prospectus delivery in market making transactions imposes a burden on affiliated broker-dealers.[39]

In the context of ABS transactions, the position of the Commission staff concerning market-making registration has evolved gradually. In the 1980s, when shelf registration became available for the offer and sale of mortgage-related securities, the prospectus would typically include language to the effect that one or more underwriters, including an underwriter affiliated with the depositor, may make a secondary market in the securities. The staff did not begin

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[37] As noted above, for some more frequent issuers it is estimated that the cost of compliance with the current filing procedures may exceed $200,000 annually. These costs would be eliminated under the filing procedures that we are proposing.

[38] *See* Task Force Report at p. 42.

[39] *See* Release No. 33-7606A (Nov. 13, 1998) [63 FR 67174], at n. 138 (the "Aircraft Carrier Release").

imposing market-making registration and prospectus delivery requirements, however, until the late 1980s, and did so then only in the context of non-mortgage ABS. When commercial mortgage-backed securities emerged in the registered ABS market in the early 1990s, the staff began to require market-making registration and prospectus delivery where an underwriter was affiliated with both the issuer and the servicer. Ultimately, the staff extended this position to residential mortgage-backed securities as well.

The position of the Commission staff concerning market-making prospectuses has evolved gradually as well. Contrary to the views expressed in footnote 86 to the Proposing Release, most attorneys practicing in the ABS area would have agreed that a market-making prospectus satisfies the requirements of the Securities Act where the issuer continues to file Exchange Act reports for the subject ABS and the related prospectus incorporates by reference such reports.[40] In cases where the issuer has suspended its reporting obligations under the Exchange Act, the staff has confirmed in at least one instance that a market-making prospectus delivery obligation may be satisfied by delivering the original prospectus, together with copies of at least the most recent distribution report prepared and distributed to investors.[41] On the basis of the view expressed in footnote 86, in order to maintain a current market-making prospectus for the life of the underlying securities, ABS issuers affiliated with both a servicer and a broker-dealer making a market in the subject ABS would be subject not only to ongoing disclosure requirements under the Exchange Act reporting framework but also to extensive and burdensome updating requirements concerning pool composition. By comparison, most other ABS issuers, including those issuing ABS backed by substantially similar collateral, would likely suspend their reporting requirements upon completion of their first fiscal year.

We continue to believe that a general exemption from the Securities Act registration provisions for market-making transactions should be adopted, particularly in the context of the ABS market, where the Commission appears to liken a servicer to a corporate issuer that is presumed to possess material information. If the Commission is unwilling to provide a general exemption from these registration provisions at this time, we respectfully request that the Commission make such an exemption available in any case where (i) the subject ABS are rated investment grade by an NRSRO as of the date of such resale or (ii) the purchaser in any such market-making transaction is an institutional investor.

Until such time as the Commission acts to establish such an exemption, we respectfully submit that the previously-recognized procedures for maintaining a current market-making prospectus as described above should continue to be recognized.[42] In connection with any re-proposal or the

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[40] This view is based on written correspondence and conversations with the Commission staff at various times over several years, typically in the course of the staff's review of a pending registration statement. This approach requires that, in the event that there is a material development concerning the subject ABS that is not otherwise addressed in the periodic distribution reports filed with the Commission, such development must be reported on a Form 8-K current report.

[41] Again, in the event of a material development concerning the subject ABS not otherwise addressed in the periodic distribution reports, information concerning such development would need to be provided by some other means (*e.g.*, by means of a "sticker" supplement to the prospectus).

[42] We believe this result is all the more compelling in light of the Commission's rule proposals in the area of periodic reporting, which would operate to require significantly more updated information in periodic reports than is the case currently.

adoption of any final rules with respect to these ABS rule proposals, we strongly urge the Commission to expressly confirm, by means of a statement to such effect in the related re-proposing or adopting release, the following positions as expressed by the Commission staff, and as understood and relied upon by the ABS market, for many years:

(i) Market-making registration and prospectus delivery is required only in cases where the broker-dealer is affiliated with both the issuer and the servicer for the subject ABS transaction; and

(ii) a market-making prospectus satisfies the requirements of the Securities Act (x) where the issuer continues to file Exchange Act reports for the subject ABS and the related prospectus incorporates by reference such reports and (y) in cases where the issuer has suspended its reporting obligations under the Exchange Act, where the original prospectus is accompanied by a copy of at least the most recent distribution report prepared and distributed to investors.

4. Form S-3 Eligibility Requirements for ABS

a. Investment Grade and ABS Definitional Requirements

The Commission proposes several conditions regarding the types of ABS that would qualify for Form S-3 eligibility. In addition to retaining the existing requirement that such ABS be rated "investment grade" by an NRSRO at the time of offer and sale to the public, four additional conditions are proposed. These conditions would require that (i) delinquent assets not constitute 20% or more, as measured by dollar volume, of the original asset pool, (ii) for securities backed by leases other than automobile leases, the portion of the cash flows to repay the securities anticipated to come from the residual value of the physical property underlying the lease may not constitute 20% or more, as measured by dollar volume, of the original asset pool, (iii) the offering must not contemplate a prefunding in excess of 25% of the proceeds of the offering or that lasts for more than one year, and (iv) with respect to financial assets that do not by their nature revolve, the amount of additional assets to be acquired in a revolving period may not exceed 25% of the proceeds of the offering or last for more than one year.[43] For the reasons set forth earlier in this letter, we respectfully request that the proposed bright-line tests described above be relaxed, revised or, in some cases, eliminated.

b. Extension of Reporting Compliance Requirements

Currently, use of Form S-3 for ABS does not depend on the depositor or any issuing entity established by the depositor having been subject to a reporting requirement prior to such use. However, if the depositor or any such issuing entity has or had an existing or prior reporting requirement during the prior 12 calendar months, use of Form S-3 would be conditioned on all such reporting requirements having been timely satisfied, absent a waiver of such condition from the Commission staff. Under the rule proposals, the Commission would continue to permit use of Form S-3 without imposing a reporting history requirement but would significantly extend the

[43] Our comments on the definition of the term "asset-backed security" as defined for its broader purposes apply with equal force to such term as defined for purposes of Form S-3.

reporting compliance requirement by considering not only the reporting compliance of the depositor and any issuing entity established by the depositor, but also the reporting compliance of any issuing entity established directly or indirectly by a sponsor.

We strongly object to this proposed extension of the Exchange Act reporting compliance requirement. The proposed extension of this requirement as a condition to use of Form S-3 raises a number of concerns, ranging from more substantive, policy-based considerations relating to issues of fundamental fairness to more process-oriented, practical limitations that make the requirement, at best, impracticable. We have the following observations and comments concerning this proposal.

i. Identification of the "Sponsor"

As the proposed extension of the reporting compliance requirement contemplates an assessment of the reporting compliance of each issuing entity established by the sponsor, it is necessary, as a threshold matter, to identify each entity that may be a "sponsor" in order that we can then identify the issuing entities established by such sponsor. It is in this exercise that our first series of important comments on this S-3 eligibility requirement arise.

- The proposed definition of "sponsor" set forth in Item 1101(l) of Regulation AB is vague in at least three important respects,[44] making it difficult to determine which issuing entities' reporting histories would be relevant to the S-3 eligibility determination.

  i. First, it is unclear whether the seller of the assets, or some direct or indirect parent of the seller, would be the sponsor in the context of a particular ABS transaction.

  ii. Second, although the term "sponsor," as proposed to be defined, refers to only one entity, in some securitizations the asset pool will include assets sold or transferred by two or more financial institutions. It is not clear whether, in that context, one or all of the sellers would be "sponsors" of the securitization. Some ABS transactions have as many as seven or eight entities transferring assets to one depositor.

  iii. Third, the term "sponsor" focuses, in part, on the person who "organizes and initiates an [ABS] transaction." In many ABS transactions, the entity or entities that sell assets to the depositor are entirely unrelated to the depositor, and play no role in organizing and initiating the ABS transactions.

- In some ABS programs, the identity of the entity or entities transferring assets changes from one takedown transaction to the next and is not known until the time of the takedown transaction, and, therefore, until after the Form S-3 registration statement has been filed and declared effective. As a result, it is impossible to identify the issuing entities whose reporting compliance would need to be assessed at the time the Form S-3 registration statement is filed.

[44] The proposed definition of "sponsor" is discussed in greater detail in Section II.D.1. of this letter, in connection with our comments on proposed Regulation AB.

ii. Establishing Reporting Compliance and the Potential Far-Reaching and Unjust Consequences of Non-Compliance

Putting aside issues relating to the identification of each entity that may be a "sponsor," we are very concerned that extending the reporting compliance requirement to issuing entities established by a sponsor would be unworkable and would carry with it unintended and unjust consequences. As noted above, some ABS transactions have as many as seven or eight unaffiliated entities transferring assets to one unaffiliated depositor. At the same time, many of these same entities transfer assets to several other unaffiliated depositors each of which, in turn, may transfer the assets to one or another issuing vehicle established by such depositor under entirely unrelated ABS programs. This network of relationships and inter-relationships could potentially result in the same entity being a "sponsor" under any number of unrelated ABS programs. The following points are intended to highlight how this network of multiple "sponsorships" could give rise to countless and complex situations where the reporting compliance of a particular issuing entity, with no nexus to a depositor or ABS program, could nevertheless defeat such depositor's eligibility to file a Form S-3 registration statement. As noted above, we believe that this is not a result intended by the Commission's proposal.

- First, assuming it is even possible to identify the relevant sponsor or sponsors, prior to the filing by a depositor of an S-3 registration statement, the proposed rule potentially would require a seller of assets to review the filings of all the securitizations into which it had sold assets to determine if all of the related depositors had complied with their Exchange Act reporting requirements. This, of course, would raise the cost of completing many ABS transactions to a prohibitive level.

- Second, under the proposed rule, if an issuing entity failed to comply with its Exchange Act reporting requirements, the subject sponsor or sponsors would be effectively prohibited from transferring assets to even an unaffiliated depositor for securitization. Even one failure to comply with its reporting requirements by any depositor to which the sponsor transfers assets (whether affiliated or not) would fully bar the sponsor from the public capital markets for up to a year. In our view, it is neither fair nor appropriate to penalize a sponsor for defects in the compliance record of an unaffiliated depositor.

iii. Establishing Reporting Compliance and the Potential Unjust Consequences of Non-Compliance in the case of a Single, Affiliated Sponsor

Putting aside all of the issues described above, we are also very concerned by the proposal to extend the reporting compliance requirement to all issuing entities established by a sponsor in the straightforward case where a single, affiliated sponsor maintains multiple securitization platforms for registered ABS offerings. We believe the proposed rule would have an overly broad effect on a sponsor that maintains, through different affiliated depositors, several Form S-3 registration statements, each for a different asset class.

For example, we do not believe that a sponsor should be barred from renewing its Form S-3 registration statement for securities backed by automobile loans solely because of a reporting delinquency by an issuing entity indirectly established by such sponsor under a Form S-3

registration statement for securities backed by residential mortgage loans.[45] The two securitization programs operate entirely independent of one another and have absolutely no nexus other than a common sponsor. We also believe the proposal raises questions of fundamental fairness since, by analogy to the corporate market, in a case involving two independent subsidiaries of a parent company, the reporting record of one such subsidiary would in no way impact the other subsidiary's eligibility to use Form S-3 where the only nexus between the two subsidiaries is a common parent.

We believe the Commission may have proposed the extension of the current reporting compliance requirement to close a loophole of sorts that exists potentially under the present rules. Currently, if an issuing entity failed to comply with its Exchange Act reporting requirements, the related sponsor (usually a parent of the related depositor) could continue to use Form S-3 to securitize its assets by establishing a new depositor entity and filing a new Form S-3 registration statement. Extending the current reporting compliance requirement to the sponsor would close this loophole but, as set forth above, would carry with it unworkable, unjust and, at times, draconian consequences.

We respectfully request, therefore, that the Commission revise its Form S-3 eligibility standards to eliminate the proposed extension of the reporting compliance requirement to issuing entities established by the sponsor. We believe that the loophole described above can be closed by adding a condition to Form S-3 to the effect that, where a depositor or issuing entity established by such depositor is precluded from filing a Form S-3 as a result of its failure to satisfy the reporting compliance requirement, until such time as such depositor is again eligible to file a Form S-3, no other depositor affiliated with such depositor may file a Form S-3 to register ABS supported by assets of the same class as those supporting the ABS which gave rise to such failure.[46]

c. Exemptions from Timely Reporting Requirements

i. Reports Relating to Securities Act Updating

The Proposing Release sets forth specific rules relating to the use and filing of ABS informational and computational materials in connection with the offering process for certain ABS offerings. In addition, the proposed rules contemplate the filing of certain "Securities Act updating disclosure" to the extent the composition of the actual asset pool at the time of issuance of a series of ABS differs from the composition of the pool as described in the final prospectus.

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[45] Indeed, such a result could trigger a liquidity crisis for an issuer merely because of an administrative error under a single securitization platform.

[46] We would, however, see the need for two further clarifications concerning such a condition to use of Form S-3. First, in the context of a business acquisition, if a sponsor acquires a depositor that was not in compliance with its Exchange Act reporting requirements prior to the acquisition and such acquisition is not part of a transaction designed to evade the reporting requirements of the Exchange Act, only the acquired depositor and not the acquirer's pre-existing depositors should be ineligible to use Form S-3. Second, if one or more affiliates of the depositor are currently engaged in a pre-existing ongoing securitization platform involving assets of the same class as those supporting the ABS covered by the Form S-3 registration statement under which Exchange Act reports were not timely filed, and such ongoing securitization platform is not designed to evade the reporting requirements of the Exchange Act, such affiliate should not be ineligible to use its separate Form S-3 registration statement or file an new Form S-3 registration statement so long as it independently meets the criteria to file on Form S-3.

In each of these cases, the information required to be filed is permitted to be filed on Form 8-K and, as a result, such information is incorporated by reference into the underlying registration statement (if on Form S-3). Because the information contained in a Form 8-K report filed for either of the above purposes relates uniquely to the offering process for a specific ABS transaction and functions as an update to the underlying registration statement, we respectfully request that the Commission revise the proposed General Instructions to Form S-3 to clarify and confirm that a report that is required to be filed solely pursuant to either Item 6.01 or Item 6.06 of Form 8-K will also be excluded from the timely filing requirement set forth in such General Instructions.

ii. Good Faith Immaterial, Inadvertent or Involuntary Delinquent Reports

We respectfully request that the Commission incorporate into the General Instructions to Form S-3 a provision, similar to that found in each of Rule 165(e) and Rule 508(a) under the Securities Act, to the effect that a good faith immaterial, inadvertent or involuntary failure to file or delay in meeting the timely filing requirements under the Exchange Act would not result in the loss of Form S-3 eligibility.

- *Involuntary Delinquency:* It is often the case, as is increasingly apparent under proposed Regulation AB, that the content and completeness of Exchange Act reports for ABS issuers is dependent on the timely receipt of reports and other information from unaffiliated third parties. For example, where multiple servicers are involved in servicing the pool assets for a particular ABS transaction, a separate servicer compliance statement would be required from each servicer that meets the criteria in Item 1107(a) of proposed Regulation AB.[47] In other cases, all (or virtually all) of the report is prepared by an unaffiliated third party, such as a bond administrator. In the case where a bona fide effort is made to file an Exchange Act report in a timely manner, but such report either is not filed or is filed in an incomplete form as a result of a delay in obtaining, or the inability to obtain, reports or other information from one or more unaffiliated third parties, we believe that the failure to file or delay in filing such Exchange Act report should be deemed "involuntary" and, therefore, should not affect the Form S-3 eligibility of the subject depositor.

- *Immaterial or Inadvertent Delinquency:* Under the proposed Form S-3 eligibility requirements, the potential consequences to issuers of even one delinquent filing – loss of on-demand registration and, therefore, drastically restricted access to the public capital markets – could be quite severe. In the absence of a provision that takes into account immaterial or inadvertent failures to file or delays in filing, we believe that these consequences are unduly harsh, particularly in their failure to distinguish between issuers that are "perpetual offenders" and issuers who may on occasion have good faith unintentional delinquencies.

[47] The proposed definition of "servicer" and the proposed servicer compliance statements are each discussed in greater detail later in this letter, in connection with our comments on proposed Regulation AB.

In this regard, we take exception to the Commission's view that instances where the reporting compliance requirement would not be met are expected to be rare. Outside of the master trust context, one of the hallmark characteristics of the ABS market, and one that markedly distinguishes the ABS market from the corporate market, is the creation of discrete issuing entities in connection with each takedown. As a result, some depositors literally have hundreds of separate issuing entities in existence and many others have a hundred or more separate issuing entities in existence. A corporate issuer may have multiple effective registration statements, each resulting in an overlapping periodic reporting requirement, where a single periodic report will satisfy the issuer's reporting obligations under each such registration statement. By contrast, a depositor for an ABS program may have a single effective registration statement, resulting in as many independent and non-overlapping periodic reporting requirements as the number of separate issuing entities in existence thereunder. For any given periodic reporting period, where a corporate issuer may be obligated to prepare one periodic report, an ABS depositor may be obligated to prepare hundreds.[48] In addition, the sheer heft of an ABS depositor's reporting obligations is only compounded by the frequency of its periodic reporting intervals. Where corporate issuers' periodic reports are made once each quarter, the vast majority of ABS issuers report monthly.

In our view, therefore, it is not only possible but, quite candidly, inevitable that one or another of these issuing entities will from time to time experience a delay in filing one or another periodic report, albeit unintentional. In the case where a bona fide immaterial or inadvertent failure to file or delay in filing has occurred, we believe the failure to file or delay in filing such report should not affect the Form S-3 eligibility of the subject depositor.

In addition, in light of the enhanced reporting requirements contemplated in the rule proposals, there will be some period of time during which good faith filings will be made but such filings may not be entirely consistent with filings of other similar issuers or with the staff's interpretations of the new rules, creating uncertainty about the extent to which one or more of an issuer's periodic reports was "timely" filed.

If the Commission does not exempt such good faith immaterial, inadvertent or involuntary delinquencies from the timely reporting requirements for Form S-3 eligibility, we believe the potential consequences to issuers would be both unjust and draconian. We believe that a loss of Form S-3 eligibility for these reasons is particularly inappropriate in the case of ABS issuers where, in contrast to seasoned corporate issuers, the prospectuses prepared in connection with each takedown transaction are drafted using "Form S-1 level" disclosure and, therefore, without any reliance on the content of the subject Exchange Act reports.

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[48] The proposed requirement that a depositor prepare and file separate periodic reports (rather than a single combined report) for each issuing entity each periodic reporting period is discussed in greater detail later in this letter, in connection with our comments on proposed Regulation AB and the proposed Exchange Act reporting framework.

For all of these reasons, we respectfully request that the Commission incorporate into the General Instructions to Form S-3 a provision to the effect that a good faith immaterial, inadvertent or involuntary failure to file or delay in meeting the timely filing requirements under the Exchange Act would not result in the loss of Form S-3 eligibility.[49]

d. Use of Currently-Effective Form S-3 Registration Statement

In Section III.A.3.c. of the Proposing Release, the Commission indicates that it is codifying its 12-month reporting compliance requirement ". . . for continued Form S-3 eligibility for *new transactions*." [Emphasis added.] We understand the Commission's reference to "new transactions" to refer to takedowns off of a new Form S-3 registration statement that would otherwise have been filed but for the reporting anomaly. Any interpretation to the effect that a reporting anomaly would prohibit new transactions off of a currently-effective Form S-3 registration statement would contradict the express language included in the proposed General Instructions to Form S-3 and long-standing practice in the ABS and non-ABS markets. In addition, any such interpretation would run contrary to the letter and spirit of Rule 401(g) of Regulation C[50] and various interpretations of the Commission staff.[51] We also note, consistent with the policy underpinnings of Rule 401(g), that any interpretation to the effect that Form S-3's 12-month reporting compliance requirement could intervene to prevent a takedown off a currently-effective Form S-3 registration statement would be impossible to police and would call into question whether every takedown transaction might give rise to a violation of Section 5 of the Securities Act due to some unknown defect in a relevant entity's periodic reporting. Finally, in the case of an effective Form S-3 registration statement, we respectfully submit that the Commission has at its disposal various powers, including its authority to issue a stop order pursuant to Section 8(d) of the Securities Act, by which to enforce periodic reporting requirements.[52]

5. Determining the "Issuer" and Required Signatures

Proposed Securities Act Rule 191 would clarify that the depositor for the ABS, acting solely in its capacity as depositor to the issuing entity, is the "issuer" for purposes of the ABS of that issuing entity. We have no objection to the designation of the depositor as the "issuer," at least with respect to ABS issued by domestic entities.

The designation of the depositor as the issuer may not, however, always be appropriate with respect to foreign ABS. Foreign jurisdictions such as Australia have created "managers" rather

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[49] As noted by the Commission in footnote 198 to the Proposing Release, in the context of Rule 165(e), factors to be considered in determining whether a delay in filing is immaterial or unintentional include: the nature of the information, the length of the delay, and the surrounding circumstances, including whether a bona fide effort was made to file timely. We believe the same standards should apply for purposes of Form S-3 eligibility and that, in determining whether a delay in filing is involuntary, an additional factor would include whether there was a delay in obtaining, or an inability to obtain, information or reports from one or more unaffiliated third parties.

[50] 17 CFR 230.401(g).

[51] *See* "Manual of Publicly Available Telephone Interpretations," compiled by The Office of Chief Counsel, Division of Corporation Finance, July 1997, at H.72-73 and B.79; *see also id.* at A.78, B.53-55.

[52] For example, non-compliance with Exchange Act reporting requirements could be used by the Commission as grounds for a stop order in the discretion of the Commission and, therefore, as an enforcement mechanism for such reporting requirements.

than "depositors" to be the issuer on behalf of the trusts created by these managers. We respectfully propose, therefore, that the Commission also include the term "manager" (as set forth in Securities Act Section 2(a)(4)) with the term "depositor" in proposed Securities Act Rule 191 (and Exchange Act Rule 3b-19) as the "issuer," if the applicable laws of the local jurisdiction require that structure.

C. Foreign ABS

We commend the Commission for its actions to alleviate impediments to the shelf registration system for offerings of ABS by foreign issuers or backed by foreign financial assets and whole-heartedly support the Commission's efforts to this end. Consistent with the framework of the federal securities laws generally, we believe that properly crafted disclosure regulations that address pertinent regulatory and other matters relating to the subject ABS and underlying assets should address any concerns that the Commission and its staff may have had historically with such shelf offerings.

D. Proposed Exclusion from Exchange Act Rule 15c2-8(b)

In Section III.A.5. of the Proposing Release, the Commission indicates its intent to codify a series of no-action letters that relieve broker-dealers from a requirement to deliver a copy of a preliminary prospectus to any person who is expected to receive a confirmation of sale at least 48 hours prior to the sending of such confirmation.[53] As with the series of no-action letters, the proposed exclusion would be available only in connection with offerings of investment grade ABS eligible for registration on a Form S-3 registration statement.

We support codification of these no-action letters but believe that the exclusion should also apply to ABS registered on a Form S-1 registration statement where the subject ABS are expected to be rated investment grade as of their issuance date. At the time the Commission initially established the "48-hour rule" of Rule 15c2-8(b) as its policy, it expressed concern with perceived sales abuses arising in connection with initial public offerings of companies with no reporting history, many of which were of a "highly speculative character."[54] The 48-hour requirement was carefully designed to take into account "new and speculative" issues, and the Commission expressly recognized that "the burden placed on issuers by extension of the '48-hour rule' beyond new and speculative issues outweighs the public interest in such an extension" and codified this determination to limit the rule to initial public offerings of a "speculative" character.[55] We respectfully submit, therefore, that the exclusion from Rule 15c2-8(b) should apply to all ABS carrying an investment grade rating, regardless of the form on which such ABS are registered.

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[53] *See* footnote 29 above.
[54] *See* Release No. 33-4968 (Apr. 24, 1969) [34 FR 7235].
[55] *Id*.

E. Registration of Underlying Pool Assets

1. Proposed Exceptions from Disclosure and Delivery Conditions

Proposed Securities Act Rule 190(c) would clarify that, in certain securitization transactions where the asset pool for the subject ABS includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool, no independent disclosure and delivery obligations will arise, although the interest in the underlying asset pool may need to be separately registered in connection with the subject ABS transaction. We respectfully request that the Commission consider codifying two additional interpretations in the context of such securitization transactions.

- First, consistent with current staff practice, we request that the Commission add an additional clause to Securities Act Rule 457[56] codifying the staff's position that, where a filing fee has been paid in connection with the offer and sale of the subject ABS, no additional fee is payable with respect to the interest in the underlying asset pool, notwithstanding its separate registration under the Securities Act.

- Second, in a departure from current staff practice, we request that the interest in the underlying asset pool that is separately registered under the Securities Act in connection with the subject ABS transaction be exempted from the requirement that such interest be rated "investment grade" by an NRSRO at the time of its deemed offer and sale to the public. In each such case, the subject ABS will have received an investment grade rating as a condition to its issuance pursuant to the Form S-3 registration statement. We believe that this additional ratings requirement for the underlying interest is entirely redundant of the ratings requirement on the subject ABS and, therefore, results in additional offering expense with no incremental benefits to investors.

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[56] 17 CFR 230.457.

II. DISCLOSURE

A. Proposed Regulation AB

The Commission is proposing to replace the current informal ABS disclosure framework, which has developed through industry practice and the staff comment process, with a set of disclosure regulations consolidated in one central location aptly called "Regulation AB." Some of these disclosure regulations are appropriately described as "principles-based" and are intended to be tailored by the issuer to the particular transaction and asset-type involved; others are considerably more specific and are intended for more universal application across the spectrum of ABS transactions. We strongly agree with the Commission's view that a principles-based approach provides the best framework for disclosure in the context of ABS and is superior to providing detailed disclosure guidelines on the basis of asset type.[57] We also agree with the general focus of the disclosure requirements included in proposed Regulation AB.

At the same time, however, we feel that some of the disclosure standards in the proposed rules are much too rigid and specific, even when prefaced with "if material" or "to the extent material," and would require or encourage excessive information and detail that goes well beyond current disclosure practices and appropriate standards of materiality. In these instances, we share a concern identified by the Commission that too much detail in the actual rules may obscure and override the underlying disclosure concepts when the rules are applied across the diverse asset types and transaction structures. Our comments are intended to highlight instances where, while bringing greater transparency to ABS, Regulation AB may encourage issuers to produce unnecessarily detailed and immaterial disclosure out of a concern that such information might be viewed as "presumptively material" under the proposed rules.

By encouraging unwarranted additional disclosure, we are also concerned that the rules will significantly increase the amount of time, effort and expense to ABS issuers in preparing a prospectus. In particular, the Commission is proposing very detailed and specific information requirements, and very low disclosure thresholds, for servicers and originators, which, in many cases, may be entities unaffiliated with the issuer. We believe that these disclosure requirements are too onerous and that the related disclosure thresholds are too low.

B. Item 1100 of Proposed Regulation AB – General

1. Presentation of Historical Delinquency and Loss Information

Item 1100(b)(1) of proposed Regulation AB would require disclosure of delinquency experience in 30-day increments, beginning with assets 30-59 days delinquent, through the point that the assets are written off or charged off as uncollectible. We have the following comments and requested revisions to Item 1100(b)(1).

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[57] The ABS market is characterized by massive amounts of data elements that may have relevance in analyzing the origination and servicing of hundreds, thousands or even tens of thousands of discrete pool assets. We strongly believe that it would be highly impractical to attempt to direct the specific data elements that should be disclosed in a prospectus for all ABS offerings or even all ABS offerings within a particular asset sector. Instead, the appropriate data elements should be assessed in the circumstances of the subject ABS program and the specific transaction structure for the ABS offering.

- Currently, delinquency experience is typically presented in 30-day increments until an asset is 90 days or more delinquent and on an aggregate basis for assets 90 days or more past due (*e.g.*, some issuers present delinquencies in increments of 30-59 days, 60-89 days and 90 days or more; other issuers present delinquencies in increments of 31-60 days, 61-90 days and 91 days or more). For the following reasons, we respectfully request that the Commission revise proposed Item 1100(b)(1) to adopt this convention.

  An asset may initially become delinquent for any number of reasons, many of which are not credit related. In the early periods following a delinquency, obligors will in many cases return to a cycle of timely payment in the ordinary course. As the duration of a delinquency extends to 90 days or more, however, it becomes increasingly likely that the delinquency relates entirely to credit-related factors. Presenting delinquency data in 30-day increments until the asset is 90 days or more delinquent, therefore, facilitates differentiating between delinquency data that may relate to non-credit related factors and delinquency data which relates entirely to credit-related factors. Because an asset that is 90 days or more past due is almost certainly delinquent as a result of credit-related factors, we respectfully submit that requiring delinquency experience to be presented in 30-day increments during periods beyond the 90-day mark would provide no incremental benefit to investors but would require a fundamental change in disclosure practices across a broad range of ABS that would carry with it concomitant costs.

  In addition, the proposed approach would be particularly burdensome in the context of ABS supported by residential and commercial mortgage loans, where the loans continue to be carried as assets and are not written off until the underlying collateral is liquidated.[58] In many cases the period of time over which the underlying collateral may be liquidated depends on state foreclosure law. As a result, the standard practice in the mortgage industry is to present delinquencies in the following increments: 30-59 days, 60-89 days, 90 days or more, with this latter period often including the status of foreclosures, bankruptcies and real estate owned. For this additional reason, we respectfully submit that requiring delinquency experience to be presented in 30-day increments after an asset is 90 days or more past due would bring additional and undue burdens to issuers with no incremental benefit to investors.

- As noted above, while delinquency information is shown in 30-day increments, for some asset classes those increments are presented as 31-60 days, 61-90 days and 91 days or more. In addition, in some cases, a 0-30 days increment is included. We respectfully request, therefore, that the Commission revise Item 1100(b)(1) to eliminate the clause "beginning with assets 30-59 days delinquent" appearing in the first sentence thereof. Any other outcome would have extremely adverse results from an issuer cost perspective.

2. Presentation of Certain Third Party Information

Item 1100(c) of proposed Regulation AB indicates that certain disclosure requirements regarding financial information about significant obligors (as required pursuant to Item 1111(b) of

[58] We also discuss these practices in connection with our comments in Section I.A.4.b. of this letter, relating to the definition of the term "non-performing."

proposed Regulation AB) may be satisfied by including a reference to the obligor's Commission filings. We believe, however, that Item 1100(c)(2)(iii) of proposed Regulation AB presents significant difficulties. This item would require that the issuer undertake to either provide the third party disclosure directly or terminate all or the affected portion of the transaction if such significant obligor ceases to satisfy the conditions permitting reference to its public information. Our comments and observations concerning Item 1100(c)(2)(iii) are set forth in detail in Section IV.D.8. of this letter, in connection with our discussion of Item 6 of Form 10-D (requiring updated financial information concerning significant obligors and significant credit enhancers).

3. Filing of Required Exhibits

Item 1100(f) of proposed Regulation AB indicates that where agreements or other documents specified in Regulation AB are required to be filed as exhibits to a registration statement, they may be incorporated by reference as an exhibit to the registration statement, for example, by filing a Form 8-K in the case of offerings registered on Form S-3. We respectfully request that the Commission extend the benefits of Item 1100(f) to ABS registered on a Form S-1 registration statement. To accomplish this, we request that the Commission amend the Form S-1 registration statement to permit incorporation by reference for these purposes.

As discussed in greater detail in Section III.A.2.b.i. of this letter, in connection with our recommendations concerning the use of ABS informational and computational material for ABS registered on Form S-1, incorporation by reference in the context of primary offerings of ABS serves a fundamentally different and more limited purpose than it does in the context of corporate securities offerings. The function of incorporation by reference in this context would be entirely mechanical – as a means to file supplemental exhibits and thereby update a Securities Act registration statement. As a result, the convention of incorporation by reference should not be dependent on the underlying form on which the ABS are registered.

C. Forepart of Registration Statement and Prospectus

Item 1102 of proposed Regulation AB would require that certain basic information concerning each class of securities offered under a prospectus be included on the outside front cover of such prospectus. It is not uncommon in many ABS offerings for numerous separate classes or tranches of ABS to be offered by a single prospectus – sometimes as many as 20 or more tranches. In such cases, it is simply not possible to comply with a requirement to present the class-specific information contemplated by Item 1102 on the cover of the prospectus without, at a minimum, compromising compliance with other Commission regulations, including those arising out of Securities Act Rule 421 following the Commission's "plain English" reforms in 1998. We respectfully request, therefore, that Item 1102 be revised to permit class-specific information to be presented in the summary, or in a separate table appearing immediately preceding the summary, instead of the outside front cover page to the prospectus.

D. Sponsors

1. Definition

The term "sponsor" is defined in Item 1101(l) of proposed Regulation AB to mean "the person who organizes and initiates an asset-backed securities transaction by selling or transferring

assets, either directly or indirectly, including through an affiliate, to the issuing entity." As discussed earlier in this letter in connection with our comments on the proposed Form S-3 eligibility requirements for ABS, the proposed definition of "sponsor" is vague in several respects, making it very difficult to determine who the "sponsor" would be in various situations. The following examples illustrate these difficulties.

- In some ABS transactions as many as seven or eight entities will sell assets to one depositor for subsequent transfer to an issuing entity. In most of these transactions, some or all of the sellers are unaffiliated with the depositor and play no role in organizing or initiating the ABS transactions. The definition of "sponsor," however, links the activities of organizing and initiating the ABS transaction, on the one hand, and selling or transferring the assets to the issuing entity, on the other hand. As a result, in cases where multiple unaffiliated sellers transfer assets to a single depositor, we believe that the depositor is the only appropriate entity to designate as the sponsor of the transaction.

- In other ABS transactions two or more entities affiliated with a depositor may transfer assets originated or purchased by each such entity to such depositor, or each such entity may transfer such assets to separate affiliated depositors, for subsequent transfer by such depositor or depositors to the same issuing entity. The definition, however, refers to a sponsor in the singular, suggesting that only one entity may be a sponsor.

- Still in other ABS transactions the transfer of assets to the issuing vehicle is a three-step process: the financial assets are first transferred by one entity (typically the entity that has either originated or purchased the assets) to an intermediate affiliated entity (often a parent, "sister" or subsidiary), then by such intermediate entity to an affiliated depositor, and finally by such depositor to the issuing entity. While it is unclear which entity in the chain of transfers described above would be the "sponsor" under the proposed definition, we believe that the first entity in the chain of transfers that is an affiliate of the depositor should be the sponsor (*i.e.*, the entity that had either originated or purchased the assets from an unaffiliated person).[59]

- And still in other ABS transactions, a single entity or group of affiliated entities that are unaffiliated with a depositor may sell or transfer assets to the depositor for subsequent transfer to an issuing entity. In some cases the unaffiliated entity or entities will play a role in organizing or initiating the ABS transaction and in other cases they will not. In these instances, the definition may be ambiguous. The entity or entities that originated or acquired the assets are transferring them to a limited purpose entity – the depositor – for securitization, but such entity or entities are unaffiliated with the depositor and played no role in creating the depositor.[60]

Based on the discussions set forth in the Proposing Release, it seems clear that the Commission intends that the definition of "sponsor" focus on the entity that "organizes and initiates" the ABS transaction. In order to identify the person or persons that should properly be characterized as

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[59] In the context of this example, the definition of "sponsor" could be read to include the entity that initiates the chain of transfers as well as each intermediate entity, including the depositor.
[60] *See* Proposing Release, Section II, at n. 44.

the sponsor or sponsors for an ABS transaction, we propose that certain revisions be made to the definition of "sponsor," and that an instruction to the definition be included. We have included a proposed definition and related instruction in Exhibit B to this letter. Our proposed changes are intended to ensure that in each case the person or group of affiliated persons that actually organize and initiate the ABS transaction, whether or not affiliated with the depositor, are identified as the sponsor or sponsors for the transaction.[61]

E. Issuing Entity and Transfer of Asset Pool

Item 1106 of proposed Regulation AB would require that certain information concerning the nature of the issuing entity and the transfer of the pool assets be disclosed in the prospectus. We have the following comments on Item 1106.

- *Item 1106(i):* Item 1106(i) of proposed Regulation AB would require that the prospectus disclose information about the purchase price for the pool assets, the principles followed and persons responsible for determining the purchase price, and the relationship of such persons to various parties involved in the origination and transfer of the assets and the sale of the ABS, including any underwriter. We have two principal concerns with this provision.

  First, the concept of an "amount paid" by an issuing entity for the pool assets is not particularly meaningful in many securitization platforms. For example, as discussed in Section I.A.4.a. earlier in this letter, in most credit card master trusts the depositor is permitted to assign additional assets to the issuing vehicle from time to time irrespective of the timetable for the issuance of any particular series of ABS. In this instance, the addition of receivables arising in additional accounts would operate to increase both the balance of receivables comprising the asset pool and the size of the depositor's retained interest in the master trust. There is no concept of an "amount paid" in this illustration – $100 of principal receivables, for example, are transferred to the master trust, resulting in a corresponding increase in the balance of principal receivables in the trust and in the depositor's retained interest in the master trust.

  Second, even where the concept of an "amount paid" may be ascertainable, this information is not relevant to ABS investors and should not be required disclosure. The "amount paid" is simply the amount of funds raised in the offering together with any securities retained by the depositor.

  We respectfully request that the Commission eliminate Item 1106(i) in its entirety as not material to an ABS investor.

[61] This broader reading of the term "sponsor" underscores our significant concerns regarding the Commission's proposed extension of the Exchange Act reporting compliance requirement as a condition to use of Form S-3 to include the reporting compliance of issuing entities established by a "sponsor."

F. Servicers

1. Definition

The term "servicer" is broadly defined in proposed Item 1101(j) to include any person who is responsible for management or collection of the pool assets, or making allocations or distributions to holders of the ABS. Trustees that make allocations or distributions to holders of the ABS are excluded from the definition but only in cases where the trustee receives those allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer. We have the following comments on the proposed definition.

- As proposed, the definition would include entities that perform only "bond administration" functions (*i.e.*, making allocations or distributions to holders of the ABS with no involvement in management or collection of the pool assets). The functions and responsibilities of a bond administrator, however, are significantly more limited and involve a considerably narrower range of skills than those required of an entity responsible for the management or collection of pool assets. Traditional servicing activities implicate a wide range of skills and strategies relating specifically to collection and management of the pool assets. In many cases, different skills and strategies are required depending on the characteristics of the specific pool assets – collection strategies for mortgage loans secured by real property may be quite different from those for unsecured consumer debt. Bond administration, on the other hand, involves a significantly more limited range of responsibilities, and the skills involved are narrower in scope and are not dependent on the types of assets underlying the ABS – allocations and distributions of cash on securities do not implicate different skill sets depending on the type of ABS involved.

  We respectfully submit that the detailed background and other information contemplated by proposed Item 1107 is excessive and unduly burdensome as it relates to entities performing the limited functions of a bond administrator. We request, therefore, that the Commission (i) revise the definition of "servicer" to move those elements that relate to bond administration into a separate definition or (ii) revise proposed Item 1107 to distinguish between bond administration and traditional servicing activities, and, in either event, significantly reduce the level of background and other information required for entities performing only bond administration activities. We have included proposed definitions in Exhibit B to this letter.

- If the Commission does not adopt our requested revisions as described above, we have the following additional comment. The second sentence of the definition of "servicer" operates to exclude a trustee for the issuing entity from the definition in cases where the trustee's activities are limited to applying allocations or distributions received from a servicer. This exclusion should not be limited to "trustees." In many ABS transactions, these ministerial duties are performed by a paying agent, issuing and paying agent, verification agent, backup servicer or similar person that in some (but not all) cases is the same legal entity that acts in the capacity of the trustee. We respectfully request, therefore, that the second sentence of the definition be revised as follows: "The term servicer does not include a trustee, paying agent, administrator or other person for the

issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities if such person receives such allocations or distributions from a servicer (or receives such distributions on pool assets that are securities)[62] and such person does not otherwise perform the functions of a servicer."

- We respectfully submit that a definition of "master servicer" should be added to Item 1101 of proposed Regulation AB and that this definition should distinguish between the two basic types of master servicing for ABS. A master servicer would be defined to be an entity that does not itself perform asset servicing functions but is either (i) contractually liable for the activities of servicers or subservicers in servicing the pool assets, or (ii) contractually responsible for monitoring or overseeing the activities of the servicers or subservicers and replacing them if needed. We respectfully submit that the detailed background and other information contemplated by proposed Item 1107 is excessive and unduly burdensome as it relates to entities performing the narrower functions of an "oversight" master servicer that performs only those activities described in clause (ii) above. We request that the Commission adopt disclosure requirements for such oversight master servicers comparable to the requirements for trustees set forth in Item 1108. We have included a proposed definition in Exhibit B to this letter.

- We also respectfully request that the Commission clarify, by revising the relevant definitions or by adding an instruction thereto, that none of a clearing agency (*e.g.*, the Depository Trust Company), any nominee of such clearing agency, or, in such capacity, any direct or indirect participant in such clearing agency, will be considered a servicer or administrator.

2. Servicer Disclosure

Proposed Item 1107 would require information about a servicer's function, experience and servicing practices. Where servicing of pool assets involves multiple servicers, disclosure would be required for any master servicer, each affiliated servicer, each unaffiliated servicer that services 10% of more of the pool assets and each other servicer that manages distressed assets or other material aspects of servicing of the pool assets. For each such servicer, proposed Item 1107 would require detailed disclosure covering servicing experience, roles, responsibilities and servicing practices, and back-up servicing arrangements.

a. Contractual Responsibility for Servicing Activities

We believe that the disclosure requirements contemplated by Item 1107 should apply only to those servicers and master servicers that are contractually responsible to the issuing entity for the performance of servicing activities. In each case, this is the person that is ultimately responsible to the issuing entity for the performance of the designated servicing activities, and is the person that is accountable and liable to the issuing entity in the event those responsibilities are mismanaged. Where a contractually responsible servicer or master servicer outsources servicing

[62] This parenthetical is added for reasons discussed in greater detail in Section IV.B.2. of this letter, in connection with our comments on permitted signatories on Exchange Act reports and the definition of "servicer" in Item 1101(j) of proposed Regulation AB.

to a subservicer, the responsible servicer or master servicer institutes policies and procedures to monitor the subservicer's performance and compliance. As a result, servicing activities are in all cases undertaken by either a contractually responsible servicer or master servicer, or, in the alternative, a subservicer that is subject to monitoring and oversight by a contractually responsible servicer or master servicer. We respectfully submit, therefore, that investors are properly informed by disclosure relating to those entities who bear responsibility for the various servicing activities and who are ultimately liable for the proper execution of those responsibilities.

b. Disclosure Threshold

The Commission indicates that the 10% threshold triggering disclosure requirements for unaffiliated servicers is consistent with the thresholds proposed for other parties to the ABS transaction, such as significant obligors and providers of credit enhancement or other support. For the reasons set forth below, we respectfully submit that the proposed threshold triggering disclosure requirements, particularly the detailed requirements currently contemplated in proposed Item 1107, for unaffiliated servicers is inappropriately low.

We strongly believe that the disclosure thresholds for significant obligors and credit enhancers do not present conceptual parallels for application in the context of servicer disclosure because such thresholds are based on parties that possess direct *financial obligations* to the ABS transaction. By contrast, servicers have no similar financial obligations to the ABS transaction and represent the *channel* rather than the *source* of payments to ABS investors.[63] Stated another way, while we agree with the Commission's basic proposition that servicing may impact expected performance, third party financial obligors have a fundamentally different and more direct impact on asset performance and, ultimately, on the ABS themselves than would ever be true of a servicer or other party whose obligations are of a non-financial character.

In addition, ABS transactions include structural safeguards designed to detect and decrease the impact of substandard servicer performance. In virtually all ABS transactions, if a servicer materially breaches its duties under the transaction agreements, a servicer default will occur giving rise to the right to replace that servicer. While the Commission is correct to focus on disclosure regarding the terms for servicer removal, replacement and resignation, and the terms for appointment of a successor servicer, we respectfully submit that the mechanism of servicer succession upon removal or resignation of a servicer operates as an important structural safeguard to mitigate the effects of inferior servicing and, therefore, provides a further basis for application of a higher disclosure threshold.

We respectfully submit, therefore, that the appropriate threshold triggering disclosure requirements for unaffiliated servicers should be increased from 10% to 25%. If the Commission seeks to implement a graduated disclosure scheme involving more streamlined disclosure in the case of servicing between, for example, a 10% and 25% threshold, we

[63] While servicers in some transactions may provide advances for delinquent payments, such advance features function as a very limited liquidity facility and not as a credit facility. The servicer would not, therefore, be required to advance funds unless it reasonably expected that it would be reimbursed from late payments by the obligor or proceeds of liquidation or disposition of the collateral securing the obligor's payment obligation.

respectfully submit that such streamlined disclosure should consist solely of the servicer's name, a brief description of the nature of the servicer's business, including the length of time it has been engaged in servicing of assets generally and of the type being securitized and, where available, the current ranking assigned to such entity's servicing business from an NRSRO.[64] Any disclosure concerning such rankings must, however, be on a voluntary basis unless the Commission also revises Securities Act Rule 436 to exclude such servicer rankings from the consent requirements of that rule, in a manner comparable to the exclusion set forth in Rule 436(g) relating to security ratings.

c. Disclosure Items

As noted above, proposed Item 1107 would require detailed disclosure covering servicing experience, roles, responsibilities and servicing practices, and back-up servicing arrangements. First and foremost, we believe that the sheer volume of disclosure contemplated by Item 1107 is excessive, particularly for an entity that services only 10% of the pool assets. In addition, certain of the provisions of Item 1107 are too detailed, even where prefaced with "if material" or "to the extent material," and would encourage issuers to produce unnecessarily detailed and immaterial disclosure out of concerns that such information might be viewed as "presumptively material" because it is specifically identified in Item 1107. We respectfully encourage the Commission to revise Item 1107 to reflect a more principles-based approach to servicer disclosure requirements. We offer the following specific comments and observations to illustrate these concerns.

- *Item 1107(a):* We strongly believe that certain very detailed examples for servicer disclosure items should be removed from Item 1107(a) of proposed Regulation AB. Specifically, we urge the deletion of the portion of Item 1107(a)(2) that would require the disclosure of "computer systems and back-up systems." We also recommend the deletion of Item 1107(a)(3), which would require the disclosure of "any material changes to the servicer's policies or procedures in servicing assets of the same type as the pool assets" during the most recent three-year period. Each of these items is inconsistent with the Commission's approach for principles-based disclosure rules and would impose an extremely burdensome and costly level of due diligence obligations on depositors, sponsors and underwriters that is not justified by the typical role of a servicer in an ABS transaction, and would not provide investors with information typically required to make an investment decision.

  We are also concerned with the sheer scope and open-ended nature of Item 1107(a)(4), which would require information regarding a servicer's financial condition where it "could" have a material impact on the asset pool and the subject ABS. At a minimum, consistent with many of the other disclosure provisions, the materiality standard should be revised to require such disclosure only "to the extent material" to investors.

[64] Such rankings provide an independent, objective view of an entity's ability to service loan and asset portfolios. These rankings provide market participants with a consistent benchmark for assessing the operational risk associated with particular servicers. Servicers may receive any one of a series of ranking designations. For example, Standard & Poor's Ratings Services uses the following ranking designations: Strong, Above Average, Average, Below Average, Weak. In addition, Standard & Poor's assigns an Outlook, as follows: Positive, Stable, Negative or Developing.

- *Item 1107(b):* We also believe Item 1107(b) requires detailed information that is not consistent with a principles-based approach. For example, Item 1107(b)(4) requires disclosure "to the extent material" of statistical information regarding servicer advances on the servicer's overall servicing portfolio for the past three years. We recommend deletion of this item because servicer advances are made only in limited circumstances in the context of a securitization. With respect to Item 1107(b)(7), we request clarification that segregation of pool assets from other assets is not required. In many securitizations, to assure servicing in accordance with the servicer's customary policies and procedures no segregation of assets is made.

G. Originators

Item 1109 of proposed Regulation AB would require material information about an originator's origination program, particularly information material to the performance of the pool assets, such as the originator's credit-granting or underwriting criteria. Disclosure would be required for any originator or group of affiliated originators (apart from the sponsor) that originate 10% or more of the pool assets.

1. Request for Definition

Item 1101 of proposed Regulation AB does not include a definition of the term "originator." As a result, it is unclear whether the originator is intended to be, for example, the entity that sold the loans or other financial assets to the sponsor or depositor, closed a loan in its name, provided funds for loan closings, or established the underwriting standards for originations. Because proposed Item 1109 is clearly focused on the potential impact origination may have on asset performance, we believe that the definition should focus on the entity that established the underwriting or credit-granting criteria. Under this approach, if any pool asset was initially underwritten by a party that would otherwise be the originator but such party applied the underwriting standards of a subsequent purchaser, or a subsequent purchaser re-underwrote the pool asset in accordance with its underwriting or credit-granting criteria, the subsequent purchaser would be the "originator."[65] In addition, to the extent that a party originated pool assets using the underwriting or credit-granting criteria of another originator (for instance, under a correspondent origination program), only the party whose criteria were used would be the "originator." We have included a proposed definition in Exhibit B to this letter.

2. Originator Disclosure

a. Disclosure Threshold

The Commission indicates that the 10% threshold triggering disclosure requirements for originators is consistent with the thresholds proposed for other parties to the ABS transaction,

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[65] This approach is consistent with the approach taken by the Commission staff in a series of no-action letters interpreting Section 3(a)(41)(A)(ii) of the Exchange Act. Pursuant to these no-action letters, subject to certain conditions, residential mortgage loans generated and closed by mortgage brokers in accordance with a third party's underwriting standards, and acquired by such third party, either directly from such mortgage brokers, or indirectly through certain correspondent institutions, would be deemed to have been "originated" by such third party. *See, e.g.*, Prudential Home Mortgage Securities Company, Inc. (Feb. 10, 1994).

such as significant obligors and providers of credit enhancement or other support. For reasons very similar to those set forth above in Section II.F.2.b. with respect to unaffiliated servicers, we respectfully submit that the proposed threshold triggering disclosure requirements for originators is inappropriately low.

We strongly believe that the disclosure thresholds for significant obligors and credit enhancers do not present conceptual parallels for application in the context of originator disclosure since, again, such thresholds are based on parties that possess direct *financial obligations* to the ABS transaction. By contrast, originators have no similar financial obligations to the ABS transaction and do not even have a continuing role with respect to the pool assets post-origination. As such, while we agree with the Commission's basic proposition that origination may impact expected performance, third party financial obligors have a fundamentally different and more direct impact on asset performance and, ultimately, on the ABS themselves than would ever be true of an originator or other party whose obligations are of a non-financial character.

We respectfully submit, therefore, that the appropriate threshold triggering disclosure requirements for originators should be increased from 10% to a minimum of 25%. If the Commission seeks to implement a graduated disclosure scheme involving more streamlined disclosure in the case of originations between, for example, a 10% and 25% threshold, we respectfully submit that such streamlined disclosure should consist solely of the originator's name and the length of time it has been engaged in origination of assets of the type being securitized.

H. Trustees

Item 1108 of proposed Regulation AB would require disclosure covering a trustee's experience, its roles and responsibilities, including in particular the extent of the trustee's oversight responsibilities,[66] and the general character of provisions that limit trustee liability, and that relate to trustee removal or replacement.

1. Trustee Disclosure

Item 1101 of proposed Regulation AB does not include a definition of the term "trustee," though the Commission does recognize that in some cases there may be a trustee of the issuing entity and a trustee on behalf of ABS investors. We respectfully request that the Commission revise proposed Item 1108 to distinguish between trustees that have fiduciary obligations to ABS investors, and owner trustees, that typically have no such obligations to holders of ABS and that otherwise have merely ministerial responsibilities relating to the administration of the trust.[67]

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[66] With regard to trustee oversight responsibilities, the Commission identifies such matters as the extent to which the trustee independently verifies distribution calculations, access to and activity in transaction accounts, compliance with transaction covenants, use of credit enhancement, and changes in pool composition, and the underlying data used for such determinations.

[67] The appointment of an owner trustee typically arises in connection with the creation of a Delaware statutory trust. Under the Delaware Statutory Trust Act 12 Del.C.§ 3801, each Delaware statutory trust is required to appoint a trustee whose responsibilities are limited to administration of the affairs of the trust. In ABS transactions using a

We support the disclosure requirements set forth in proposed Item 1108 as applied to trustees that have fiduciary obligations to ABS investors but respectfully submit that considerably more streamlined disclosure requirements should be established for trustees that have no such fiduciary obligations to ABS investors and whose responsibilities are otherwise ministerial in nature. We believe that these more streamlined disclosure requirements should be limited to basic identifying information about the trustee and the limited nature of its roles and responsibilities in the transaction.

I. Information Obtained from Unaffiliated Parties

1. Reasonable Reliance

Proposed Regulation AB would substantially increase disclosure requirements pertaining to third parties unaffiliated with ABS issuers and, therefore, highlights a fundamental characteristic that distinguishes ABS from other securities – a unique dependence by ABS issuers on information provided by unaffiliated third parties in order to satisfy disclosure requirements arising under the Securities Act and the Exchange Act. Item 1107 of proposed Regulation AB serves as a conspicuous illustration, by requiring potentially highly-detailed information about unaffiliated servicers; information that by its very nature resides solely within the control of such unaffiliated entities and that the ABS issuer is unable to meaningfully assess for accuracy and completeness. In addition to servicers, however, Regulation AB requires relatively detailed information, including in some cases audited financial information, about sponsors, originators, trustees, credit enhancers and significant obligors. Some of these entities (*e.g.*, trustees, credit enhancers and significant obligors) are consistently unaffiliated with the issuer and depositor and others (*e.g.*, sponsors and originators) are in some cases unaffiliated with the issuer and depositor.

We respectfully request, therefore, that the Commission adopt a rule recognizing that an ABS issuer may reasonably rely on any information provided by unaffiliated third parties in connection with the preparation of any prospectus, report or other material filed with the Commission. As noted above, we believe that a reasonable reliance standard is uniquely appropriate in the context of ABS transactions where unaffiliated third parties may be the source of substantial amounts of information required to be included in prospectuses and periodic reports and where such information typically rests uniquely within the control of such unaffiliated parties.[68]

Delaware statutory trust, the responsibilities of the owner trustee are typically restricted under a trust agreement exclusively to such limited ministerial functions.

[68] In many cases, third parties involved in ABS transactions are regulated financial institutions that are required by law to make publicly available either audited financial statements or comparable financial reports, such as "call reports" for banks. Such financial statements or financial reports are often stated on the basis of statutory or regulatory accounting principles (which generally consist of a customized version of generally accepted accounting principles, or GAAP, specifically designed for each type of institution by the relevant regulators). Many financial institutions also file their financial statements with nationally recognized municipal securities information repositories as contemplated by Exchange Act Rule 15c-2(12), which make the information publicly available. In light of the public availability of financial information, the involvement of regulatory authorities in requiring such disclosure, and by specifying the accounting standards most appropriate to the particular financial institutions, it would be reasonable to conclude that the need for the Commission to impose parallel disclosure requirements on issuers who rely on the financial products provided by those institutions is substantially lessened.

2. Indemnification

Even with a reasonable reliance standard, ABS issuers who must disclose information regarding unaffiliated third parties, and underwriters acting on their behalf, may not be able to adequately manage their potential liability under the federal securities law because of what we believe to be unnecessary and unintended uncertainties concerning the effect of indemnification arrangements in this context. We respectfully request, therefore, that the Commission clarify and confirm that its opinion concerning the unenforceability of certain indemnification provisions does not apply in any case where an issuer or an underwriter, on behalf of itself, or its directors, officers or controlling persons, seeks indemnification from an unaffiliated third party for liabilities arising under the Securities Act in connection with the use by such issuer or underwriter of information provided by such unaffiliated third party. The Commission's opinion concerning the unenforceability of certain indemnification provisions is based on public policy and, in particular, the public's interest in holding a responsible party accountable for the accuracy of information it prepares and controls.[69] In the case of information provided by unaffiliated third parties, neither the issuer nor the underwriter has any involvement in its preparation and, in any practical sense, cannot otherwise control its content. We believe that indemnification arrangements in these instances do not raise any public policy concerns and, in fact, advance sound public policy by holding the party who controls and provides the information responsible and accountable for its accuracy.

J. Pool Assets

Item 1110 of proposed Regulation AB would require extensive disclosure relating to the composition and characteristics of the asset pool. While these disclosure requirements are in many respects consistent with industry practice for some asset classes, we have the following comments and observations about several of the specific disclosure items as well as the general approach reflected in proposed Item 1110 (and, where relevant, proposed Item 1100).

1. Item 1110(a)

Item 1110(a)(6) and its instruction contemplate that, where material geographic concentrations of pool assets exist, details of the laws of the related jurisdictions (such as consumer protection laws) that may materially affect pool asset performance or payments on the ABS may be required. We respectfully submit that, in cases where geographic concentration arises in the ordinary course, the information that may be material to investors is that relating to the potential effects of the state and local laws and not to the details of the law itself. We request, therefore, that the instruction to Item 1110(a)(6) be revised to limit the disclosure requirement to the

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[69] The Commission's position on indemnification for Securities Act liability, as set forth in each of Item 510 and Item 512(h) of Regulation S-K (17 CFR 229.510, 229.512(h)), to the effect that such indemnification is contrary to public policy and is, therefore, unenforceable, reflects the Commission's views on indemnification in the limited circumstances described in each such Item. Specifically, the Commission's views are expressed only to the extent (1) any provision or arrangement exists whereby the registrant may indemnify a director, officer or controlling person of the registrant against liabilities arising under the Securities Act, or (2) the underwriting agreement contains a provision whereby the registrant indemnifies the underwriter or controlling persons of the underwriter against such liabilities and a director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is such an underwriter.

material potential effects of such state or local laws, and then only to the extent that such effects are not otherwise disclosed in respect of such laws generally.

2. Item 1110(b)

Consistent with a principles-based approach, the introductory text for Item 1110(b) acknowledges that the material characteristics of an asset pool will vary depending on the nature of the pool assets. However, Item 1110(b) then lists "examples of material characteristics that may be common for many asset types" which could lead one to infer that any item listed thereafter is deemed to be a "material characteristic." We request that the last clause of the third sentence under Item 1110(b) be revised to delete the word "material" before the word "characteristics" in an effort to conform that provision to other similar provisions in the rule proposals that allow an issuer to determine materiality. In addition, we request that the introduction to Item 1110(b) otherwise clarify that the characteristics listed are merely an illustrative guide, including those listed under (b)(7), (b)(8) and (b)(9). We respectfully submit that the list presented is not representative of pool characteristics that many asset types share in common but, instead, is more in the nature of a cumulative list of characteristics *across asset types* that might be relevant for one asset type but not necessarily another asset type.

In addition, the list is too detailed and over-inclusive. For example, paragraph (b)(3) contemplates disclosure of the annual percentage rate for pool assets. Annual percentage rates, which are composite rates that take into account interest rates as well as other fees and costs assessed on an obligor, should not be material to ABS investors. An ABS investor would be interested in only those specific components of cash flows available to the ABS transaction, which in virtually all instances would have no direct correlation to the annual percentage rates on the pool assets.[70] Similarly, paragraph (b)(7) contemplates disclosure of the points and other charges paid on the pool assets. Points and charges would not be material to ABS investors as such amounts do not comprise a part of the securitization cash flows.

In the context of asset pools comprised of commercial mortgage loans, paragraph (b)(9) contemplates disclosure, to the extent material, of a list of enumerated characteristics for each commercial mortgage loan included in the related asset pool. While some of these enumerated characteristics are currently disclosed for each commercial mortgage loan in the asset pool, typically in a tabular format as an appendix to the prospectus, others are currently disclosed for only the larger loans in the asset pool (generally, any loan constituting more than 10% of the asset pool), typically in a narrative format in the body of the prospectus. Registered ABS supported by commercial mortgage loans often include in excess of 150 loans, many of which have loan balances of $1,000,000 or less. As a result, we respectfully request that paragraph (b)(9) be revised to apply only to the extent a loan represents 10% or more of the total asset pool, as measured by principal balance.

Paragraph (b)(14) would create excessively burdensome disclosure obligations by requiring a description of any economic or other factors specific to states or regions in which geographic

[70] If the Commission does not remove the reference to "annual percentage rate" in Item 1110(b)(3), at a minimum, we request that the last clause of paragraph (b)(3) be revised to delete the comma immediately following the words "floating rates" to more clearly reflect that the reference to annual percentage rates is merely illustrative.

concentrations of pool assets exist, as well as related statistical data for such states or regions. We believe it is far beyond the scope of any reasonable disclosure standards to impose an obligation on an issuer to identify and analyze regional economic conditions and, even more so, to require an issuer to re-state statistical data for each such geographic concentration, particularly where geographic concentration arises in the ordinary course.

K. Structure of the Transaction

Item 1112 of proposed Regulation AB would require extensive disclosure relating to the structure of the ABS transaction. While these disclosure requirements are in many respects consistent with industry practice, we have the following comments and observations.

- *Item 1112(d)(1):* Item 1112(d)(1) would require disclosure concerning the owners of any residual or retained interests to the cash flows and the disposition of excess cash flow. We strongly urge the Commission to eliminate this requirement or, at a minimum, revise this requirement to limit its applicability to instances where such information would be material. In fact, we cannot identify any instances where this information would be material to investors, except, potentially, where the owner is the servicer or an affiliate of the servicer and the excess cash flow is effectively an incentive servicing fee. By definition, these cash flows represent amounts in excess of amounts needed and applied to cover all allocations owing to a series of ABS. Moreover, as currently drafted, this item would require disclosure of the identity of investors in non-publicly offered residual classes, which information is most typically maintained as proprietary and, therefore, highly confidential information, and which identity may not even be known at the time a prospectus is finalized. We respectfully request, therefore, that this provision be deleted or, at a minimum, revised to limit its applicability to instances where this information would be material.

- *Item 1112(f)(2):* Item 1112(f)(2) would require the title of a class of securities to include the word "callable" if there is a redemption feature that may be exercised when 25% or more of the principal balance of *the pool assets* is outstanding. We respectfully request that, with respect to master trusts, the measure be to securities of that series rather than pool assets. In a master trust, the servicer typically has a clean-up call when a series of securities has declined to 10% (or 5%) of its original balance, although the assets of the trust have not declined.

L. Credit Enhancement, Other Support and Derivatives

1. Item 1113(a)

Item 1113(a) of proposed Regulation AB would require a description of any material internal or external sources of credit enhancement and other support features intended to assure the timely payment of amounts owing to the ABS holders. We have the following comments on Item 1113(a).

- We request that the Commission clarify that references in Item 1113 to enhancement or other support are not intended to include any arrangements obtained by the underlying

obligors or lenders in connection with the original extension of credit, such as loan-level mortgage insurance or hazard insurance.[71] We respectfully submit that such arrangements are well beyond the scope of any reasonable disclosure standards since they are entered into by individual borrowers or lenders completely independent of, and with no connection to, the ABS transaction.

- Item 1113(a) would require that any agreement with regard to such enhancement or other support, regardless of materiality, be filed as an exhibit. We respectfully request that this filing requirement be limited to material agreements, consistent with the standard triggering disclosure under Item 1113(a).

2. Item 1113(b)

Item 1113(b) of proposed Regulation AB would require information about an enhancement provider in cases where such provider is liable or *contingently liable* to provide payments representing more than a specified percentage of the cash flow supporting any class of ABS. Where a 10% payment threshold is met, certain basic descriptive and financial information, including selected financial data meeting the requirements of Item 301 of Regulation S-K, would be required. Where a 20% payment threshold is met, audited financial statements meeting the requirements of Regulation S-X would be required. We have the following comments and observations concerning Item 1113(b).

a. Credit Enhancement, Liquidity Facilities and Other Similar Support

i. Disclosure Thresholds and Trigger Calculations

While the 10% and 20% disclosure thresholds set forth in Item 1113(b)(2) are consistent with those applied historically by the Commission staff, we note that the calculations related to such triggers for purposes of Item 1113(b)(2) – which measure payments as a percentage of cash flow supporting any class – are different from the calculations related to such triggers for purposes of Item 1111(b) – which measure the amount of the asset as a percentage of the aggregate asset pool. Historically, disclosure thresholds for providers of credit enhancement, liquidity facilities and other similar support (*i.e.*, those features described in Items 1113(a)(1) and (2)) have been measured by reference to their maximum limits or maximum coverage as a percentage of the total principal amount of the pool assets. Where such credit enhancement or other support relates only to specific classes of the subject ABS offering, these disclosure thresholds would instead be measured as a percentage of the total principal amount of those classes. We continue to believe that these are the appropriate measures in those cases and respectfully request that Item 1113(b)(2) be revised to adopt these measures.

[71] For similar reasons, we also request that the Commission clarify that the term "obligor," which is defined in Item 1101(i) of proposed Regulation AB, is not intended to include the providers of any such loan-level insurance. Again, we believe that any interpretation that would include the providers of such insurance within the scope of the term "obligor" would go well beyond reasonable disclosure standards.

ii. Alternatives to GAAP Financial Statements

Third party credit enhancement involves an agreement between a third party and the issuer or a trustee that does not run directly to the security holders and, as such, the provider of such enhancement is not treated as a co-issuer of the underlying security.[72] As a result, the Commission staff in general has exhibited greater flexibility concerning the nature and level of financial disclosure concerning the provider of such enhancement. Where available, the staff has, of course, required financial statements or financial information presented in accordance with generally accepted accounting principles, or GAAP. However, if such financial statements are not available, the staff has accepted statements prepared under other standards, including under the subject entity's regulatory accounting principles, or RAP (or statutory accounting principles, or SAP, for some insurance companies). In assessing the sufficiency of such disclosure, the staff has traditionally considered factors such as (i) the amount of the credit enhancement in relation to the issuer's income and cash flows; (ii) the duration of the credit enhancement; (iii) conditions precedent to the application of the credit enhancement; and (iv) other factors that indicate a material relationship between the credit enhancer and the purchaser's anticipated return.[73]

As illustrated in Item 1113(a), external credit enhancement and other support arrangements may take a wide variety of forms. In many instances, this support is provided by entities that do not prepare GAAP financial statements but that may prepare RAP or SAP financial statements. We strongly urge the Commission, therefore, to codify and preserve in Item 1113(b) a more flexible, principles-based disclosure standard that takes into account the factors identified above, including, in particular, the fact that in some instances only non-GAAP financial information may be available. We also respectfully request that the Commission adopt a similar approach in the case of significant obligors under Item 1111(b) of proposed Regulation AB.

b. Derivatives

i. Disclosure Thresholds and Trigger Calculations

In the context of derivatives, we are very surprised by the Commission's proposed calculation related to such disclosure triggers, which departs significantly from long-standing staff and industry practice, and places liabilities and contingent liabilities on an equal footing, without taking into account the probability of the contingency arising. We strongly believe that a bright-line test that does not distinguish liabilities from contingent liabilities is highly inappropriate and fails to take into account current industry practices. In addition, as discussed below, we believe a standard which treats liabilities and contingent liabilities the same is inconsistent with basic principles of materiality as established by the Supreme Court.[74]

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[72] Historically, the Commission staff has distinguished third party credit enhancement from a "guarantee," the latter of which is viewed as a "security" within the meaning of Section 2(a)(1) of the Securities Act that must be covered by a Securities Act registration statement filed by the guarantor, as an issuer.

[73] *See* "Frequently Requested Accounting and Financial Reporting Interpretations and Guidance," Division of Corporation Finance, Section III.E (Mar. 31, 2001).

[74] The Supreme Court has held that determinations of whether a contingent or speculative event is material requires "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event" in

(a) Current Market Practice

We believe it would be better to approach derivatives in Item 1113 in the same way that the derivatives market, current ABS practice and the rating agencies approach them, and require disclosure of the ratings of the counterparty, the effect of any downgrading or withdrawal of such ratings (including any obligation of the counterparty to post collateral based on the market value of the derivative), and the right of the ABS issuer to terminate and replace the counterparty if the counterparty's rating declines below a specified level or is withdrawn. It is common in ABS transactions for swaps or other derivatives to be provided by counterparties that are highly-rated subsidiaries of diversified financial institutions. As a general matter, such counterparties neither have nor file financial statements on a stand alone basis, but are usually rated "AAA" or "AA" by the rating agencies. Such assigned ratings are based not on the financial strength of such counterparties, but on the rating agency's evaluation of the efficacy of the institution's hedged positions and the collateralization of their unhedged exposures under various stress scenarios. In our experience, rather than rely on its financial statements, investors purchasing ABS and rating agencies rating ABS rely primarily on the rating assigned to a derivative counterparty in assessing its ability to fulfill its obligations to an ABS issuer. Further, to minimize the possibility that the transaction will be exposed to counterparty credit risk, the rating agencies generally require, and the transaction documents generally provide, that any such derivative in an ABS transaction must be replaced if the counterparty's rating is reduced below investment grade or is withdrawn.

The Commission's proposed contingent liability standard will likely have an overly punitive effect on the ABS public market. The number of derivative counterparties participating in public ABS transactions will shrink because the market will effectively be limited to reporting companies with audited financial statements available and ABS sponsors and underwriters will need to conduct due diligence and obtain comfort from the counterparty's accountants on the financial information provided, which will significantly increase the issuance costs of the ABS transaction. While we agree with the Commission's objective of disclosing useful and material information to investors, we believe that the benefits of such disclosure must be carefully measured against the costs of providing it.

(b) "Contingent Liability" Standard

With respect to derivatives such as basis swaps, interest rate swaps and currency swaps, the "contingent liability" standard as proposed is administratively unwieldy and inadequate. The proposed rules do not provide any guidance on the assumptions that should be made about volatility of any applicable index (*e.g.*, LIBOR) or currency for purposes of calculating the contingent liability of the counterparty thereunder. For example, we believe that historical data with respect to such volatility should be considered and that the period covered by any such historical data should bear some relationship to the average terms of the assets or the ABS. Without further clarification, the proposed rules would seem to require a worst case assumption, even if the probability of realizing such a case is extremely remote and the expected liability is significantly different from that calculated based on the worst case assumption.

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light of the totality of the circumstances. *Basic v. Levinson*, 485 U.S. 224, 238 (1988) (quoting *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

The Commission indicates, for example, that disclosure would be required for an "out of the money" swap if the swap provider was contingently liable for more than 10% of the cash flow supporting a class, even though the probability of payment by the swap provider might be very remote. For purposes of this disclosure standard, the Commission treats an "out of the money" swap, on the one hand, and a guarantee on a high quality asset pool, on the other hand, as indistinguishable, apparently on the basis that in either instance the probability of payment on the instrument "could be remote." We believe that this comparison is fatally flawed in its failure to distinguish between the *probability of payment*, on the one hand, and the *probability of an obligation to pay*, on the other hand. A guarantee on a high quality asset pool and an "out of the money" swap may both have a low probability of payment, but only the "out of the money" swap also has a low probability of an obligation to pay.[75]

Moreover, in even the most conventional interest rate swap, a disclosure standard that places liabilities and contingent liabilities on an equal footing would most assuredly render the 10% and 20% disclosure thresholds themselves meaningless since, without a probability assessment, the amount for which the swap provider could be contingently liable would, in almost all cases, be infinite.

Historically, a typical comment from a Commission staff comment letter has indicated that disclosure is required where *credit exposure* under a derivative equals or exceeds 10% or 20%, as applicable, of either the cash flows to a series or the issuing entity's assets.[76] In order to apply the calculation included in the staff comment letters, issuers have made assessments of credit exposure by making assumptions about market conditions and other factors that would affect future payments to the issuing entity under the swap contract, and by making further assumptions in order to reach a valuation of the assumed future payments.

Notably, participants in the derivatives market routinely evaluate the "maximum probable exposure" of a counterparty on essentially the same basis.[77] The precise method for determining maximum probable exposure may vary among market participants, but a typical approach would be to determine the maximum net amount that the counterparty might be required to pay under a statistical analysis using a range of scenarios that are within two (or more) standard deviations from the base case.

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[75] Indeed, the Commission's comparison illustrates the very distinction between liabilities and contingent liabilities. In the case of a guarantee, the guarantor's *obligation to pay* is direct and absolute and is, therefore, an amount for which the guarantor is liable (as opposed to contingently liable). In the case of a swap provider, the provider's *obligation to pay* is not direct or absolute, but instead is dependent on external factors (*e.g.*, movements in interest rates or currency exchange rates) and is, therefore, an amount for which the swap provider is contingently liable. The distinction between liabilities and contingent liabilities is fundamental to an appropriate disclosure standard. We cannot overstate our view that, in the context of contingent liabilities, a necessary component of any materiality assessment – and one that we believe is mandated under the standards established by the Supreme Court – is the probability of the contingency occurring.

[76] In some cases, the staff's comment applies the threshold as a percentage of cash flows to a series; in other cases, the staff's comment applies the threshold as a percentage of the issuing entity's assets. Consistent with our recommendations above with respect to credit enhancement and other similar support, we believe that the more appropriate measure is as a percentage of the issuing entity's assets.

[77] Market participants evaluate the maximum probable exposure of a counterparty in order to (i) make credit decisions as to counterparty risk, in the case of an unsecured contract, or (ii) set required collateral levels, in the case of a secured contract.

For example, assume a 5-year interest rate swap, with LIBOR exchanged for fixed rate payments at a then current market rate, with a non-declining notional amount of $100 million. Because the floating rate paying counterparty is uncapped, under very extreme scenarios, the maximum *possible* exposure could be in excess of even the notional amount (because LIBOR, as a theoretical matter, could continue to rise without limitation). However, the maximum *probable* exposure of a counterparty calculated as described above would typically be approximately $5 million in this example.

We respectfully submit that any materiality assessment with respect to a derivative contract must necessarily include a probability assessment. An approach comparable to that described above – which assesses probable exposure – would be consistent with staff comment letters and many years of industry practice. For purposes of the disclosure thresholds set forth in Item 1113(b)(2) as applied in the case of derivative contracts, we strongly urge the Commission to recognize that the total payments for which the provider is "liable or contingently liable" would equal the maximum probable exposure of a counterparty, as determined in connection with a bona fide evaluation of the creditworthiness of the counterparty, in the case of an unsecured contract, or in determining the required collateral level, in the case of a secured contract.

(c) Recommended Revisions

We respectfully submit that the inability of issuers and derivative counterparties to comply with the financial disclosure standards contemplated by Item 1113(b)(2) underscores the importance of employing an appropriate methodology for assessing material credit exposure to a derivatives counterparty. We again respectfully submit that a determination of the maximum probable exposure to a counterparty offers a far superior measure of materiality than the standard set forth in the proposed rules.

In light of (i) the additional burden placed on issuers and highly-rated derivative counterparties that are not reporting companies, (ii) the structural safeguards designed to minimize the possibility of exposure to counterparty credit risk (*e.g.*, by posting collateral or replacing the counterparty if its rating is reduced or withdrawn), (iii) the additional transaction costs likely to be incurred by sponsors as a result of fees imposed by derivative counterparties for providing their financial information and fees of accountants for providing consents to incorporation by reference on an ongoing basis, (iv) the likely contraction in the derivative market for lack of providers willing to participate in public ABS transactions, and (v) any lack of compelling investor interest in, or enhanced investor protection resulting from, additional disclosure about highly-rated derivative counterparties, we respectfully submit that any increased financial disclosure requirement applicable to derivatives counterparties be expressly limited to such counterparties who are not rated investment grade by an NRSRO.

M. Affiliations and Certain Relationships and Related Transactions

Item 1117(b) of proposed Regulation AB contemplates disclosure of certain material business relationships, agreements, arrangements, transactions or understandings entered into outside the ordinary course of business or on terms that are not arm's length between the sponsor, depositor or issuing entity and various other parties identified with respect to the ABS transaction,

including underwriters. While we have no objection in principle to Item 1117(b), we do have two specific comments that would require revision to this item.

- As discussed earlier in this letter, the term "sponsor" would in some instances include an entity or entities not affiliated with the depositor or issuing entity. As such, we do not believe that it is appropriate to group a sponsor with the depositor and the issuing entity for purposes of Item 1117(b) unless that sponsor is also an affiliate of the depositor. We respectfully request that the Commission revise Item 1117(b) accordingly.

- An instruction to Item 1117(b) underscores the point that disclosure is required where a relationship outside of the ABS transaction exists that is outside the normal course and the general character of those relationships. However, the instruction then purports to illustrate this point by reference to material credit arrangements with an underwriter or promoter relating to the pool assets, such as providing a warehouse line of credit to fund originations or acquisitions pending securitizations. We are very surprised by this illustration and respectfully submit that such arrangements are most certainly entered into in the ordinary course of business and are on arm's length terms.

  We believe that the Commission may have mistakenly formulated the view that such arrangements are generally material based on disclosure that sometimes appears in prospectuses concerning such funding sources. In actual fact, however, disclosure concerning such arrangements is included *only* where all or a portion of the proceeds of an ABS offering are applied to repay such funding sources.

  For these reasons, we strongly disagree with the implication that such arrangements would be material to investors in the ordinary course and respectfully request that the Commission revise this instruction to Item 1117(b) to eliminate a reference to such arrangements.

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III. COMMUNICATIONS DURING THE OFFERING PROCESS

A. ABS Informational and Computational Material

1. Proposed Exemptive Rule

Currently, in reliance on a series of Commission staff no-action letters, broker-dealers, acting as underwriters or on behalf of an issuer in connection with the offer and sale of investment grade ABS registered for sale on a Form S-3 registration statement, provide prospective investors with certain written material after the effective date of the registration statement but before delivery of a final prospectus.[78] Under the proposed rules, the Commission would codify the basic concept underlying these no-action letters using a single definition of "ABS informational and computational material" intended to consolidate the descriptions of the written material referenced in the no-action letters and to streamline the procedures for their use and filing.[79] As with the series of no-action letters, the proposed exemption would be available only in connection with offerings of investment grade ABS registered on a Form S-3 registration statement.

2. Proposed Definition of ABS Informational and Computational Material

a. Basic Definition

In order to qualify as "ABS informational and computational material," the proposed definition provides that the written communication must consist "solely" of one or more of four categories of information, which categories are intended to track those recognized under the no-action letters – structural term sheets, collateral term sheets and computational material – and to clarify that static pool data may also be included. While the Commission indicates that the definition is intended to cover the same general scope of material that currently may be used, we are very concerned that the actual text of the definition is too rigid and restrictive, particularly when compared with the more flexible and descriptive accounts of this material set forth in the no-action letters.[80] As a result, a significant amount of information that is currently provided to investors in reliance on these no-action letters could be excluded under the proposed definition.

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[78] *See* Mortgage and Asset-Backed Securities (May 20, 1994) (response to no-action request on behalf of Kidder, Peabody Acceptance Corporation I and certain of its affiliates (the "Kidder letter")); Public Securities Association (May 27, 1994) (response to no-action request by PSA to permit other issuers and underwriters to rely on the no-action position granted in the Kidder letter); Distribution of Certain Written Materials Relating to Asset-Backed Securities (March 9, 1995) (response to no-action request by PSA to supplement the Commission staff's prior no-action correspondence regarding the distribution of ABS term sheets (the "PSA letter")); and Distribution of Certain Written Materials Relating to Asset-Backed Securities (April 5, 1996) (response to no-action request of Greenwood Trust Company, as originator of Discover Card Master Trust I, to supplement the Commission staff's prior no-action correspondence regarding the distribution of ABS series term sheets (the "Greenwood Trust letter").

[79] While this written material is used predominantly in the residential mortgage-backed securities market due to the quantitative nature of the analysis of prepayable mortgage loans, such material, particularly structural and collateral term sheets, is used in other ABS market sectors today. As the structural complexity of ABS transactions increases, computational material should be expected to become increasingly useful as an analytical tool.

[80] For example, Item 1101(a)(1) of proposed Regulation AB, which is the portion of the definition of "ABS informational and computational material" that corresponds to a "structural term sheet" (as described in the

In reviewing the no-action letters, it appears that the proposed text for Items 1101(a)(1) and (a)(2) of proposed Regulation AB – the portions of the definition of "ABS informational and computational material" that correspond to "structural term sheets" and "collateral term sheets," respectively – tracks the summary descriptions of such term sheets contained in the PSA letter. The PSA letter, however, goes on to describe in significantly greater detail, using principles-based concepts, the nature of such materials and their content, recognizing that the content of a term sheet may be adapted to the context of the particular transaction. We believe that any definition establishing the permissible scope of information that may be contained in ABS informational and computational material should be based on the principles-based descriptions thereof set forth in the no-action letters.

By way of illustration, the text of Item 1101(a)(1) and (a)(2) of proposed Regulation AB omits a number of items of information typically included in term sheets used in the ABS market today, including: (i) identification of key parties, such as servicers, trustees, depositors and sponsors, and a brief description of each such party's roles, responsibilities, background and experience, (ii) identification of credit enhancement and credit enhancers and a brief description of any such

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no-action letters), uses relatively rigid and restrictive language, similar to that found in Rule 134, suggesting very narrow content-based limitations:

> "(1) A brief summary of the structure of an offering of [ABS] that sets forth the name of the issuer, the estimated size of the offering and the proposed structure of the offering (such as the number of classes, seniority and priority and other terms of payment)."

By comparison, a "structural term sheet" is described far more flexibly in the PSA letter, recognizing that the content of a term sheet may be adapted to the context of the particular transaction:

> "A Structural Term Sheet provides in a relatively concise format certain factual information regarding the financial terms of an ABS offering, including a description of the structure of the securities offered, . . . the anticipated ratings for each class and other similar information relating to the proposed structure for the offering. Typically, a Structural Term Sheet will describe the basic parameters of the proposed offering, including essential descriptive information relating to each of the classes of securities proposed to be offered. For example, a Structural Term Sheet typically will indicate, for each class or tranche of an offering, the principal amount to be offered, the coupon for that class or tranche, the anticipated price (*e.g.*, 100%), yield, weighted average life, duration, the anticipated rating and similar descriptive information relating to the structure of the offering."

Similarly, Item 1101(a)(2) of proposed Regulation AB, which is the portion of the definition of "ABS informational and computational material" that corresponds to a "collateral term sheet" (as described in the no-action letters), uses relatively rigid and restrictive language, again suggesting very narrow content-based limitations:

> "(2) Descriptive factual information regarding the pool assets underlying an offering of [ABS], typically including data regarding the contractual and related characteristics of the underlying pool assets, such as weighted average coupon, weighted average maturity and other factual information regarding the type of assets comprising the pool."

By comparison, a "collateral term sheet" is described far more flexibly in the PSA letter, again recognizing that the content of a term sheet may be adapted to the context of the particular transaction:

> "A Collateral Term Sheet provides . . . descriptive data about the assets underlying a proposed ABS offering . . . . A Collateral Term Sheet for an ABS offering backed by mortgage loans, for example, may include data regarding the contractual and related characteristics of the underlying loans, such as their individual and weighted average coupons, maturities and loan-to-value ratios and other factual information regarding the types of loans comprising the pool, the geographic distribution (*e.g.*, by state or zip code) of the properties securing the loans and the programs under which the loans were originated (*e.g.*, documentation standards). In the case of ABS backed by other assets, a Collateral Term Sheet would include similar information concerning the parameters of the asset pool appropriate to the nature of the underlying assets."

party's roles and responsibilities, (iii) information regarding the underlying collateral, including its management (such as by a property manager, in the case of commercial property), (iv) information regarding significant obligors, (v) asset selection criteria, (vi) a description of the key terms of each class or tranche, including the terms relating to revolving periods, prefunding periods, clean-up calls and minimum denominations, (vii) anticipated ratings for the ABS and (viii) legal investment, tax and ERISA information.

Investors consider structural and collateral term sheets to be particularly well-suited to ABS transactions and very useful as a concise summary of the key aspects of the particular transaction, which allows an investor to more readily assess and compare transactions, and thereby more readily identify those transactions in which it has the most interest. In addition, as noted by the Commission, an increasing number of investors possess or have access to the analytical capacity to perform their own models and scenarios on pool data, making the free flow of factual information concerning the asset pool all the more valuable.[81] As a result, investors have come to expect this information, and desire the broadest access possible to factual information concerning the asset pool and the ABS.

In light of these concerns and observations, we respectfully request that the Commission revise the proposed definition of "ABS informational and computational material" to describe such material in a more flexible and descriptive manner using principles-based concepts, consistent with the descriptions of such material contained in the existing no-action letters.

In addition to the information currently provided to investors in reliance on the no-action letters, ABS issuers, underwriters and investors share a common interest in further relaxing restrictions on the content of ABS informational and computational material. While we recognize the broader issues implicated by some proposals, we believe that certain basic factual information concerning scheduling for the offering, such as road show dates, and anticipated pricing dates, could be covered in the definition of "ABS informational and computational material" at this time and addressed for the markets more generally in the course of certain amendments to Securities Act Rule 134, as requested and addressed below. Therefore, we respectfully request that the Commission further revise the proposed definition of "ABS informational and computational material" to modestly expand its scope to cover certain basic factual information concerning the offering process, such as road show dates, and anticipated pricing dates.

b. Use of ABS Informational and Computational Material for ABS Registered on Form S-1

i. ABS Registered on Form S-1

As noted above, the proposed exemption permitting the use of ABS informational and computational material prior to the availability of a final prospectus would be available only in connection with offerings of investment grade ABS registered on a Form S-3 registration

[81] In this regard, we note and appreciate the Commission's views concerning the distribution of "loan level" information (subject to regulatory requirements concerning privacy, consumer protection and the like), and the manner in which the proposed rules should be applied where issuers or underwriters provide underlying data regarding an ABS structure and the pool assets directly to investors or third party services for their independent use.

statement. We strongly recommend that the Commission extend the proposed exemption to also include ABS registered on a Form S-1 registration statement. ABS, whether registered on Form S-1 or Form S-3, share in common the fundamental characteristics of structured securities and all that accompanies that in terms of investor focus on the characteristics and quality of the underlying assets, and the timing and receipt of cash flows from those assets. As such, the value and usefulness of ABS informational and computational material to investors is not diminished in any manner simply because the subject ABS are registered on Form S-1 instead of Form S-3.[82] We encourage the Commission, therefore, to extend the proposed exemption to ABS registered on Form S-1. If the Commission agrees in principle with our views but seeks to be more circumspect in extending the exemption, we believe that a reasonable alternative would be to extend the proposed exemption to ABS registered on a Form S-1 registration statement in cases where (i) the subject ABS are anticipated to be rated investment grade by an NRSRO as of their date of sale or (ii) the purchaser is an institutional investor.

ii. Use of ABS Informational and Computational Material During "Waiting Period"

We also believe that, in connection with the use of ABS informational and computational material, there is no reason to distinguish between the "waiting period" and the "post-effective period."[83] For purposes of Section 5 of the Securities Act, the only offering activities that are conditioned on the effectiveness of a registration statement are those specified in Section 5(a), relating to the actual sale of a security and its delivery after sale. Section 5 does not otherwise operate to distinguish between the waiting period and the post-effective period in its regulation of the offering process. In other words, other than the actual sale of a security, the exact same offering restrictions apply during the waiting period and the post-effective period. As a result, we cannot identify any reason why the use of ABS informational and computational material in connection with a registered securities offering should be treated differently during the waiting period as compared with the post-effective period. We also believe that a standard that restricts the use of such material to the period after a registration statement has been filed, as contemplated by Section 5(c) of the Securities Act, operates as a meaningful and sufficient control over the use of such material in the offering process.[84]

iii. Incorporation by Reference and Form S-1

In order to extend the benefits of the exemption to ABS registered on a Form S-1 registration statement, while still relying on the use of Form 8-K to place material on file with the Commission (and thereby update the registration statement), we believe it would be entirely

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[82] A preliminary prospectus is typically prepared too late in the process to begin a dialogue concerning structuring. As a result, in the absence of an exemption permitting the use of ABS informational and computational material, investors lose the benefits of interactions with the underwriters to develop a preferred transaction structure.

[83] We believe this is equally true in the case of ABS registered for offer and sale on either a Form S-1 or Form S-3 registration statement.

[84] As a historical note, we believe that the condition under the existing no-action letters, limiting the use of such material to the period after the subject registration statement is declared effective, was largely due to the fact that the relief granted was limited to ABS offered and sold "off the shelf" and, as such, offering activity was not ordinarily expected to occur until after the registration statement was declared effective.

appropriate to permit incorporation by reference for such purposes in the context of Form S-1. For primary offerings of ABS, incorporation by reference is used for two principal purposes:

(i) to incorporate by reference third party information, such as the financial information of a credit enhancer, under the circumstances contemplated by a series of staff no-action letters as proposed to be codified in Item 1100(c) to proposed Regulation AB;[85] and

(ii) to effect certain Securities Act updating requirements, such as the updating of exhibits to the subject registration statement and, in this context, the filing of supplemental offering material in the form of ABS informational and computational material.

In addition, regardless of the form used for registration (*i.e.*, Form S-1 or Form S-3), registration statements and prospectuses prepared in connection with one or another ABS offering are consistently drafted using "Form S-1 level" disclosure and, therefore, do not rely on incorporation by reference to the issuer's Exchange Act reports.

As a result, incorporation by reference in the context of primary offerings of ABS serves a fundamentally different and more limited purpose than it does in the context of corporate securities offerings. Under the proposed rules, the Commission is already proposing to permit incorporation by reference in ABS offerings registered on Form S-1 in the circumstances contemplated by clause (i) above (for third party financial information). We respectfully submit that the function of incorporation by reference in the context of clause (ii) above is entirely procedural – as a means to file supplemental material and thereby update a Securities Act registration statement – and, therefore, its availability should not be dependent on the underlying form on which the ABS are registered.

We respectfully request, therefore, that the Commission extend the proposed exemption permitting the use of ABS informational and computational material (i) so that such material may be used at any time after the subject registration statement is filed with the Commission (whether on Form S-1 or Form S-3) and (ii) to ABS registered on a Form S-1 registration statement or, at a minimum, to such ABS in any case where (x) the subject ABS are anticipated to be rated investment grade by an NRSRO as of their date of sale or (y) the purchaser is an institutional investor, and where the material is otherwise used and filed in the manner contemplated by proposed Rule 167.

c. Securities Act Rule 134

As noted by the Commission in the Proposing Release, Securities Act Rule 134 deems certain written communications announcing an offering, often called a "tombstone" announcement, not to be a prospectus so long as the content of the communications is limited to the items specified in that rule. Rule 134, which is drafted with a focus on securities offerings by issuers with business activities and traditional operations, has always been a challenge to apply in the context of ABS, where the issuer has no such activities or operations. For example, Rule 134(a)(3) contemplates that an announcement may include "a brief indication of the general type of

[85] *See* Financial Security Assurance, Inc. (Jul. 16, 1993); MBIA Insurance Corp. (Sep. 6, 1996); and AMBAC Indemnity Corp. (Dec. 19, 1996).

business of the issuer" but has no corresponding item for an ABS issuer where an investor is instead interested in the characteristics and quality of a pool of financial assets, the standards for their servicing, the timing and receipt of cash flows from those assets and the structure for distribution of those cash flows.

We respectfully request that the Commission revise Rule 134 to clarify its application in the context of ABS. Specifically, we request that the Commission amend Rule 134 to permit any issuer of ABS to include a brief description of one or more of the following items of information:

(i) the structure of the ABS and distributions thereon, including the key terms of each class or tranche, such as amount, coupon, first payment date, accrual periods, weighted average life, expected final payment date, maturity, anticipated ratings and summary characteristics (*e.g.*, PAC, IO, companion);

(ii) CUSIP numbers for each class or tranche and whether a particular class or tranche has been sold;

(iii) legal investment, tax and ERISA information;

(iv) the nature, performance and servicing of the assets supporting the ABS, including appropriate pool level information which may include such elements as weighted average coupon, weighted average FICO, grace and forbearance percentages, portfolio yield, and delinquency and losses, if material, and information concerning asset concentrations;

(v) the identity of key parties such as sponsors, servicers, trustees and depositors; and

(vi) any credit enhancement or other enhancement mechanisms associated with the ABS, including the identity of any such enhancement provider.

As noted above, we also respectfully request that the Commission amend Rule 134 to permit any issuer to include basic factual information concerning scheduling for the offering, such as road show dates and anticipated pricing dates.

3. Proposed Conditions for Use

Under proposed Securities Act Rule 167(b), the use of ABS informational and computational material would be permitted as long as the material (i) is filed with the Commission, to the extent required by proposed Securities Act Rule 426, and (ii) includes prominently on the cover page certain basic identifying information and a legend urging investors to read relevant documents filed with the Commission and explaining how those documents may be obtained.

a. Legends

While proposed Rule 167 requires that ABS informational and computational material include a limited legend, it should not prohibit other legends that may be appropriate or required by law.[86] We respectfully request, therefore, that the Commission clarify, by means of an instruction to proposed Rule 167(b), that the limited legend prescribed thereby is not exclusive and that other legends may be included to the extent appropriate to the context in which the material is used, and as otherwise required by law.

In particular, we believe that it is not only appropriate but in many instances would be advisable to include a legend indicating that information contained in the material will be superseded by subsequent ABS informational and computational material or the final prospectus, at least to the extent of the information included in the subsequent material or the final prospectus.[87] We believe that such a legend conveys important and accurate information to prospective investors advising them that the information contained in the material may in some cases be preliminary and subject to change, just as is required to be disclosed in a preliminary prospectus pursuant to Item 501(b)(10) of Regulation S-K.[88] In addition, from time to time it may be necessary to include one or more legends required under state securities, or "blue sky," laws.

b. Reliance on Exemption Where Another Party Has Failed to Comply

In footnote 193 to the Proposing Release, the Commission indicates, consistent with the no-action letters, that a failure by a particular underwriter to cause the filing of ABS informational and computational material in connection with an offering would not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption. Subject to our comments below concerning the filing requirements for such material, and the manner in which such filing requirements relate to the existing liability framework, we respectfully request that the Commission address this position by means of an instruction to proposed Rule 167(b) and that the Commission clarify in such instruction that the position, like the rule itself, is applicable not only to an underwriter but also to any other party to the ABS transaction and any person authorized to act on their behalf that may need to rely on the rule in communicating about the transaction.

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[86] The Commission does, of course, identify certain legends that would be inappropriate, such as those which disclaim responsibility or liability for the material.

[87] In footnote 194 and the accompanying text in the Proposing Release, the Commission indicates that a more general legend – to the effect that the information contained in the material supersedes all prior ABS informational and computational material or will be superseded by the description of the offering contained in the final prospectus – does not appear applicable because not all of the information contained in the material is included or updated in subsequent ABS informational and computational material or the final prospectus. We do not believe a more tailored legend raises the same concerns.

[88] 17 CFR 229.501(b)(10).

4. Proposed Filing Requirements

a. Filing Requirements and Liability Framework Have Significantly 'Chilled' the Use of ABS Informational and Computational Material

In the Proposing Release, the Commission raises several questions concerning the filing requirements for ABS informational and computational material under the no-action letters and its proposals, including whether one or more aspects of such filing requirements, and the manner in which such filing requirements relate to the existing liability framework, have "chilled" the use of such material. We respectfully submit that the current filing requirements have, in fact, had a significant chilling effect on the use of ABS informational and computational material. As a direct result of these filing requirements and attendant concerns regarding, among other things, strict liability for the material filed, some issuers prohibit outright underwriters and dealers from using any ABS informational and computational material where such material is prepared without issuer involvement. In addition, some issuers prohibit underwriters and dealers from providing certain types of ABS informational and computational material, such as option-adjusted spreads, option-adjusted durations and complex multi-scenario vector analyses involving many prepayment speed assumptions. These types of materials are often generated by proprietary computer models of the underwriters that cannot be confirmed by issuers. The no-action letters, therefore, represent a paradox of sorts – intending to promote the free flow of timely and useful information to investors but, instead, in some cases significantly discouraging the use of such information.

We firmly believe that the existing chill on the use of ABS informational and computational material would immediately abate, and investors would begin to experience a richer flow of valuable information concerning ABS transactions, if the Commission made two important changes concerning the filing requirements and the liability standards for ABS informational and computational material. We respectfully submit that each of these revisions is consistent with sound public policy and the protection of investors.

- First, the filing requirements and liability standards for ABS informational and computational material should be determined based on the source of the material. Under current requirements, no distinction is made between material prepared by or at the direction of the issuer, on the one hand, and derived information prepared and provided by underwriters or dealers without issuer involvement (but often with investor involvement), on the other hand.

- Second, the exemption rule should include a provision that preserves the protection afforded by the exemption notwithstanding a good faith immaterial, unintentional or involuntary failure to file or delay in filing of material as required under the rule.

i. Filing Requirements and Liability Standards Should Depend on the Source of the ABS informational and computational material

As the Commission recognizes, the structuring and offering process for ABS can be quite complex, involving an analysis of the cash flow characteristics of an asset pool and detailed provisions for the allocation of those cash flows. In addition, any variety of transaction

structures can be developed for the same underlying asset pool, providing the opportunity to tailor the terms of the classes or tranches of a particular offering to the specific guidelines of investors. In order to establish a satisfactory transaction structure, interactions between underwriters and prospective investors are necessary, and involve the exchange of data and specification of assumptions, resulting in the generation of written material recognized under the no-action letters as "computational material."[89]

As may be evident, the interactive process by which underwriters and prospective investors generate this computational material typically occurs with no issuer involvement and, therefore, differs significantly from the conventional offering process for securities, where offering material is prepared by the issuer or, at a minimum, with substantial issuer involvement. In addition, the interactive process between underwriters and prospective investors can best be described as "collaborative," as investor input often influences the actual content of the computational material. For example, investors may require underwriters to provide them with computational material comprised of computer-generated tables and charts displaying for a proposed tranche of ABS the yield, average life, duration, expected maturity, interest rate sensitivity and cash flow characteristics of such tranche under a variety of *investor-directed* assumptions and prepayment scenarios. It is not unusual, therefore, that an underwriter may generate different sets of computational material relating to the same proposed transaction structure for two or more prospective investors because each such investor specifies a different set of assumptions and scenarios to be used in preparing the material.[90]

From a content perspective, computational material contains purely objective, factual data and, conversely, lacks any significant narrative discussion describing the subject ABS offering or other subjective content, such as opinions or recommendations concerning the issuer and its securities. Computational material, therefore, serves extremely valuable purposes for investors while, by its very nature, the content of such material is not prone to manipulation or distortion.

In our view, because (i) computational material is prepared without issuer involvement, and involves an interactive and collaborative process between underwriters and prospective investors, and (ii) its content is purely objective and factual, such material lacks the key characteristics of offering material and an issuer should not be required to file or be liable for its content under the Securities Act.[91] It is for these same reasons that we believe some issuers will continue to prohibit the use of computational material unless such material is exempted from the operation of Sections 11 and 12(a)(2) of the Securities Act.

To avoid the deterrent effect on providing timely and useful information to investors, we respectfully submit that the Commission should distinguish between two sources of ABS

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[89] This computational material relates to various data and assumptions concerning the payment priorities and other characteristics of the proposed tranches comprising one or another transaction structure. As noted in the no-action letters, this information is provided to a prospective investor, generally at the investor's request, in order to assist the investor in determining whether the proposed structure will meet its needs under varying assumptions.

[90] It is for this same reason that material prepared at the request of one investor is unlikely to be material or even relevant to another investor with different needs.

[91] Such computational material would presumably continue to be subject to general antifraud liability pursuant to Section 10(b) of the Exchange Act.

informational and computational material, each of which would be subject to a different filing requirement and a different liability standard under the federal securities laws.

- *Material Prepared by or at the Direction of the Issuer:* This category would include all ABS informational and computational material prepared by or at the direction of the issuer, the depositor or the sponsor of the subject ABS, and, as a result, would include all material described in Items 1101(a)(1) through (a)(3) of proposed Regulation AB. Stated another way, this category would include all ABS informational and computational material other than material covered by the second category. This material would be filed as currently contemplated pursuant to proposed Rule 426 and, accordingly, would be subject to liability pursuant to each of Sections 11 and 12(a)(2) of the Securities Act, as well as general antifraud liability pursuant to Section 10(b) of the Exchange Act.

- *Derived Information Prepared and Provided by Underwriters or Dealers Without Issuer Involvement:* This category would include ABS informational and computational material the source of which is an underwriter or dealer, and which was otherwise prepared without involvement by the issuer, the depositor or the sponsor of the subject ABS (other than the provision by any such party of such information regarding the underlying assets as is necessary for the preparation of the derived information).[92] Such material would typically include, therefore, only the material described in Item 1101(a)(4) of proposed Regulation AB. This computational material would not be subject to the filing requirements specified in proposed Rule 426 or any other rule or regulation.[93] As discussed above, because such computational material is generated without direct involvement by the issuer, the depositor or the sponsor of the subject ABS, we believe that some issuers will continue to prohibit its use unless such material is exempted from the operation of Sections 11 and 12(a)(2) of the Securities Act.[94] We respectfully request, therefore, that the Commission, by rule, deem such computational material not to be a prospectus.

In addition to the recommendations above, we respectfully request that the Commission clarify and confirm that its opinion concerning the unenforceability of certain indemnification provisions does not apply in any case where an issuer, on behalf of itself, or its directors, officers

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[92] In some instances, an underwriter or dealer includes within this computational material such background information concerning the underlying pool of assets and the proposed structure of the ABS as is necessary for an analysis of the computational data. Where the computational material is otherwise prepared by the underwriter or dealer, without issuer involvement, we do not believe that the inclusion in the computational material of such background information should alter the overall character of the material, as long as the issuer files such background information as contemplated by proposed Rule 426. As is currently contemplated by proposed Rule 426(c)(3), to the extent such background information concerning the pool of assets and the proposed structure of the ABS has already been filed by the issuer pursuant to such rule, no additional filing requirement would arise.

[93] If the Commission felt it necessary, such material could be "furnished" to the Commission on Form 8-K in a manner comparable to Regulation FD disclosure, as contemplated by Item 7.01 of Form 8-K. However, as discussed below, any provision of the rule conditioning the use of such material on its submission to the Commission should include an exception preserving the benefits of the exemption in the case of a good faith immaterial, unintentional or involuntary failure to furnish, or delay in meeting the requirement to furnish, such material.

[94] Again, such computational material would presumably continue to be subject to general antifraud liability pursuant to Section 10(b) of the Exchange Act.

or persons controlling the issuer, seeks indemnification from an unaffiliated underwriter or dealer for liabilities arising under the Securities Act in connection with the use by such underwriter or dealer of ABS informational and computational material prepared by such underwriter or dealer without involvement by such issuer. The Commission's opinion concerning the unenforceability of certain indemnification provisions is based on public policy and, in particular, the public's interest in holding a responsible party accountable for the accuracy of information it prepares and controls.[95] In the instant circumstances, the issuer has no involvement in the preparation of the computational material and, in any practical sense, cannot otherwise control its content. We believe that there is a considerable amount of unnecessary and unintended uncertainty concerning the effect of indemnification arrangements in this context even though no corresponding public policy concern is implicated. We also believe that ABS informational and computational material would be more freely used if the Commission confirmed that its opinion does not apply to indemnification arrangements in this context.

ii. Good Faith Immaterial, Inadvertent or Involuntary Failure to File or Delay in Filing

In connection with the filing requirements under proposed Rule 167(b), the Commission is not proposing a provision that currently is available in the communications exemptions for business combination transactions that preserves the protection afforded by the exemption notwithstanding a good faith immaterial or unintentional failure to file or delay in filing of material as required under the rule. In reaching this result, the Commission observes that the absence of such protection does not appear to have had a chilling effect on the use of ABS informational and computational material in the ABS market.

As discussed above, we respectfully disagree with the Commission's observation that the current filing requirements, which provide no protection for good faith filing anomalies, have not had a chilling effect on the use of ABS informational and computational material. We respectfully request, therefore, that the Commission incorporate into proposed Rule 167 a provision to the effect that a good faith immaterial, inadvertent or involuntary failure to file or delay in filing ABS informational and computational material will not result in a loss of protection under the exemption.

As described in some detail above, computational material is typically prepared by underwriters or dealers without the involvement of the issuer. As a result, the content and completeness of any such filing is entirely dependent on the timely receipt of the written material from one or

[95] The Commission's position on indemnification for Securities Act liability, as set forth in each of Item 510 and Item 512(h) of Regulation S-K (17 CFR 229.510, 229.512(h)), to the effect that such indemnification is contrary to public policy and is, therefore, unenforceable, reflects the Commission's views on indemnification in the limited circumstances described in each such Item. Specifically, the Commission's views are expressed only to the extent (1) any provision or arrangement exists whereby the registrant may indemnify a director, officer or controlling person of the registrant against liabilities arising under the Securities Act, or (2) the underwriting agreement contains a provision whereby the registrant indemnifies the underwriter or controlling persons of the underwriter against such liabilities and a director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is such an underwriter.

more unaffiliated underwriters or dealers.[96] Moreover, the issuer in these cases has no ability to independently ascertain whether the written material received from any such underwriter or dealer accurately reflects the material actually used by such underwriter or dealer, or even whether all written material subject to the filing requirement has been provided. Finally, as a separate point, computational material in many cases is quite voluminous and it is very likely that issuers will from time to time encounter unforeseen filing delays, for example, where a document must first be re-formatted to eliminate computer instructions or formatting code.

In the case where a bona fide effort is made to file ABS informational and computational material in a timely manner, but such material either is not filed or is filed in an incomplete form as a result of a delay in obtaining, or the inability to obtain, reports or other information from one or more unaffiliated third parties, or for other unintentional or immaterial reasons, we believe that the failure to file or delay in filing of such material should be treated as immaterial, inadvertent or involuntary and, therefore, should not affect the availability of the protections afforded by the exemption.[97]

b. Models and Analytic Software Inputs

In the Proposing Release, the Commission clarifies that, in cases where investor analytics or other third party services allow issuers and underwriters to import into a system or otherwise provide data regarding structure or underlying assets that investors can then use for their own purposes, absent a relationship with the third party, only the inputs, models and other information provided by the issuer or underwriter to an investor or service would constitute ABS informational and computational material. The Commission goes on to discuss the format in which such inputs, models and other information may be filed, noting (i) that issuers and underwriters may aggregate data and file it in consolidated form, (ii) that such information should be in an understandable form, (iii) a preference to file material using the same presentation used for investors and (iv) in the case of documents that contain computer instructions or formatting code, executable code used by a program to read the information is not to be filed. We respectfully request that the Commission supplement its views as expressed in the Proposing Release, to clarify the information that may be used in reliance on the proposed exemption, and that is required to be filed, including the acceptable format for filing.

- First, we respectfully request that either proposed Rule 167 or Item 1101(a) of proposed Regulation AB be revised to clarify, within the operative text or by instruction thereto, that a written communication provided by the issuer, underwriter or any other participant in the subject ABS transaction that includes executable code used by a program to read information constitutes ABS informational and computational material.

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[96] This assumes, of course, that the Commission does not adopt our recommendations above concerning a filing exemption for such material.

[97] As noted by the Commission in footnote 198 to the Proposing Release, in the context of Rule 165(e), factors to be considered in determining whether a delay in filing is immaterial or unintentional include: the nature of the information, the length of the delay, and the surrounding circumstances, including whether a bona fide effort was made to file timely. We believe the same standards should apply for purposes of the communications exemption for ABS informational and computational material and that, in determining whether a delay in filing is involuntary, an additional factor would include whether there was a delay in obtaining, or an inability to obtain, information or reports from one or more unaffiliated third parties.

- Second, we request that the Commission confirm that, to the extent models and model inputs simply encapsulate other previously-filed ABS informational and computational material, they need not be filed separately.

c. Continued Availability of Filing under Cover of Form SE

In connection with the no-action letters regarding ABS informational and computational material, the Commission amended its EDGAR filing rules to exempt computational material from electronic filing requirements. As a result, computational material is currently permitted to be filed in paper under cover of Form SE. With advances in EDGAR, including the acceptance of HTML documents, the Commission is proposing to eliminate the electronic filing exemption for computational material. For the reasons set forth in Section III.A.4.a. of this letter, we respectfully submit that computational material should not be subject to any filing requirement where such material is prepared without issuer involvement. However, if the Commission does not adopt our recommendation concerning this exemption from filing, we respectfully request that the Commission reconsider its proposal to eliminate the electronic filing exemption as a proposal that would bring additional cost to issuers (and, therefore, even further chill on the use of such material) with absolutely no corresponding benefits to investors.

The filing of documents in HTML format as compared with ASCII format is an improvement to EDGAR in absolute terms, but by any relative measure, in the context of computational material its benefits are merely marginal. Computational material is denoted by voluminous, highly-formatted documents, dense with statistical and tabular data, the likes of which are unparalleled by any other type of filing. The Commission makes the observation that non-ABS registrants now routinely include detailed statistical and tabular data in their EDGAR filings. We respectfully question the comparative value of any such filing. Computational material does not merely *include* detailed statistical and tabular data; such data *defines* computational material, and it is not unusual, under the current filing requirements, for a Form SE to include multiple versions of computational material that are difficult to convert and may total to scores of pages in length. In short, the hardships associated with conversion of the source document into a format approved for official filing with the Commission continue to be both unique and severe in the context of computational material.

Currently, Regulation S-T provides issuers with an optional alternative to make a filing in an "unofficial" duplicate form in Portable Document Format (PDF). PDF provides a facility for recording a virtually identical duplicate of the source material with a minimum of formatting. This can be accomplished either through direct output, as to a print device, from the source program (including tables and charts) or through scanning the image of the printed document. While the latter alternative results in large file sizes that tax the storage capabilities under the current EDGAR system, the former alternative – direct output – results in file sizes comparable to HTML versions.

We respectfully submit, therefore, that the Commission should amend Regulation S-T to allow ABS informational and computational material to be filed in PDF direct output format and to recognize such filings as satisfying any filing requirements for such material. If the Commission determines not to permit filing in PDF direct output format to satisfy official filing requirements, we respectfully submit that the Commission should continue to permit ABS informational and

computational material to be filed in physical form, under cover of Form SE.[98] As noted above, we strongly believe that the Commission's proposal to eliminate the electronic filing exemption would bring additional cost to issuers with absolutely no corresponding benefits to investors. Finally, in keeping with its unique character as investor-directed and investor-specific information, we are unaware of any instance where an investor or other market participant has sought to access computational material from Commission archives.

B. Research Reports

1. Proposed ABS Research Report Safe Harbor

Currently, in reliance on a Commission staff no-action letter, brokers or dealers have the benefits of a conditional safe harbor for the publication of research material ("ABS research") in and around an offering of ABS registered or to be registered on Form S-3, even though any such broker or dealer is participating, or will participate, in the distribution of the registered securities.[99] Under the proposed rules, the Commission would codify this position. As with the no-action letter, the codified research safe harbor would be available only in connection with offerings of investment grade ABS registered or eligible to be registered on Form S-3.

2. Role of Securities Firms in Disseminating ABS Research

As the Commission has recognized, securities firms play a pivotal role in providing investors with timely and relevant information about ABS. The nature and scope of research material that ABS investors need was outlined for the Commission staff in the PSA research letter:

> "The ABS business has been characterized since its inception by a high degree of innovation,…creat[ing] a demand among investors for timely information about these innovations as well as a need for continuing performance information concerning comparable outstanding securities within a particular ABS group or market sector. Investors also seek descriptive, analytical and comparative information relating to various asset types and classes that underlie different categories of ABS."
>
> "Unlike the information contained in prospectuses…provided to investors in connection with a particular ABS offering, the information contained in research reports typically deals with the characteristics of a general sector of the ABS market. Such reports may offer the preparer's views on default risk, early redemption risk, prepayment risk, extension risk, collateral performance, break-even spreads, relative value versus other fixed income securities, and the likely benefits of credit enhancement under particular scenarios. Investors also have an interest in data that describes for comparative purposes the performance…of one or more categories of ABS or underlying ABS collateral."

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[98] If the Commission felt it necessary, the option to file in physical form could be conditioned on also filing the information unofficially in PDF direct output format.

[99] *See* Dissemination of Research Materials Relating to Asset-Backed Securities (Feb. 7, 1997) (response to no-action request on behalf of PSA The Bond Market Trade Association (the "PSA research letter")).

3. The Importance of Continuity of Research Coverage

While the PSA no-action letter has helped to some degree, the task of distinguishing permitted research from forbidden "gun-jumping" too often remains quite difficult. Certain of the criteria set forth in the no-action letter call for subjective content-based assessments of the research, making it very difficult to establish standards to define the boundaries of permissible research that can be applied consistently. Because of these often challenging interpretive issues, the dissemination of valuable research to ABS investors is significantly less fluid than is the case in the corporate market.

As a result, we believe that the standards for the issuance of ABS research should be revised to be more consistent with the standards and approach applicable in the corporate market under Rule 139. We respectfully request, therefore, that Rule 139a include an alternative standard, comparable to the more streamlined standard in Rule 139 applicable to seasoned corporate issuers, so long as certain prescribed conditions are satisfied, as described below. Where the prescribed conditions are satisfied, we believe that the more streamlined standards should apply to all ABS, regardless of whether the subject ABS are registered for offer and sale on a Form S-3 or Form S-1 registration statement.[100] Where the prescribed conditions are not satisfied, the more restrictive content-based standards currently proposed would apply.[101]

Under this framework, we believe that the more streamlined standards should apply where the following conditions are satisfied:

(i) the publication in which the ABS research is proposed to be published is distributed with reasonable regularity in the normal course of business; and

(ii) either of the following is true –

(a) the subject ABS are expected to be rated investment grade as of their issuance date and are being offered only to institutional investors; or

(b) the subject ABS are expected to be rated investment grade as of their issuance date and the broker or dealer has previously published or distributed with reasonable regularity ABS research relating to ABS backed directly or indirectly by substantially similar collateral as that directly or indirectly backing the subject ABS.

We believe that these conditions would operate as very effective safeguards against the potential misuse of research to improperly condition the market for a concurrent registered securities offering. Equally important, the introduction of more definite standards on the bounds of

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[100] As with the exemption for ABS informational and computational material, we believe the research safe harbor should not be limited to only a subset of ABS. Investors have as much need for timely and relevant information about ABS registered on Form S-1 as they do for ABS registered on Form S-3. We believe Rule 139a will be most effective and beneficial to investors if the rule operates to promote research across the entirety of the ABS market.

[101] Certain additional comments on the current standards are addressed later in this letter, immediately following this discussion.

permissible ABS research would promote greater continuity in the dissemination of ABS research to investors.

4. Revisions to Current Conditions for Use of ABS Research

Lastly, with respect to the conditions to Rule 139a set forth in the Proposing Release, we respectfully request that the Commission eliminate the condition from the PSA research letter that sufficient information be available from public sources to provide a reasonable basis for the view expressed by the broker or dealer with respect to the subject ABS. This condition was initially included in an effort to address indirectly the concern that issuers might selectively share material non-public information with only "captive" brokers or dealers and thereby influence the content of the research. In the years since the PSA research letter was issued, the Commission and the SROs have adopted various regulations that comprehensively address this and related concerns. Regulation FD and Exchange Act Rules 10b5-1 and 10b5-2 were enacted by the Commission for the express purpose of holding issuers and certain persons who possess material non-public information about such issuers, including brokers and dealers, accountable for actions that they take on the basis of such information. In addition, Regulation AC and various SRO regulations subject analysts producing research material to enhanced requirements concerning independence and accountability for their views as expressed through research material. As a result, we respectfully submit that the condition is redundant of more recent regulations that focus more directly on the underlying concern and, therefore, that the condition is unnecessary. In addition, this condition to some extent has operated as a "chill" on the dissemination of research by imposing an obligation on brokers and dealers to make qualitative assessments concerning the adequacy of an unaffiliated issuer's public disclosures. We respectfully submit that Regulation FD focuses on the underlying concerns more directly and allocates responsibility more appropriately.

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IV. ONGOING REPORTING UNDER THE EXCHANGE ACT

A. General Comments and Request for Confirmation

1. General Comments and Request for Exemption for Existing Deals

In our review of the Proposing Release and the proposed rules relating to ongoing reporting, we recognize much which is familiar and has been developed over the years through no-action letters and through staff positions expressed in other forms. We also see much which is new and which represents a change in form and an expansion of the amount and detail of information to be reported.

We consider the form, amount and detail of the information proposed to be reported to be such a major change from the current practice—and from what has been built into the documentation and contracts for existing ABS—that, as a preface to our ongoing reporting comments, we hereby request that the Commission provide a generous transition period for implementation of the new forms, rules and directions and that such transition period provide an exemption from the new rules for ABS issued prior to or within 12 months after the publication date of the new rules.

There is considerable overlap between the proposed rules relating to disclosure, which rules are discussed in Section II of this comment letter, and those relating to ongoing reporting, discussed in this Section IV. To the extent the proposed rules and directions relating to ongoing reporting refer to rules and directions discussed in connection with the disclosure requirements, those comments made in Section II of this letter are equally applicable to ongoing reporting without being restated in this Section.

In addition to the points made in the preceding two paragraphs, there are several points and issues which carry through multiple aspects of the ongoing reporting provisions and which we respectfully suggest should guide the development of rules and regulations for this area. Some of these key points and issues are summarized as follows:

- The market for ABS is predominantly a sophisticated, institutional market. Investors in ABS are accustomed to accessing information through a variety of sources including information posted to issuers' and depositors' websites or made available through Bloomberg or other services. These investors are highly sophisticated and able to understand and make use of the information available to them. We believe that the form and content of periodic distribution reports provided by most issuers today have generally been developed in response to the needs and requests of investors, and the information provided is the information determined to be most useful to investors.

- The ABS industry is highly diverse. The type of assets which are securitized vary greatly – from commercial mortgages to individual consumer credit card accounts. Structures range from multi-billion dollar revolving master trusts to repackagings of a single mortgage. Rules and regulations which apply to the asset-backed industry must be flexible enough to accommodate a wide variety of asset classes and an almost endless variety of structures. What is material in one transaction may not be material in another.

- The proposed forms, rules and directions represent a significant change from current practice. If implemented as proposed, the new forms, rules and directions would significantly expand the amount of time, effort and expense of compliance with the ongoing reporting obligations. Issuers and depositors do not currently have the systems in place, do not have access to some of the information required, and, in many instances, do not have adequate staff, to comply with the proposals.

- Many asset-backed transactions involve assets originated, deposited and/or serviced by multiple unrelated parties and, in some cases, such parties, once they have sold assets into a securitization structure, have no ongoing relationship with any of the other parties to the transaction. Controlling the actions of such parties, obtaining information from them or making representations on their behalf may not be possible.

- Repackagings and resecuritizations bear little resemblance to other ABS backed by a pool of assets which must be managed and serviced. Special provisions should be adopted to accommodate repackagings and resecuritizations.

- It is difficult for issuers to prepare and file information through the EDGAR system and it is difficult for investors to use EDGAR. The system should be improved. One way in which it could be improved would be to expand the use of other informational sources and thereby relieve the need to provide extensive filings through EDGAR.

- We appreciate the creation of the new Form 10-D for purposes of reporting periodic distribution information. We believe, however, that the form should be limited to reporting periodic distribution information. As proposed, the form combines the routine distribution information with a list of additional reporting requirements – many items of which we would submit are more properly reported, when and if material, on Form 8-K.

- We are intrigued by the Commission's suggestion that, as an alternative to filing periodic distribution reports by Form 8-K or Form 10-D, issuers be permitted to post distribution reports on a website and not file such reports with the Commission except to the extent needed to subject the reports to the Sarbanes-Oxley certifications. This would be a progressive, highly efficient and useful development – a movement designed to improve the amount and quality of information available and reduce administrative burdens. However, to the extent all Form 10-D information ultimately is required to be filed with the Commission by EDGAR, much of the benefit is lost. We urge development of a certification that would refer to the information posted to the website.

2. Request for Confirmation Concerning Accelerated Filer Status

ABS issuers and their counsel are of the belief that ABS issuers are not "accelerated filers" as such term is defined in Rule 12b-2 under the Exchange Act. We believe this position is well founded[102] and understand from informal discussions that the staff does not object to this

[102] The primary basis for this position is that the definition of "accelerated filer" excludes companies that "do not have a common equity public float." The staff has informally confirmed that ABS do not come within the meaning of "common equity."

position. We request the Commission's confirmation of the position that ABS issuers are not "accelerated filers" within the meaning of Rule 12b-2.

3. Specific Comments

With the foregoing general comments as background, we provide the following specific responses and comments to the reporting proposals.

B. Determining the "Issuer" and Operation of Section 15(d) Reporting Obligation

1. Depositor Designated as "Issuer"

Under proposed Exchange Act Rule 3b-19, the depositor for the ABS, acting solely in its capacity as depositor to the issuing entity, would be the "issuer" for purposes of the ABS of that issuing entity. The Proposing Release states that the intent is to "clarify the definition of 'issuer' with respect to the reporting obligation and the nature and operation of the Section 15(d) reporting obligation." We have no objection to the designation of the depositor as the "issuer," at least with respect to ABS issued by United States domestic entities. In the United States, ABS are issued through a variety of structures and "issuing entities." Common law trusts, statutory trusts, limited liability companies, partnerships and corporations are common issuing entities. These entities usually are newly-created, limited purpose, bankruptcy-remote entities which have no employees, officers or directors. Given the limited abilities of the issuing entities, questions frequently arise concerning the appropriate person to file Exchange Act reports. The proposal clarifies the issue. The designation of the "depositor" as the issuer for purposes of filing the Exchange Act reports, is appropriate and helpful with respect to U.S. issuers. With respect to foreign issuers, see Section I.C. of this comment letter.

2. Signatories on Exchange Act Reports

The General Instructions for Forms 10-D and 8-K, as proposed, state that the report must be signed by the depositor. "In the alternative" the report may be signed on behalf of the issuing entity by a duly authorized representative of the servicer. If there are multiple servicers, a duly authorized representative of the master servicer (or entity performing the equivalent functions) must sign if a representative of the servicer is to sign.

The General Instructions for Form 10-K, as proposed, state that the report must be signed either (i) on behalf of the depositor by the senior officer in charge of securitization of the depositor or (ii) on behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer or, if the servicer is to sign and multiple servicers are involved, then the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent functions) must sign.

The Proposing Release and the proposed rules, therefore, contemplate that the depositor will sign the Exchange Act reports, but the proposed rules also recognize "alternative" scenarios in which a servicer or master servicer may sign. We believe that, in some transactions, there are other parties better suited to perform this responsibility. In some cases the appropriate party may be the trustee or an administrator.

The following are examples of transactions in which market participants other than the depositor or servicer may be appropriate signatories. This list of examples is illustrative only; it is not exhaustive.

> **Example 1**: A securitization involves more than one servicer. Each servicer is a party to the pooling and servicing agreement and each services a portion of the portfolio. The trustee's duties include performing all bond administration functions (*i.e.*, receiving all remittances from servicers, calculating amounts distributable on the various classes, making distributions to investors and maintaining the bond register). In this example, the trustee has active responsibility for administrative activities that relate to the entire transaction, while no servicer has responsibility for servicing the entire transaction. In this case, the trustee should be permitted to sign Exchange Act reports.
>
> **Example 2**: The second structure is basically the same as Example 1. The securitization involves more than one servicer. Each servicer signs the pooling and servicing agreement and each services a portion of the pool; however, in this second example, the trustee's duties are limited to distributing cash to investors. A separate entity acts as bond administrator and performs all other bond administration functions including receiving remittances from the servicers and calculating amounts distributable on the various classes. In this example, the administrator has active responsibility for activities that relate to the entire transaction while the trustee has a very limited role and no servicer has responsibility for servicing the entire transaction. The administrator should, therefore, be permitted to sign Exchange Act reports.
>
> **Example 3**: A third example involves a resecuritization in which existing ABS are used to support a new issuance of ABS. There is no servicer. The trustee's duties are limited to distributing cash to investors. A separate entity acts as administrator and performs all other bond administration functions. In this example, the administrator has active responsibility for activities that relate to the entire transaction. The administrator should, therefore, be permitted to sign Exchange Act reports.
>
> **Example 4**: The fourth example involves the repackaging of corporate bonds of one or more issuers. In such a securitization, the trustee acts as trustee and performs all administration of the trust including collecting on the underlying assets, making distributions to certificateholders and administering defaulted underlying assets. There is no servicer. The trustee has active responsibility for administrative activities of the entire transaction and should be permitted to sign Exchange Act reports.

The four examples above offer brief descriptions of transactions in which the trustee or administrator may be the appropriate entity to sign Exchange Act reports as the only entity engaged in activities that related to the entire transaction. In such case, the depositor, by contract, would assign the obligation to the trustee or administrator.

We note that the definition of "servicer" in Item 1101(j) of proposed Regulation AB seems to permit a trustee or an administrator to be construed as a "servicer" if that trustee or administrator is responsible for the management or collection of the portfolio or for making allocations or

distributions to holders of the ABS. With respect to the proposed definition of "servicer" in Item 1101(j), we note:

- An administrator (because it is a person responsible for making allocations or distributions to holders) may be a "servicer"; however, since with an administrator (other than in a resecuritization) there would always be at least one other servicer, the General Instructions would require the reports to be signed by the "master servicer (or entity performing the equivalent functions)" which would seem to indicate that the administrator could not sign.

- A trustee (other than in a resecuritization) generally would be receiving allocations or distributions from a servicer, and therefore, may not be a "servicer" and could not sign the reports, even if the trustee were making allocations or distributions to investors.

- In the case of a trustee in a resecuritization where the trustee is responsible for making allocations or distributions to investors, the definition may be ambiguous. The trustee would not be receiving distributions from a servicer for the underlying assets but would be receiving distributions from a servicer of the underlying ABS or from the trustee of the underlying corporate bonds.

  As a result of the foregoing concerns, we respectfully request that:

  The second sentence of the Item 1101(j) definition of "servicer" be revised to exclude administrators and trustees.[103] That sentence would then read, "The term servicer does not include a trustee, paying agent, administrator or other person for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities if such person receives such allocations or distributions from a servicer (or receives such distributions on pool assets that are securities) and such person does not otherwise perform the functions of a servicer."

  The General Instructions to Forms 8-K, 10-D and 10-K be revised to permit the report to be signed, in the alternative, by a servicer, trustee or administrator. In addition, where multiple servicers are involved, each as a party to the ABS transaction, and no entity acts as a master servicer (or performs equivalent functions), the entity with responsibility for servicing the greatest amount of pool assets (determined as of the date of closing) should be permitted to sign the report.

  The General Instructions to Forms 8-K and 10-D be revised to clarify that the report may be signed by a duly authorized representative of the depositor. Currently, the General Instructions to these forms is silent on who may sign on behalf of the depositor.

[103] This request is made in the event that the Commission does not accept our comments on the proposed definition of "servicer" discussed in greater detail earlier in this letter, in connection with our comments on Items 1101(j) and 1107 of proposed Regulation AB. In those comments, we ask the Commission to revise the definition of "servicer" to move those elements that relate to bond administration into a separate definition and to significantly reduce the level of background and other information required for entities performing only bond administration activities.

3. Powers of Attorney

Without regard to the parties which are permitted to sign the Exchange Act reports, we assume and request clarification that any of such persons may, by power of attorney, authorize others to sign the Form 10-D, Form 8-K or Form 10-K on their behalf. We understand, of course, that such powers of attorney could not be used for purposes of signing the certification.

4. Section 15(d) Reporting Obligation

Overall we find the proposed interpretive rules relating to Section 15(d) reporting to be appropriate. We would, however, make the following comments and suggestions:

(i) Proposed Exchange Rule 15d-22(b) provides that the reporting requirements under Section 15(d) of the Exchange Act would no longer apply if, at the beginning of any fiscal year, other than the fiscal year in which the takedown occurred, the securities of each class in the takedown are held of record by less than 300 persons. We believe it would be helpful if the rule were to specify that the reporting requirements cease automatically without the necessity to file a Form 15.

(ii) Proposed Exchange Rule 15d-22(a) provides that annual and other reports need not be filed pursuant to Section 15(d) of the Exchange Act until the first bona fide sale in a takedown of securities under the registration statement. In the Proposing Release, footnote 228 notes that under prior no-action letters no Form 10-K report or other Exchange Act reports were required to be filed where a takedown of ABS occurred very close to the end of the fiscal year and where no distribution occurred until the following fiscal year. The proposal would reverse that position and require that the issuer file a Form 10-K for the fiscal year in which the transaction closed whether or not any distribution occurred in that year. In reversing the position, the Commission indicates its belief that information regarding the servicing of the asset pool, including the servicer compliance statement and assessment of compliance, would still be important information for investors, even for a period as short as a few weeks.

We respectfully request that the prior position be maintained. Where no distributions have occurred within the subject fiscal year, the property of the issuing entity has remained the same, and no other reportable events have occurred prior to the completion of the subject fiscal year (*e.g.*, no updates regarding legal proceedings, no matters submitted to a vote of security holders), and where servicing activities, if any, have been so limited as to not yet have resulted in even one distribution to security holders, we strongly believe that the filing of the Form 10-K would not further the purposes of the Exchange Act and would require issuers to incur unwarranted and unnecessary costs. This position would also be consistent with the approach of reporting distributions on a periodic basis. Until at least one distribution date has occurred, there would be no distribution report which would be covered by the certification included in the Form 10-K and, for such a short period of time, there would be no need to provide

the servicer's assessment and incur the expenses of obtaining an accountant's attestation.

In addition, in some securitizations it is quite likely that there will have been no "servicing" activity prior to completion of the subject fiscal year. For example, in resecuritization and repackaging transactions it is likely that the underlying securities would not have produced any cash flows in the period from the date of issuance of the ABS to the end of the subject fiscal year and, therefore, that not even the limited bond administration functions implicated by such transactions would have commenced. The same may be true in some commercial mortgage-backed securitizations, where there has been no (or merely incidental) cash flow activity through the end of the subject fiscal year. Even in securitizations where cash flow activity may have begun, we believe that the activities of a servicer for such a limited time period, and where not even one distribution to security holders has occurred, should properly be viewed as incidental.

(iii) The Proposing Release also requests comment on whether the ability to suspend reporting under Section 15(d) of the Exchange Act should be revisited. We strongly believe that the ability to suspend filing of Section 15(d) reports should not be modified. The investor base for the structured securities market is comprised predominantly of institutional investors, including financial institutions, pension funds, insurance companies and money managers. Overall, the fixed-income market is somewhat more heterogeneous with a broader mix of investors, including more retail and individual investors than the ABS market. We would, therefore, find it somewhat anomalous if the statutory reporting scheme were to be applied more restrictively (and, therefore, more severely) to ABS than to the fixed-income markets generally.

A reversal of the current policy would subject issuers to an unnecessary administrative burden and unexpected financial costs. Such costs and administrative burdens could be considerable. In addition to the financial costs associated with ongoing reporting obligations, many issuers could not maintain the accuracy and timeliness of such reports without significantly increasing staffing beyond current levels. If the suspension from Exchange Act reporting that is available more generally to the fixed-income markets were discontinued for the ABS market, compliance costs for those depositors with scores and scores of separate issuing entities in existence would increase exponentially.

C. Reporting under EDGAR

1. Comments Concerning EDGAR Improvements

The Proposing Release requests comment on any additional ways to make reporting on EDGAR less time-consuming or less costly for ABS issuers while still providing an efficient and usable retrieval system for investors and the marketplace.

We generally agree that EDGAR currently is administratively burdensome to use and, in fact, limits the usefulness of information provided through that system. There are many ways to improve the EDGAR system. We note the following:

- The conversion of documents to ASCII or HTML is not automated on EDGAR, but rather requires substantial effort (and, therefore, substantial costs) by skilled operators. EDGAR's lack of automation creates a risk of filing delay due to transmission error. To improve the system, issuers should be able to include files on EDGAR in formats such as PDF, Excel and XML. The ability to attach files in such formats would eliminate many of the delays and administrative burdens associated with converting files into ASCII or HTML. It could also improve the readability and usefulness of information which is filed.

- The process by which depositors obtain CIK codes is cumbersome, and the proposed requirements regarding static pool information and loan level data, if implemented, would exacerbate the process for obtaining CIK codes. In addition, the Commission's proposed elimination of paper filing exemptions pursuant to which ABS issuers may submit paper filings for ABS computational materials and term sheets would further complicate the process by which depositors obtain CIK codes. Consequently, the process for obtaining CIK codes should be fully automated on EDGAR in order to relieve some of the administrative burden imposed by the current system.

- Depositors should be able to direct their own naming convention for each new issuing entity's CIK code.

- The process by which issuers post documents on EDGAR should be web based and fully automated.

- The Commission should create a user-friendly method by which issuers may obtain separate CIK codes on older transactions without being required to file a prospectus or other document to obtain such code.

In addition to the matters related specifically to EDGAR set forth above, we note that if the Commission were to permit periodic distribution reports to be posted to a website rather than being filed with the Commission, that, in itself, would substantially reduce the volume and burden of the monthly EDGAR filings for ABS issuers and would provide an efficient and usable retrieval system for investors and the marketplace.[104] If, however, all of the periodic distribution reports, whether or not available at a website, are required, at some point, to be filed with the Commission, much of the benefit from an efficiency and cost standpoint would be lost. We, request, therefore, that the Commission also consider a system by which the Sarbanes-Oxley

[104] If the distribution reports were to be published on a website, we would suggest the following requirements. First, depositors should provide notice to investors of the website address, and in either a prospectus or Form 8-K filing should disclose their intent to post distribution reports in either a prospectus or a Form 8-K filing. Second, the website should be unrestricted and available to all investors. Third, the depositor should maintain a daily record of the website contents, which record should be preserved until the later of (i) five years from such record date and (ii) the date on which the related ABS are paid in full.

certification could be applied to the periodic distribution reports without the distribution reports actually being filed with the Commission. Such a system might allow an issuer to post its distribution reports to a website and state that such reports are being posted in lieu of filing with the Commission. Then the Form 10-K could, in listing information included as part of the annual report and thereby as part of the information covered by the Sarbanes-Oxley certification, list the information available on the website and posted in lieu of filing.

2. Separate vs. Aggregated Reports

In the Proposing Release, the Commission indicates its belief that filing separate annual, periodic and other reports for each issuing entity under discrete CIK codes provides easier access to information on a particular issuing entity and its ABS, and easier tracking of the entity's reporting obligation and when that obligation may be suspended. The Commission goes on to state, ". . . we do not believe providing required information for multiple issuing entities in a 'combined' annual or periodic report containing information regarding multiple issuing entities of a single sponsor or depositor is consistent with these objectives."

Footnote 238 to the Proposing Release identifies certain instances where, by no-action letter,[105] the Commission staff has acknowledged combined reporting on a limited basis. This footnote then expresses the staff's belief that these no-action letters gave rise to the current practice of combined reporting on a larger scale. It is our understanding, however, that the practice of combined reporting on behalf of multiple issuing entities organized by a common depositor was the subject of specific informal discussions with the staff of the Office of Chief Counsel in the Division of Corporation Finance ("Office of Chief Counsel") in the mid-1990s, and that the practice was expressly approved on the condition that any such combined report include an exhibit index that separately identifies each distribution report and that each such distribution report be included as a separate exhibit. As discussed below, we believe that an index arranged by issuing entity and by distribution report provides readily accessible information to investors.

As noted earlier in this letter, outside of the master trust context, one of the hallmark characteristics of the ABS market, and one that markedly distinguishes the ABS market from the corporate markets, is the creation of discrete issuing entities in connection with each takedown. As a result, some depositors have literally hundreds of separate issuing entities in existence and many others have a hundred or more in existence. A corporate issuer may have multiple effective registration statements, each resulting in an overlapping periodic reporting requirement, where a single periodic report will satisfy the issuer's reporting obligations under each such registration statement. By contrast, a depositor for an ABS program may have a single effective registration statement, resulting in as many independent and non-overlapping periodic reporting requirements as the number of separate issuing entities in existence thereunder. For any given periodic reporting period, where a corporate issuer may be obligated to prepare one periodic report, an ABS depositor may be obligated to prepare hundreds. In addition, the sheer heft of an ABS depositor's reporting obligations is compounded by the frequency of its periodic reporting intervals. Where corporate issuers' periodic reports are made once each quarter, the vast majority of ABS issuers report monthly. It is our understanding that these vastly greater

[105] *See, e.g.*, TMS Home Equity Trust 1992-D-I; TMS Home Equity Trust 1992-D-II (Mar. 22, 1993) and The Money Store, Inc.; TMS Home Equity Trust 19930A-I (Aug. 4, 1993).

reporting burdens served, in large part, as the basis for the Office of Chief Counsel's previous approval of combined reporting.

Moreover, for many of these securitization platforms, there are significant points of commonality across the discrete issuances. It is often the case, for example, that the same roster of key transaction parties is associated with each issuance. In addition to a common depositor, often the same master servicer, sponsor and trustee will be involved in all or a significant majority of the transactions. One could easily imagine, therefore, particularly under the proposed disclosure and reporting framework which contemplates enhanced disclosures regarding key transaction parties, that a single event, such as a material litigation update with respect to the trustee or a servicer succession by merger, could trigger the identical reporting requirement for *each* outstanding issuance. It seems unnecessary for a depositor with 80, 90, or 100 or more separate issuing entities to file 80, 90, or 100 or more separate Form 8-K reports, each including the identical information for each issuing entity.

In addition, it seems particularly anomalous that the Commission is currently proposing, on the one hand, disclosure standards that in some cases could require static pool data with respect to prior securitized pools while, on the other hand, reversing a staff position concerning combined reporting for prior securitized pools.

Finally, we respectfully disagree with the Commission's view that the filing of separate annual, periodic and other reports for each issuing entity provides easier access to information on a particular issuing entity. Investors, who frequently own ABS issued by several discrete issuing entities with a common depositor, would be far more likely to access information about a transaction or group of transactions by reference to their common depositor, and would gain access more readily to the underlying distribution reports of the several issuing entities by reference to a single periodic report rather than by searching a database for several discrete periodic reports, each relating to a different issuing entity. We respectfully disagree with statements made by the staff suggesting that an investor might more easily access information about a specific transaction by reference to the name of the related issuing entity or by reference to its CIK code. An investor is far more likely to associate a series of ABS with the name of the depositor than with the technical legal name of the issuing vehicle and it is wholly unrealistic to think that an investor would ever associate a series of ABS with a discrete CIK code.

We believe that it is much easier to locate the distribution report or reports of interest to an investor by first identifying its common denominator – its depositor – and then reviewing an organized exhibit index that separately identifies each distribution report by such depositor.

For all of the above reasons, we respectfully request that the Commission continue to recognize combined periodic reports for all issuing entities of a common depositor. The depositor would be permitted to file one Form 10-D for each distribution period.[106] That Form 10-D would include the distribution reports for each issuing entity as a separate exhibit under Part I of the aggregate Form 10-D. The Form 10-D would include an exhibit index allowing the report for any given issuing entity to be readily located. This would be an easier way for an investor to

[106] Similarly, the depositor would be permitted to file one Form 10-K for each annual period.

locate a distribution report for any given issuing entity than under the Commission's proposal for separate reports, and it would be a far simpler monthly filing process for the depositor.[107]

D. Distribution Reports on Proposed Form 10-D

1. General Comments

We agree that, for the most part, the ordinary ABS periodic distribution reports which, up to this point, have been filed by Form 8-K do not report the type of information for which Form 8-K was originally designed. We appreciate the development of the new Form 10-D as a vehicle to file the periodic distribution reports. Use of Form 10-D will make the reports easier to find and will permit easy differentiation between routine filings and the filings reporting material current events.

Our concern, however, is that Form 10-D, as proposed, creates much the same confusion as the current practice of filing everything on Form 8-K. The proposed Form 10-D includes, as Item 1, the periodic distribution information. However, it also, requires the periodic filing of many items which we submit are equally well or, in many cases, better suited to Form 8-K reporting. With the addition of Form 10-D, as proposed, the industry will have gone from reporting routine distribution information by Form 8-K along with other current events, to reporting other current events by Form 10-D along with the routine distribution information.

We request that Form 10-D be reserved for filing of the periodic distribution reports and that other matters be reported by Form 8-K. We recognize and appreciate that the Commission has, in proposing Form 10-D and the accompanying instructions, also proposed filing deadlines which much better fit the needs of ABS issuers than those which apply generally to reports filed on Form 8-K. We would request that for ABS information to be filed on Form 8-K, issuers be allowed 15 calendar days[108] from the occurrence of the reportable event. The time will, in many cases, be needed simply to collect and compile information from numerous sources.

We respectfully request that the Commission delete the reference to Item 1119. We submit that Item 1119 is far too broad an extension of what is currently reported on a monthly basis and also that Item 1119 is too rigid. If, however, the Commission believes that such reference to Item 1119 is a necessary feature of the reporting structure, then Item 1119 of Regulation AB should clearly state that the items described therein are for illustrative purposes only and there should be no implication that all of the items listed must be included in all reports. What should be included should be only what is needed to inform investors and the market of the ongoing performance of the pool of assets. Specific items and events required to be reported should be left to Form 8-K.

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[107] This position is especially appropriate given the difficulty of working with the existing EDGAR system. A single Form 10-D with multiple distribution reports attached would be substantially less expensive for a depositor to file through an EDGAR submission.

[108] Numerous no-action letters have recognized the 15-day period as acceptable in the context of reporting various ABS events. *See, e.g.*, Bay View Securitization Corporation (Jan. 15, 1998) and Bank One Auto Trust 1995-A (Aug. 16, 1995).

We note that in many places in the proposed rules and instructions relating to Form 10-D, as well as those relating to Forms 8-K and 10-K, information is to be reported with respect to a significant obligor or significant enhancement provider (*e.g.*, Items 6 and 7 of Form 10-D, Items 1.03 and 6.06 of Form 8-K and Items 6 and 7 of Form 10-K) and, at least with respect to the reporting of legal proceedings, originators of 10% or more of the pool assets. In addition, distinctions are made between significant obligors related to 10% or more of the pool assets and those related to 20% or more and also between entities providing enhancement in an amount equal to 10% or more of the cash flow and those providing enhancement in an amount equal to 20% or more. We assume that a determination concerning which entities constitute significant obligors, significant enhancement providers and the relevant originators is made at the time of issuance of the ABS and would not change with fluctuations in the asset pool. The market views these determinations as being a snapshot taken at closing. Some assets pay down more quickly than others and could cause entities to fall out of or rise into one category or another, frequently without the knowledge of the issuer and certainly with no ability of the issuer to control such changes. Monitoring and managing such changes would be extremely burdensome. Therefore, we request the Commission's confirmation that the determinations made at closing would control throughout the life of the ABS.

We are also concerned about the amount of overlap and layering of reporting which will result from the implementation of the proposed rules relating to Form 10-D. While we recognize that the Proposing Release and the general instructions to the forms do not require that the same information actually be filed by both forms, the nature of the information required overlaps. We note the following as examples:

- Item 1119(n), proposed to be reported on Form 10-D, includes information regarding any new issuance of ABS backed by the same asset pool, any pool asset additions, removals, substitutions and repurchases. Item 6.05 of Form 8-K also requires reporting of additional securities that are either backed by the same asset pool or are issued by the same issuing entity. The information required by Item 1119(n) for Form 10-D and by Item 6.05 of Form 8-K need not be filed under either of such provisions if the information is provided in an effective registration statement or in a prospectus timely filed pursuant to Rule 424. If, however, the information is not provided by registration statement or filing under Rule 424 the instructions appear to require reporting on both Form 10-D and Form 8-K. In addition, Item 3 of Form 10-D requires information on the sale of securities and the use of proceeds if the securities are either backed by the same asset pool or are issued by the same issuing entity, regardless of whether the transaction was registered under the Securities Act. Item 3 of Form 10-D does provide that no information need be furnished in response to this Item it has previously been included in a current report on From 8-K.

- Item 1119(l), proposed to be reported under Item 1 on Form 10-D, provides for the reporting of breaches of material pool asset representations or warranties or transaction covenants. This item is a good example of matters which should, and commonly are, reported on Form 8-K. Item 2.04 of Form 8-K requires reporting of triggering events that accelerate or increase a direct financial obligation. The proposed instructions to Form 8-K make it clear that this item is required if an early amortization, performance trigger

or other event, including an event of default has occurred that would materially alter the payment priority or distribution of cash flows. To the extent a breach of material pool asset representations or warranties or transaction covenants does not fall under this item, it would be reported under Item 8.01 Other Events. Reporting this information on Form 10-D is an example of the overlap of the purposes of proposed Form 10-D and Form 8-K.

- Section 3.03 of Form 8-K requires reporting of amendments to the governing documents which result in a material modification of the rights of security holders. Item 9 of Form 10-D provides for the filing of documents. As a result, while amendments to the governing documents would be reported by Form 8-K, the amendment would be filed by Form 10-D.

- Item 5 of Form 10-D requires a report if any matter has been submitted to a vote of security holders through the solicitation of proxies or otherwise. Item 3.03 on Form 8-K requires reporting of a material modification of the rights of security holders. The submission of items to a vote of security holders in a publicly-held asset-backed transaction is rare and usually is undertaken because the matter in question would result in a material modification of the rights of security holders. Thus, while Item 3.03 of Form 8-K is broader than Item 5 of Form 10-D, they cover many of the same matters.

- Item 7 of Form 10-D would require financial data or financial statements for entities providing enhancement or other support for ABS. Item 6.03 of Form 8-K requires information concerning a termination, addition or material change in credit enhancement for any class of ABS. The provisions both require monitoring and reporting of information related to credit enhancement.

2. Grandfathering/Transition

ABS issuers are accustomed to filing monthly or other periodic distribution reports. These reports are, in most cases, the same reports as are prepared for and delivered to the trustee or administrator and contain the information required by the governing documents.

The distribution reports have been developed over time by custom and by agreement between issuers, underwriters and investors, and the required form and information are commonly dictated by the governing documents. The reports may vary substantially from one asset-type to another and from one transaction to another. Generally, it has been our experience that for both issuers and investors, this system has worked well and has provided on an ongoing, timely basis, that information which is important to investors and the market generally.

We view the amount and detail of information required by Form 10-D as proposed to be a significant and, to a large extent, an unnecessary departure from current practice. The proposals would substantially change the nature of the monthly reports in ways that will require substantial added time and expense for the industry to adjust and comply.

For existing transactions, finding a way to pay for the added costs may be extremely difficult. One of the fundamental characteristics of a securitization is that assets are transferred into a

securitization vehicle, and from that point forward the depositor has no continuing financial responsibility for the performance of the assets or the transaction, except as provided by contract. For existing transactions, the various parties' fees are fixed and were determined based on administrative costs known at the time of issuance. Securitization vehicles are usually capitalized at a level to be sufficient to permit the entity to carry out its obligations during the term of the financing—on the basis of costs known at the time of issuance. If administrative costs increase, there is no source of cash to cover the increased amounts.

In recognition of the concerns described above, we propose that, as stated at the beginning of this Section IV, securities issued prior to or within a period of not less than 12 months after the publication date of the final rules be grandfathered and that issuers of such securities continue to report by Form 8-K in accordance with the current modified reporting system.

This 12-month period after the publication date of the rules would allow issuers and servicers to become familiar with the new forms, hire and train staff and develop systems to provide the additional information and to develop systems to present the information in the manner required.

We believe that grandfathering ABS issued prior to or within 12 months after the publication date of the new rules would help to provide a smooth transition. Most ABS are of relatively short maturities, in the range of three to seven years, and the average life of a deal is often much shorter. Thus existing transactions subject to the old rules will phase out naturally in a few years.

3. Filing Deadlines/Extension for Form 10-D

We believe that the proposed 15-day deadline for filing a Form 10-D is appropriate.[109] For normal periodic distribution information, any shorter deadline would heighten the burden on issuers without an incremental benefit to investors. Also, a minimum of a 15-day deadline would be necessary if the Commission retains its proposal for separate reporting by each issuing entity. Consistent with current industry practice, the deadline for filing the distribution report should begin on the related distribution date.

We believe, however, that any filing rule for periodic reports should incorporate an extension mechanism comparable to that currently available to corporate issuers pursuant to Exchange Act Rule 12b-25. We believe a filing extension of at least five business days would be appropriate and equitable. The rules should also provide that the Commission staff, in its discretion, may extend a filing deadline. This discretion may be particularly important as the market adjusts to the new reporting requirements. There may, for example, be unforeseen difficulties in providing some of the requested information. We also request that the Commission include a provision pursuant to which the staff may waive late filings which are subsequently cured. This provision would be particularly important in the context of Form S-3, where form eligibility is conditioned on timely reporting requirements.

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[109] The Form 10-D reporting frequency should be tied to distributions on the ABS, not to the frequency of payments on the pool assets. Most of the information on the Form 10-D relates to the distributions and the relevant period for reporting on the assets is the period corresponding to the distribution period.

We also respectfully request that the Commission incorporate into the General Instruction for Form 10-D a provision to the effect that a good faith immaterial, inadvertent or involuntary failure to file or a delay in meeting the timely filing requirements under the Exchange Act would not result in the loss of Form S-3 eligibility. See further discussion of this point included earlier in this letter with respect to registration (Section I.B.4.c.ii.).

4. Repackagings/Resecuritizations

Proposed Exchange Act Rules 13a-17 and 15d-17 and the Proposing Release require that *every* asset-backed issuer subject to Exchange Act reporting requirements make reports on Form 10-D. The proposed rules and the Proposing Release also require that a Form 10-D be filed by each asset-backed issuer *after each required distribution date* on the ABS.

We respectfully submit that the proposed alternative regulatory regime and regulations should be designed and drafted with sufficient flexibility to accommodate the full spectrum of ABS while recognizing the fundamental characteristics that distinguish one category of ABS from another. We believe, however, that the regulatory regime and regulations fail to accomplish this in the case of repackagings and resecuritizations.[110] Repackagings are generally simple pass-through structures, sometimes with only one underlying asset. These transactions involve no meaningful servicing or other management of the underlying asset and typically involve only basic bond administration (*i.e.*, receipt of simple stream of payments on an underlying security and calculating amounts distributable to a single class of security holders). Distribution reports are little more than a *payment record* – confirming the remittance amount but otherwise lacking substantive content – and are neither material nor time-sensitive in nature. We respectfully submit that the current filing requirements for repackaging transactions are unduly burdensome and are not a particularly good fit in light of their unusually basic structure. We also believe these filing requirements result from an unnecessarily rigid application of the statutory reporting scheme.

In many repackaging transactions, we believe that an annual periodic report on Form 10-K, as supplemented when and if necessary by such current reports on Form 8-K as may be required to report material events from time to time, would be the most appropriate reporting scheme for such ABS. If the Commission is unable to agree, an alternative that would alleviate at least the burden of multiple filings every month would be that the issuer have the option of filing distribution information quarterly on Form 10-D or Form 10-Q. The issuer would, of course, be obligated to continue to file Form 8-K reports as required to report typical Form 8-K events.

[110] We use the terms “repackagings” and “resecuritizations” interchangeably in this letter.

5. Item 1 of Form 10-D; Distribution and Pool Performance Information

The servicing or distribution report is a document tailored to the structure of each issue and to the type of asset which is subject to the securitization. Item 1 of the General Instructions to the proposed Form 10-D states that "taken together, the attached distribution report and the information provided under this Item *must* contain all of the information required by Item 1119 of Regulation AB." (Emphasis added.) We urge that the introductory paragraph of Item 1119 and the instructions for Form 10-D specifically state that the report provide only that distribution information which is material to investors and that the list of items referenced in Item 1119 is illustrative only and should be required only to the extent material and should be deemed modified as appropriate under the circumstances.

We have the following specific comments and observations concerning Item 1119 – whether such items remain as required items for the distribution report or are moved to Form 8-K.

- *Item 1119(a) – Record Dates, etc.:* Very little seems to be gained by including the applicable record dates, accrual dates, determination dates and distribution dates in each monthly report. These items are specified in the governing documents, disclosed in the prospectus and do not change. If the distribution report states the period covered by the report that should be sufficient.

- *Item 1119(b) – Cash Flows and Sources:* If cash flows are to be reported by source, the categories should be permitted to be generic, *e.g.*, "collections on loans," "collections of principal receivables," "collection of finance charge receivables" or "draws on surety bond." In addition, the reference to "portfolio yield, if any" is unclear. We request clarification of its intended meaning in the context of Item 1119(b). Alternatively, as it appears to be intended as merely illustrative, its deletion may be equally appropriate.

- *Item 1119(c)(1) – Fees or Expenses:* In many transactions the depositor or the Servicer pays specified fees and expenses of third parties such as trustees and rating agencies. Fees and expenses not paid by cash flow from the assets should not be subject to the disclosure requirement.

- *Item 1119(c)(4) – Excess Cash Flow:* The definitions of excess cash flow, excess spread, excess finance charges and similar terms vary from one transaction to another and from one type of asset to another. Also, depending on the structure, excess spread may, by definition, be the excess after a certain subset of obligations are satisfied and the excess is then reallocated in the normal course of the transaction and may go through a second or third waterfall before any remaining amounts would be distributed to the residual holder. Therefore, we would propose that within this category the only item which needs to be reported is the amount of excess cash flow released to the holder of the residual interest.

- *Item 1119(e) – Interest Rates:* If the "interest rates applicable to the pool assets" is reported, it should be on a weighted average basis.

- *Item 1119(g) – Draws on Credit Enhancement:* We note that the purpose, method of calculation and use of any draws on credit enhancement should be provided in the governing documents and described in the prospectus and should not need to be re-stated in the periodic reports. Descriptions of any amounts drawn and remaining amounts available seems appropriate to be reported for external credit enhancement or reserve accounts, but would only need to be reported for any period in which a draw on the credit enhancement actually occurs. Internal credit enhancement such as the application of funds in a waterfall to pay senior securities prior to subordinated securities should not give rise to reporting since that is a normal occurrence.

  For bond insurance which provides coverage for all principal and interest and for swaps, the amount of coverage remaining would not be a known specific amount. We question whether payments made under a swap need to be reported if those amounts are drawn only in the normal course of the functioning of the swap due to fluctuation in interest rates or currency values. We believe that with respect to swaps, reference would be appropriate only if there were an extraordinary payment—such as a termination payment—made or due.

- *Item 1119(h) – Updated Asset Pool Information:* Item 1119(h) of proposed Regulation AB would require updated pool composition information, such as weighted average coupon, weighted average life, weighted average remaining term, pool factors, prepayment amounts, current payment/prepayment speeds and other prepayment or interest rate sensitivity information, and for certain leasing transactions, the turn-in rates and residual value realization rates. This information may be and commonly is included in the prospectus and described with respect to the pool at the time of its creation; however, with the exception of the pool factors, it has not commonly been provided in periodic distribution reports. For the reasons set forth below, we strongly urge the Commission to eliminate Item 1119(h) from its proposals.

  The proposed updating requirements represent a substantial extension of an issuer's disclosure obligations as compared with the information described in the no-action letters and commonly provided in distribution reports. If implemented and required this would significantly increase the amount of time, effort and expense involved in compliance with ongoing reporting obligations. Issuers, servicers and other key transaction parties typically do not have systems in place to comply with this proposal, particularly on a monthly basis.

  The periodic reporting framework as developed and applied in the context of ABS focuses on information regarding the ongoing performance of the asset pool as a whole and not on detailed, specific pool characteristics as they may fluctuate from time to time. These detailed, specific characteristics continually and naturally change in response to hundreds of factors, some of which may be market-oriented factors, such as interest rate movements and economic forecasts, and others of which may be very individual factors unique to the specific obligor, such as consumer preferences and financial condition. Obviously, neither the servicer nor any other transaction party has any control over these continual changes and investors and the market as a whole fully understand and

appreciate the impact of these external factors. We respectfully submit that periodic reports should be required to include only that information necessary to inform investors and the market of the *ongoing performance* of the asset pool, and not information about the routine and natural changing characteristics of the asset pool in the ordinary course.

- *Item 1119(i) – Delinquency and Loss Information:* Delinquency and loss information required to be included in the periodic distribution reports should be presented on a pool wide basis only. We note that Item 1110(c), in describing delinquency and loss information to be included in a prospectus, requires such information not only for the asset pool, but also by various stratifications of the pool such as by asset term, geography or credit scores. In most cases delinquency and loss information on a pool-wide basis is constantly monitored and is the key information needed by investors. Such information for subsets within the pool is not commonly made available. For many issuers, reporting such information for any subset of the pool would be a major expansion of the ongoing reporting obligations and practice. We also question its usefulness to investors. Any fluctuations within the subsets would, obviously, be reflected in the overall pool results. We request clarification that, for periodic distribution reports, delinquency and loss information is required only on an asset pool basis.

- *Item 1119(j) – Advances:* Servicer advances are common in many transactions, and, so long as advances and reimbursements are made in the ordinary course of servicing, we see no reason to provide any special reporting information concerning advances. However, if information on advances is required, it should be limited to generic categories – *e.g.*, total principal and interest advances and total taxes and insurance advances. If reimbursement sources are described, they also should be generic descriptions such as "loan proceeds" or "general funds," as the source of reimbursement for normal advances is generally specifically provided in the governing documents and does not change from one distribution period to another.

- *Item 1119(k) – Modifications to Pool Asset Terms:* This item should be revised to make it clear that a modification is "material" only if it is material to the pool as a whole, not on an asset by asset basis. In the normal course of servicing a pool of loans it is common to modify, extend or waive terms, fees, penalties or payments of individual loans if that is warranted to deal with a temporary problem or to try to collect an otherwise uncollectible loan. Servicing guidelines usually specifically provide the circumstances under which such modifications, extensions or waivers may be made. Changes, if any, made to an individual loan may be material to that loan, but of only minor significance to the pool as a whole or to investors and should not be reported. So long as the servicer is complying with the servicing guidelines, we do not believe that such modifications to the pool assets should give rise to special reporting requirements. If this provision is retained, reporting should be limited to modifications which affect a material portion of the pool.

- *Item 1119(l) – Breaches of Representations, Warranties and Covenants:* We propose that this item be eliminated from the matters to be reported on Form 10-D. The same general matters are covered in Item 2.04 of Form 8-K. Item 2.04 of Form 8-K requires reporting of "triggering events that accelerate or increase a direct financial obligation or

an obligation under an off-balance sheet arrangement." The proposed revised instructions to Item 2.04 make it clear that, for ABS, such provision applies "if an early amortization, performance trigger or other event, including an event of default, has occurred."

If Item 1119(l) is retained, we propose that it only apply to breaches of material pool asset representations or warranties or transaction covenants which, under the governing documents, rise to the level of constituting an event of default or a servicer default (for purposes of this comment, these are collectively referred to as "Events of Default") or require a repurchase or substitution of a material portion of the subject assets (for purposes of this comment, these are collectively referred to as "Repurchase Obligations"). ABS governing documents are negotiated and drafted with numerous representations, warranties and covenants. A breach of such representations, warranties or covenants does not, in most cases, automatically rise to the level of being an Event of Default or Repurchase Obligation for which remedies are available. With the exception of the occurrence of a bankruptcy, a breach often does not have any consequences, unless it is a material breach or has a material adverse effect on the ABS holders and unless notice of the breach is given and a cure period (commonly 30, 60 or 90 days) has passed. If the breach is not cured in the time permitted, and the event becomes an Event of Default or Repurchase Obligation, at that point, the documents commonly provide that the trustee provide notice to the security holders. We respectfully submit that this should also be the point at which the event becomes reportable.

- *Item 1119(n) – New Issuances, Additions, Removals:* Information about new issuances of ABS backed by the same asset pool should be included only to the extent material and not included in a registration statement or a prospectus filed pursuant to Rule 424. In any event, information about new issuances of ABS backed by the same asset pool should not be required to reference any classes offered privately or to resecuritizations backed by privately offered classes, if the issuance of such securities does not materially affect the interest of investors in the pool assets.

  With respect to the reporting of the addition or removal of accounts or loans or other pool assets, we note that in most transactions and, in particular, in master trust arrangements, the addition and removal of accounts or loans is routine. The fact that it will occur and the methodology to be applied are disclosed to investors. We respectfully submit that Item 1119(n) should be revised to require information regarding additions and removals of pool assets only where such events occur by amendment to the documents or if the addition or removal materially changes the pool size or characteristics. Reporting of routine additions and removals gives such events far more importance than is warranted. In addition, additions and removals are reflected in the reporting of the pool balances.

- *Item 1119(n)(2) – Additions and Removals Requiring Prospectus Level Information:* This item would require that if an addition, removal or substitution of pool assets materially changes the composition of the asset pool taken as a whole, then information at the level specified for use in a prospectus is to be provided. Specifically, Item 1119(n)(2) references Items 1104 (sponsors), 1107 (servicers), 1109 (originators), 1110

(pool assets), requiring extensive detailed statistical pool information and general information, and 1111 (significant obligors of pool assets).

Item 1119(n)(2) goes far beyond current practices and requirements and is overly broad. Similar to Item 1119(h), Item 1119(n)(2), if implemented, would significantly increase the amount of time, effort and expense involved in compliance with ongoing reporting obligations.

We respectfully request that the Commission eliminate Item 1119(n)(2).

If, however, the Commission retains this item, we request, at a minimum, that Item 1119(n)(2) be revised in a manner consistent with the following points:[111]

- The issuer should in no event be required to restate prospectus level pool disclosure as a result of changes in composition due to repurchases or substitutions.

- For the reasons described in the immediately preceding bullet point relating to Item 1119(n) generally, restated information should in no event be required where additions and removals of pool assets occur in accordance with the terms and conditions, including the eligibility criteria, set forth in the transaction documents and disclosed in the prospectus. Such information would only be reported where such changes result from an amendment to the documents.

- For many of the same reasons set forth above with respect to Item 1119(h), if the pool composition has materially changed due to "organic" or natural causes (*e.g.*, as a result of prepayments) no requirement to restate the prospectus level pool disclosure should apply. Similarly, changes in pool composition due to the deposit of additional balances of revolving assets, as opposed to new accounts, into the pool should be viewed as organic changes and should not trigger a requirement to restate disclosure.

In addition, if Item 1119(n)(2) is not eliminated, we request clarification that the determination of which entities constitute significant obligors (and whether at the 10% or 20% level) be made at the time of issuance of the ABS and that, such entities not change with subsequent fluctuations in the pool. Changes which occur as a result of generic or systemic fluctuations are to be expected and are understood by investors.[112]

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[111] We strongly believe that there should *not* be a limitation in the definition of asset-backed security providing that pool changes not materially alter the characteristics of the pool. We do not believe this is a real concern to investors. The circumstances under which the transaction participants are permitted to change the pool composition are clearly established in the transaction documents and disclosed in the prospectus. For example, in prefunding account deals, the prospectus states required pool parameters that must be maintained following the addition of the prefunding account pool assets. In addition the pool composition can and does change due to organic or natural causes and causes which are not within the control of the parties to the transaction.

[112] As noted, we believe that much of the detail with respect to fluctuations in pool assets need not be reported. The Proposing Release asks, as well, for comment as to whether, if models, estimates or projections are included in the registration statement then disclosure should be required for any material changes based on actual performance. We believe that any such disclosure requirement would be completely unwarranted. It is well understood and disclosed that computational materials, bond amortization decrement tables (or "dec" tables) and weighted average life tables,

6. Item 2 of Form 10-D – Legal Proceedings

a. General Comment

For each of Items 2 through 8 we would propose that such matters, to the extent not included in the issuer's periodic distribution report, be reported, to the extent material, on Form 8-K. If, however, such Items do remain as items to be reported on Form 10-D, the issuer, depositor or servicer should have the option to include information responsive to each such item in its periodic distribution report without the need to repeat such information in the body of the report.

b. Comparison to 10-Q Requirements

In referencing Item 1115 of proposed Regulation AB, Item 2 to Form 10-D significantly expands the reporting requirements with respect to litigation and regulatory matters over that currently required of issuers filing on Form 10-Q and over that which has been recognized in no-action letters as adequate and appropriate litigation disclosure for ABS issuers.

Most ABS issuers will be filing a Form 10-D on a monthly basis. Item 2 as proposed would require issuers to maintain a reporting network of contacts and sources and check with such sources each month seeking descriptions of legal proceedings "pending or known to be threatened" against the sponsor, depositor, trustee, issuing entity, servicer, enhancement provider and certain originators and any proceedings "known to be contemplated" by any governmental authorities. By contrast, the instructions for Form 10-Q, by reference to Item 103 in Regulation S-K, have a much less burdensome requirement, and a quarterly reporting obligation. Item 103 states only that the form describe "briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business," to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. We respectfully submit that the proposed requirement would place an enormous and unwarranted diligence burden on the preparer of the report.

Numerous no-action letters issued to asset-backed issuers over the years have provided that, in connection with the preparation of Form 10-K, the issuer need describe only material legal proceedings with respect to or involving the trust, the trustee, the originator, the seller or the servicer, in accordance with Item 103 of Regulation S-K. We respectfully request that the litigation required to be reported be determined by the same standards as set forth in these no-action letters and, as such, by the standards set forth in Item 103 of Regulation S-K.

As an alternative, we would request that, if Item 2 remains as proposed, the reporting requirement be imposed only at the point the entity responsible for preparing the report obtains actual knowledge of the event.

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and similar estimates and projections are based on structuring assumptions, assumed pool characteristics, prepayment assumptions, interest rate assumptions, loss and other assumptions. Investors understand and assume that the actual results will vary. At any time after issuance, ABS would be similarly valued based on those same types of assumptions on a forward-looking basis. Retrospective differences between past assumptions and actual performance would be irrelevant. Also, the distribution information provided on a periodic basis will provide continued updating with respect to the actual performance of the pool.

7. Item 3 of Form 10-D – Sales of Securities

Information about new issuances of ABS backed by the same asset pool or that are otherwise issued by the same issuing entity should be included only to the extent material to investors and not included in a registration statement or a prospectus filed pursuant to Rule 424. Sales of ABS should not be deemed to be material if those sales did not materially affect the interests of investors in the asset pool, or were sold as part of a program or master trust issuance program described in the issuer's prospectus.

8. Item 6 of Form 10-D – Financial Disclosure for Significant Obligors

Proposed Item 6 would require updated financial information about significant obligors.[113] Subject to certain conditions, disclosure requirements regarding the significant obligor may be satisfied by including a reference to the obligor's Commission filings. However, if such significant obligor ceases to satisfy the conditions permitting reference to its public information, then Item 1100(c)(2)(iii) of proposed Regulation AB would require the issuer either to provide the third party disclosure directly or to terminate all or the affected portion of the transaction. For the following reasons, we respectfully submit that the requirements of Item 1100(c)(2)(iii) are unduly rigid and severe in their effect and, equally importantly, are contrary to sound public policy and investor protection considerations.

By its terms, Item 1100(c)(2)(i) calls for the third party significant obligor to be, in essence, a "stranger" to the subject ABS transaction, by requiring that neither the third party nor any of its affiliates have a direct or indirect agreement, arrangement, relationship or understanding relating to the ABS transaction. As a result, in the circumstances contemplated by Item 1100(c)(2)(iii), the issuer would in most instances have no means, contractual or otherwise to access, or compel access to, the third party financial information. As currently drafted, where the third party information is unavailable to the issuer, the only alternative contemplated by Item 1100(c)(2)(iii) is that the issuer terminate all or the affected portion of the transaction. We respectfully submit that, in any case where required information rests within the knowledge and control of an unaffiliated person, a rule that prescribes termination of all or a portion of a transaction where such information becomes unavailable is inherently inequitable and inconsistent with current Commission policy as reflected in Rule 409 of Regulation C under the Securities Act.[114] We respectfully request that the Commission revise Item 1100(c)(2)(iii) to require that the issuer undertake to provide the required financial information only to the extent such information is known or reasonably available to the issuer, in the same manner as contemplated by Securities Act Rule 409.

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[113] A significant obligor is any person, group of affiliated persons, property, lease or group of affiliated leases which represent 10% or more of the pool assets.

[114] 17 CFR 230.409. Rule 409 provides "[i]nformation required need be given only insofar as it is known or reasonably available to the registrant. If any required information is unknown and not reasonably available to the registrant, either because the obtaining thereof could involve unreasonable effort or expense, or because it rests peculiarly within the knowledge of another person not affiliated with the registrant, the information may be omitted . . . ."

In addition, by requiring that the transaction "unwind" upon the unavailability of the third party information, Item 1100(c)(2)(iii) has the characteristics of a "penalty," equating the unavailability of such financial information to a *per se* indication of financial distress, or at least an indication that the transaction or a portion thereof is otherwise no longer suited to the public markets. In reality, the circumstances giving rise to the unavailability of such third party financial information are entirely fact-specific and, therefore, should not be subject to a pre-determined result. Indeed, the Commission staff only relatively recently adopted this more rigid disclosure standard; previously, the staff endorsed a "wait and see" approach that did not include an unwind mandate, presumably in recognition of the fact that a programmed result was unnecessarily rigid and that an issuer had no meaningful recourse to compel disclosure in such circumstances and, therefore, should not be penalized for the actions of an unaffiliated third party.

Finally, we wish to note that a requirement that mandates transaction termination, without any regard to additional factors, very likely may result in investor harm rather than investor protection. In terminating all or the affected portion of the subject transaction, an issuer would most typically either sell the affected pool assets or distribute the same in kind to existing security holders. Any forced liquidation that eliminates discretion concerning the timing and manner of such sale will almost certainly produce a lower yield than would otherwise be the case. In addition, the option of an in kind distribution has absolutely no remedial effect – the investor would simply hold an asset directly that it previously held indirectly.[115] Furthermore, to sell assets or distribute assets in kind from a pool as to which a REMIC election has been made would result in a prohibited transaction for federal income tax purposes with a 100% tax levied on any gain realized. For all of these reasons, we respectfully request that the Commission revise Item 1100(c)(2)(iii) as requested above.

In any event, as noted above, the Commission staff only relatively recently adopted the more rigid disclosure standard set forth in the proposals and, as a result, the option to terminate all or a portion of a transaction for the reasons contemplated by Item 1100(c)(2)(iii) does not currently exist in most transaction documents. If the rule is to be implemented (a result to which we strongly object), it should apply only to new securitizations occurring after the effective date of the rule and all transactions closed prior to the effective date should be grandfathered. In addition, if Item 1100(c)(2)(iii) is implemented, we believe its rigidity would be partially mitigated by limiting its application to only those significant obligors that satisfy the 20% or more threshold and by excluding from its scope resecuritizations where the pool assets are securities.

With respect to this item as well as others noted in this comment letter, we assume that the determination of which entities constitute significant obligors with respect to a transaction would be determined at the time of issuance of the ABS and would not change with subsequent fluctuations in the pool. We request the Commission's confirmation of this position.

[115] Where the underlying asset is itself a security, it will almost certainly be a book-entry security and it is virtually inconceivable that the in kind distribution would impact the reporting status of the underlying obligor.

9. Market Risk Issues

We do not believe disclosure with respect to market risk is appropriate for ABS. Market risk is not generally a concern since the ABS are supported by cash flow on the assets and should not be affected by market valuations. Other assets held as security for the ABS, such as amounts in reserve accounts, are usually required to be invested in very short-term or liquid assets.

E. Annual Reports on Form 10-K

Asset-backed issuers are well acquainted with filing of the annual report on Form 10-K under the modified reporting system. In our review of the existing form – items 1 through 15 – we find that such items are consistent, for the most part, with current practices and the no-action letters on which such practices were developed. We have only one new comment on the list of existing form items. With respect to the list of additional disclosure items, we have several points we would like to raise.

1. Existing Form Items – Security Ownership

Item 12 of Form 10-K requires, and the proposed rules would require issuers to disclose information regarding the security ownership of certain beneficial owners (as set forth in Item 403 of Regulation S-K). Under the ABS no-action letters, a split exists with respect to the applicability of Item 12 of Form 10-K and, therefore, Item 403 of Regulation S-K which is referenced therein.[116] We respectfully raise for the Commission's consideration the prospect of making Item 12 of Form 10-K (and Item 403 of Regulation S-K in its entirety) inapplicable to ABS so long as the subject issuing entity has no executive officers or directors. We believe that the requirement in Item 403(a) to disclose the beneficial owners of more than 5% of the issuer's voting securities imposes a substantial administrative burden on issuers with virtually no corresponding benefit to investors.[117]

Holders of ABS have no general right to vote and do not control or otherwise participate in any decision-making relating to the assets or policies of the issuer. Their involvement in the transaction is very different from the securities holders of corporate equity. The holders of specified amounts of ABS have the right to act as a group in the event of the occurrence of certain events which, if continuing, would constitute defaults or amortization events under the transaction documents for that specific ABS transaction, in a manner very much akin to the rights of bond holders under an indenture for registered debt securities. We believe that these factors provide a compelling basis to conclude that the holders of ABS do not, in fact, constitute holders of "voting securities." The holders of such ABS have no voting rights similar to the right to vote for the board of directors. Because ABS holders have no right, in any traditional sense, to otherwise control the assets, policies or affairs of the issuer, we respectfully request that the

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[116] *See*, *e.g.*, Norwest Asset Securities Corporation (Dec. 17, 1996); Nissan Auto Receivables Corporation (Jun. 28, 1996) (each obtaining relief from periodic reporting with respect to, among other matters, Item 12 of Form 10-K and Item 403 of Regulation S-K in its entirety.

[117] Almost all publicly issued ABS are held in book entry form in the name of a nominee for The Depository Trust Company. Annually, the issuer must contact DTC, at a considerable expense, to obtain a listing of the participants holding 5% or more of each class of the issuer's securities. The listing, which may be quite lengthy and difficult to format and include in the EDGAR filing, is then included in the Form 10-K.

Commission revise the General Instructions to Form 10-K to make Item 12 inapplicable to ABS so long as the subject issuing entity has no executive officers or directors.

2. Item 1111(b) – Financial Disclosure for Significant Obligors and Item 1113(b)(2) – Financial Disclosure for Enhancers

Our views as expressed in Section IV.D.8., with respect to Item 6 (Significant Obligors of Pool Assets) and Item 7 (Significant Enhancement Provider Information) to Form 10-D, apply with equal force in the context of Form 10-K.

3. Item 1115 – Legal Proceedings

Our views as expressed in Section IV.D.6., with respect to Item 2 (Legal Proceedings) to Form 10-D, apply with equal force in the context of Form 10-K.

4. Additional Disclosure Proposals

a. Updated pool information

We respectfully submit that updated pool composition information should not be required for Form 10-K. After the initial issuance of ABS, investors rely primarily on other sources of information and updated pool composition information is unnecessary. For example, depositors and issuers provide access to monthly distribution reports – which are generally adequate in their current form – to investors and maintain websites accessible by investors which provide historical monthly distribution reports. Such websites often include interactive tools by which investors may sort the information.

Updated pool data provided by the issuer, together with analytical tools provided by third party data providers, allow investors to obtain valuations not provided in monthly distribution reports. As evidenced by the foregoing, the ABS market has developed standards and practices which efficiently and effectively deliver information to investors. Thus, we believe that the ABS market should be able to continue to develop standards and practices for delivering information to investors regarding the underlying assets in outstanding ABS transactions without rules requiring that such information be filed by Form 10-K or any other manner.

b. Financial information for transaction parties

We submit that, consistent with the position that the Commission has taken to this point in the context of ABS transactions, financial information and financial statements should not be mandated for any transaction parties. The nature of an asset-backed transaction is such that the assets are transferred to a separate legal entity and are isolated from the transferor and other entities. The securities issued to investors are payable solely from the assets segregated for that purpose. The structure of the transaction is designed so that the securities are payable from the pool assets alone, in order that the securities achieve a higher credit rating than that of the originator and transferor. The issuer prepares and distributes periodic reports on the performance of the assets, but does not prepare traditional financial statements. Numerous no action letters have recognized the fundamental differences between ABS issuers and operating companies and,

because of such differences, the modified reporting system has been developed. We also believe it would be misleading to ABS investors to include financial information on transaction parties – such as the servicer and the depositor – who have no obligation to make payments on the ABS. Similarly, financial information on a series trust (*e.g.*, a titling trust or similar entity), when only specified assets are available for the ABS, could be misleading.

5. Servicer Compliance Statement

The annual compliance statement is a historical anomaly and is largely subsumed in the new assessment and attestation procedures, particularly if, as we propose, that procedure is apportioned so that each respective servicer for which a report is required would address only its own activities. Currently, it is useful in that it addresses deal level obligations, which the USAP audit does not; however, it could be redundant under new assessment and attestation procedure.[118]

F. Certifications under Section 302 of the Sarbanes-Oxley Act

While we agree that, in principle, the requirements set forth in the Proposing Release regarding the Section 302 certification are consistent with current practice, we are concerned with the restrictions regarding who may sign such certification. In Section IV.B.2. of this comment letter, we have stated our position that the list of transaction parties permitted to sign Exchange Act reports should be expanded beyond the depositor and, in some cases, the servicer to also include the trustee, master servicer or an administrator. If a trustee, master servicer or administrator is permitted to sign Exchange Act reports, the appropriate officer of the trustee, master servicer or administrator should also be permitted to sign the certification.

With respect to distribution reports, such reports are not certified at the time such report is filed, but rather, are certified on an annual basis at the time the Form 10-K is filed. This practice has evolved as a result of the difficulties inherent in conducting due diligence with respect to the Section 302 certification and should be preserved. In addition, we believe that the reasonable reliance instruction in the Section 302 certification should continue to apply with respect to information provided by *any* unaffiliated parties, including any registered public accounting firm performing an attestation on the assessment of compliance with servicing criteria.

G. Reports of Compliance with Servicing Criteria and Accountant's Attestation

1. Current Requirements

As discussed in the Proposing Release, under the modified reporting system, the annual report on Form 10-K focuses on the attestation of compliance with the minimum servicing criteria, as examined by a registered public accountant, rather than requiring audited financial statements for the issuing entity. The Commission appears to have three main concerns with the current

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[118] We note, however, that if the Sarbanes-Oxley certification is to be signed by the senior officer in charge of securitization of the depositor, as opposed to the senior officer in charge of the servicing function of the servicer, such officer of the depositor may make the certification based "on my knowledge and the servicer compliance statements. . . ."

reporting practices as they relate to servicing compliance. The first concern is that, given the increasingly disparate types of non-mortgage assets securitized in the ABS market and the increasingly complex cash flow structures that are becoming common in the ABS market, the most frequently used criteria for measuring servicing compliance, the Uniform Single Attestation Program for Mortgage Bankers, or USAP, are no longer a particularly good fit for measuring servicing compliance. The second concern is that not all aspects of servicing and bond administration are being consistently covered by all ABS issuers. The third concern, which is an outgrowth of the various no-action letters relied upon by market participants, is a lack of uniform involvement by registered public accountants in the review of servicing compliance.

2. Proposed Assessment and Attestation of Servicing Compliance

In response to these concerns the Commission proposes a uniform framework that continues to focus on servicer performance rather than audited financial statements,[119] but which replaces the USAP with a standard set of criteria against which a "responsible party" for an ABS transaction is to assess servicing compliance. This standard set of servicing criteria is drawn to some extent from the USAP but has been expanded to, in the view of the Commission, more adequately cover areas of asset-backed reporting that the Commission believes are currently at risk of being insufficiently covered.

a. Responsible Party's Report on Compliance with Servicing Criteria

Specifically, the Commission's proposal requires a report by a "responsible party" for each reportable asset-backed transaction that is to include:

(i) a statement of such party's responsibility for assessing compliance with the servicing criteria;

(ii) a statement that such party used the servicing criteria set out in Item 1120(d) to assess compliance with the servicing criteria;

(iii) such party's assessment of compliance with the servicing criteria as of the end of, and for the reporting period covered by, the Form 10-K (including any material instance of noncompliance identified by such party); and

(iv) a statement that a registered public accounting firm has issued an attestation report on such party's assessment of compliance with the servicing criteria as of the end of and for the reporting period covered by the applicable report on Form 10-K.

It is our view that the requirements set out above could be appropriate in a circumstance where (i) there is a single transaction party (or affiliated group of parties) that is, in fact, responsible for all aspects of servicing and bond administration covered by Item 1120(d) and (ii) that same entity or one of its affiliates is also the party signing the attestation. However, with few if any exceptions, in structures currently utilized in the ABS market, a single entity is not responsible

[119] See Section IV.G.5. of this letter for a discussion of audited financial statements and agreed upon procedures.

for all aspects of servicing and bond administration covered by Item 1120(d). Even in structures that have a single servicer, multiple parties (including trustees and agents) play a role in the servicing and bond administration functions of asset-backed transactions that are enumerated in Item 1120(d). Given that fact, and as we discuss in greater detail below, we believe that the Commission's proposal should be revised to assign the responsibility for assessing compliance with each material aspect of servicing and bond administration to the particular party that has accepted the responsibility for each of those aspects of servicing and bond administration. It is also our view that, under current auditing guidance, a responsible party will not be able to obtain the proposed attestation report from a firm of registered public accountants because such party will generally be unable to represent to the accountants that such responsible party is responsible for both compliance with the servicing criteria and the effectiveness of the internal control over compliance with the servicing criteria.

b. Proposed definition of "Responsible Party"

The Commission proposes that the "responsible party" that would be required to provide the report described above would be either (i) the depositor, if the depositor signs the report on Form 10-K, or (ii) the servicer, if the servicer, on behalf of the issuing entity, signs such report. If multiple servicers are involved in an asset-backed transaction and a representative of a servicing entity is to sign the report on Form 10-K on behalf of the issuing entity, the Commission indicates that the "master servicer" would be the responsible party.[120]

As we note above, one of our chief concerns with the Commission's proposal is that we do not believe that it assigns responsibility for assessing compliance with the servicing criteria to the appropriate party. This concern is evident in the proposed definition of "responsible party." We believe that as a general rule, the appropriate party to assess compliance with any of the servicing criteria is the party responsible for the related servicing or bond administration functions, regardless of whether that party signs the report on Form 10-K.

We believe the final rule should allow any of the transaction parties, including the depositor, the trustee, the master servicer, any servicer or the bond administrator, to be the party administratively responsible for gathering the items to be included in the Exchange Act reports. We do not believe that the mere fact that one of those parties might sign the report on Form 10-K should dictate that such party be responsible for assessing servicing and bond administration compliance. We respectfully submit that such responsibilities be determined by contract among the parties to the transaction within the transaction documents.[121]

c. Proposed Scope: Period to be Covered

The Commission proposes that the contemplated report would include an assessment of the servicing function as of the end of, and for a full fiscal period (or the applicable partial period in

[120] In some ABS transactions, multiple servicers may be involved, each as a party to the ABS transaction and with no master servicer or other entity performing the equivalent function. At a minimum, this raises a question concerning the entity or entities that could be construed as a "responsible party" under the definition.

[121] The actual entity acting as the responsible party could be identified as such in its compliance report filed as an exhibit to the Form 10-K report as proposed by Item 1120(a).

the case of the initial report), rather than at a single point in time. We believe that this proposed approach is appropriate.

d. Proposed Scope: Level of Reporting

Rather than requiring an assessment of servicing compliance at a transaction-specific level, the Commission proposes that servicing compliance be determined at a servicing platform level. This platform level reporting approach contemplates that a responsible party, in a single examination, assess servicing compliance with respect to all ABS transactions involving such party that are backed by assets of the type backing the asset-backed securities covered by the report on Form 10-K.

Subject to the discussion below regarding the limited ability of the responsible party to assess the level of servicing compliance by unaffiliated third parties, and for accountants to report on the same, we believe that the platform assessment approach is appropriate. However, our support for platform level assessments is dependent on an approach that limits the compliance assessments required from any entity, including the responsible party, to items that each such entity can, in a cost effective manner, meaningfully assess. This means that each entity responsible for a material servicing function[122] would be required to assess, and obtain an attestation from registered public accountants in connection with, the compliance by its affiliated group platform with the applicable servicing criteria. Given the Commission's desire to insure that all aspects of asset-backed servicing are covered by the final reporting framework, we understand the Commission's interest in placing responsibility for gathering the assessments of compliance and related attestations with a single party. For this reason, we also support an approach that would require the responsible party to either (i) confirm that an assessment and attestation covering each unaffiliated party with material servicing or bond administration responsibilities has been received by the responsible party or (ii) disclose that an entity with material servicing or bond administration responsibilities has failed to deliver its required assessment and attestation. We do not believe, however, as discussed more fully below, that the responsible party, regardless of how it is defined, should be given the task of looking behind such assessments in order to itself assess the level of compliance maintained by unaffiliated servicing platforms.

e. Proposed Scope: Entire Servicing Function

Given the various servicing functions that are present in some types of ABS transactions and the possibility that various unaffiliated parties may be involved in those servicing activities, the Commission expresses concern that, currently, there is no assurance that the entire scope of servicing is consistently receiving adequate reporting coverage. In order to address that concern, the Commission proposes that the responsible party assess material compliance with all of the servicing criteria applicable to the ABS transaction regardless of the number of parties involved in servicing and bond administration. The Commission proposes that the responsible party accomplish this through the use of reasonable means to assess whether the parties performing any of the servicing functions that are material to servicing and bond administration as a whole are in compliance with the servicing criteria. The Commission also notes that this single report

[122] See Section IV.G.2.e. for a discussion of our views of what constitutes a material servicing function.

approach permits the responsible party to place reasonable reliance upon information provided by unaffiliated third parties that are responsible for certain aspects of servicing and bond administration. Additionally, to the extent that the responsible party's assessment of compliance identifies any material instance of noncompliance, the Commission proposes that the responsible party would be required to describe any material impacts or effects that have affected, or may reasonably be likely to affect, pool asset performance, servicing of the pool assets or payments or expected payments on the asset-back securities.[123]

We appreciate the Commission's desire to ensure that all material aspects of servicing and bond administration are included in the annual assessment of servicing compliance. We also note, however, that the Commission specifically asks a number of questions regarding the feasibility and appropriateness of asking a single entity to be responsible for the entirety of the servicing assessment. In response to these questions, we strongly believe that it would be a mistake to assign responsibility for making that global assessment – even permitting reasonable reliance on unaffiliated third party information – to the responsible party as outlined in the Commission's proposal. It is also our view, as we discuss in more detail below in Section IV.G.3. of this letter, that as currently proposed and under current auditing standards, registered public accountants will rarely, if ever, be able to provide the attestation reports required by the Commission's proposal. It is also our understanding that, even if the accountants could, under current auditing standards, provide the attestations contemplated by the Commission's proposal, they would frequently be unwilling to do so.

As noted above, it is our view that the responsible party is poorly positioned to be principally charged with the task of investigating the level of compliance maintained by unaffiliated third parties. While the proposal seems to recognize this concern by allowing the responsible party to reasonably rely on information provided by unaffiliated third parties, the proposal still indicates that the responsible party will be involved in assessing compliance through that reasonable reliance. We believe that the responsible party is equally poorly positioned to be charged with the task of testing or proving any assessment of compliance – even in connection with reasonable reliance – made by these unaffiliated third parties. We believe that generally, the responsibility for assessing compliance with the servicing criteria set forth in Item 1120(d) should be placed solely, in each case, with the individual party whose servicing activities and servicing platform are being evaluated; the final rules should not require that it be placed on an unaffiliated party. We believe that each of those individual assessments can be performed by each such party at a platform level, consistent with the Commission's proposal. However, we believe that the final rules should allow some flexibility in certain circumstances. If unaffiliated servicing entities – such as a master servicer and a subservicer – have structured their relationship in a way that would allow the master servicer to represent to its accountants that such master servicer is responsible for both compliance with servicing criteria and the effectiveness of the internal control over compliance with servicing criteria, it is our view that the final rules should permit that type of consolidated reporting. However, it is also our view that the instances where this type of joint report might be possible will be rare and therefore the final rules should not require parties to make assessments that cover more than their affiliated platform.

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[123] *See* Item 1120(c).

Again, given the nature of asset-backed transactions and the potential for different parties to play various servicing roles, we understand the Commission's desire to ensure that compliance with all aspects of the servicing of an ABS transaction are assessed on a regular basis. We respectfully submit, however, that the appropriate way to ensure the consistent scope of that compliance assessment is to apportion the assessment responsibilities. We believe this can be done in two steps.

First, as indicated above, we believe that the Commission should place responsibility for the actual assessment, along with the validity of that assessment (including any and all related reporting liability), directly with each entity responsible for the material servicing and bond administration functions. To the extent that any of these assessments identifies any material instance of noncompliance on the part of the applicable platform, the applicable assessing party should describe, to the extent possible, any material aspects or effects that have affected, or may reasonably be likely to affect pool asset performance, servicing of the pool assets – in each case with respect to the portion of the pool serviced by such entity – or payments or expected payments on the asset-backed securities. However, given that the assessments are to be done on a platform basis and not on a transaction specific basis, we believe that in many instances the assessing party may not be able to describe the impact to a specific transaction that instances of noncompliance might have. In these instances, we believe that the issuer will be on notice of such noncompliance and will be under an obligation to determine, and to disclose to investors, any material effects that such noncompliance might have on pool asset performance, servicing of the pool assets or payments or expected payments on the related asset-backed securities. Given the amount of work that any final rules relating to assessments will require to be performed prior to the filing of the report on Form 10-K, we do not believe that the issuer will be able to make that determination prior to the required filing date for the report on Form 10-K. Therefore, we believe that neither the issuer nor the responsible party should be required to prepare a description of the effects of noncompliance by any unaffiliated third-party within the report on Form 10-K, but should continue to be required to provide this type of disclosure by the timely filing of reports on Form 8-K.

Second, in order to insure reporting with respect to all aspects of servicing and bond administration, the Commission should require the responsible party, whether such party is the signer of the Form 10-K or otherwise, to confirm whether or not reports on assessment of compliance and related attestations have been obtained covering each unaffiliated third party that participates in any material servicing function covered in Item 1120(d) that is applicable to the subject transaction. Once the responsible party obtains the reports on assessment of compliance and the related accountants' attestations from unaffiliated third parties with a material servicing or bond administration function, those assessment reports and attestations should be included as a portion of the exhibit to the related report on Form 10-K, along with the responsible party's assessment of its own servicing compliance, if applicable.

In order to ensure that the ABS market is receiving complete disclosure, we believe that it would also be appropriate to require the responsible party to provide two additional pieces of information. First, to the extent that the responsible party was to receive an assessment and attestation from an unrelated third party but such assessment and attestation were not delivered, the responsible party should note that omission on its assessment of compliance. Second, while we do not believe that it is appropriate or, given timing constraints, feasible to require the

responsible party to prepare a description of the effects or any of the possible effects of instances of material noncompliance reported by unaffiliated third parties, we do believe that the responsible party can make the material in the various assessments more accessible to the marketplace by identifying and providing references to each instance of material noncompliance reported by each unaffiliated third party in their individual compliance assessments. By pursuing this suggested course, the Commission would accomplish its goal of insuring that there are periodic assessments of compliance with respect to all material aspects of servicing and bond administration. Moreover, such a rule would provide that the parties who are best positioned to perform those assessments are assigned the responsibility for providing them.

Furthermore, we believe that it would be inappropriate to require an assessment of compliance and related attestation be filed from every entity that has any role in the servicing or bond administration functions of an ABS transaction regardless of their level of participation. There is a point at which the cost to the responsible party and the applicable servicers of complying with such a requirement will far outweigh whatever marginal benefit the market might receive. We believe that every entity that has contractual privity with the issuing entity and is responsible for any servicing or bond administration function that can be assessed using the servicing criteria described in Item 1120(d), should be required to deliver a compliance assessment and related attestation. We also believe that any servicer lacking contractual privity with the issuing entity and which services 10% or more of the related asset pool – determined on a dollar basis of the original pool balance – should be required to deliver a compliance assessment and related attestation, unless another entity has asserted responsibility for the related servicing criteria and related internal control over compliance in its assessment. We believe that the entities in these two groups capture those parties that are responsible for the material servicing and bond administration functions. To the extent an entity lacks contractual privity with the issuing entity and services less than 10% of the related asset pool – determined on a dollar basis of the original pool – we do not believe that entity should be required to deliver an assessment of compliance or a related attestation. This scaled approach to reporting will ensure that investors receive adequate assurances concerning servicing compliance in a cost-effective manner.

We do not believe that material instances of non-compliance identified in the assessments of compliance should result in a penalty such as ineligibility to use Form S-3. We note that several of the recent USAP reports in the residential mortgage market reported some instance of noncompliance. We believe that disclosure of instances of noncompliance has been and continues be the preferred way for investors and market participants to make investment decisions. We do not believe that pre-determined regulatory consequences are necessary or would be useful.

Finally, we request that the Commission confirm in any final rules adopted, that none of the Depository Trust Company, any nominee of DTC or any direct or indirect participant in DTC, or any similar entities performing the functions of a clearing organization or related participant, would in any instance be construed as being among the group of entities for which an assessment of servicing compliance and related attestation is required.

f. Proposed Servicing Criteria

Given the perceived shortfalls of the USAP, and the absence of other suitable servicing criteria, the Commission proposes to establish uniform, disclosure-based servicing criteria to be used by each party involved in servicing and bond administration and the related registered public accounting firms in assessing servicing compliance. Those criteria are set out in Item 1120(d) in the Commission's proposal.

We generally agree that a uniformly applied set of appropriate servicing criteria will add value to the ABS market and provide participants in that market with information that may enhance their investment decisions. In the proposal, the Commission invites comment on whether suitable criteria could be developed by others to meet the objectives of the proposal. We believe that if given an appropriate amount of time, ABS market participants could develop suitable uniform servicing criteria. However, rather than pursue the development of a separate set of servicing criteria, we believe that the Commission's proposed servicing criteria is a productive starting point. We believe that the servicing criteria proposed in Item 1120(d), if revised to give effect to our comments below,[124] would provide ABS participants with an acceptable set of servicing criteria that could be applied across asset types. As noted below, however, we believe that, in the context of developing a standard set of servicing criteria to be applied across the entire ABS market, it is critical that market participants be afforded the ability to exclude inapplicable servicing criteria from the compliance assessment process if such criteria are inapplicable to a transaction.

If the recommendations provided in this letter are incorporated into the Commission's proposal, we believe that the proposal and the criteria set out in Item 1120(d) would work for all ABS transactions. However, as more fully discussed in Section IV.G.2.g. in this letter, this conclusion depends on the ability of the assessing entities to exclude criteria contained in Item 1120(d), to the extent that the specific criteria are not applicable or meaningful to a transaction. If the recommendations provided in this letter are not incorporated into the Commission's proposals, we respectfully submit that the alternative proposal described in Section III.D.7.d. of the Proposing Release would be the only other viable alternative under the current market structure and existing auditing guidelines.

g. Identification of Inapplicable Criteria

In the Proposing Release, the Commission notes that due to the unique and fluid nature of the ABS market, the responsible party would have discretion to exclude from its report those servicing criteria that are inapplicable to the servicing of the applicable underlying asset class. We agree that discretion of this type is absolutely necessary in order for the parties assessing compliance to apply a single set of servicing criteria across the entirety of the current and still evolving ABS market. We are not opposed to a final rule that would require each assessing party to identify either (i) all of the servicing criteria set out in Item 1120(d) that are not applicable to the activities of such entity, or alternatively (ii) only the criteria set out in Item 1120(d) that is applicable to the activities of such entity.

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[124] *See* Section IV.G.4. to this letter.

3. Attestation Report on Assessment of Compliance

The Commission proposes that, following the responsible party's assessment of compliance with the applicable servicing criteria set out in Item 1120(d), a registered public accounting firm would be required to report on and attest to such assessment of compliance through performance of an examination engagement. This attestation report of the registered public accounting firm would also be required as a portion of the assessment and attestation exhibit to the related report on Form 10-K.

As mentioned earlier, we believe that the proposal, as currently set out, places requirements on the responsible party and its registered public accountants that generally will not be possible to meet. Even if current auditing standards would allow registered public accountants to provide the attestations that the Commission's proposal requires, we do not believe that accountants will be willing to accept engagements that would require them to accept such responsibility.

The American Institute of Certified Public Accountants' Statement of Standards for Attestation Engagements No. 10, Compliance Attestation ("SSAE No. 10"), which has been adopted as an Interim Attestation Standard by the Public Company Accounting Oversight Board, governs attestation engagements in which an accountant performs an examination of a party's compliance with specific laws, regulations or contractual requirements. Under the provisions of SSAE No. 10, the assessing party is not required to be the entity whose compliance is being evaluated. However, we believe that, in order for an accountant to provide an attestation report, SSAE No. 10 requires the assessing party – the responsible party under the Commission's proposal – to state that such assessing party is responsible for (i) the applicable entity's compliance with the specified requirements, and (ii) the effectiveness of the applicable entity's internal control over compliance.[125] In Item 1120(a)(1), the Commission's proposal purports to require that the responsible party only accept responsibility for assessing compliance with all servicing criteria by all parties. However, in order to obtain the attestation report required by Item 1120(b) in compliance with the current auditing standards set out in SSAE No. 10, we believe that under the Commission's proposal, the responsible party would be required to accept responsibility for actual compliance by all entities covered by the related assessment as well as for the effectiveness of their internal controls. In ABS transactions where there are multiple, unaffiliated parties performing various elements of the servicing functions described in Item 1120(d), such as servicers, a master servicer, administrators and the trustee, these entities – with rare exception – do not assume responsibility for the performance of functions by other entities and rarely – if ever – assume responsibility for the effectiveness of other entity's internal controls over compliance. As a result, in ABS transactions where there are multiple, unrelated parties performing various elements of the servicing functions described in Item 1120(d), under the existing guidelines in SSAE No. 10, we do not believe it will be possible in most cases to obtain an attestation report for a single assessment of compliance as contemplated by the Commission. Also, SSAE No. 10, paragraph 42, provides auditing guidance with respect to engagements involving multiple components.[126] Although this guidance says that the reporting

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[125] *See* paragraphs 601.10, 601.15 and 601.68 of SSAE No. 10.

[126] The text of SSAE No. 10, paragraph 42 follows. In an engagement to examine an entity's compliance with specified requirements when the entity has operations in several components (for example, locations, branches, subsidiaries, or programs), the practitioner may determine that it is not necessary to test compliance with

accountant would not have to test compliance with requirements at every component, there is an expectation that the accountant would have to perform procedures at every significant location of every entity performing servicing or bond administration functions, particularly since the responsible party does not have the ability to directly supervise the activities of the other service providers. We maintain that satisfying the requirement to perform procedures at multiple locations is not feasible in any transaction in which there are multiple parties and could not be done without incurring significant incremental costs that are not supportable by the economics of these transactions.

Moreover, as a practical matter, we understand that registered public accounting firms will be unwilling, due to risk-reward considerations, to serve as the accountants for the responsible party when such party and its affiliates do not perform significant portions of the overall servicing and bond administration. Although SSAE No. 10 does not incorporate the auditing literature's concept of a "principal auditor," accountants are still likely to apply those same professional judgments as are outlined in AU Section 543, Part of Audit Performed by Other Independent Auditors, paragraph 2.[127]

As noted above, we believe that, given a properly drafted set of uniform servicing criteria, the responsible party will be able to perform an examination of its affiliated asset-backed servicing platform, if any, and, based on that examination, assess its own compliance on a platform basis with those criteria. We also believe that each other entity that plays a material role in the servicing of an ABS transaction will be able to perform its own examination of its affiliated asset-backed servicing platform and based on that examination, assess its affiliated compliance on a platform basis. It is our view that in each of the cases described above, each such entity is the appropriate party to assert responsibility for its own assessment of compliance with respect to its affiliated platform and the effectiveness of the internal controls relating thereto, in a way that will allow its registered public accountants to complete an attestation with respect to such assessment in accordance with current auditing standards. However, as noted above,[128] to the extent that unaffiliated parties have structured their relationship in a way that would allow one party to make the statements required by current auditing standards in order to allow accountants

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requirements at every component. In making such a determination and in selecting the components to be tested, the practitioner should consider factors such as the following:

a. The degree to which the specified compliance requirements apply at the component level
b. Judgments about materiality
c. The degree of centralization of records
d. The effectiveness of the control environment, particularly management's direct control over the exercise of authority delegated to others and its ability to supervise activities at various locations effectively
e. The nature and extent of operations conducted at the various components
f. The similarity of operations over compliance for different components

[127] AU Section 543, Part of Audit Performed by Other Independent Auditors, paragraph 2 states: "The auditor considering whether he may serve as principal auditor may have performed all but a relatively minor portion of the work, or significant parts of the audit may have been performed by other auditors. In the latter case, he must decide whether his own participation is sufficient to enable him to serve as the principal auditor and to report as such on the financial statements. In deciding this question, the auditor should consider, among other things, the materiality of the portion of the financial statements he has audited in comparison with the portion audited by other auditors, the extent of his knowledge of the overall financial statements, and the importance of the components he audited in relation to the enterprise as a whole."

[128] See Sections IV.G.2.d. and IV.G.2.e. of this letter.

to provide an attestation relating to such assessment, we believe that the final rules should allow this flexibility.

4. Item 1120(d) of Regulation AB

Following are specific comments on the servicing criteria proposed as Item 1120(d).

Item 1120(d)(2)(i)	Currently, ABS transaction documents often require that payments on pool assets be deposited into collection accounts – usually a bank clearing account – within two business days. However, if the credit rating of the servicer meets a threshold set forth in the transaction documents, deposits of those payments on pool assets often do not have to be deposited into the custodial bank accounts of the trustee or administrator until a future date. To clarify that compliance with Item 1120(d)(2)(i) does not require an earlier deposit into noncommingled custodial accounts than the underlying transaction documents require, we respectfully request that the words "appropriate custodial bank accounts and" be deleted.
Item 1120(d)(2)(ii)	We believe that additional clarity is needed with respect to this Item. While the servicing entity can make disbursements via wire transfer on behalf of an obligor (for example in connection with disbursements in connection with escrowed amounts), we are not aware of examples of disbursements that are made on behalf of investors. We respectfully request that this item be revised to read "Disbursements made via wire transfer to or on behalf of an obligor or to an investor are made only by authorized personnel."
Item 1120(d)(2)(iv)	It is our understanding that this Item is not meant to override any permission to commingle funds that might be present in the transaction documents. Rather, we believe that the Commission intends that this Item provide a confirmation that, to the extent transaction documents require segregation of accounts and funds, such segregation is respected. To clarify this intent, we respectfully request that the words "as set forth in" be changed to "to the extent required in".
Item 1120(d)(2)(v)	We do not understand the requirement of maintaining custodial accounts at federally insured institutions. The amounts on deposit in these custodial accounts will generally far exceed any federal insurance limits. Given this, we do not understand what benefit is produced by this requirement and respectfully request that this Item be removed.
Item 1120(d)(3)(i)(D)	We do not believe that it is possible for servicing entities to confirm that reports to investors agree with the records of those investors. We do believe that the servicing entities can agree their records with the records of the trustee as to the total unpaid principal balance and

number of pool assets serviced by such entity. We respectfully request the deletion of the words "investors' and/or" from this item.

Item 1120(d)(3)(iii) — We believe that additional clarity is needed with respect to this Item. We do not believe that the servicer will be maintaining records for investors. We believe that this Item is requiring that disbursements made to an investor be posted to the servicer's records. If this interpretation is correct, we believe this Item should be revised to clarify that intent. If this interpretation is incorrect, we do not believe that servicers will be able to comply and respectfully request that this Item be removed.

Item 1120(d)(4)(iv) — We believe that additional clarity is needed with respect to this Item. Payments on pool assets may be posted by the servicer to its records relating to the obligor, but the servicer cannot control the posting of items in the obligor's records unless those records are maintained by the servicer. See Item 1120(d)(4)(xiii).

Item 1120(d)(4)(v) — We do not believe that the servicing entities can agree their records with the obligor's records with respect to the unpaid principal balance. We believe that servicers can use commercially reasonable means to communicate what its records indicate with respect to the unpaid principal balance with the applicable obligors. We respectfully request that this Item be revised to indicate this standard.

Item 1120(d)(4)(vii) — We believe that the reporting requirements regarding loss mitigation are more detailed than necessary. It is our view that the second sentence of this Item that appears to require reporting on loss mitigation will not provide information to investors that is materially useful and should, therefore, be removed.

5. Discussion of Audited Financial Statements and Agreed Upon Procedures

In its proposal, the Commission asked questions regarding the effectiveness of a reporting regime that focused on assessments of compliance as compared to other forms of accounting comfort. We believe that a reporting regime that is consistent with our suggestions in Sections IV.G.2.d. and e and Section IV.G.3. of this letter regarding assessments of servicing compliance and related attestation reports by registered public accounting firms will be more useful to the ABS market than would audited financial statements of an ABS issuer. With respect to operating entities, financial statements are useful because they provide a standardized format for valuing assets and liabilities and determining the financial condition of an entity. With respect to ABS issuers, however, the valuations and determinations audited financial statements provide are not relevant, as ABS issuers are structured such that a specified pool of assets generates sufficient cash flow to support the securities. We also believe that audited financial statements in connection with certain types of ABS issuing entities such as titling trusts would not only be unhelpful, but could also be misleading to investors since not all of the amounts reflected in those financial statements would be available to all investors.

We believe that whatever marginal benefit audited cash-basis financial statements for issuers might be to ABS investors is easily outweighed by the significant costs that would be imposed on issuers. We believe that the development of the asset-backed market confirms this conclusion. Fairly early in the development of the ABS market, some issuers started providing these types of audited financial statements; in the case of agency-backed CMOs we believe it was a requirement that the trust which issued debt securities provide annual audited financial statements. However, as the ABS market matured, this type of disclosure was generally not embraced by issuers or demanded by investors. Consequently, we believe that audited financial statements for issuers should not be required

With respect to servicers, we believe that reporting obligations should focus on a servicer's compliance with servicing criteria. While audited financial statements would provide information regarding the financial condition of a servicer, such financial statements would provide no assurance about its ability to meet or comply with servicing requirements. Also, given the fact that the ABS servicer is not generally an obligor under the related ABS securities, any requirement that could implicate otherwise should be avoided. Consequently, we believe that audited financial statements of servicers should not be required.

If the Commission's proposal regarding the accountant's attestation report is modified as per our suggestions in Sections IV.G.2.d. and e and Section IV.G.3. of this letter, it would be more productive to prepare an attestation report on the assessment of servicing criteria than it would be to require audited financial statements of the servicer. Similarly, we do not see the value in allowing certain ABS transactions to use a form of agreed upon procedures ("AUP") to fulfill the accountant report requirement of the modified reporting system. AUP are unique to specific transactions and entities. Because AUP vary based on the specifics of a transaction, we do not believe a form of AUP could be applicable to all asset classes. In addition, AUP letters are not intended for distribution to third parties. Thus, because the Commission's proposal regarding the accountant report requirement contemplates an examination engagement, we believe that AUP letters would be neither useful nor practical in ABS transactions.

H. Reporting on Form 8-K

As set forth in the Proposing Release, the events required to be reported on Form 8-K would be expanded to include events specific to ABS. As we review the new Items 6.01, 6.02, 6.03 and 6.04, we have no objection to such items, except to the extent they overlap or duplicate the information to be reported on Form 10-D. We propose that such information should be reported on Form 8-K rather than Form 10-D. With respect to some of the events which are required to be reported under the proposal, we offer the comments below.

1. Item 2.04 – Triggering Events

We note that one of the events to be reported on Form 8-K – as Item 2.04 – is the occurrence of an early amortization event, performance trigger or other event, including an event of default, under the transaction agreements that would materially alter the payment priority or distribution of cash flows or the amortization schedule. The reports to be filed with Form 10-D include similar information. By reference to Item 1119(m) of proposed Regulation AB, Form 10-D is expected to include information "on ratio, coverage or other tests used for determining any early

amortization, liquidation or other performance trigger and whether the trigger was met." The Form 8-K would require that the report be made within four business days and the Form 10-D would require that the report be made not later than 15 days after the applicable distribution date. As noted, earlier, we have proposed that Form 10-D be used only for the filing of the periodic distribution reports. If, however, other events are to be reported on Form 10-D, then it does not seem that this information should be required on both forms and, if the event would materially alter the payment priority or distribution of cash flows or the amortization schedule and would clearly relate to distributions, as between the two forms, it would seem to be better suited to reporting by Form 10-D along with the distribution information.

2. Item 6.04 – Failure to Make a Required Distribution

Item 6.04 requires the filing of a Form 8-K if a required distribution to holders of the ABS is not made as of the required distribution date. We understand this item to require a report only if the failure constitutes a default under the governing documents. It is not feasible for the issuer to discover every minor error in distributions, particularly if the error has been corrected. We request clarification that minor errors in calculation and distribution which are corrected when discovered are not required to be reported.

3. Item 6.05 – Sales of Additional Securities

Item 6.05 requires the filing of a report on Form 8-K if "additional securities that are either backed by the same asset pool or are otherwise issued by the issuing entity are sold, whether or not registered under the Securities Act." We believe that this provision should contain a materiality standard or threshold. We note that, particularly for seasoned revolving master trusts, additional tranches, classes or series of notes are commonly issued several times during a month with no effect on holders of outstanding notes. At the same time, outstanding tranches, classes or series may mature and be paid. Whether other tranches, classes or series are issued or paid is typically of little significance to the holders of the outstanding ABS. Each tranche, class or series is entitled only to its specific share of the pool assets without regard to how many assets are in the pool or how many other investors have an interest in the pool. The overall size of the pool and the amount of ABS outstanding may be of interest, but can easily be understood from the periodic distribution reports and the annual report on Form 10-K.

In any event disclosure of pricing information in a private transaction should not be required. Such information is confidential and not material to investors.

4. Item 6.06 – Securities Act Updating Disclosure

Proposed Item 6.06 is intended to address instances where the composition of the actual asset pool at the time of issuance of the ABS differs from the composition of the pool as described in the final prospectus. Specifically, Item 6.06 provides that if the actual asset pool at the time of issuance of the ABS "differs" by 5% or more from the description of the pool in the prospectus, then all of the information required by Items 1110 and 1111 of proposed Regulation AB regarding the characteristics of the actual asset pool – presumably as of the date of issuance – would be required to be filed by Form 8-K. We have the following comments on this proposal.

First, we strongly object to this proposal as applied to master trusts and believe that master trusts should be exempted from this provision in its entirety.[129] For such trusts, the investor buys an ever-changing pool. The actual asset pool at the time of issuance of any series of ABS as compared with the description of such asset pool in the prospectus will most assuredly change and such change is expected. Indeed, the prospectus advises investors (and investors well understand) that assets may be added to (or removed from) the asset pool on specified conditions at any time or from time to time. We believe that the Commission's intended scope of Item 6.06 was perhaps more narrow – for example, to address instances where the assets comprising a fixed pool are changed after the prospectus is prepared – but, by its terms, no such limitation is included.

Second, as noted earlier in this letter, the characteristics of an asset pool, whether fixed or revolving, change continually and naturally over time, including from day to day. For example, an obligor on a pool loan may make a principal payment, including a prepayment, or the holder of a credit card may incur additional charges or pay off his or her balance in its entirety, all in the ordinary course. In the case of an asset pool comprised of thousands or tens of thousands of individual loans these organic changes can be significant, and such changes are understood and expected. We respectfully request, therefore, that the Commission clarify that Item 6.06 is intended to trigger a disclosure obligation only in those cases where the composition of an asset pool intended to be fixed changes during the specified measuring period.

Third, even as applied to ABS supported by fixed pools, certain points of clarification are needed. Item 6.06 indicates that updated pool disclosure is required where the actual pool "differs" by 5% or more from the pool as described in the prospectus. Item 6.06 should be revised to clarify by what key parameters this 5% change is to be measured. For example, is the measure intended to be a 5% change in pool balance or a 5% change in some other key pool metric? It is imperative that any test ultimately employed to measure the extent to which the actual pool may "differ" from the pool as described in the prospectus, be limited to one or two key parameters capable of tracking on a real-time basis, such as principal balance and number of loans or accounts.[130]

I. Other Exchange Act Proposals

We support each of the Commission's Exchange Act proposals set forth in Section III.D.9. of the Proposing Release, relating to (i) codification of the requirement to file reports tied to

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[129] We believe that any trust which, by design, contemplates the addition of additional assets, whether because the asset revolves naturally or because additional other assets are intended to be added over time, should be exempted from this provision. We believe that master trusts with naturally revolving assets best exemplifies our concern.

[130] We wish to emphasize to the Commission that the ability to track changes in pool characteristics on a real-time basis for any metric other than the most basic (*e.g.*, actual pool balance and number of loans, accounts, etc.) would be a virtual impossibility. Data defining pool characteristics as of any point in time must first be captured and organized before it can be analyzed. These steps alone can take several days for a pool of hundreds, thousands or even tens of thousands of individual loans or accounts. After the data is organized, the information must then be verified, both internally and by outside accountants, before the information is determined to be reliable and accurate and, therefore, suitable to be reported and filed with the Commission. These steps will typically require several additional days.

distributions on ABS in lieu of quarterly reporting on Form 10-Q,[131] (ii) an exemption from Section 16 of the Exchange Act in its entirety, and (iii) the applicability of the transition report rules to ABS issuers.

V. TRANSITION PERIOD

As has been noted numerous times in this letter, the proposed rules, forms and directions represent a major change in registration, disclosure and ongoing reporting. The existing rules, with modifications over the years, have been in place since the inception of ABS, and market participants have developed their business, practices and contractual arrangements around such existing system. Implementing policies, processes and procedures to adjust to the changes will take time. In considering how best to allow for an orderly transition, we would propose the following:

- **Effective Date**. We strongly believe that compliance with the proposed rules, forms and directions will be a long and difficult process for many in the ABS industry. It will involve many parties, some of which are unaffiliated and have no contractual obligation to cooperate, changes in systems, changes in operating procedures, amendments to existing documents and a list of undertakings we have not yet even started to compile. As a result, our strong inclination would be to propose a very long transition period. However, we also recognize the Commission's interest in encouraging a transition at the soonest practical time and our intent is to be reasonable in our requests. Therefore, we propose that the effective date be 12 months after the date of publication of the final rules in the Federal Register.[132]

- **Granting of Relief**. We request, however, that the Commission recognize that, notwithstanding diligent efforts on the part of the ABS industry to comply, there almost certainly will be cases where compliance cannot be accomplished within the time permitted. In such cases, we request the ability to apply for a hardship exemption and to be granted additional time to comply as needed on a case by case basis, or on a "class of transactions" basis, where the class might be defined by any number of common characteristics (*e.g.,* common depositor, sponsor or other key transaction party, asset type or transaction structure).

- **Amendments**. In many cases documents and registration statements may need to be amended to comply with the new rules. We request a transition rule which would allow post-effective amendments to registration statements that are necessary to comply with the new rules to become effective upon filing with the Commission, in a manner comparable to that available for amendments filed solely to add exhibits to a registration statement pursuant to Securities Act Rule 462(d).[133]

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[131] As noted in Section IV.D.4., we do, however, continue to believe that special provisions should be adopted for repackagings and resecuritizations permitting considerably more streamlined reporting practices.

[132] We note that with the plain English rules, which were far less difficult to implement, the effective date was approximately eight months after publication.

[133] 17 CFR 230.462(d).

- **Registration**. As stated above, we propose that the rules have an effective date 12 months after the date of publication of the final rules. Under Rule 401(a) of the Securities Act, unless the new rules provide otherwise, all registration statements and the prospectuses included therein, filed prior to the effective date and which complied with the rules and forms in effect on the initial filing date, will be in compliance notwithstanding the change in the rules. All registration statements filed on or after the effective date of the new ABS rules will be required to comply with such new rules. Some questions have been raised about the status of a security which qualified as an asset-backed security under the existing rules, but which for some reason does not technically meet the definition of an asset-backed security under the new rules. We believe, but request the Commission's confirmation, that if the security and the registration statement relating to such security complied with the rules at the time the registration statement was filed, the subsequent change in the rules relating to the definition of ABS, will not cause the registration to cease to be effective.

- **Disclosure**. Again, as stated above, we would propose that new rules have an effective date 12 months after the date of publication of the final rules. If a prospectus is included in a new registration statement filed on or after the effective date, the new disclosure rules will apply to that registration statement and the prospectus. With respect to any registration statement filed prior to the effective date, if at any time on or after the effective date a post-effective amendment is filed, the new rules will apply to the registration statement and prospectus at that time. With respect to any registration statement on Form S-3 filed prior to the effective date of the new rules, the new disclosure rules will apply to any prospectus filed pursuant to Securities Act Rule 424(b) after the effective date.

- **Ongoing Reporting**. As discussed at length in Section IV relating to ongoing reporting and for the reasons described in that section, we propose that all ABS issued prior to publication of the final rules or within 12 months thereafter be grandfathered, and not be subject to the new rules and continue to report under the existing modified reporting system until such ABS are retired. We believe this would provide a smooth and natural transition since the maturities of most ABS are relatively short and the average life is even shorter. Thus, most of the existing ABS subject to the current system would in a short period of time be paid, and starting 12 months after the publication date all new ABS would report under the new rules.

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The ASF very much appreciates the opportunity to provide the foregoing comments in response to the Commission's Proposing Release. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact George Miller of the ASF at 646.637.9216.

Sincerely,

Vernon H.C. Wright
Chairman
American Securitization Forum

SELECTED REQUESTS FOR COMMENT ANNOTATED TO ASF COMMENT LETTER

I. **Overview**

II. **Background and Development of ABS and Regulatory Treatment**

III. **Discussion of the Proposals**

A. Securities Act Registration

1. Current Requirements

2. Definition of Asset-Backed Security

a. Basic Definition

Questions regarding the proposed definition of "asset-backed security:"

We request comment on our proposed definition. Are any further modifications to the definition necessary? If so, what modifications should be made and why?

See Section I.A.

b. Nature of Issuing Entity

Questions regarding the nature of the issuing entity:

We request comment on the proposed conditions regarding the nature of the issuing entity. Is the proposed condition on the passive and restricted nature of the issuing entity appropriate?

See Section I.A.3.

c. Delinquent and Non-Performing Pool Assets

Questions regarding proposals for delinquent and non-performing assets:

We request comment on the codification of these existing interpretations. Is there a reason to re-evaluate these interpretations? In particular, should there still be an absolute bar on non-performing assets? We also request comment on the proposed delinquency concentration limits. The 50% non-shelf limit is designed to help assure that even those asset-backed securities that do not qualify for shelf registration are appropriately subject to our proposed ABS disclosure and reporting regime. Should either limit be higher or lower? Should these tests be conducted at any time other than issuance of the asset-backed securities?

See Sections I.A.1. and I.A.4.

We request comment on our proposed definitions of "non-performing" and "delinquent." Should the definition of non-performing be tied to the charge-off policies of both the transaction documents and the sponsor? Is it necessary to require disclosure of the sponsor's charge-off policies? Is the proposed clarification regarding re-aging appropriate? Should there be a specific delinquency date for when an asset is non-performing? What would that date be (e.g., 90 or 180 days delinquent)? If possible, please provide supporting data in relation to current market practices.

See Section I.A.4.b.

d. Lease-Backed Securitizations and Residual Values

Questions regarding the proposals for lease-backed ABS:

Should ABS backed in part by cash flows from residual values be included in the definition of asset-backed security? Does the proposed proviso to the definition of asset-backed security capture the types of lease transactions that include residual values?

See Section I.A.5.

We request comment on our proposed limits on the cash flows that are anticipated to come from residual values. Should there be such limits? What alternatives could be used in lieu of limits to address the concerns identified? Is there a disclosure-based solution that would preclude the need for such limits? Are there additional concerns we have not identified? Should there be different limits for automobile leases versus other leases? Should there be different limits for non-automobile leases for shelf registration eligibility? Should there be such limits for automobile leases? Should any of the proposed limits be higher or lower? Should the limits be based on a different amount (e.g., percentage of offering proceeds instead of asset pool)? If possible, please provide supporting data in relation to current market practices.

See Sections I.A.1. and I.A.5.

e. Exceptions to the "Discrete" Requirement

Questions regarding proposed exceptions to the "discrete pool" requirement:

Should asset-backed securities transactions be allowed to have master trusts, prefunding periods and revolving periods? Are there some asset types where the inclusion of such features should disqualify any issued securities from being considered an "asset-backed security?" Should one or more of the features (e.g., master trusts or revolving periods) not be included or expanded for all asset types? Are there any additional exceptions that should be made?

See Section I.A.6.

Should there be any pre-determined limits on master trust structures? Are the proposed limits appropriate for the use of prefunding or revolving periods? Should there be such

limits? What alternatives could be used in lieu of limits? Should there be different limits for shelf registration eligibility? Should there be different limits based on the nature of the asset (fixed or revolving)? Should any of the proposed limits be higher or lower? Should the length of prefunding or revolving periods be longer or shorter than one year? If possible, please provide supporting data in relation to current market practices. Please see Section III.B.4. for comment requested regarding disclosure related to these features.

See Section I.A.6.

3. Securities Act Registration Statements

a. Form Types

Questions regarding proposed form types:

We request comment on the proposed general instructions to Forms S-1 and S-3. Is the proposed menu of disclosure items appropriate? Should any additional items be included or omitted?

See Section I.B.1.

b. Presentation of Disclosure in Base Prospectuses and Prospectus Supplements

Questions regarding presentation of disclosure in base prospectuses and prospectus supplements:

Is any additional guidance or clarification necessary regarding the presentation of base prospectus and prospectus supplement disclosure? Should we be more specific, including by rule if necessary, on what information must be in the base prospectus as opposed to the prospectus supplement? If so, how should disclosures be delineated?

See Section I.B.1.

Is the proposed specification that a separate base prospectus and form of prospectus supplement must be presented for each asset class and country of origin appropriate?

See Section I.B.1.

c. Form S-3 Eligibility Requirements for ABS

Questions regarding Form S-3 eligibility:

Are there any additional conditions that should be required to qualify for Form S-3 eligibility? Are the proposed conditions appropriate?

See Section I.B.4.

d. Determining the "Issuer" and Required Signatures

Questions regarding proposed definition of "issuer" and signatures required:

We request comment on our proposed rule clarifying the "issuer" for an asset-backed security. In addition to, or in lieu of the depositor, should another entity be considered the "issuer," such as the sponsor, the servicer, the trustee or the issuing entity? What would be the bases for designating such entity or entities as the "issuer?"

See Sections I.B.5. and IV.B.1.

4. Foreign ABS

Questions regarding foreign ABS:

We request comment on the application of our proposals to foreign ABS. Is there a need to create different regulatory requirements for foreign ABS? If so, what accommodations should be made and why? We request comment particularly from the point of views of potential issuers of foreign ABS who would prepare this information as well as potential investors in foreign ABS regarding what information would be material to their investing decisions.

See Sections I.B.5. and I.C.

5. Proposed Exclusion from Exchange Act Rule 15c2-8(b)

Questions regarding proposed exclusion from Exchange Act Rule 15c2-8(b):

Should we codify an exclusion from the preliminary prospectus delivery requirements of Rule 15c2-8(b) for Form S-3 ABS?

See Section I.D.

Is the proposed limitation to Form S-3 ABS still appropriate? If not, under what circumstances should the proposal be extended to Form S-1 ABS?

See Section I.D.

6. Registration of Underlying Pool Assets

a. Current Requirements

b. Proposal for When Registration is Required

c. Proposed Exceptions from Disclosure and Delivery Conditions

Should we address further examples?

See Section I.E.1.

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B. Disclosure

1. Proposed Regulation AB

Questions regarding overall approach to proposed Regulation AB:

We request comment on our proposed principles-based approach for Regulation AB. Should we provide detailed disclosure guides by asset type instead? In evaluating the proposed items in Regulation AB, do the items provide sufficient clarity in identifying the disclosure concept? Should we be more specific (or less specific) regarding any particular items?

See Section II.A.

Is additional disclosure regarding the background, experience, performance and role of transaction parties needed? In evaluating the proposed disclosure items relating to these parties, should we be more specific on particular aspects that should be disclosed?

See Sections II.F., II.G.2. and II.H.1. (regarding servicers, originators and trustees, respectively).

Should audited financial statements be required to be filed for issuing entities? If so, for what periods? What would be the costs and benefits of such a requirement?

See Section IV.G.5. (discussing audited financial statements for issuing entities).

Are one or more of the basic audited financial statements (balance sheet, statement of income, retained earnings, or cash flows) more relevant for issuing entities than the others? If so, which one(s) and should it (they) be required to be filed?

See Section IV.G.5.

Instead of GAAP financial statements, should financial statements be required that are prepared on another basis, such as on the basis of cash receipts and cash disbursements?

See Section II.L.2.a.ii. (regarding providers of credit enhancement).

2. Forepart of Registration Statement and Prospectus

Questions regarding proposed disclosure for forepart of registration statement and prospectus:

Are any modifications needed to the proposed list of items? Should we be more specific (or less specific) regarding any items?

See Section II.C.

3. Transaction Parties

a. Sponsor

b. Depositor

c. Issuing Entity and Transfer of Asset Pool

d. Servicers

e. Trustees

f. Originators

g. Other Transaction Parties and Scope of Disclosure

Questions regarding proposed disclosure for transaction parties:

We request comment on the proposed disclosure regarding transaction parties. We also request comment on our proposed definitions. Are there additional parties not mentioned that should be specifically referenced? For each particular disclosure item, are there any modifications that should be made to the list of items to be disclosed? Several rating agencies provide ratings for servicers. Should these be required to be disclosed?

> *See* Sections II.D., II.F., II.G. and II.H. (regarding comments on transaction parties, proposed definitions and modifications to disclosure requirements); Section II.F.2.b. (regarding ratings for servicers).

Should specific financial information be required regarding any of the transaction parties? If so, for which parties should information be required? What information should be required (e.g., audited financial statements) and for what periods? Under what circumstances should such information be required?

> *See* Sections II.F.2., II.G.2., II.H.1. and II.L. (regarding comments on servicers, originators, trustees and enhancement providers, respectively).

In the case of sponsors that acquire pool assets for securitization from other originators or issuers, should there be disclosure of the difference between the acquisition price and the price paid by the issuing entity?

> *See* Section II.E. (regarding purchase price for the transfer of assets and the sale of ABS).

Is a 10% breakpoint appropriate for triggering disclosure regarding unaffiliated servicers and significant originators? Should the percentage be higher (e.g., 20%) or lower (e.g., 5%)? Should a specific percentage not be used for determining when disclosure is appropriate? Is disclosure regarding other servicers that account for a material portion or aspect of the servicing of the pool assets appropriate?

> *See* Section II.F.2. (regarding unaffiliated servicers); Section II.G.2.a. (regarding significant originators).

Should the proposed disclosure regarding the trustee include more explicit examples of activities that the trustee does and does not do? Is the same disclosure needed for both the trustee for the issuing entity and the trustee for the ABS indenture?

> *See* Section II.H. (regarding proposed trustee disclosure and disclosure needed for ABS indenture trustees).

Should any information regarding third party originators be required other than what is provided today?

> *See* Section II.G.2. (regarding information on third party originators).

We request comment on the clarification regarding the application of our proposals to the asset pool underlying a financial asset that represents an interest in or the right to the payments or cash flows of that asset pool.

> *See* Section II.J. (regarding clarification of the proposals).

4. Pool Assets

a. Pool Composition

b. Sources of Pool Cash Flow

c. Changes to the Asset Pool

d. Rights and Claims Regarding the Pool Assets

Questions regarding proposed disclosure for the asset pool:

We request comment on the proposed disclosure regarding the asset pool. Are there any modifications that should be made to the list of representative items to be disclosed?

> *See* Section II.J. (regarding comments on the list of representative items).

5. Transaction Structure

Questions regarding proposed disclosure regarding the transaction structure:

We request comment on the above proposed disclosure regarding transaction structure. Are there any modifications that should be made to the list of items?

> *See* Section II.K. (regarding modifications to the list of disclosure items with respect to transaction structure).

6. Significant Obligors

Questions regarding proposed disclosure regarding significant obligors:

We also request comment on the level of disclosure to be required, both descriptive and financial, regarding significant obligors.

See Sections II.B.2. and IV.D.8. (regarding updating of financial information for significant obligors).

7. Credit Enhancement and Other Support

Questions regarding proposed disclosure regarding credit enhancement and other support:

We request comment on our proposals for disclosure regarding credit enhancement and other forms of support for an ABS transaction. Are any modifications necessary? Are there any additional examples we should provide?

See Section II.L.

Is the test of whether the enhancement provider is liable or contingently liable for payments representing 10% or more of the cash flows to any class of the asset-backed securities the appropriate test? If not, why? What alternatives should be used? Should different tests be used for different forms of enhancement? What would be the rationale for different tests?

See Section II.L.

Are the 10% and 20% breakpoints still appropriate for triggering when different levels of financial disclosure should be required? Should they be changed?

See Section II.L.

We also request comment on the level of disclosure to be required, both descriptive and financial. Are there alternative disclosures that should be required or permitted? For example, in the case of an insurance company or other regulated entity that is not subject to Exchange Act reporting requirements and does not otherwise provide GAAP financial statements, should financial statements prepared under the entities' regulatory accounting principles be acceptable as a substitute?

See Section II.L. (regarding the level of disclosure required); Section II.L.2.a.ii. (regarding non-GAAP financial statements).

8. Other Basic Disclosure Items

a. Tax Matters

b. Legal Proceedings

c. Affiliations and Certain Relationships and Related Transactions

d. Ratings

e. Reports and Additional Information

Questions regarding other proposed basic disclosure items:

What should be the proper scope for disclosure of affiliations and relationships between transaction parties? Should any modifications be made to the proposed disclosure item? Are all of the proposed related party transaction disclosures useful, or should the disclosure be limited from what is proposed

See Section II.M. (regarding modifications to affiliations and relationships disclosure).

9. Alternatives to Present Third Party Financial Information

a. Incorporation by Reference

Request for comment on the incorporation by reference alternative:

Is it appropriate to extend incorporation by reference for third parties to registered ABS offerings on Form S-1? Would it be appropriate to extend it to all parties?

See Section III.A.2.b.iii.

b. Reference Information

* * *

C. Communications During the Offering Process

1. ABS Informational and Computational Material

a. Current Requirements

b. Proposed Exemptive Rule

Questions regarding the proposed exemptive rule:

We request comment on the proposed exemptive rule.

> *See* Sections III.A.1. and III.A.2. (regarding comments on the proposed exemptive rule).

We do not propose to limit eligibility for the exemption on any variables such as transaction size or asset type. However, under the existing no-action letters we see few filings related to the use of term sheets or computational material outside of MBS. Should we limit eligibility by size, asset type or other variable? Is the use of these materials not necessary for other asset classes? Is there a reason why more of these materials are not filed?

> *See* Section III.A.1. (footnote 79 regarding use of such materials outside of MBS).

Is the proposed limitation to registered offerings on Form S-3 still appropriate? If not, under what circumstances should the proposal be extended to offerings on Form S-1? The existing letters and our proposals require filing of material on Form 8-K that is incorporated by reference into the registration statement. They also only apply to the use of materials after the effective date of the registration statement (e.g., before a takedown off of an effective shelf registration statement). How would this procedure work with respect to non-shelf registered offerings on Form S-1?

> *See* Section III.A.2.b.i. (regarding extending the proposal to Form S-1); Section III.A.2.b.iii. (regarding incorporation by reference and offerings on Form S-1).

Are any clarifying amendments necessary for ABS with respect to Securities Act Rule 134? This rule deems certain limited communications announcing an offering (often called a "tombstone" announcement) not a prospectus so long as the communication is limited to the items specified in that rule. What items would be appropriate for ABS (e.g., announcing the asset type being securitized, asset concentrations, sponsor, servicer or weighed average life, maturity or coupon), and why should they be included?

> *See* Section III.A.2.c.

c. Proposed Definition of ABS Informational and Computational Material

Questions regarding the proposed definition of ABS informational and computational material:

We request comment on the proposed definition of ABS informational and computational material, including the proposed addition of static pool data to the types of materials that may be used. Does the definition reflect the scope of materials that are used under the existing no-action letters?

See Section III.A.2.a.

Consistent with the no-action letters, we do not propose content restrictions for the material so long as it meets the definition of ABS informational and computational material. Is this still an appropriate approach? Of course, even without content restrictions, the antifraud rules and other liability provisions applicable to the material would continue to apply.

See Section III.A.2.a.

Is any additional clarification needed regarding other uses of ABS informational and computational material?

See Section III.A.2.b.

d. Proposed Conditions for Use

Questions regarding the proposed conditions to the exemption:

We request comment on our proposed conditions to the exemption, including whether any additional conditions would be appropriate. For example, we request comment on the basic information and legend we propose to require for the materials. Is any of the proposed information not necessary? Is any additional clarification about inappropriate disclaimers or legends necessary?

See Section III.A.3. (regarding comments on the proposed conditions, the basic information and legend and clarification thereof).

While the ABS market has operated under the no-action letters for nearly a decade without it, should the rule include an exception for a good faith immaterial or unintentional failure to file or delay in meeting the filing requirements? Has the absence of this exception chilled communications? Why would such an exception be appropriate now?

See Section III.A.4.a.

e. Proposed Filing Requirements

Questions regarding the proposed filing requirements:

Should filing requirements distinguish between material provided or containing information provided by the issuer, on the one hand, and materials provided by underwriters or dealers not containing such issuer information, on the other? If so, why, and how should the two be differentiated?

> *See* Section III.A.4.a. (regarding differentiating between materials depending on whether such materials were prepared or provided by the issuer or not).

Are any additional clarifications or modifications needed on when or how such materials need to be filed?

> *See* Section III.A.4.

We request comment on liability requirements for ABS informational and computational material. While the existing liability framework does not appear to have chilled the use of such materials, is there any reason to re-evaluate the liability framework for them? If so, how and why?

> *See* Section III.A.4.

Should we not remove the EDGAR filing exemption for ABS informational and computational material? Are there particular difficulties or unreasonable expenses that would be associated with electronic filing of such material that would still exist under EDGAR? If so, please explain and quantify any such expenses in relation to other electronic filings.

> *See* Section III.A.4.c.

2. Research Reports

a. Current Requirements

b. Proposed ABS Research Report Safe Harbor

Questions regarding the proposed ABS research report safe harbor:

We request comment on the proposed safe harbor. We have reorganized and reordered the conditions from the staff no-action letter and altered the wording slightly to make them easier to read and consistent with terms used in our other proposals. We otherwise did not mean to change the intent or scope of the original no-action letter. Are any additional revisions necessary or would any additional clarifications be appropriate?

> *See* Section III.B.

We also request comment on the continued applicability of any of the conditions or whether any additional conditions are necessary.

See Section III.B.4.

Is the limitation to offerings on Form S-3 still appropriate? If not, under what circumstances should the proposal be extended to offerings on Form S-1? In particular, are there any additional conditions that should be required for extending the safe harbor to Form S-1 offerings?

See Section III.B.3. (footnote 100).

* * *

D. Ongoing Reporting under the Exchange Act

1. Current Requirements

2. Determining the "Issuer" and Operation of the Section 15(d) Reporting Obligation

Questions regarding proposed definition of "issuer" and operation of the Section 15(d) reporting obligation:

We request comment on our proposed rule clarifying the "issuer" of asset-backed securities for purposes of the Exchange Act. In addition to or in lieu of the depositor, should another entity be considered the "issuer," such as the sponsor, the servicer, the trustee or the issuing entity?

See Section IV.B.1.

Should the ability to suspend reporting under Section 15(d) be revisited? For example, should it be a condition or required undertaking for registration statement form eligibility or for any of our other proposals that Exchange Act reporting will continue for the life of the asset-backed security? What would be the relative costs and benefits of such a requirement?

See Section IV.B.4.

We request comment on our proposed interpretive rules regarding the operation of the Section 15(d) reporting obligation. Should any of these positions be revised? Are additional interpretations or accommodations necessary?

See Section IV.B.4.

3. Reporting under EDGAR

Questions regarding reporting on EDGAR:

We request comment on any additional ways to make reporting on EDGAR less time-consuming or costly for ABS issuers while still providing an efficient and usable retrieval system for investors and the marketplace. For example, under the current system a filer must affirmatively indicate through a serial tag that a new issuing entity is being created when a prospectus is filed pursuant to Rule 424(b) to generate the new issuing entity's separate CIK code. Would it be more effective to require a mandatory serial tag for such filings or establish an "opt-out" system for the serial tag (in lieu of the current "opt-in" system)?

See Section IV.C.

4. Distribution Reports on Proposed Form 10-D

Request for comment on proposed Form 10-D:

We request comment on proposed Form 10-D. Would a separate form type for distribution reports be beneficial? Should additional parties be permitted to sign the report?

See Sections IV.B.2. (regarding signatories on Exchange Act reports) and IV.D.

What should be the appropriate deadline for Form 10-D reports? Given that the Form 10-D will in most cases consist only of the distribution report and also given advancements in technology, should the proposed 15-day deadline be shorter (e.g., 2 business days, 5 days, 10 days)? Should the deadline be tied to the end of the distribution period?

See Section IV.D.3. and footnote 109.

As an alternative to the current system, should it be required (e.g., through a condition to an exemption to filing with the SEC or for continued Form S-3 eligibility) that distribution reports are posted on a specified party's website within a certain time period (e.g., same day or 2 business days after the distribution date) and not filed with the Commission until the Form 10-K (e.g., so that it is filed and subject to the Section 302 certification)? What would be the advantages and disadvantages of such a system?

See Sections IV.A.1. and IV.C.1.

The modified reporting system did not clearly contemplate any filing extensions for distribution information, such as those available under Exchange Act Rule 12b-25. Under that rule, registrants that face extenuating circumstances have the ability to gain a one-time filing extension for five calendar days for quarterly reports and fifteen calendar days for annual reports, if certain conditions are met. Is there a reason to provide a comparable filing extension for proposed Form 10-D? If so, what would be the length of such an extension (e.g., 2, 5 or 10 days)? Under what circumstances or conditions should such an extension be available?

See Section IV.D.3.

We request comment on the manner of presenting distribution and pool performance information. Should the distribution report required by the transaction agreements still serve as the primary method for presentation of this information?

See Section IV.D.

Are there any modifications that should be made to the list of representative items that should be disclosed regarding the distribution or asset performance? In particular, are there additional items that should be added or should any proposed items be deleted? For example, what amount of detail regarding updated pool composition information

should be specified? Should there be a requirement to update all or some part of the information required by proposed Item 1110 of Regulation AB? Should any of the representative items be specifically mandated for disclosure and not just as examples of representative material disclosure?

See Sections IV.D.1., IV.D.5., IV.D.6., IV.D.7., IV.D.8. and IV.D.9.

Our proposed disclosure regarding changes to the asset pool, such as those that involve a master trust or a prefunding or revolving period, could result in additional disclosures from those that are currently provided today, particularly regarding material changes to the composition of the asset pool. Are these disclosures desirable? Should some or all of this information instead be filed on a more current basis on Form 8-K? Should disclosures only be required if the pool differs materially by a certain percentage from the original pool?

See Sections IV.D.1. and IV.D.5.

If a previous filing, including the registration statement or ABS informational and computational material, included the results of any payment or sensitivity analyses, models or estimates or projections regarding items such as expected yield, maturity or pool performance, should there be a requirement to disclose any material changes between the previously disclosed information and the actual performance of the pool assets or the asset-backed securities?

See Section IV.D.5.

We also request comment regarding the proposed other disclosure items for Form 10-D.

See Section IV.D.

5. Annual Reports on Form 10-K

Questions regarding proposed Form 10-K disclosure:

We request comment on the proposed general instruction to Form 10-K. Should additional or different parties be permitted to sign the report?

See Section IV.B.2.

Is the proposed menu of disclosure items appropriate? Should any additional items be included or omitted?

See Section IV.E.

Should updated pool composition information be required for the Form 10-K? For example, several modified reporting no-action letters require aggregate distribution and pool performance information for the reporting period. Should such disclosure be required for the Form 10-K? Should there be a requirement to update and restate all or

some part of the information required by proposed Item 1110 of Regulation AB, such as static pool information?

See Section IV.E.4.

Should specific financial information be required regarding any transaction parties, such as the sponsor, servicer or issuing entity? If so, for which parties should information be required? What information should be required (e.g., audited financial statements)? Under what circumstances should such information be required? Should any such information also be provided in distribution reports on Form 10-D?

See Sections IV.D.8., IV.E.2. and IV.E.4.

We request comment on the proposed servicer compliance statement. Would such a statement still be beneficial? In particular, would this compliance statement still be necessary given the Sarbanes-Oxley Section 302 certification and the proposed assessment of compliance with servicing criteria?

See Section IV.E.5.

If multiple servicers are involved, should additional statements be required by servicers other than the master servicer? Is the proposal to require each Item 1107(a) servicer to submit a compliance statement appropriate? Should compliance statements be limited to only the master servicer?

See Section IV.G.

6. Certifications under Section 302 of Sarbanes-Oxley Act

Questions regarding certifications:

We request comment on the certification requirements for ABS filings. Are any modifications needed to the form of certification?

See Section IV.F.

Should additional or different persons be permitted to sign the proposed certification? For example, should we permit the trustee to sign the certification?

See Section IV.F.

Is the reasonable reliance instruction necessary?

See Section IV.F.

7. Report of Compliance with Servicing Criteria and Accountant's Attestation

a. Current Requirements

b. Proposed Assessment and Attestation of Servicing Compliance

c. Attestation Report on Assessment of Compliance

Questions regarding proposed assessment of compliance with servicing criteria:

We request comment on our proposal. Should the Commission specify the form of reporting required in ABS annual reports? For instance, should certain ABS transactions be allowed to use a form of agreed-upon procedures to fulfill the accountant report requirement of the modified reporting system? If so, why?

See Section IV.G.5.

Would audited financial statements of the ABS issuer or servicer be more useful to an ABS investor than a report on servicing compliance and related attestation report by a registered public accounting firm?

See Section IV.G.5.

Should there be any revisions to the proposed requirements for the responsible party's report or the accountant's report?

See Sections IV.G.2., IV.G.3. and IV.G.4.

We request comment on our proposed definition of "responsible party." Should any other entities ever be the "responsible party" (e.g., the trustee)? Should one party be required to assess and report on the entire servicing function?

See Section IV.G.2.

In lieu of a single assessment of compliance at the servicing "platform" level, should separate assessments of compliance be required with respect to each transaction? Does a "platform" level assessment provide adequate assurance even if no testing was performed at the individual trust level for the particular Form 10-K report? What would be the relative costs of a "transaction" level requirement in relation to the incremental benefits?

See Sections IV.G.2.d. and IV.G.2.e.

How should unaffiliated parties be treated with respect to the assessment of compliance? Is the proposed approach of having a single responsible party assess material compliance with all of the servicing criteria, regardless of the actual party that performs the criteria, appropriate? Is it appropriate to allow the responsible party to reasonably rely on information from unaffiliated parties to make its own assessment?

See Sections IV.G.2.a., IV.G.2.b., IV.G.2.d. and IV.G.2.e.

What alternative approaches would be preferable to the proposed single party approach and why? For example, should separate reports be required for all parties that perform the respective criteria? If so, how will an investor have confidence that all criteria have

been assessed? Instead, should the responsible party only assess compliance against the criteria it or an affiliate performs and assess compliance with an additional criterion that it has received reports from unaffiliated parties that perform the other criteria? How should exceptions noted in the unaffiliated parties' reports or the inability to obtain reports be treated?

See Sections IV.G.2.a. through IV.G.2.f.

Is reporting by the accountant on the responsible party's assertion of compliance that covers the entire servicing function feasible? Should an approach be considered that would enable an accountant to make reference to the attestation or other procedures performed by another accountant performing procedures on parts of the servicing function, similar to the approach considered by AU § 543, "Part of Audit Performed by Other Independent Auditors?" Would additional guidance be required to make such an approach operational outside the context of a financial statement audit? Do other analogous instances of such reporting already exist?

See Section IV.G.3.

Should material instances of noncompliance have regulatory ramifications, such as on Securities Act form eligibility?

See Section IV.G.2.e.

Is the period to be covered by the report appropriate?

See Section IV.G.2.c.

Has the Commission considered all of the servicing criteria in its proposed framework that are important to ABS servicing? If not, what additional criteria should be included in the framework? Answers should provide specific language relating to specific criteria.

See Sections IV.G.2.f. and IV.G.4.

Are some of the servicing criteria included in the Commission's proposed framework more costly than the benefit they provide to investors? Should any of the criteria be modified? Any suggested modifications should provide specific language. We request particular comment on quantification of the costs that would be involved in the proposal.

See Sections IV.G.2.f. and IV.G.4.

Are any of the servicing criteria not subject to objective evaluation for purposes of the responsible party's assertion regarding compliance and the registered public accounting firm's attestation on the assertion regarding compliance? If so, how could they be revised?

See Section IV.G.4.

Are there some asset classes or transaction structures where the proposal would not be operational?

See Section IV.G.4.

Should additional guidance be given regarding how a responsible party is to determine whether there is a material instance of noncompliance?

See Section IV.G.2.e.

Should disclosure regarding the effects of material instances of noncompliance be required in the Form 10-K report? Is there any additional information that would be material? For example, should there be disclosure of any identified instances of noncompliance that would be material to the transaction but were not material to the responsible party's overall "platform" such that the instances of noncompliance were not noted in the responsible party's overall assertion?

See Section IV.G.2.e.

d. Alternative Proposal

Questions regarding alternative proposal:

In exploring such an approach, we seek comment on whether such an approach would be operational and result in useful information to investors.

See Section IV.G.2.f.

8. Current Reporting on Form 8-K

a. Items Requiring Current Disclosure

b. Clarifying Amendments to Existing Items

c. Proposed New Items

d. Safe Harbor and Eligibility to Use Form S-3

Questions regarding proposed Form 8-K reporting:

We request comment on our proposed amendments to Form 8-K for asset-backed securities. Should additional or different parties be permitted to sign the report?

See Sections IV.B.2. (regarding signatories on Exchange Act reports) and IV.H.

Should any additional reportable events be included or omitted?

See Section IV.H.

Are any other clarifying instructions needed regarding Items that would remain applicable? Are the proposed new Items sufficiently clear and detailed? Are any

modifications necessary? For example, should we clarify how differences in pool composition in proposed Item 6.06 should be measured? Should disclosure of additional issuances of securities be required on Form 8-K even if disclosed in an effective registration statement or Rule 424 prospectus?

See Section IV.H.

Should any of the items be revised in the case of a master trust?

See Section IV.H.4.

9. Other Exchange Act Reporting Proposals

a. Proposed Exclusion from Form 10-Q

b. Proposed Exemptions from Section 16

c. Proposals Regarding Transition Reports

Questions regarding other Exchange Act proposals:

Should we codify the exclusion from quarterly reporting on Form 10-Q for asset-backed issuers? Should we exempt asset-backed securities from Section 16?

See Section IV.I.

Should all of the applicable Form 10-K items be required for a transition report?

See Section IV.I.

e. Other Miscellaneous Proposals

f. Transition Period

Questions regarding implementation and a transition period:

Should we provide a transition period with respect to the implementation of all or some portion of our proposals? If so, what proposals should be subject to any transition period and would be an appropriate length for any transition period (e.g., 3 months, 6 months)?

See Sections IV.A.1., IV.D.2. and V.

Should there be different transition periods for different proposals? In particular, should there be an extended transition period for the proposed assessment and attestation of compliance with servicing criteria?

See Section V.

Are there special considerations we should take into account in providing a transition period with respect to certain issuers, such as foreign ABS, certain asset classes or existing transactions? Should transactions before a certain point be "grandfathered"

from the proposals? How should any remaining capacity under existing shelf registration statements be treated?

See Section V.

* * *

§229.1101 (Item 1101) Definitions.

The following definitions apply to the terms used in Regulation AB (§§ 229.1100 through 229.1121), unless specified otherwise:[134]

(c)(1) Asset-backed security means a security that entitles its holders to receive payments that depend primarily on the cash flows of identifiable financial assets (including any proceeds from the disposition of any such assets or property related to such assets), plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders.

(2) The following additional conditions apply in order to be considered an asset-backed security:

(i) Neither the depositor nor the issuing entity is an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or will become an investment company as a result of the asset-backed securities transaction.

(ii) The activities of the issuing entity are limited to acquiring, holding, collecting and disposing of such identifiable financial and other assets referenced in paragraph (c)(1) of this Section, issuing the asset-backed securities supported or serviced by such assets, and other activities reasonably incidental thereto.

Instruction to clause (c) of item 1101: For purposes of the definition of "asset-backed security" set forth in clause (c) of item 1101, a lease shall constitute a "financial asset."

(l) Sponsor means any person or group of affiliated persons who organize and initiate an asset-backed securities transaction by selling or transferring, either directly or indirectly, to an issuing entity more than 50% of the assets comprising the asset pool of such issuing entity. Notwithstanding the above, if in any case, upon an assessment of the particular facts and circumstances surrounding the subject asset-backed securities transaction, a depositor for such transaction determines that the sponsor for such transaction should be another entity or group of affiliated entities, such depositor, by mutual agreement with such entity or group of affiliated entities, may designate such entity or group of affiliated entities as the sponsor; provided that each such entity does, in fact, organize and initiate the asset-backed securities transaction and is identified as a sponsor in the prospectus, accompanied by the reasons for such designation.

Instruction to clause (l) of item 1101: The sponsor would ordinarily mean the depositor unless, immediately prior to the transfer of the assets by the depositor to the issuing entity, an entity or group of affiliated entities sold or transferred, either directly or indirectly, to the depositor more than 50% of the assets comprising the asset pool of the issuing entity, in which case the sponsor would ordinarily mean such entity or group of affiliated entities. Ultimately, the sponsor should be the entity or group of affiliated entities that organize and initiate an asset-backed securities transaction.

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[134] The proposed definition of "asset-backed security" included above would replace the definition set forth in the Proposing Release *in its entirety* (including the additional conditions thereto set forth in Item 1101(c)(2) and (c)(3) of proposed Regulation AB).

(j) Servicer means any person responsible for the management or collection of any of the receivables or other financial assets underlying the asset-backed securities. The term servicer includes any person responsible for making allocations or distributions to holders of the asset-backed securities that also performs the functions of a servicer.

(_) Administrator means any person responsible for making allocations or distributions to holders of the asset-backed securities, but that does not also perform the functions of a servicer. The term administrator does not include a trustee, paying agent or other person that makes allocations or distributions to holders of the asset-backed securities if such person receives such allocations or distributions from a servicer (or receives such distributions on pool assets that are securities) and such person does not also perform the functions of a servicer.

(_) Master Servicer means any person that does not itself perform any primary servicing functions but as to the issuing entity is either (1) contractually liable for the activities of servicers or subservicers in servicing the pool assets, or (2) contractually responsible for monitoring the activities of servicers or subservicers and replacing them if needed. The term master servicer also includes any person responsible for calculating and making distributions or payments to holders of the asset-backed securities that also performs master servicing functions.

(_) Originator means, as to any of the receivables or other financial assets underlying the asset-backed securities, the person whose underwriting or credit-granting criteria were applied in making the decision to approve the asset prior to funding, and that agreed to fund or purchase the asset.

Instruction to clause (_) of item 1101: If any receivable or other financial asset was initially underwritten by a party that would otherwise be the originator but such party applied the underwriting standards of a subsequent purchaser, or a subsequent purchaser re-underwrote the pool asset in accordance with its underwriting or credit-granting criteria, the subsequent purchaser would be the originator. In addition, to the extent that a party originated pool assets using the underwriting or credit-granting criteria of another originator (for instance, under a correspondent origination program), only the party whose criteria were used would be the originator.