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

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Re: **Request for Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Wall Street Reform and Consumer Protection Act**
Title IX Investor Protection and Improvements to the Regulation of Securities
Subtitle D - Improvements to the Asset-Backed Securitization Process

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities and the Committee on Securitization and Structured Finance (together, the "Committees") of the Section of Business Law of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission (the "Commission") in connection with the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") that permit or require the Commission to undertake various initiatives, including rulemaking and studies touching on many areas of financial regulation.

The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law.

The Committees thank the Commission for this opportunity to comment on the initiatives the Commission is required or permitted to undertake in connection with the Dodd-Frank Act. In accordance with the Commission's efforts to organize the submission of comments relating to each major initiative under the Dodd-Frank Act, the Committees will be submitting a number of comment letters, each addressing one of the major initiatives as identified by the Commission. This letter will comment on rule-making provisions relating to Sections 941(b) and 942 of Subtitle D, Improvements to the Asset-Backed Securitization Process, of Title IX of the Dodd-Frank Act ("Subtitle D").

We have reviewed the proposing rulemaking release issued by the Commission on October 4, 2010 entitled "Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act" (the "943 NPR"),[1] and the rules proposed therein (the "Proposed 943 Rules"). In this letter, we will occasionally refer to the Proposed 943 Rules, the 943 NPR and the terminology used in the 943 NPR,[2] though we do not here comment upon those proposed rules. The Committees will comment on the Proposed 943 Rules in a separate letter.

We have also reviewed the *Report to Congress on Risk Retention* submitted by the Board of Governors of the Federal Reserve System to Congress on October 19, 2010 (the "FRS Report").[3] We believe certain key points, relevant to rulemaking under Section 941(b) of Subtitle D, are set forth in the FRS Report, and we will refer to them from time to time in this letter.

Finally, we will refer from time to time to the terms of the new safe harbors for securitization transactions sponsored by insured depository institutions (the "New IDI Securitization Rule")[4] adopted by the Federal Deposit Insurance Corporation (the "FDIC").

Background on Transaction Structures

As noted in the 943 NPR, the definition of asset-backed security used in the Dodd-Frank Act is much broader than the definition of asset-backed security used in Regulation AB. As a result, the types of transactions and typical structures covered by the Dodd-Frank Act are more varied than those typically used in offerings subject to Regulation AB. We believe that the significantly broader scope of Exchange Act-ABS raises a number of interpretive questions under Subtitle D.

There are four types of transaction structures that we will reference from time to time in this letter.[5] We describe here the salient characteristics of each.

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1 75 Fed. Reg. 62718, October 13, 2010.

2 We will employ at times the terminology of "Exchange Act-ABS" and "Reg AB-ABS" used in the 943 NPR to reference these distinct definitions, and we use the term "Exchange Act-ABS" in the singular (i.e., Exchange-Act Asset-Backed Security) and in the plural (i.e., Exchange-Act Asset-Backed Securities).

3 Available at http://federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf

4 75 Fed. Reg. 60287, September 30, 2010.

5 Although we have grouped ABS into these categories for purposes of this letter, there are a large variety of structures and asset classes with significant features that are not completely captured by these categories. The types of transaction structures described here should not be considered exhaustive.

We refer to this type of transaction as an "Aggregator Transaction."

C. CLOs

Another type of transaction structure is used for collateralized loan obligations, or "CLOs."[9] CLOs have historically been used to securitize a significant percentage of leveraged term loans and a lesser percentage of other types of corporate loans. The securities issued in CLO offerings are typically not registered under the Securities Act and therefore have not become subject to Regulation AB. A CLO typically has a revolving period during which new loans may be added to the pool and existing loans may be sold out of the pool.

Generally speaking, CLOs can be divided into two categories. The first category is known as "sponsored" or "balance sheet" CLOs. In these transactions, a financial institution is securitizing a pool of loans that it has originated. Typically, these are so-called "middle market" loans that have been made solely by that institution or by a small group of lenders. In a sponsored CLO, the structure is typically the same as a Classic Sponsor Transaction, with the financial institution transferring the loans to a special purpose subsidiary that deposits the loans into an issuing entity that issues the asset-backed securities. The sponsor or an affiliate is generally the servicer of the securitized loans.

In a "managed" or "non-balance sheet" CLO, the pool of loans that is securitized is assembled by a third party known as the "collateral manager." The collateral manager has not originated the loans, and typically will not ever own the loans. Instead, the collateral manager selects the loans for the securitization, and the issuing entity purchases the loans in a series of trades with a variety of counterparties who may be either the originators of the assets or secondary owners. Those counterparties may or may not know that they are selling to a securitization vehicle. In a managed CLO, the issuing entity is typically an offshore entity, the nominal equity of which is owned by a service company that is not substantively involved in the transaction beyond its role in owning the nominal equity.

Sometimes, the collateral manager owns all or a portion of the most junior class of notes issued by the issuing entity, which notes constitute the effective capital of the issuing entity.

D. ABCP Conduit Transactions

A fourth type of structure is used in transactions entered into by multi-seller asset-backed commercial paper ("ABCP") conduits. Multi-seller ABCP conduits are issuing entities that are sponsored by banks and other financial companies to enable customers of the conduit sponsor to

9 This type of structure is used for other collateralized obligations referenced in the definition of Exchange Act-ABS, including collateralized debt obligations, collateralized bond obligations, collateralized debt obligations of ABS and collateralized debt obligations of collateralized debt obligations. We are of the view that the CLO is more likely than other forms of collateralized obligations to experience a robust re-emergence from the financial crisis and, therefore, we will focus in this letter on the CLO.

obtain financing from the ABCP market.[10] The transactions between a particular conduit and various customers of the sponsor may take different forms, but in virtually all cases the conduit makes a fixed income investment (referred to below as "Conduit Portfolio Investments") backed by a pool of receivables originated or aggregated by the customer, and the customer or one of its affiliates acts as servicer for the receivables (or contracts with an entity other than the conduit or its sponsor to act as servicer) and retains a substantial residual interest in the receivables. The main forms of Conduit Portfolio Investments are:

- The conduit purchases an asset-backed security ("ABS") from a customer, which closely resembles ABS issued in registered offerings, except that the conduit sponsor generally negotiates the terms of the ABS directly with the customer. Typically, the customer will have sold receivables backing the ABS to an affiliate that acts as depositor to the issuing entity for the ABS. The depositor generally retains subordinated interests in the receivables which provide substantial credit enhancement for the conduit's investment.

- The conduit makes a loan to a bankruptcy-remote subsidiary of the customer, secured by receivables that the customer sells to the subsidiary. The documentation is similar to a secured bank loan, but adjusted to reflect (and protect) the borrower's bankruptcy remote status. The loan is subject to an advance rate that assures a level of overcollateralization that functions like the retained subordinated interests in the first type of Conduit Portfolio Investment.

- The conduit purchases a senior undivided interest in a pool of receivables that a customer has transferred to a bankruptcy-remote subsidiary. The retained, junior undivided interest is economically similar to the retained subordinated interests in the first type of Conduit Portfolio Investment and the overcollateralization in the second and likewise provides substantial credit enhancement for the conduit's investment.

- The conduit purchases a pool of receivables from a customer's bankruptcy-remote subsidiary, paying an initial cash purchase price and also agreeing to pay a deferred purchase price over time. The deferred purchase price is payable only to the extent that the conduit receives collections on the purchased receivables in excess of its cash investment, plus an agreed-upon yield, servicing fees and other transaction costs. Thus the deferred purchase price is economically similar to the retained, subordinated interests (or overcollateralization) in the three preceding types of Conduit Portfolio Investments.

10 ABCP can be, and has been, issued by entities other than the classic multi-seller ABCP conduits discussed here. Other issuers of ABCP include or have included single seller vehicles, structured investment vehicles, some CLOs and arbitrage conduits, Other than the brief discussion of arbitrage conduits in footnote 11 below, we do not specifically address the treatment of these other issuer types in this letter.

Each Conduit Portfolio Investment generally arises from a transaction similar to a Classic Sponsor Transaction, an Aggregator Transaction or a CLO. In this letter, we discuss ABCP transactions (which we refer to as "ABCP Conduit Transactions") as a separate category because there are certain aspects that are unique to this structure.

To finance Conduit Portfolio Investments, the conduit issues ABCP, which generally has a much shorter maturity than the Conduit Portfolio Investments. ABCP is rolled over at maturity to provide continued funding while the Conduit Portfolio Investments remain outstanding. The conduit is usually managed by its sponsor, which is responsible for selecting assets to be acquired and which negotiates the terms of each Conduit Portfolio Investment directly with the sponsor's customer.[11] The conduit sponsor generally does not transfer any assets to the issuing entity. The sponsor provides committed liquidity and credit enhancement facilities to the conduit that are drawn to repay maturing ABCP if new ABCP cannot be issued for that purpose. Because of the terms of Basel II, it is expected that conduit sponsors will increasingly combine liquidity facilities and credit enhancement facilities into one facility that performs the roles of each. Other financial institutions also may provide these liquidity and, less frequently, credit enhancement facilities.

Neither ABCP itself, nor three out of the four main types of Conduit Portfolio Investments, fit neatly into the definition of Exchange Act-ABS. As to ABCP, the customary use of the proceeds of newly issued ABCP to roll over maturing ABCP is at odds with paragraph (A) of the definition of Exchange Act-ABS (which requires, among other things, that payment on the subject securities depend primarily on cash flow from the underlying assets). As to Conduit Portfolio Investments, only the first of the four types we describe above involves the issuance of an instrument that is explicitly described as a security.[12] Nevertheless, it seems likely that Congress intended the risk retention requirements to apply to ABCP Conduit Transactions. For the reasons set out in our discussion of ABCP Conduit Transactions in Part I.A.1. below, we suggest that the risk retention rules look at ABCP Conduit Transactions on an integrated basis, with the primary focus being on Conduit Portfolio Investments.

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With this background, we now turn to our suggestions with respect to the rulemaking to be undertaken by the Commission pursuant to Sections 941(b) and 942 under Subtitle D of the Dodd-Frank Act.

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11 This differentiates the classic ABCP multi-seller conduits from CLOs, as well as from so-called "arbitrage conduits", which purchased Exchange Act-ABS in registered offerings or Rule 144A offerings with broader distribution and no direct negotiations between the conduit sponsor and the sponsor of the purchased ABS. While we do not discuss them further in this letter, we believe that arbitrage conduits should generally be analyzed in a manner similar to CLOs for purposes of the risk retention rules.

12 In light of our recommendation below, we do not think it is necessary to conclude whether any or all of the other three types of investments are investment contracts under the test enunciated in SEC v. W. J. Howey Co., 328 U.S. 293 (1946).

I. Section 941(b)

Section 941 of the Dodd-Frank Act amends the Securities Exchange Act of 1934[13] (the "Exchange Act") and provides for the adoption of regulations imposing credit risk retention obligations on securitizers. Our comments in this Part I relate specifically to rulemaking requirements set forth in Section 941(b), which adds new Section 15G ("Section 15G") to the Exchange Act.

In general, our comments below are organized according to the sections within Section 15G that call for the publication of rules on various aspects of risk retention. We have, however, taken a different approach with respect to the various portions of Section 15G that provide for authority to adopt exceptions, exemptions and adjustments to the basic rules of Section 15G.[14] In those instances where we believe this exemptive authority should be used in respect of a general rule that is contained elsewhere, we have addressed the use of exemptive authority in the same place that we discuss the general rule.

A. Section 15G(a) and (b): Definitions and Regulations Required

Section 15G(b) directs the Commission, jointly with the other Federal agencies specified therein (the "Regulatory Agencies"),[15] to prescribe regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any asset it transfers to a third party through the issuance of an asset-backed security. We refer at times to this retention as the "retained interest."

Section 15G(a)(3) defines "securitizer" to mean (A) an issuer of an Exchange Act-ABS or (B) a 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 issuer. Rule 191 under the Securities Act treats the depositor of an ABS transaction as the issuer with respect to an issuing entity, and we will refer to clause (A) of the definition as the "depositor branch."[16]

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13 15 U.S.C. 78a et seq.

14 These exemptive provisions are principally located in Section 15G(c)(1)(G)(i) - (iv) and Section 15G(e).

15 In most instances, rulemaking and other actions required under Section 15G are to be undertaken by the Commission jointly with the "Federal banking agencies," defined under Section 15G(a)(1) to mean the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation ("FDIC"), and, with respect to asset-backed securities collateralized by residential mortgages, the Secretary of Housing and Urban Development and the Federal Housing Finance Agency. The references in part I of this letter to rulemaking by the "Regulatory Agencies" refer to the applicable regulators.

16 We recognize that Rule 191 is promulgated under the Securities Act, whereas Section 15G is part of the Exchange Act. It might be appropriate for the Commission to adopt a rule comparable to Rule 191 under the Exchange Act. In any event, we believe that the focus on the depositor, rather than the issuing entity, is appropriate for risk retention purposes. As the issuing entity is the entity that owns the assets, it is unclear to us how risk retention by such entity would work in this context.

The functions described in clause (B) of the definition closely resemble those of the typical sponsor of an ABS transaction, and we will refer to clause (B) as the "sponsor branch" of the definition. We recommend that, in their rulemaking, the Regulatory Agencies clarify the application of the term "securitizer" in selected circumstances involving the issuance of Exchange Act-ABS.

Section 15G(a)(4) defines an "originator" as a person who (A) through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security and (B) sells an asset directly or indirectly to a securitizer. There are circumstances in which it is difficult to identify which entity in a transaction constitutes an originator. This difficulty lies largely in determining what it means for an entity that fits within clause (A) of the definition (whom we will call "credit extenders") to "sell an asset directly or indirectly to a securitizer." We recommend that, in their rulemaking, the Regulatory Agencies clarify the application of the term "originator" in selected circumstances involving the issuance of Exchange Act-ABS.

We will refer in the following discussion to the four transaction structures described in the "Background" section of this letter.

Classic Sponsor Transaction. In this type of transaction, the sponsor would be a securitizer by virtue of the sponsor branch of the definition, and the depositor would be a securitizer by virtue of the depositor branch. We believe the identification of each securitizer is understood in this type of transaction. Additionally, in a Classic Sponsor Transaction, the sponsor would also be an originator.

Aggregator Transactions. In an Aggregator Transaction, the depositor would presumably be a securitizer, based on treatment of a depositor as an issuer. If the aggregator were to transfer assets to the issuing entity, whether directly or through the depositor, the aggregator would also be a securitizer.

As discussed above, an aggregator does not itself create the assets it securitizes, rather it purchases them from other parties who may or may not be credit extenders. Each of those credit extenders could technically fall within the definition of "originator", as the assets it created have ultimately been transferred to the issuer. However, many credit extenders have no reason to believe that the assets they originate and subsequently sell are going to be included in a securitization. This may be particularly true for sales of corporate debt and mortgage loans where there exist robust trading markets and the seller of such assets would not necessarily have any knowledge of the motivations of a purchaser of the debt. Also, a purchaser may hold the asset for a number of months or years prior to its decision to securitize such asset rendering it impossible for the seller to have had any awareness of the securitization transaction. Moreover, even in circumstances where the sale contract between such an originator and the aggregator does expressly contemplate the actual or possible securitization of the assets, any single originator may have the very limited role of selling only a fraction of the assets included in an Aggregator Transaction and therefore can not itself be considered a securitizer who "organizes and initiates" the asset-backed securities transaction.

CLOs. A sponsored CLO is a form of Classic Sponsor Transaction. Accordingly, we think the sponsor constitutes a securitizer under the sponsor branch of the securitizer definition. As well, the sponsor is also the originator.

The determination of who constitutes a securitizer or an originator can be challenging in the case of a managed CLO. As described above, the underlying assets are typically acquired directly by the issuing entity. The parties who transferred the assets to the issuing entity are often unaware that they are dealing with a securitization entity. These entities would not seem to fall within the sponsor branch of the definition; although they transferred assets to the issuing entity, they had no intention of "organizing" or "initiating" an asset-backed securities transaction. In addition, the asset pool in CLO structures is actively managed, and as a result, assets may be acquired and sold over the life of the transaction. If the sponsor branch of "securitizer" were interpreted to include any party selling loans to a CLO in the secondary market, that interpretation would lead to the incongruous effect that the identities of the securitizers would change over time as the pool assets changed.

It also does not seem that any party in a managed CLO fits into the issuer branch of the definition of securitizer. As noted above, Rule 191 specifies that the depositor, as the party transferring assets to the issuing entity, constitutes the issuer with respect to that issuing entity. In a managed CLO, no person fills the role of a depositor, as the issuing entity generally acquires its assets directly from many different parties, none of whom may be involved in the CLO.

It is also difficult to treat any person in a managed CLO as an originator. As in the case of an Aggregator Transaction, each credit extender from which a CLO purchases assets could technically fall within the definition of originator, as the assets it created have ultimately been transferred to the issuer. If the credit extender has sold directly to the securitizer, and if the sale contract expressly contemplates the actual or possible securitization of the assets, then it would seem that the credit extender has reason to believe that it could be an originator for purposes of Section 941. However, as discussed above, many credit extenders have no reason to believe that the assets they originate and subsequently sell are going to be included in a securitization and do not necessarily have any knowledge of the motivations of a purchaser of the debt.

As noted in the FRS Report, managed CLOs utilize conditional cash flows (specifically overcollateralization and interest coverage tests and related cash flow diversions) and performance-based compensation to mitigate the risks sought to be addressed by risk retention requirements, which are often described as "moral hazard" and "information asymmetry." The usual compensation arrangement includes a base fee (payable at a high level of the waterfall), a subordinate fee (payable after current debt service) and an incentive fee (payable if the equity holders receive more than a specified return). In addition, since the underlying loans are syndicated corporate loans, the arranger of such corporate loan facility will usually retain an interest therein and this will also serve to mitigate information asymmetry.[17]

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17 These topics are covered in more detail in a white paper of the Loan Syndication and Trading Association (available at: http://lsta.org/WorkArea/showcontent.aspx?id=10976).

For seasoned and institutional asset managers, the CLO market did not require manager risk retention. In contrast, for smaller, less-well known managers, the market often required the related manager to hold a significant portion (typically ranging from 10-25%). Of course, the institutional asset manager's reputational risk may be seen as a substitute for actual risk retention. We ask the Commission to consider whether managed CLOs that use the structures described above have sufficiently aligned the interests of the collateral manager with those of the CLO's investors such that no additional risk retention should be required.

ABCP Conduit Transactions.

In considering who is the securitizer in an ABCP Conduit Transaction, it is necessary to consider both the Conduit Portfolio Investments (which we believe is the proper focus in these transactions) and the ABCP that the conduit issues. As to each Conduit Portfolio Investment, the analysis is complicated by the fact that Conduit Portfolio Investments can fall within (or be functionally equivalent to) Classic Sponsor Transactions, Aggregator Transactions or CLOs. Currently, a common type of ABCP Conduit Transaction involves Conduit Portfolio Investments arising in bespoke Classic Sponsor Transaction (or functionally equivalent transactions where the investments are not identified as securities), but ABCP conduits have, in the past, also acquired Conduit Portfolio Investments issued in Aggregator Transactions and CLOs. Conduits also occasionally purchase ABCP issued by other conduits.

The analysis (and uncertainty) as to which entity is a securitizer with respect to Conduit Portfolio Investments generally tracks the discussion above, depending upon which of the categories the acquired ABS falls in. For instance, if the Conduit Portfolio Investment arises from a Classic Sponsor Transaction, then the conduit sponsor's customer is typically the securitizer of the Conduit Portfolio Investment by virtue of clause (ii) of the definition, and the depositor with respect to the Conduit Portfolio Investment is a securitizer of that investment under clause (i). Although use of the conduit interposes another step between the customer and investors, the customer in an ABCP Conduit Transaction of this type stands in a position that is closely analogous to the position of a sponsor in any other Classic Sponsor Transaction. The customer is, ultimately, the entity that obtains funding through the ABCP Conduit Transaction and is also the party with most direct control over the underwriting and servicing of the securitized assets. In this type of transaction, we believe the customer would be the most appropriate entity to be subject to the risk retention rules: it is the party in a position to influence the practices that Congress sought to address when it required securitizers to retain risk.

Regardless of which category of Conduit Portfolio Investment is acquired by a conduit, neither the conduit sponsor nor the conduit itself fits within the definition of securitizer with respect to the acquired investment. Neither the conduit sponsor nor the conduit is a depositor of the acquired investment , nor does either sell or transfer the underlying assets (as required under the sponsor branch of the definition).

Turning to the ABCP issued by the conduit, it is not clear who is the securitizer. The conduit's sponsor generally would not be covered by the sponsor branch, as the conduit sponsor typically does not transfer any assets. Nor is the conduit sponsor an issuer of the ABCP, unless the ABCP is viewed as "certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates," and the sponsor is viewed as a person "performing the acts and assuming the duties of . . . manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued"[18]. We believe the better reading of this portion of the Exchange Act's definition of "issuer" would exclude a conduit sponsor from its scope.

Whether the conduit itself is a securitizer depends in part on whether it is viewed as the issuer of the ABCP. While the conduit literally does issue the ABCP, conduits are similar to the issuing entities dealt with in Rule 191 under the Securities Act. Rule 191 treats the depositor (as defined in Regulation AB) as the issuer of ABS, instead of the issuing entity. If it applied in this context, Rule 191 would seem to identify the various sponsor customers (or their affiliated depositors) that transfer assets to the conduit as issuers, rather than the conduit itself. Such a result would be consistent with our view expressed above that the customers are the entities in the best position to influence the practices that Congress sought to address with the risk retention requirement.

Most conduits issue ABCP on a pooled basis, meaning that they issue ABCP to cover their aggregate funding needs, rather than allocating particular ABCP notes to particular Exchange Act-ABS acquired by the conduit. As a result, it would not be practicable to allocate particular ABCP notes to particular customers as securitizers, and it would be difficult to apply the risk retention requirements for customers at the level of the ABCP. We suggest instead that the Commission apply the risk retention requirements for ABCP Conduit Transactions at the level of the Conduit Portfolio Investments, requiring each customer (or its affiliates) to retain specified amounts of risk (unless otherwise exempt) with respect to the assets they transfer in connection with that Conduit Portfolio Investment. As noted above in our description of the common types of ABCP Conduit Transactions, the customers and/or their affiliates generally retain substantial subordinated interests under current and historical market practices.

We also suggest that the Regulatory Agencies specify in their proposed and final rule that a conduit sponsor is not a securitizer with respect to an ABCP Conduit Transaction under clause (i) of the definition. Because conduit sponsors do not ordinarily transfer assets in ABCP Conduit Transactions, in our view, the proposed and final rule should clarify that conduit sponsors generally would not be considered to be securitizers of ABCP issued by conduits they sponsor.[19]

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18 Exchange Act Section 3(a)(8).

19 In the event that a conduit sponsor does transfer assets to its conduit, such sponsor would, appropriately, be considered a securitizer under the sponsor branch of the definition. We also understand that in some circumstances conduit customers may retain a subordinated or other interest that in view of the credit quality of the pool may be less than 5% of the securitized pool. In view of (i) the excellent safety record of the multiseller ABCP Conduits, even during the last three years, and (ii) the fact that almost all of such transactions are bespoke and heavily negotiated with conduit sponsors who in effect through their liquidity and credit enhancement facilities keep 100% of the risk of the portion of the pool invested in by the conduit, we suggest that the Commission should allow the 5% requirement to be varied if related conduit sponsors believe it prudent to do so.

As with securitizers, the identification of originators in ABCP Conduit Transactions depends on the category of Exchange Act-ABS acquired by the conduit; the entity or entities that are originators for the Exchange Act-ABS would still be the originators with respect to the ABCP Conduit Transaction. In no case would a conduit sponsor, in its capacity as such, or the conduit itself, be an originator.

B. Section 15G(c): Standards for Regulations

Section 15G(c) supplements the general rulemaking direction of Section 15G(b) by setting forth several standards to which the risk retention regulations must conform.

1. Section 15G(c)(1)(A): Prohibition on hedging

Section 15G(c)(1)(A) states that the risk retention regulations prescribed under Section 15G shall prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain with respect to an asset.

Notwithstanding the absolute language of Section 15G(c)(1(A), Congress recognized that a blanket prohibition on hedging would not be appropriate. Toward that end, Section 15G(e)(1) expressly states that the Regulatory Agencies may adopt or issue exceptions to the hedging requirements of Section 15G(c)(1).

As stated in our Reg AB Comment Letter,[20] it is critical that appropriate interest-rate and currency-risk hedging, as well as any other hedges that tailor the characteristics of underlying assets to investor objectives, be permitted as exceptions to the hedging prohibition. Such hedges are necessary in order to satisfy investor demand for stable and predictable cash flows on ABS. The Commission's proposal in its proposed amendments to Regulation AB to allow such hedges appropriately restricts the hedging of credit risk while still protecting the holders of such retained interests against market movements outside their control. We request that the Regulatory Agencies follow the Commission's approach with respect to Regulation AB and use the authority under Section 15G(e) to carve out such hedges from the prohibition set forth in Section 15G(c)(1)(A).

In addition, we note that the statute does not expressly prohibit the pledge of retained interests. We recognize that the FDIC has adopted an approach to risk retention that prohibits the pledge of retained interests.[21] However, we think the FDIC made a mistake in prohibiting pledges of retained interests and we believe the better course for rules adopted by the Regulatory Agencies under the Dodd-Frank Act is to permit pledges of retained interests. In our view, a securitizer's ability to pledge retained interests on a recourse basis would not be inconsistent with the intent of the statute, because the securitizer would be obligated to its lender and would

[20] Letter dated August 17, 2010 to the Commission from the Committees with respect to Commission File No. S7-08-10, Release Nos. 33-9117 and 34-61858, available at http://sec.gov/comments/s7-08-10/s70810-150.pdf (the "Reg AB Comment Letter").

[21] New IDI Securitization Rule, Section 360.6(b)(5)(i)(A).

still retain risk associated with the performance of the assets underlying its retained interest. The pledge of the retained interest would not eliminate the securitizer's interest in the performance of the assets, whether the retained interest and the underlying assets performed better than or worse than expected.

Such flexibility to pledge the retained interest to secure indebtedness is important to the smooth functioning of financial institutions. Preventing a financial institution from pledging its retained interests as collateral would, in our view, inhibit liquidity and harm, rather than help, the goal of restoring liquidity to the financial system. Accordingly, we request that the Regulatory Agencies confirm that such a pledge, when there is recourse to the securitizer or an affiliate of the securitizer, would not violate the risk retention rules. The ability of the creditor to whom the retained interest is pledged to take possession or control of the instrument or asset representing the retained interest, and to foreclose in the event of a default by the borrower, must also be expressly acknowledged in the regulations.

2. Section 15G(c)(1)(B)(i): General rule

Section 15(G(c)(B)(i) specifies that the prescribed risk retention rules require a securitizer to retain "not less than 5 percent" of the credit risk for any asset which is not a qualified residential mortgage (or that is a qualified residential mortgage which is securitized with one or more assets that are not qualified residential mortgages). The statutory language gives the Regulatory Agencies broad authority to set risk retention levels above 5%.

We urge the Regulatory Agencies to implement a rule that, at least initially, sets the maximum required risk retention percentage at 5% across the board for any transaction structure or any asset class. Each of the Commission and the FDIC has already considered the appropriate risk retention levels, and each has proposed rules imposing an obligation of 5% for all applicable transactions.[22]

We believe that setting the initial risk retention level at greater than 5% could unduly inhibit liquidity. The impact that the imposition of risk retention requirements will have on the market is unknown, and we believe, therefore, that the Regulatory Agencies should proceed with caution. The implementation of risk retention is certain to create both economic and administrative burdens for asset originators and sponsors and issuers of asset-backed securities. These burdens may impede other public and private efforts to revitalize the capital markets and to increase the availability of credit to the public. Requiring risk retention in excess of 5% could well exacerbate these burdens. Indeed, the FRS Report warns of the possibility that the interaction of the risk retention rules with new accounting standards and regulatory capital requirements may make securitization less attractive and result in less available credit.[23] Should future events indicate a need to increase this amount, the Regulatory Agencies would have the authority to do so.

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22 75 Fed. Reg. 23328, May 3, 2010 at 23339; New IDI Securitization Rule, Section 360.6(b)(5)(i)(A).

23 FRS Report at 3.

As we noted above, within the context of any particular transaction, there may be more than one securitizer. Were multiple securitizers in a transaction subject to a risk retention obligation, the risk retention amount (whether it is 5% or some greater number) would be multiplied. We see no indication that Congress intended for each party to a securitization to retain a 5% (or other applicable percentage) interest. In our view, if one securitizer with respect to a particular ABS transaction has retained a sufficient amount of risk to satisfy the applicable risk retention requirement, then additional transaction participants falling within the definition of "securitizer" should be relieved of any additional risk retention obligations. A transaction-specific approach that allows one or more parties to bear all risk retention obligations for a given transaction will provide certainty to other parties that may otherwise be hesitant to participate in the transaction. We therefore suggest that the Regulatory Agencies include an anti-duplication provision in its proposed and final rules pursuant to Section 15G(b). Such a provision will decrease the overall cost of the transaction by eliminating the duplicative burden and uncertainty that a securitizer-specific rule would impose.[24]

The concept of eliminating unnecessary duplication is also reflected in the Proposed 943 Rules,[25] which acknowledge that there may be situations where multiple affiliated securitizers will have individual reporting obligations with respect to a particular transaction. The Commission proposes that where one securitizer makes the required disclosures for a given transaction, such disclosures will be sufficient to satisfy the reporting obligations of all affiliated securitizers.[26]

3. Section 15G(c)(1)(B)(ii): Exceptions and exemptions to the general rule

While Section 15G establishes standards to which the adopted risk retention rules must conform, the statute also requires the Regulatory Agencies in certain circumstances, and permits the Regulatory Agencies in other circumstances, to deviate from those standards to establish lower risk retention requirements. The statute provides a number of different bases upon which the Regulatory Agencies are to formulate these exemptions and exceptions. We address each of these provisions in this part of the letter.

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24 Although we discuss below our belief that the Regulatory Agencies should not require originators to retain any portion of the required risk retention, in the event the originator in an ABS transaction contractually agrees to maintain the required risk retention, we would expect that the anti-duplication provision would apply to such structure and not mandate additional risk retention by the securitizer.

25 We note that the Proposed 943 Rules additionally address the definition of "asset-backed security" set forth in Section 3(a)(77) of the Exchange Act, which was added to the statute by Section 941(a) of the Dodd-Frank Act. While we do not undertake in this letter to address the issues raised by this definition, we refer to paragraph VI. D. of our Reg AB Comment Letter. This paragraph addresses the proposed definition of "structured finance product." The comments and concerns expressed in our Reg AB Comment Letter with respect to that definition apply equally to the definition of "asset-backed security" added to the Exchange Act by the Dodd-Frank Act, as the language of both definitions is largely identical.

26 943 NPR, footnote 22, page 4.

The FRS Report provides ample support for the notion that the Regulatory Agencies should utilize all of their available tools when establishing risk retention requirements. The FRS Report reviews the performance of the major classes of Exchange Act-ABS and notes that there were significant performance differences among those classes. The report goes on to suggest:

> In light of the heterogeneity of asset classes and securitization structures, practices and performance, the Board recommends that rulemakers consider crafting credit risk retention requirements that are tailored to each major class of securitized assets. . . [A] single approach to credit risk retention could curtail credit availability in certain sectors of the securitization market.[27]

Section 15G(c)(1)(B)(ii) states that the risk retention rules must require less than 5 percent retention if the *originator* of the asset meets the underwriting standards required to be prescribed under Section 15G(c)(2)(B).

In addition, the Regulatory Agencies are given broad discretion to create an exemption to the risk retention rules under Section 15G(c)(1)(G) "for any securitization, as may be appropriate in the public interest and for the protection of investors." We believe this section permits exemptions based upon the factors unrelated to the particular terms of an asset or on whether the originator meets those standards with respect to specific assets. These factors could include the design of the transaction to build credit enhancement over time, the originator's track record in sponsoring performing securitizations and other factors that demonstrate the likely soundness of the offered Exchange Act-ABS.

This language provides the authority to develop a mechanism by which individual transactions may be deemed eligible for lower risk retention requirements, or even exempt from these requirements.[28] We encourage the Regulatory Agencies to develop a procedure by which securitization sponsors may apply for such an exemption based on such factors as the Regulatory Agencies find appropriate. Factors we believe to be appropriate to consider include safeguards inherent to the structure of the transaction, experience of the servicer or manager in dealing with assets of the type included in the pool, loss history for similar assets originated by the primary originator for the transaction and the credit quality of the assets of the pool based on heightened objective underwriting standards.

These different formulations for underwriting standards support the idea that evidence of quality underwriting with respect to a given securitization can be established through several means, including: (1) the credit characteristics of the underlying assets, either on an asset-by-

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27 FRS Report at 83-84.

28 We note that the statute provides two sections which authorize the Regulatory Agencies to create exemptions to the risk retention requirements, Section 15G(c)(1)(G)(i) and Section 15G(e). While 15G(e) addresses exemptions for whole types of transactions and asset classes, we read Section 15G(c)(1)(G)(i) to provide for individual transaction exemptions.

asset basis or on a weighted average basis across all assets in the pool, (2) the transaction structure as a whole and the incentives created thereby and (3) the originator's overall track record of originating performing assets. Each of these standards supported by the statute is an effective means for establishing high quality underwriting and we urge the Regulatory Agencies to adopt rules applying each of these exceptions to reduce the risk retention obligations.

Another type of transaction that should be considered for an exemption is the "re-securitization," in which a party (the "re-securitizer") acquires an outstanding ABS in a secondary transaction, places the ABS into a new issuing entity and issues new interests. A re-securitization is often effected as a means for providing additional credit enhancement to already issued asset-backed securities. Typically, the re-securitization issuance occurs at some interval of time following the issuance of the underlying ABS. The imposition of risk retention obligations on a re-securitizer would have no impact on the origination process for the underlying assets comprising the original ABS and would therefore not further any of the goals of Congress in adopting Section 941(b) of the Dodd-Frank Act. As well, it would effectively result in duplicative risk retention requirements. We request that the Regulatory Agencies expressly exempt re-securitization transactions from the risk retention rules promulgated under Section 15G.

4. Section 15G(c)(1)(C)(i) and (ii): Permissible forms and minimum duration of risk retention

Clauses (i) and (ii) of Section 15G(c)(1)(C) give the Regulatory Agencies broad discretion to establish the permissible forms and the "minimum duration" of risk retention. We believe that these are two of the most critical provisions in Section 15G.

In Section 942(c)(2) of the Dodd-Frank Act, Congress indicated its intention that risk retention not have a negative impact on the "continued viability of the asset-backed securitization markets and on the availability of credit for new lending." The determinations made by the Regulatory Agencies regarding forms and durations of risk retention will be crucial in achieving Congress's goal.

At the outset of this discussion, we think it is important to realize that risk retention by securitizers is a common practice in many parts of the securitization markets. The FRS Report expressly noted the positive relationship between the performance of asset-backed securities and the presence of significant risk retention by the related securitization participants.[29]

However, requiring a securitizer to hold a retained interest *that the securitizer otherwise would have sold* restricts that securitizer's flexibility. If the securitizer is also prohibited from pledging the asset, the amount of secured or securitized funding that the securitizer can obtain will be reduced. The securitizer will have several unattractive alternatives:

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[29] FRS Report at 43.

- it can seek to raise incremental unsecured debt or equity, which will be more expensive funding;
- it can curtail its origination activities, reflecting the need to finance the retained interests from existing funding sources; or
- it can determine that securitization is no longer a cost-effective source of funding, and it can cease or decrease its use of securitization.

Any of these outcomes would, we believe, undermine Congress's goal of maintaining the continued viability of the ABS markets and the availability of credit for new lending. We believe that the Regulatory Agencies must recognize that there can be significant incremental economic costs to holding retained interests that securitizers would otherwise have sold or pledged, and the Regulatory Agencies must design cost-effective risk retention arrangements.

We believe that a first step in achieving Congress's goal is to recognize that there are multiple ways in which effective risk retention can be structured. To date, regulatory actions have been more limited. In the proposed revisions to Regulation AB, the Commission proposed to impose a "vertical slice" risk retention scheme, whereby sponsors of asset-backed securities registered on Form SF-3 would be required to retain five percent of the securities of each tranche issued in a given transaction or a seller's interest.[30] In the New IDI Securitization Rule, the FDIC specified that risk retention must take the form of either a five percent vertical slice or "a representative sample of the securitized financial assets equal to not less than five (5) percent of the principal amount of the financial assets at transfer."[31] We agree with the Commission and the FDIC that these are appropriate forms that risk retention might take. However, we feel strongly that these three should not be the only permissible forms of risk retention.

We also believe that the Regulatory Agencies should consider the topic of risk retention in the context of the overall structure of a transaction and in light of other measures that are employed in transactions to align interests and mitigate risk. As noted in the FRS Report, there are a number of other incentive alignment mechanisms that can replace or complement credit risk retention.[32] As the Regulatory Agencies are aware, many asset classes performed well in the financial crisis; participants in securitizations of all asset classes should not effectively be penalized for the problems that arose in the residential real estate finance sector.

Among the possible forms of risk retention that would serve to align the interests of issuers and investors are:

- Retention by the depositor of the "first loss" interest, whether consisting of asset overcollateralization, cash reserves or a "horizontal slice" of securities
- Retention of the "seller's interest" in credit card and other revolving vehicles
- Retention of a representative sample of similar assets outside the securitization

30 75 Fed. Reg. 23328, May 3, 2010 at 23339.

31 New IDI Securitization Rule, Section 360.6(b)(5)(i)(A).

32 FRS Report at 84.

- Sale of a first-loss piece to a third party that specifically negotiates for such position and performs due diligence with respect to the securitized assets
- A determination by the Regulatory Agencies that the underwriting standards and controls for the assets are adequate
- Provision of adequate representations and warranties and adequate enforcement mechanisms appropriate for the asset class
- Retention of a "vertical slice" of securities
- Subordinate and incentive management fees paid to CLO collateral managers

We suggest that the Regulatory Agencies, in their proposed rulemaking, invite comments as to other options from which securitizers may choose in satisfying their risk retention obligations. By permitting a range of options, securitizers will be able to maintain flexibility in transaction structures, which will encourage the steady growth of ABS volume and minimize any chilling effect of risk retention on the provision of credit to the public.[33] We believe this can be accomplished in a manner fully consistent with the statutory risk retention objectives.

We have suggested above that the Regulatory Agencies clarify by rule that ABCP conduit sponsors are not securitizers with respect to ABCP Conduit Transactions . If the final rules adopted by the Regulatory Agencies follow our suggestion, then no special rules about permissible forms of risk retention are needed for ABCP Conduit Transactions. On the other hand, should the Regulatory Agencies determine that conduit sponsors should be viewed as securitizers, we believe that any rulemaking should provide that any liquidity or credit support facilities provided by the sponsor to a conduit would be counted towards satisfying the risk retention requirement. In addition, as we discuss above, we believe that no special rules about permissible foms of risk retention are needed for re-securitizations of previously issued ABS when that ABS meets the applicable risk retention requirements.

Section 15G(c)(1)(C)(ii) directs the Regulatory Agencies to adopt rules which specify "the minimum duration of the risk retention required under [Section 15G]." In setting any duration for retention of risk, we believe the Regulatory Agencies should take into account the specific form of risk retention.

At present, some types of risk retention are typically held by securitizers for the life of a transaction. Examples include:

- liability for representations and warranties regarding the securitized assets
- a minimum seller's interest in a credit card master trust
- a "first loss" position held by a depositor
- subordinate and incentive management fees paid to CLO collateral managers

In these cases, we believe that securitizers would be willing to maintain the risk retention for the life of their transactions.

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33 We note that such a flexible risk retention scheme has been implemented under Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 (Directive Number 111 of 2009, Official Journal of September 16, 2009, L302, Page 110).

On the other hand, some forms of risk retention are not part of ordinary practice, such as vertical slices and (for certain asset classes) representative samples of securitized assets. When (as is currently the case with the New IDI Securitization Rule) these are the only permitted forms of risk retention and they are required to be maintained for the life of the transaction, the requirement is quite burdensome. Such an inflexible requirement not only subjects the securitizer to additional funding costs or reduced levels of funding; it also results in market value risk on the retained assets, impedes the securitizer's ability to manage its balance sheet and gives no credit to the other forms of risk retention that the securitizer already maintains (such as representation and warranty liability and first loss exposure).

We believe that the length of the required holding period should be calibrated to the type of risk retention and to the asset class. Particularly for those types of risk retention that are not currently in force and for asset classes that have not demonstrated major problems, we believe that the duration should be limited to the period in which such obligations would provide the most benefit to investors, which we believe would be the early stage of a transaction.

5. Section 15G(c)(1)(E): Commercial mortgages

Section 15G(c)(1)(E) provides that the Regulatory Agencies may consider allowing, as a permissible form of risk retention in securitizations of commercial mortgages, the purchase by a third party of a first-loss position that specifically negotiates for the purchase of such position, holds adequate financial resources to back losses, provides due diligence on all of the individual assets in the pool and meets the same standards for risk retention as are required of securitizers.

The statutory reference to the "adequate financial resources" of the third party first-loss provider with which to "back losses" is unclear to us in that a securitization structure by its nature is generally independent of the credit risk or resources of its security holders. As it is generally the principal balance of the security representing the first-loss position that is reduced to absorb the losses in a transaction, we do not interpret the statutory language regarding the backing of losses to imply any duty on the part of the third party first-loss provider other than to purchase such security. Likewise, the adequate financial resources of the third party first-loss provider are established by such party's furnishing of the appropriate purchase price for such security. We request that the Regulatory Agencies clarify that the role of the third party first-loss provider is solely to purchase a first-loss security and no more than provision of the purchase price therefore will be required to establish such party's financial resources.

6. Section 15G(c)(2): Quality underwriting standards for asset classes

Section 15G(c)(2)(A) requires the Regulatory Agencies to prescribe regulations which establish asset classes with separate rules for securitizers of different classes of assets. The asset classes which the statute specifies are residential mortgages, commercial mortgages, commercial loans, and auto loans. The statute permits the Regulatory Agencies to establish any other classes of assets they deem appropriate. For each asset class so established, the Federal banking agencies[34] must establish underwriting standards that specify the terms, conditions and characteristics of a loan within the asset class that indicate a low credit risk with respect thereto.

We suggest that, in the proposing release, the Regulatory Agencies identify the asset classes (and subclasses) they consider to be appropriate, and invite comment as to whether any of these asset classes should be defined differently than the identified proposals, or subdivided into two or more separate classes. We also suggest that rules authorize the staff of the Commission and the Federal banking agencies, pursuant to delegated authority, to redefine or supplement any asset class as issues are identified and the market evolves. We do not offer in this letter a proposed list of asset classes, but we note that the FRS Report discussed nine asset classes in depth and identified another 36 types of assets that have been securitized."[35]

Section 15G(c)(2)(B) instructs the Regulatory Agencies to develop underwriting standards for each identified asset class that specify the terms, conditions and characteristics of a loan within the asset class that indicate a low credit risk with respect to the loan.

Although we do not have a suggested list of underwriting standards for any specific asset class, as with the determination of asset classes, we encourage the Regulatory Agencies, in their proposed rulemaking, to seek public input regarding such standards. We offer the following suggestions for this approach:

- The standards developed under this section for any asset class should be objectively determinable and, to the extent possible, relatively few in number, in order to permit a securitizer to assess accurately whether the assets in a securitized pool meet the standards.
- Compliance with each of the standards should be determined at a single date for each asset. That date might be the origination date, or it might be the cutoff date for the pool. For revolving pool transactions, it should be either the origination date or the cutoff date as of which an asset is added to the pool.
- Compliance with the standards should not require periodic re-evaluation or testing (*e.g.*, whether the loan is not delinquent by 30 days or more), because such re-evaluation would introduce uncertainty into transactions and may be impractical – if a security were issued in compliance with the applicable underwriting standards, it would be difficult to ascertain what a securitizer should do should circumstances later change.

C. Sections 15G(c)(1)(G)(iv) and 15G(d): Originators and risk retention

Although Section 15G(b) specifies that the risk retention requirement is to be imposed upon securitizers, Section 15G(c)(1)(G)(iv) permits the Regulatory Agencies to allocate the

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34 While the statute specifies that such underwriting standards are to be established by the Federal banking agencies, we assume that such agencies will act in consultation with the Commission in the development of such standards.

35 FRS Report at 27 fn.20.

required retention between a securitizer and an originator from whom the securitizer purchases assets. We recommend that the Regulatory Agencies not mandate that originators bear a portion of the risk retention requirements for securitized assets. Instead, the Regulatory Agencies should simply permit originators to assume this obligation, if they so choose, by means of a contract with the securitizer.

We take this position for reasons both of practicality and of concern for market impact. On a practical level, we think that a rule that would impose the risk retention requirement in part on non-affiliated originators would be extraordinarily difficult to manage. In Aggregator Transactions and CLOs, the means of allocating the originators' share of risk retention among what could be a number of different originators is not at all clear, nor is it clear how that obligation would be enforced against an originator that had been paid for its assets and that did not want to repurchase a portion of the credit risk. These problems would be even more pronounced for revolving pools and managed asset transactions, where the mix of originators could easily shift over time.

We also think that a rule requiring originators to bear a portion of the credit risk could have a chilling effect on certain trading markets for collateral of the type that backs offerings of Exchange Act-ABS and may prevent new markets from developing. Imposing a risk on the holder of a security impairs fungibility of the security. There are active trading markets for certain asset classes, such as residential mortgages and leveraged loans, and Exchange Act-ABS in those asset classes often include underlying assets which have been purchased in the secondary market. The originator in such a scenario is unlikely to have any knowledge of whether the asset it originated will be securitized or of the identity of the securitizer or the structure of the securitization. For example, trades of syndicated leveraged loans are effected through standardized forms which give the seller no indication of the purchaser's ultimate intent with respect to the traded loan. In addition, we also believe that imposing risk retention obligations on the party that initially originated the asset could have a chilling effect on the willingness of lenders to extend credit in the first instance.

For these reasons, we suggest that the Regulatory Agencies adopt rules that specifically carve out risk retention liability for originators where such liability is not expressly agreed to by the originator at the time of sale of the asset.

D. Section 15G(i): Effective Date

The effective date of the regulations prescribed pursuant to Section 15G is, with respect to securitizers and originators of asset-backed securities backed by residential mortgages, one year after the date on which final rules thereunder are published in the Federal Register and, with respect to securitizers and originators of all other classes of asset-backed securities, two years after such date. We note the clear intent of Congress to apply risk retention rules implemented under Section 15G to transactions which are consummated after the applicable effective date and suggest that the Regulatory Agencies expressly state in the rules promulgated under Section 15G that such rules will not have retroactive effect.

We note that the FDIC has adopted final rules which impose risk retention obligations commencing January 1, 2011 with such obligations automatically conforming to those implemented under Dodd-Frank upon the effectiveness thereof. We strongly encourage the Commission to refrain from following the FDIC's example with respect to its own risk retention rules under Regulation AB. In view of the overlap of the joint risk retention rules mandated by the Dodd-Frank Act and the rules set forth in the Commission's proposed revisions to Regulation AB, and the inconsistency in the effectiveness of such rules, we suggest that the Commission remove all risk retention provisions from Regulation AB and address risk retention through the joint rules adopted under Dodd-Frank only. Such an approach would promote consistency and the orderly implementation of risk retention throughout the securitization market.

II. Section 942: Disclosures and Reporting for Asset-Backed Securities

A. <u>Section 942(a): Suspension of Duty to File</u>

Section 942(a) of the Dodd-Frank Act amends Section 15(d) of the Exchange Act by eliminating the automatic suspension of periodic reporting duties for asset-backed securities. Instead, Section 942(a) adds a subsection to Section 15(d) of the Exchange Act that permits the Commission to provide for such a suspension by rule on such terms and conditions and for such period or periods as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

As discussed in our Reg AB Comment Letter,[36] it is possible to read Section 942 to apply to issuers of all prior offerings of asset-backed securities, including those that had delisted such securities pursuant to Section 15(d) prior to the enactment of the Dodd-Frank Act. In our view, it would be inappropriate and burdensome to resuscitate reporting obligations with respect to any issuer whose Exchange Act reporting obligations had, prior the effective date of the rules implemented under the Dodd-Frank Act, terminated or been suspended pursuant to Section 15(d) or pursuant to Rules 15d-6, 12h-3, 12h-4 or 12h-6. We encourage the Commission, in its proposed and final rulemaking, to confirm that any issuer that has ceased its reporting obligations prior the effective date of the rules implemented pursuant to Section 942(a) would not be subject to a renewed filing obligation. In our view, such obligations should be imposed only on issuers that have issued ABS after the effective date of the rules implemented pursuant to Section 942(a), and after the Commission has adopted appropriate rules governing the ability of such issuers to terminate their reporting obligations consistent with the public interest.

In addition, we request that the Commission establish a clear termination date for reporting obligations for ABS under Section 15(d) that takes into account the sometimes prolonged winding up process of a securitization vehicle. Possible termination dates may include the date on which the balance of the assets held by the issuing entity has been reduced to a certain percentage of the original pool and the date on which all securities which remain outstanding are held solely by affiliates of the issuing entity.

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36 Part IV.B. of our Reg AB Comment Letter. Also see Part II.D. of our Reg AB Comment Letter.

B. Section 942(b): Disclosure Requirements

Section 942(b) of the Dodd-Frank Act amends Section 7 of the Securities Act by adding new subsection (c) thereto which instructs the Commission to issue rules requiring issuers of asset-backed securities to disclose information regarding the assets backing such securities.

Section 7 of the Securities Act is entitled "Information Required in Registration Statement." Congress's placement of this disclosure provision in Section 7 indicates its intent to limit the application of Section 942(b) to securities registered pursuant to Section 5 of the Securities Act and nothing in Section 942(b) suggests that its disclosure requirements should apply to privately issued securities, including securities issued in Rule 144A or other exemption from registration transactions. As we discussed in our Reg AB Comment Letter, [37] we have numerous policy concerns about requiring disclosure of asset-level data in private offerings and believe the negative implications of requiring such disclosures in private offerings would far outweigh the limited benefits to investors. We refer the Commission to the statements set forth in Part VI.B. of our Reg AB Comment Letter for further discussion of our views on this issue.

[37] Part VI.B. of our Reg AB Comment Letter.

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Once again, the Committees appreciate the opportunity to submit these comments. Members of the Committees are experienced in the securitization of various asset classes and structures; we would be happy to share our experience, not as industry representatives, but as experienced practitioners, in helping shape the risk retention regulations. We are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin
Chair, Committee on Federal Regulation of Securities

/s/ Vicki O. Tucker
Vicki O. Tucker
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A. Classic Sponsor Transactions

In a classic Exchange Act-ABS transaction described in the 943 NPR,[6] a sponsor that has originated a pool of assets and that decides to securitize them first transfers that pool to a special purpose subsidiary. This subsidiary in turn deposits the pool into a trust or other issuing entity that issues asset-backed securities. The sponsor, or an affiliate of the sponsor, acts as the servicer of the assets. The pool of assets may be either a fixed, liquidating pool or a revolving pool. Under Regulation AB, the person that transfers the assets into the issuing entity is known as the "depositor." In this two-step transfer, that person is the special purpose subsidiary. Rule 191 under the Securities Act of 1933 (the "Securities Act") provides that the depositor constitutes the "issuer" for Securities Act purposes.[7]

We refer to this type of transaction as a "Classic Sponsor Transaction."

B. Aggregator Transactions

Sometimes an investment bank or other financial institution, which we will call an "aggregator," will acquire assets from one or more unaffiliated originators and then effect a securitization. The aggregator, or an affiliate of the aggregator, will acquire one or more pools of assets such as residential mortgage loans from unaffiliated sellers. Those sellers may be the originators of the assets that they sell, or they may have purchased the assets from someone else. It may be the case that the aggregator securitizes in a single transaction both the purchased assets and assets that it or its affiliate has originated.

As in the Classic Sponsor Transaction, the aggregator may transfer the assets to an affiliated special purpose subsidiary that in turn deposits the assets into an issuing entity which issues the securities. Alternatively, the special purpose subsidiary could acquire the assets directly from the sellers. The asset-level servicing of the underlying assets often, though not always, remains with the originators or their affiliates. The aggregator or an affiliate may act as master servicer for the transaction, although a trustee might instead fill that role.

As with the Classic Sponsor Transaction, the special purpose subsidiary will be the depositor under Regulation AB if it transfers the assets to an issuing entity, and it will also be the issuer under Rule 191.[8]

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6 943 NPR, p. 10-11.

7 A slight variant on this structure occurs in a one-step transaction in which the special purpose subsidiary holds the assets and issues the asset-backed securities itself, rather than transferring the assets to another issuing entity. In the one-step transfer, Regulation AB provides that the sponsor is the depositor, and under Rule 191 the sponsor is also considered the issuer.

8 If a one-step transfer were to occur in which the special purpose subsidiary issues the asset-backed securities, then the person(s) transferring the assets to the special purpose subsidiary would be the depositor(s) and the sponsor(s), and therefor the issuer(s).