

Comment Letter re: Securities Offering Reform Proposal

February 15, 2005

Mr. Jonathan G. Katz  
Secretary  
United States Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549

Re: Securities Offering Reform (File No. S7-38-04) – Impact on the MBS Forward Delivery Market

Dear Mr. Katz:

This comment letter is submitted on behalf of a group of participants including the Mortgage Bankers Association of America, the Housing Policy Council of the Financial Services Roundtable, and the Consumer Mortgage Coalition<sup>1</sup> (the “Commenting Group”). We are pleased to submit this comment letter to the Securities and Exchange Commission (the “SEC” or the “Commission”) regarding the SEC’s proposed rules (the “Proposed Rules”) for securities offering reform and related commentary contained in Release No. 33-8501; 34-50624; IC-26649 (Nov. 3, 2004) (the “Proposing Release”) as they relate to Forward MBS (as described below).

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation’s residential and commercial real estate markets; to expand homeownership prospects through increased affordability; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters excellence and technical know-how among real estate finance professionals through a wide range of educational programs and technical publications. Its membership of approximately 2,900 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the mortgage lending field. For additional information, visit MBA’s Web site: [www.mortgagebankers.org](http://www.mortgagebankers.org).

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. The Roundtable’s Housing Policy Council is made up of nineteen companies that are among the nation’s leaders in mortgage finance. Member companies originate sixty-two percent of the mortgages for American home buyers.

The Consumer Mortgage Coalition is a trade association of national mortgage lenders, servicers and service providers.

## Introduction

The Commenting Group is concerned that the details of the potential application of the Proposed Rules will result in unforeseen and possibly severe operational and financial consequences for the forward delivery market for non-agency or “private label” residential mortgage-backed securities, as described in detail below. This comment letter is intended to address specific issues relating to the Proposing Release, as applied to Forward MBS, that are of critical importance to the Commenting Group.

At the outset, we wish to indicate our support for and agreement with comment letters on the Proposed Rules submitted by The Bond Market Association (letter dated January 31, 2005, regarding impact on the ABS markets (the “BMA Letter (ABS)”), and by the American Securitization Forum (letter dated February 4, 2005 (the “ASF Letter”).

In light of the importance of the Forward MBS market to the members of the Commenting Group, we request a meeting with the Commission to give us the opportunity to enlarge on the views expressed here and to answer any questions the Commission staff might have. We welcome the opportunity to bring to the Commission individuals from our industry with expertise and practical experience in the business process and hedging practices utilized in the offering of MBS on a forward basis.

## Description of the MBS Market

This letter focuses on publicly offered mortgage-backed securities (“MBS”) that are not insured or guaranteed by any government sponsored entity such as Fannie Mae or Freddie Mac. More particularly, our focus is on MBS backed by relatively generic mortgage loans originated under established mortgage programs. Pools of these types of mortgages (“Forward Mortgage Pools”) are sold pursuant to a forward sale process as described below, and are subsequently offered and sold to investors as MBS (“Forward MBS”).<sup>2</sup>

The market for MBS is vast. In 2004, \$864 billion of non-agency mortgage-backed securities were issued. Approximately \$2.9 trillion of non-agency mortgage-backed securities have been issued since 1995. A substantial portion of these underlying mortgage pools and related MBS have been sold as Forward MBS using the forward sale procedures described below. Entities that engage in such forward sales include financial institutions, broker-dealer affiliates, and mortgage originators and conduits. Substantially all Forward MBS are registered on a Form S-3 registration statement, and are required to be rated investment grade.<sup>3</sup>

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<sup>2</sup> Please note that in this letter we refer to Forward MBS as a subset of all MBS and MBS as a subset of all asset-backed securities. We use “asset-backed security” as such term is defined in Regulation AB.

<sup>3</sup> In fact, the vast majority of Forward MBS are rated “AAA” by at least two of the three primary rating agencies.

## The Forward MBS Offering and Sale Process

*Market Differences.* As the Commission noted in the adopting release for Regulation AB, the ABS offering and sale process is starkly different from that observed in the corporate debt market and other non-ABS portions of the fixed income market. Further, even within the ABS arena, there are considerable differences in market practices. The offering process for Forward MBS as described below is considerably different in key respects from other portions of the MBS and ABS markets.<sup>4</sup> These differences are primarily due to (i) the uniform, commoditized nature of the mortgage loans underlying Forward MBS, (ii) the seasoned participants that sell Forward Mortgage Pools and (iii) the large amount of information possessed by the capital markets with respect to Forward MBS.

Most Forward Mortgage Pools are comprised of relatively generic mortgage loans that were originated or purchased by sellers under established mortgage programs. Programs of this type have been in operation for many years. Underwriting criteria, origination procedures and servicing procedures under these programs are typically quite standardized and in many respects are very similar to long-standing programs maintained by Fannie Mae and Freddie Mac. In many cases, mortgage loans underlying Forward MBS would be eligible for purchase under agency programs but for the fact that they exceed the loan limits established by those agencies. It is the consistent, long standing nature of these programs that supports the market perception of these mortgage loans as commodity instruments.

In addition, a number of the largest and most seasoned sellers of Forward Mortgage Pools (which include many of the Commenting Group's members) have a market presence similar to that of the largest corporate debt issuers. These sellers have a long, established history in the secondary mortgage market, each having sold tens of billions of dollars worth of mortgage loans or MBS with highly consistent product features over the last 20 years or more. As a result, a mature and efficient market for Forward Mortgage Pools

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<sup>4</sup> There are, however, similarities with the overall ABS market. For example, each series of Forward MBS is generally issued by a separate trust formed by a common depositor. The depositor will act as registrant under the Form S-3 registration statement. Regulation AB clarifies that the "issuer" of each series of ABS is the depositor, acting solely in its capacity as depositor to the issuing entity, for all purposes under the Securities Act of 1933, as amended (the "Securities Act") and the Securities Exchange Act of 1934, as amended. We note that the communications provisions of the Proposed Rules deal with communications by or on behalf of an issuer as such communications relate to a registered offering of the securities of such issuer.

In this letter, we use the term "issuer" as defined under Regulation AB. We use the term "seller" to refer to the entity that sells mortgage loans on a forward basis to a dealer, for delivery either as Forward MBS registered under a shelf registration statement or as whole loans. The seller may either originate the mortgage loans, or purchase them from other originators under long-standing, consistent programs and criteria established by the seller. The seller would typically be the "sponsor" (as that term is used in Regulation AB) only if the Forward MBS are to be issued under a registration statement maintained by the seller. We use the term "dealer" to refer to the entity that purchases the Forward Mortgage Pool or Forward MBS from the seller. The dealer may be a broker-dealer that will act as underwriter for the Forward MBS when issued, or may be a mortgage loan trading company affiliated with a broker-dealer.

and Forward MBS has developed, and this market possesses substantial amounts of relevant information. This information is available to market participants in many forms, including hundreds of prior public issuances of similar MBS, detailed performance information about each of these issuances, published underwriting and servicing guidelines, multiple base prospectuses, and third party research. This information is available either via EDGAR or in many cases via other publicly available websites.

The combination of consistent, commoditized assets and longstanding seasoned sellers that have made publicly available substantial amounts of relevant information has resulted in a mature and efficient market for Forward Mortgage Pools and Forward MBS. This market is highly comparable to the market for securities issued by “well known seasoned issuers” as defined under the Proposed Rules. It is also this combination that enables dealers to commit to purchase Forward Mortgage Pools, and investors to indicate a willingness to invest in Forward MBS at an earlier stage than would be the case for other types of MBS and ABS.

*Hypothetical Offering Example:* A typical sale of a Forward Mortgage Pool, followed by a Forward MBS offering and sale, would proceed as follows. XYZ Mortgage, the seller, decides to sell a pool of mortgage loans through a Forward MBS offering. The first step in this process would be the initial sale of the Forward Mortgage Pool by the seller to a dealer who had been selected to structure and underwrite the proposed Forward MBS issuance. Due to the uniform nature of the underlying mortgage loans and the dealer’s knowledge of the seller and its programs, the dealer is able to agree to a fixed total price on a firm commitment basis, generally based on a number of aggregate basic parameters or “specs” with regard to the mortgage pool. These specs generally include weighted average coupons, pool sizes, geographic concentrations, weighted average credit scores, and weighted average loan-to-value ratios.

In this example, the sale of the Forward Mortgage Pool to the dealer would occur after the provision of basic pool parameters on a date referred to herein as T-45; i.e., approximately 45 days prior to the anticipated pricing of the Forward MBS to investors. At this stage, no structuring of the Forward MBS issuance will have been determined, and the dealer will attempt to develop a structure that can be favorably priced in the market while meeting investors’ needs. Over the next 45 days, the dealer will, in varying order depending on the dealer in question and the issuance itself, (i) determine a structure that will be set forth in a term sheet, the final version of which will be provided to investors and filed with the SEC, and (ii) conduct a dialogue with investors to take indications of interest, or “soft circles”, as to desired pricing range, class or classes of securities, customized features and desired face amount of securities.<sup>5</sup> For this type of

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<sup>5</sup> As the Commission noted in the final release related to Regulation AB, this dialogue and the use of ABS informational and computational materials, are effective in “providing an increased flow of information to investors, the flexibility to tailor materials to specifically identified investor needs, and the liability for false and misleading statements or omissions, we believe permitting the use of ABS informational and computational materials for Form S-3 ABS during such period is appropriate in the public interest and consistent with the protection of investors. . . .”.

offering, the price the seller receives for the mortgage loans is not affected by the prices at which the investors ultimately purchase the Forward MBS.

This process of determining an overall pricing of the series of Forward MBS will typically include “soft circles” from various potential investors at varying dates during the 45-day period. During this 45 day period, up to and including the “pricing” date determined by the dealer (referred to in this letter as T-0), the dealer will re-contact the soft-circled investors to confirm their commitment to purchase a specific face amount of a class or classes of Forward MBS at a final, specified price. When an investor has either committed or re-confirmed its soft circle, the investment decision is considered final, although as discussed below, the investor’s obligation to purchase is subject to the condition that there are no material changes in the final prospectus. At or prior to T-0, the dealer will also determine whether any oversubscription has occurred and factor the level of investor interest into the overall pricing of the issue. The confirmation of the trade would typically be sent on T+2. At the settlement date (which may be, for example, T+4), the securities are delivered to the investor and the investor makes final payment of the purchase price. Prior to T-0, potential investors typically will receive various “ABS informational and computational materials”<sup>6</sup>, including one or more term sheets. At or prior to T-0, potential investors will generally have received the final version of the term sheet. The confirmation sent on T+2 will be preceded or accompanied by the final prospectus containing all information required to be provided under the Securities Act.

During the 45 day offering period described above, an "iterative" process takes place in which investors are shown a preliminary structure, and are afforded the opportunity to provide feedback on that preliminary structure. The first investors to provide soft circles generally have the ability to request changes in the payment terms applicable to their class or classes after their initial indication of interest. This in turn will result in changes to the structure that may affect one or more of the other classes for which soft circles have not yet been obtained. A free flow of information, including term sheets and oral communications, between dealers and investors is essential to this process. This dialogue is extremely beneficial to investors in that they are better able to obtain a security that meets their specific investment objectives. Moreover, the ability to conduct this process over an extended offering period enhances the likelihood that the final structure will result in the greatest value to the investors. This “iterative process” provides flexibility and efficient pricing, and contributes substantially to the efficiency of the capital markets, resulting in economic benefits for investors as well as mortgage loan borrowers.

If the Proposed Rules were to be adopted such that the market’s ability to engage in this type of meaningful dialogue were to be undermined, investors input during the structuring process would decrease, and investors would be less able to obtain the specific investments they desire. Investors could be presented with a fixed structure on essentially a "take it or leave it" basis. This could lead to less favorable pricing, higher costs to the seller, and higher interest rates for mortgage loan borrowers.

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<sup>6</sup> As defined in Regulation AB.

Furthermore, if the Proposed Rules were to be adopted such that market participants were no longer willing to engage in Forward Mortgage Pool or Forward MBS transactions, significant hedging and other costs could be borne by mortgage industry participants, with corresponding inefficiencies borne by investors and mortgage loan borrowers. We address these concerns in further detail below.

### Use of Preliminary Information in the Forward MBS Offering Process

Under current custom and practice based on market participants' understanding of existing law, if an investor agrees with an underwriter to purchase Forward MBS based on preliminary information,<sup>7</sup> such as a term sheet or other ABS informational and computational material,<sup>8</sup> and there is a material change<sup>9</sup> in the final prospectus as compared to the information contained in the preliminary information, then the investor has the right to decline to purchase the Forward MBS prior to settlement.<sup>10</sup>

It is important to note that the Forward MBS market is driven primarily by institutional investors who regularly specify the desired features of potential securities and otherwise have material input in the process of structuring such Forward MBS. These investors understand that certain material but generic information will be provided to them in the final prospectus (and generally will not be included in any preliminary information).<sup>11</sup> This information generally includes disclosure regarding tax and ERISA considerations, risk factors, a description of underwriting guidelines and general asset descriptions. This information rarely changes materially from transaction to transaction, and investors in Forward MBS generally will have received such information in prior transactions or will be able to readily obtain it via EDGAR or other publicly available websites.<sup>12</sup>

In addition, investors are generally provided more detailed information regarding specific asset characteristics, with the understanding that such information will not materially vary from the parameters or "specs" referred to herein. As with all types of preliminary

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<sup>7</sup> By "preliminary information" we refer to all information conveyed to the Forward MBS investor at the time of the contract of sale of the Forward MBS, whether in the form of a preliminary prospectus, a free writing prospectus, ABS information and computational materials (as defined in Regulation AB), or oral representations, including any agreement to provide specific terms requested by the investor.

<sup>8</sup> The Commenting Group believes that term sheets and other ABS Informational and Computational Materials, rather than preliminary prospectuses, are predominantly used in Forward MBS offerings.

<sup>9</sup> By "material change" we refer to (i) a material error in the preliminary information that is corrected in the final prospectus, (ii) information in the final prospectus that represents a change in a material term or characteristic from the information contained in the preliminary information, or (iii) the inclusion of information in the final prospectus that was not contained in the preliminary information, where such information in the final prospectus is not consistent with market custom and standards or with prior dealings with that depositor.

<sup>10</sup> This decision is sometimes referred to by market participants as "breaking the trade".

<sup>11</sup> The SEC has codified the parameters of the use of term sheets in Regulation AB, to the extent such term sheets constitute "ABS informational and computational materials" as defined in Regulation AB. Clearly, ABS informational and computational materials are not required to contain all material information about an ABS offering, and are not required to contain all information required to be in the prospectus.

<sup>12</sup> As with information regarding "well-known seasoned issuers," this type of material but generic information has already been absorbed by the marketplace.

information, investors expect that the additional information that is contained in the final prospectus, to the extent it is material, will be consistent with market custom and standards as well as any prior dealings with the same depositor.

It is our view that if the issuer or underwriter of a Forward MBS offering determines, whether brought to its attention by an investor or otherwise, that a material change with respect to an issue of Forward MBS has occurred, the current market practice is to alert the related investors prior to settlement, and

- afford such investors the opportunity to decline to purchase such Forward MBS, or
- re-price (with possible further investor input) the sale of such Forward MBS in light of the material change.

If, however, notwithstanding the occurrence of a material change, settlement of the trade with or without re-pricing does in fact occur, it is our view that under market practice prior to the Proposing Release, market participants believed that no ongoing Section 12(a)(2) claim would exist with respect to the material change, provided that the final prospectus contained all information that was required and contained no material errors or omissions.<sup>13</sup>

The above articulation is consistent with the following positions:

- For Forward MBS, liability under Section 12(a)(2) is not based on the information provided to the investor at any particular point during the offering process. Rather, 12(a)(2) liability is based on the totality of information provided during the offering process, which includes the final prospectus, and the manner in which the information is provided, which includes whether the investor has an adequate time to review the final prospectus, and whether the dealer alerts the investor to any material changes.
- A Forward MBS investor's obligation to purchase is subject to a condition subsequent; namely, that there will be no material change in the final prospectus from the preliminary information.

The Commenting Group believes that each of the above positions is founded on the protections provided to investors under the Securities Act, and each is consistent with the Commission's goal of the protection of investors through the provision of materially complete information before the investor is unconditionally obligated to purchase.

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<sup>13</sup> In the relatively infrequent instances where a class of Forward MBS is to be offered to retail investors, indications of interest generally will not be taken, and contracts of sale will not be entered into, until the final prospectus is available.

## Implications of Adoption of Proposed Rule 159 on the Forward MBS Markets

The Commenting Group is concerned that Proposed Rule 159, if adopted as currently proposed, would impose Section 12(a)(2) liability based solely on an error or omission in the preliminary information, even if that error or omission had been corrected in the final prospectus, and even if the investor had been aware of or made aware of the material change and had nonetheless allowed settlement to occur.

In our view, issuers, underwriters and investors generally have observed, and continue to observe, Forward MBS market practices under which, if a material change occurs after the provision of preliminary information, and (i) the change is brought to the attention of the investor or (ii) the investor has a reasonable opportunity to review the final prospectus, then, the investor would have the right to break or re-price the trade based on the material change. Further, if settlement occurs notwithstanding such material change, no ongoing Section 12(a)(2) liability exists based solely on the preliminary information.

Participants in the Forward MBS market have accepted the above understanding as fundamentally fair given the informed, mature and efficient market for commoditized MBS issued by long-standing seasoned participants.

We believe that in the context of Forward MBS, the changes in the offering process that Proposed Rule 159 could reasonably be expected to bring about are particularly significant, and could have severe consequences that are not necessary for achievement of the goals expressed by the Commission in the Proposing Release. In particular, given the Forward MBS offering process described above, if Proposed Rule 159 were to be adopted as proposed, we anticipate that dealers may no longer be willing to engage in forward purchases of mortgage loans intended for securitization on a firm commitment, fixed price basis, or would do so on a much shorter timeline than currently observed. In addition, such a result would hinder or prevent the development of a forward market for other asset classes, thus preventing the efficiencies that result from this process for issuers, investors and, ultimately, mortgage loan borrowers and other consumers.

Furthermore, dealers would likely no longer be able to engage in the iterative offering process described above for Forward MBS if the dealer were exposed to potential Section 12(a)(2) liability for the preliminary information available at the time of an initial indication of investor interest without regard to the final prospectus. This would adversely affect the market efficiency resulting from the iterative process described above. Furthermore, an inability to obtain significant feedback from investors during this period could lead directly to the dealer's inability to provide a forward, fixed price commitment to the seller.

Finally, as with all ABS, the dealer may be unable to enter into a binding commitment to sell securities based on a final term sheet at T-0. Under current custom and practice, the dealer receives representations from the issuer as to the accuracy and completeness of the final prospectus, and also receives a "10b-5 letter" from outside counsel to the effect that the final prospectus meets certain standards. However, these assurances are not provided

under current practice for a term sheet, and they are not viewed as necessary under the ABS market's understanding of the liability standard. Under Rule 159, the dealer would need these assurances on the term sheet in order to have the same level of support that it has today as to the final prospectus. In our view, an issuer could not provide such a representation, nor could outside counsel provide a 10b-5 letter on a final term sheet.

We note that the Proposing Release refers to reforming or entering into a new contract at the time of provision of subsequent information. However, since under this approach the old contract is being replaced by a new and different contract, the investor would have the ability to refuse to enter into the new contract for any reason. As a result, given the way the Forward MBS markets operate today, in the event of a material change, the investor would effectively have the right to decline to go forward for any reason, including reasons completely unrelated to the material change. This has never been an expectation of any of the participants in the Forward MBS market. We believe that this approach would represent a fundamental change from the way the Forward MBS markets currently operate, and would undermine the confidence and stability of this market.

As discussed above, one of the hallmarks of the Forward MBS market is the dialogue that occurs between institutional investors and dealers, which dialogue occurs within the context of a marketplace that already possesses substantial information. Issuers, dealers and institutional investors understand that preliminary information will be supplemented by further material information contained in the final prospectus. If an investment contract can be reformed on the basis of *any* material information being included in the final prospectus that was not included in the preliminary information, then virtually every Forward MBS offering would be subject to reformation. As noted above, most of the "material" information that appears in the final prospectus but is not included in the preliminary information is generic disclosure that rarely changes from transaction to transaction (e.g., tax and ERISA disclosure). Allowing virtually every Forward MBS to be reformed in this manner would represent a fundamental change in this marketplace, and undermine the confidence and stability of this mature and efficient market.

Given the long (in the above example, 45-day<sup>14</sup>) period common in the Forward MBS markets between pricing of the loan sale and the structuring and pricing of the resultant Forward MBS, the implications for our market are magnified. Faced with the prospect of "incurable" Section 12(a)(2) liability based on preliminary information, underwriters could be effectively compelled to wait until they had determined that the structure of the Forward MBS had been finalized, and that fully complete and correct information about the Forward MBS offering had been provided to investors, before committing themselves to purchase the related mortgage loans from the seller. In other words, the market practice of a dealer entering into a forward purchase of mortgage loans from the seller and entering into a firm commitment underwriting with the seller 45 or more days prior to final pricing may change to a market practice of a "best efforts only" underwriting.

The demise of forward sales and firm commitment underwritings would have a severe negative impact on sellers of mortgage loans for securitization, as illustrated in the

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<sup>14</sup> We believe that 45 days is common, but that this period may be longer; e.g., 60 days or more.

following comparison. Let us assume a typical mortgage loan seller that wishes to sell as much of its originations as possible prior to a given quarter end; for example, to sell all eligible mortgage loans originated by March 15 in a securitization that closes no later than March 31. Under current practices, the seller will be able in early- to mid-February to enter into a forward commitment with a dealer to sell the loans, based on assumed parameters. The dealer will be able to commence marketing and engage in discussions with investors in an orderly manner over an extended offering period. In contrast, if the effect of Proposed Rule 159 is to prevent dealers from being willing to issue a firm forward commitment at a fixed price, and the dealer is forced to delay marketing and the taking of soft circles until after the final pool information is available (which would be several days after March 15), not only as to the assumed seller but all similarly situated sellers, then the market would be “flooded” in late March with MBS. The benefits of the extended marketing period, including the iterative process under the current system, could be lost. Sellers and dealers alike are concerned that this would result in inefficient pricing.

An alternative and perhaps more likely impact would be that sellers would cut off the loan production going into these securitizations at an earlier date, for example February 15, in order to permit marketing over an extended period based on final pool information, with the adverse consequence that the seller’s loan production would have to be carried on its balance sheet for an additional period of time. As a result, the seller would need to hold additional capital to support its asset base. In addition, because sellers in the Forward MBS market typically unwind or release their hedges on pools of mortgage loans once the forward sale has been entered into, hedge costs would be greater.

We estimate that the costs of such a change under the alternative impact discussed above would be substantial. Given the \$864 billion face amount of mortgage loans securitized by non-agency sellers in 2004 alone, the resultant increased hedge costs alone would be approximately \$1.1 billion, based on estimated hedge costs of approximately 0.125% of the unpaid principal balance of the mortgage loans per month. As for capital costs, we estimate that the assets on the balance sheets of Forward MBS sellers in the aggregate would need to increase by approximately \$72 billion, with an associated incremental aggregate capital requirement of \$3.6 billion.<sup>15</sup> These increased costs would inevitably have to be passed along to borrowers or to Forward MBS investors.

In addition to the direct impact on sellers, issuers, investors and consumers noted above, the Commenting Group wishes to draw your attention to the effect the proposed rule would have on the competitive landscape of the overall mortgage market. The two primary federally chartered government sponsored enterprises competing in the mortgage markets (Fannie Mae and Freddie Mac, or the "GSEs") issue mortgage-backed securities that are exempt from SEC registration. These two entities issued \$880 billion of exempt mortgage-backed securities during 2005. The implications of the proposed rule described in the prior paragraphs would likely have the consequence of expanding the benefit of the

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<sup>15</sup> This estimate assumes that the aggregate \$864 billion face amount sold would need to be held on the balance sheets of sellers for an additional one-month period, and a 20:1, or 5% of assets, estimated capital requirement.

GSE status conveyed upon these entities. This would be the likely result if, as we explain earlier in this letter, the adoption of Proposed Rule 159 would adversely affect the market for Forward MBS sales of non-agency MBS but, because of the SEC exemption for federal agency MBS, forward sales of such agency MBS would be unaffected. The Commenting Group believes that this shifting of the competitive landscape was not an intended consequence of the proposed rule nor considered in the assessment of the economic cost of the proposed rule.

### Conclusion

For the above reasons, we ask the Commission to modify Proposed Rule 159 such that Section 12(a)(2) liability would be based on the totality of information provided during the offering process, including the final prospectus. At a minimum, we would request that Proposed Rule 159 be modified so that there would be no Section 12(a)(2) claim based solely on a material error or omission in the preliminary information delivered at the time of the initial investment indication, if the material error was corrected or the omitted information was provided in the final prospectus and the change was either brought to the attention of the investor or the investor had a reasonable opportunity to review the final prospectus prior to settlement.

We understand that the BMA Letter (ABS) and the ASF Letter address similar issues, and contain alternative arguments including: 1) the non-adoption of Proposed Rule 159, 2) an acknowledgement in the final rules that a contract of sale can be made subject to the condition subsequent that there be no material change between the preliminary information and the final prospectus, and 3) proposals for a “safe harbor,” generally to the effect that if a contract of sale is based on preliminary information and the investor’s obligation is subject to the condition subsequent that no material changes between the preliminary information and the final prospectus will occur that would render the preliminary information materially incorrect or misleading, and such a change occurs but the correct information is included in the final prospectus, 12(a)(2) liability will be based on the totality of information provided to the investor, including the final prospectus, provided that certain conditions are met, such as the issuer or underwriter identifying the change to the investor prior to settlement, or delivering the final prospectus at least 48 hours prior to settlement. We endorse and support these proposals, particularly insofar as they take into account the specific Forward MBS related concerns raised in this letter.

To extent the Commission determines not to adopt the proposal put forth by this letter, the ASF Letter or the BMA Letter (ABS), the Commenting Group believes that further analysis is necessary to determine the costs associated with changing the competitive landscape of the mortgage market for forward sales of private label, non-agency MBS versus agency MBS.

The Commenting Group appreciates the Commission’s consideration of the points raised in this comment letter, and we look forward to meeting with the Commission prior to the

adoption of the final regulation to discuss these points further, and perhaps re-comment in light of those discussions.

Should you have any questions about the comments in this letter, please contact John Beccia at (202) 589-2457.

Yours truly,

The Mortgage Bankers Association

The Financial Services Roundtable

The Consumer Mortgage Coalition