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THE BOND MARKET ASSOCIATION

July 12, 2004

By e-mail: rule-comments@sec.gov

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

Re: File Number S7-21-04
Proposed Rule: Asset-Backed Securities

Dear Mr. Katz:

The Bond Market Association[1] (the "Association") is pleased to submit this comment letter to the Securities and Exchange Commission (the "SEC" or the "Commission") regarding the SEC's proposed rules for asset-backed securities ("ABS") and related commentary contained in Release Nos. 33-8419, 34-49644 (the "Proposing Release").

At the outset, we would like to note that this comment letter is intended to address only specific issues about the Proposing Release that are most of interest to the Association and its members. This letter is not intended to be comprehensive in scope. We note that the American Securitization Forum, and the Committee on Federal Regulation of Securities of the American Bar Association, are planning to submit comment letters that are intended to be comprehensive in scope, and we generally support the recommendations made in those letters, particularly as to matters not covered in our letter, many of which are matters of significant concern to members of the Association. We also generally support the recommendations in comment letters to be

[1] The Association represents securities firms and banks that underwrite, distribute and trade in fixed income securities, both domestically and internationally. More information about the Association is available on its website at www.bondmarkets.com. This comment letter was prepared in consultation with the Association's MBS/ABS Legal Advisory Committee.

submitted by the Mortgage Bankers Association and the Commercial Mortgage Securities Association.

I. Executive Summary

The Association welcomes the SEC's commitment to comprehensive rulemaking for ABS. The Proposing Release is clearly reflective of tremendous effort and a thorough understanding of the ABS markets. We are confident that the final regulations if appropriately modified will benefit all market participants by providing regulatory certainty and enhancing access to information.

At the same time we have specific concerns about a number of provisions in the Proposing Release that we believe may impose unwarranted burdens on market participants or that may have unforeseen risks or consequences, or that may not be workable. We believe that if these key issues are addressed appropriately, the overall impact of the proposal on the ABS markets will be much more positive.

Following is a brief summary of the most important points in our letter:

Grandfathering, Effective Date

In light of the expansive and far reaching nature of the proposed changes, we propose:

For disclosure changes, a 12 month delay in the effective date.

For reporting and assessment/attestation changes, a 12 month delay in the effective date, and a permanent grandfathering of all ABS issued prior to that effective date.

Reliance on Third Party Information

We request an ability to reasonably rely on information provided by non-affiliates for inclusion in the prospectus.

We request a relaxation of the Commission's policy regarding indemnification, for information provided by non-affiliates for inclusion in the prospectus.

Registration Issues

We request substantial changes in the effect of 1934 Act compliance on eligibility for Form S-3, including: clarifying that an effective Form S-3 registration statement is valid unless the SEC indicates otherwise, limiting the entities whose non-compliance can affect eligibility to commonly controlled depositors that issue ABS backed by the same asset type, and providing for a reasonable opportunity to cure non-compliance and return to eligibility without further delay.

We request that the SEC discontinue requiring market making prospectuses for ABS.

Disclosure Issues

We propose a number of changes to the static pool data disclosure requirements, including: flexibility as to whose data should be provided, limitations on what data should be required and a recognition that static pool data is not always material, the ability to provide static pool data through websites without Section 11 liability, and a safe harbor for the selection of static pool data to the extent required to be in the prospectus.

We propose an alternative test for measuring derivatives against the proposed financial disclosure thresholds, and relief from the requirement to provide financial statements for certain derivatives providers.

Communications Issues

We request clarification of a variety of communications issues.

We request specific revision to Rule 134 to accommodate ABS offerings.

Reporting Issues

We request an expansion of the permitted signers of 1934 Act reports to include trustees and administrators, and recommend de-linking the responsible party from the Form 10-K signer.

We request that ongoing financial disclosure for enhancers and significant obligors not be required if it cannot be obtained without unreasonable expense or effort.

We propose elimination of the requirement to update the pool composition disclosure.

We strongly recommend that the assessment of compliance be performed separately for each entity (or affiliated group) performing servicing functions.

We note that the proposal for a compliance attestation on a single assessment of compliance does not appear workable.

Issues Regarding Repackaging Transactions

We suggest that repackaging issuers not be required to terminate the transaction if a significant obligor on the underlying assets ceases to file 1934 Act reports.

We strongly object to the broad exclusion of “synthetic securitizations” from the coverage of the proposed rule.

We request clarification of which requirements of the proposed rule do and do not apply to repackaging transactions, and we note a number of specific provisions that should not.

II. **Overarching Issues**

This portion of our comment letter addresses a number of issues that touch upon more than one of the four principal areas covered by the Proposing Release.

A. Grandfathering, Effective Date

The Association views the Proposing Release as much more than a mere codification of existing practice with selected enhancements. The changes will clearly be expansive and far reaching in scope.

On the disclosure side, we respectfully request that for registration statements declared effective after the publication date of the final regulations, issuers be given 12 months from the date of publication to come into full compliance with the new prospectus requirements. We believe this much lead time will be needed to compile the required static pool data and other disclosures and to re-negotiate agreements with transaction counterparties as needed to obtain third party information.

We strongly recommend that an extended effective date be provided for portions of the final regulations relating to periodic reporting under the Securities Exchange Act of 1934 (the “1934 Act”) including the new assessment of compliance and attestation procedures. We believe that after the requirements of the final regulations are known, it will take some time for the transaction parties to negotiate the allocations of responsibility and costs needed to achieve compliance. We recommend that these requirements have an effective date 12 months after the publication date of the final regulations, and that these requirements only apply to ABS transactions that close after the effective date.

Existing ABS transactions may be unable to fully comply with certain aspects of the revised periodic reporting requirements and assessment of compliance and attestation procedures. Many transaction participants are not legally or contractually obligated to revise their reporting obligations and compliance verification procedures and cannot be compelled to do so. Also, all servicing and other administrative fees are fixed and cannot be increased to cover the increased costs that would result under the revised periodic reporting requirements, and there is no other source of funds to pay these increased costs. Further, while 1934 Act reporting for most outstanding ABS transactions will be suspended prior to the effective date, we recommend that the SEC fully grandfather all ABS transactions issued prior to the effective date of the final regulations with respect to reporting requirements. The industry should be permitted to focus its efforts on bringing new transactions into compliance.

We note that when the plain English rules were implemented, a delay in effectiveness of approximately 8 months was allowed. We believe the changes under the final ABS regulations will require a far greater amount of effort to adapt to.

B. Reliance on Third Party Information

The Proposing Release expands the amount of required disclosure, particularly information that must be obtained from third parties. Examples include: static pool data from non-affiliates, a description of the servicer's business (including computer systems and back-ups, and material information about the servicer's financial condition), a description of the trustee's business, a description of significant originators' origination programs, financial information regarding significant obligors and enhancement providers, legal proceedings relating to transaction participants, and other transactions among the transaction participants. This information may be difficult to obtain, and even if obtained would be even more difficult for the issuer to verify.

We request that the SEC include in the final regulation a provision stating that where required disclosure can only be obtained by the ABS issuer or underwriter from unaffiliated entities that the issuer or underwriter may reasonably rely on such information obtained from an unaffiliated entity. This proposal is not intended to reduce securities law liability for information about the structure of the securitization or the pool assets being securitized. In addition, we request that for all information that is required to be included in any 1934 Act report that can only be obtained by the issuer or underwriter from unaffiliated entities, the issuer or underwriter may reasonably rely on such information obtained from an unaffiliated entity. We note that the SEC has endorsed this concept in the context of the assessment of compliance proposal, and we believe it is also appropriate in the disclosure context as well as in all other aspects of reporting. In all of these areas, to the extent the information can only be obtained from an unaffiliated entity, the issuer and underwriter are equally reliant on such unaffiliated entity.

Issuers and underwriters typically obtain indemnification against securities law liability for errors or omissions in disclosure provided by parties other than affiliates for inclusion in the prospectus. In light of the substantial increase in unaffiliated third party entity level disclosure required that would result under the Proposing Release, we request that the SEC update its policy regarding indemnification. Specifically, we request that the SEC indicate that indemnification of issuers and underwriters against securities law liabilities by unaffiliated entities that provide entity level prospectus disclosure shall not contravene public policy.

As between unrelated corporate entities such as ABS issuers, on the one hand, and servicers, enhancement providers and significant obligors, on the other, we do not believe that such indemnification would actually cause the issuer to disregard its responsibility for the disclosure. ABS issuers understand that notwithstanding any indemnification, they have direct liability under the Securities Act of 1933 (the "1933 Act") for all material in the prospectus. A reasonable issuer would not view an indemnification agreement as in effect an insurance policy against 1933 Act liability. On the other hand, a person that provides entity level information to an issuer for inclusion in a prospectus should be incentivized to verify its accuracy, and should not be able to use the SEC's policy against indemnification as a shield against negligence or malfeasance in providing the information. We make this proposal solely with respect to ABS issuers. We believe that it would be appropriate for the SEC to distinguish between ABS issuers and other issuers in this regard, in light of the substantial amount of mandated entity level prospectus disclosure about unaffiliated third parties, which we maintain is a fundamental difference from the required prospectus disclosure for non-ABS issuers.

III. Registration Issues

This section of our comment letter addresses issues that arise under the Registration section of the Proposing Release.

A. Form S-3 Eligibility

Certain features of the Proposing Release unduly increase the risks associated with non-compliance with 1934 Act reporting requirements, specifically regarding eligibility for using Form S-3. The Association believes that these features impose unreasonable risks of illiquidity on ABS market participants, and go much farther than necessary in order to encourage better 1934 Act reporting compliance.

The availability of Form S-3 shelf registration is critical to the ability of issuers to offer ABS publicly. Shelf registration is more than merely important, and shelf registration is more than merely helpful to smooth operations. **The market for publicly offered ABS could not function without clear access to shelf registration**. Registration of ABS on Form S-1 is not a broadly useful alternative. Prior submissions to the SEC by the Association and others have made it clear that the timeline for a typical ABS offering does not permit the review and comment period that results from Form S-1 registration.

We note that the Proposing Release includes many provisions under which Form S-1 could be used for a non-shelf offering of ABS. We also note that there is a good deal of detailed commentary in the letters of the ASF and the ABA concerning the possible use of Form S-1, which is appropriate in light of the comprehensive nature of those letters. Nevertheless, as a practical matter, Form S-1 registration is extremely unlikely to be used in an ABS offering. Experience has shown that where shelf registration is not available for any reason for an ABS offering, in virtually every case the alternative has not been to use Form S-1 but rather to offer the ABS under Rule 144A or otherwise in a private placement. Form S-1 would be even less likely to be used for an ABS offering under the Proposing Release, in that the timing constraints remain while at the same time a Form S-1 ABS offering would now be further burdened with all of the additional disclosure and reporting requirements imposed on a Form S-3 offering.

Complete loss of eligibility to use Form S-3 due to 1934 Act non-compliance, if not corrected, could be the tipping point that causes significant portions of the ABS market to migrate to Rule 144A offerings. We respectfully submit that this result would be detrimental to all: investors would lose liquidity and the protection of 1933 Act registration, issuers would suffer reduced offering proceeds and incur higher financing costs, and borrowers could pay marginally higher interest rates.

1. Compliance testing: ongoing vs. at filing

The instructions to Form S-3 as revised in the Proposing Release impose an eligibility requirement on the use of Form S-3 requiring the depositor and any issuing entity previously established by the depositor or the sponsor during the twelve months plus any portion of a month "immediately preceding the filing of the registration statement on this Form", to have completed all 1934 Act filings that were required on a timely basis with limited exceptions. However, the text of the Proposing Release states that such reporting obligations must "have been complied with for the prior 12 months for continued Form S-3 eligibility for new transactions."

Notwithstanding the clear language of the Form S-3 instructions, we are concerned that the latter language quoted above would leave open the possibility that an ABS issuer with an effective registration statement would not be able to use that registration statement for a takedown if there had been a failure to comply with the relevant 1934 Act reporting requirements during the 12 months prior to the takedown. We also note that the latter language quoted reflects a different and more onerous rule than applies to non-ABS issuers.[2]

ABS market participants need to know with certainty whether an effective ABS shelf registration statement with adequate capacity can be used. Decisions about whether to originate or purchase financial assets, as well as pricing decisions, all depend to a large extent on knowing with reasonable certainty whether securitization is an available exit strategy. If the availability of securitization were uncertain, there would inevitably be a pricing consequence that would be unfavorable to borrowers as well as investors.

Accordingly, and notwithstanding the fact that it is the issuer's responsibility to represent that it meets the eligibility requirements to use Form S-3, we request that the SEC state in the final regulation that:

- Once an ABS registration statement on Form S-3 is declared effective, the eligibility requirements relating to Form S-3 reporting will be deemed to have been satisfied at the time of filing.

- Once an ABS registration statement on Form S-3 is declared effective, the registration statement will continue to be available for takedowns regardless of compliance with the relevant 1934 Act reporting requirements during the 12 months prior to the takedown, unless the SEC had placed a stop order on the registration statement or had otherwise formally notified the depositor of its inability to use the registration statement.

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2 See Division of Corporation Finance, Manual of Publicly Available Telephone Interpretations, Interpretation H.72 (July 1997).

For ABS issuers, given (i) there can be a large number of issuing entities across asset classes whose compliance may be relevant and that represent different businesses with different investor bases and (ii) issuers will increasingly need to rely on non-affiliated parties for information required to be filed, the loss of S-3 eligibility across an institution's businesses is a disproportionately harsh response compared to the "fault" represented by a late 1934 Act report or the resulting harm to investors.

2. Test should not relate to the sponsor, but to commonly controlled depositors and the same asset type

The proposed Form S-3 eligibility requirements relating to 1934 Act reporting represent a dramatic change because they concern not only the depositor's reporting obligations, but also those applicable to any ABS issuer previously established by the sponsor.

We understand that this expansion is intended to prevent a situation under which if a depositor had an imperfect 1934 Act reporting history, the parent of the depositor could still technically comply with the Form S-3 eligibility requirements by simply forming a new entity to act as depositor. We support the SEC's effort to prevent the avoidance of the eligibility requirements in this fashion. However, we believe that the approach taken needs refinement.

A significant problem with the SEC's approach in this regard is that the sponsor is not identified at the time of filing. Under the Proposing Release, the sponsor is not the entity that causes the depositor to file the Form S-3; rather, the sponsor is the entity that organizes and initiates any specific takedown by transferring assets directly or indirectly to the issuing entity. Over the life of a shelf registration statement, there may be a number of different entities that are identified as sponsor for the various takedowns.

- For example, a loan seller that sells loans directly to an unaffiliated depositor for immediate resale into a securitization could be a "sponsor" of such depositor's offering.

- Following such a takedown, if as to any other series of ABS for which that loan seller was a sponsor (including under its own registration statement if any), there was any failure to file a required 1934 Act report, such unaffiliated depositor could become ineligible to use Form S-3.

- We maintain that such results would be an aberration as compared to the duties and responsibilities imposed by the federal securities laws on non-ABS capital markets participants.

We believe that the SEC's objectives can best be met, subject to the Association's suggestions below regarding the ability to cure non-compliance, by conditioning Form S-3 eligibility on compliance with 1934 Act reporting obligations only in connection with ABS of issuing entities previously established by the depositor, or by any other entity that is controlled, directly or indirectly, by a controlling person of the depositor, as determined at the time the registration statement is filed, and backed by the same asset type.

Form S-3 eligibility requirements should be based on compliance with 1934 Act reporting obligations solely in connection with ABS backed by the same asset type. Even with the limitation to commonly controlled depositors, the eligibility requirements would still cast a wider net than necessary. In the case of very large financial institutions that conduct securitization operations involving different asset types, securitization of different asset types may be conducted through separate business units that may also independently undertake 1934 Act reporting compliance. We are concerned that diversified financial institutions will be at a competitive disadvantage if non-compliance in one area can result in ineligibility throughout the organization to use Form S-3 for ABS offerings. Limiting the range of issuing entities whose reporting compliance is relevant to those formed by commonly controlled depositors, and which also relate to the same asset type, would still be a broad enough range to prevent the avoidance of the Form S-3 eligibility requirements in the manner discussed above.

3. Cure or waiver of non-compliance

The eligibility requirements relating to 1934 Act report filing as drafted in the instructions to Form S-3 in the Proposing Release state that all material required to be filed for the relevant period must have been filed in a timely manner. This strict standard does not allow for immaterial instances of non-compliance, or for curing non-compliance.

Recently the SEC has substantially increased its review of 1934 Act reports of ABS issuers. Staff members have indicated that the incidence of non-compliance by ABS issuers is generally higher than for non-ABS issuers. The Association's members are committed to taking reasonable steps to improve compliance with 1934 Act reporting requirements for ABS issuers. We also note that compliance with 1934 Act reporting requirements by ABS issuers has already improved significantly as a result of increased focus on compliance brought about by the Sarbanes-Oxley Act of 2002.

At the same time, however, there are practical and foreseeable limitations to increasing the percentage of fully compliant filers during the period following the effective date of the final regulations. Even with regard solely to transactions that are issued after the final regulations are published, the transition to the new reporting rules will require a major overhaul of systems and practices. The ABS industry will continue to be distinguished from non-ABS markets by the need to rely on unaffiliated persons for substantial portions (in many cases, virtually all) of the information required to be included in the 1934 Act reports. Moreover, the compliance burden for ABS issuers may be more difficult as compared to non-ABS issuers, due to the greater frequency of periodic reports (monthly instead of quarterly), and the fact that for a group of affiliated depositors the total number of reporting entities may be in the hundreds.

It should also be noted that in practical terms ABS investors are far less dependent on 1934 Act reports for current information than non-ABS investors. Investors generally obtain current information about ABS from distribution reports (whether or not filed with the SEC), issuer websites, trustee websites, third party data services such as Bloomberg and Intex, and rating agency reports. Further, most ABS issuers suspend filing of 1934 Act reports as soon as possible. Investors do not appear to find this practice to be objectionable, and there does not appear to be any pricing advantage for ABS where 1934 Act reports are continued beyond the time when suspension is allowed.

Commentary by staff members earlier this year indicated that in conjunction with its heightened review of 1934 Act reports by ABS issuers, the SEC was following a policy under which, for an ABS issuer that had been identified as non-compliant with its 1934 Act reports, if either those violations were waived by the staff (in its discretion) or the issuer had cured its reports to the satisfaction of the staff, then that issuer would be allowed to have a new shelf registration go effective without having to wait for 12 months since the last instance of non-compliance. Yet this policy is not reflected in the Proposing Release. We consider it essential for the SEC to carry forward this policy in the final regulations.

Accordingly, we request that the eligibility requirements for ABS in Form S-3 be revised to provide that: 1) eligibility will not be impaired by immaterial or inadvertent instances of non-compliance, and 2) notwithstanding any non-compliance during the relevant period, if the non-compliance has been either waived or cured (even if cured after the due date), then thereafter eligibility will not be impaired. The SEC should also consider stating the criteria that should be used in giving any such waiver. We believe the criteria should include factors such as whether the issuer was making reasonable efforts to achieve compliance, and the degree to which non-compliance resulted from acts or inaction of non-affiliated parties.

This is a critically important issue. With the above policy in place, ABS issuers will know that if they discover inadvertent instances of non-compliance, or if they are not able to achieve timely compliance through the inability to obtain information from third parties, they can nevertheless continue to make efforts to complete or cure compliance, including bringing instances of non-compliance to the staff's attention, without risk of being unreasonably penalized. Without a policy similar to that described above, and even with the other changes we recommend in this section, ABS issuers will live in fear that anything less than 100% perfect compliance as to a potentially vast number of separate required 1934 Act reports could result in the loss of access to the capital markets through a Form S-3 shelf registration statement for 12 months for itself and for commonly controlled depositors, or alternatively may shift to the Rule 144A markets.

We believe that an essential element of reasonable rule-making is that any penalties that may be imposed for violations be both reasonably predictable, and commensurate with the harm caused.

B. <u>Market making prospectuses</u>

Prior to the publication of the Proposing Release, most securitization market participants believed that the SEC's position on market making prospectuses in the ABS context was that a market making prospectus is required where the dealer is affiliated with both the depositor and the servicer. It was understood that affiliation merely between the dealer and the depositor would not give raise the requirement, because depositors typically do not have access to servicing data. As to the required content of the market making prospectus, it was generally understood that the SEC would be satisfied where the issuer continues to file 1934 Act reports on the related series, and where the prospectus states that all 1934 Act reports are incorporated by reference; provided that if there is any material development about the series that is not covered by the information required in the monthly statement to investors, that must be reported on a Form 8-K report. Furthermore, there were examples of comment letters in which the SEC permitted ABS issuers who had suspended filing of 1934 Act reports, to instead deliver the original prospectus and prospectus supplement together with copies of recent monthly reports to investors, with no updating of the prospectus pool information required. While there were some examples of the SEC requiring that the pool information in the prospectus be updated for use as a market making prospectus, these examples were exceptions and were not considered to be the SEC's general policy. The ABS industry has come to rely on this position.

In footnote 86 of the Proposing Release, the SEC now indicates that "consistent with staff interpretations", the pool composition tables in the prospectus must be kept current for use in ABS market making transactions, either by filing an updated prospectus or by filing the updated pool composition tables on Form 8-K. We respectfully submit that this position is reflective of only a small minority of prior staff interpretations and would be perceived as a significant change in policy by most ABS market participants.

The Association does not believe that it would be appropriate to make a significant change in policy increasing the compliance burden for ABS market making transactions, while at the same time reserving to the future broader disclosure reform initiative any further consideration of changes in policy for market making transactions generally.

As described under VII.C below, there is even less reason to require market-making prospectuses in repackaging transactions than there is in other ABS transactions.

1. <u>Discontinuance of market making prospectuses for ABS</u>

We respectfully request that the SEC take the opportunity to re-consider its policy on market making prospectuses for ABS. We believe that the SEC's policy on market making prospectuses for ABS should be addressed in the context of ABS rulemaking, not in the context of broader reforms, for the following reasons: the SEC's current policy on market making prospectuses has a disproportionate impact on ABS relative to other sectors, the absence of any investor need or policy consideration that justifies requiring a market making prospectus for ABS, and the inapplicability to ABS of what we understand to be the technical reading of the securities laws that would require a market making prospectus.

The SEC's current policy on market making prospectuses has a disproportionate impact on ABS relative to other sectors, for the following reasons. First, it is very likely that for an issuance of ABS, the underwriter in the initial offering will make a secondary market and will be involved in most secondary transactions, as compared to other types of securities which are more likely to be exchange listed. Second, ABS issuers are much more likely to be eligible to suspend 1934 Act reports than are issuers of other types of securities, inasmuch as ABS are much less likely to be exchange listed or widely held. This is relevant to the extent that market making prospectus requirements are satisfied through incorporation of 1934 Act reports. Finally, under footnote 86 of the Proposing Release, the required content of the 1934 Act reports would no longer be considered sufficient to update the prospectus, and additional updating of the prospectus would be required for ABS. There is no comparable requirement for other types of securities.

Investors who purchase ABS in market making transactions do not need or request greater amounts of information simply because the dealer is affiliated with the depositor and the servicer. If the information that is provided in non-affiliated ABS market making transactions is adequate to meet the needs of investors, then that same level of information is also adequate for affiliated ABS market making transactions.

The only apparent policy justification for requiring a market making prospectus in affiliated ABS market maker transactions is that the dealer might be able to use material non-public information obtained from the servicer. Adequate safeguards exist under federal securities law to prevent dealers from misusing information in this manner, without imposing a market making prospectus requirement.

We note also that Report of the Task Force on Disclosure Simplification recommended in March 1996 that the need for a market making prospectus be eliminated for certain transactions.

The need for a market making prospectus in affiliated ABS market maker transactions is apparently based not on investor need or policy considerations, but rather on a too technical interpretation of the securities laws. This is based on the concept that the exemption under Section 4(3) of the Securities Act of 1933 (the "1933 Act") for transactions by a dealer is not available unless, pursuant to the definition of "dealer" in Section 2(a)(12) of the 1933 Act, the dealer is transacting in securities issued by another person. In addition, for purposes of the definition of "underwriter" in Section 2(a)(11) of the 1933 Act, "issuer" includes any person under direct or indirect common control with the issuer. When read together, the technical reading is that the exemption for transactions by a dealer is not available when the dealer is transacting in securities issued by any person under direct or indirect common control with the dealer.

We submit that this technical reading does not support the requirement for a market making prospectus in affiliated market maker transactions in the ABS context, especially in light of proposed Rule 191 in the Proposing Release. The new rule would make it clear that the "issuer" of ABS is the depositor acting solely in its capacity as depositor to the issuing entity, and that the depositor acting in that capacity is a different "issuer" from the depositor for purposes of that depositor's own securities. Consistent with the proposed rule, we further submit that a dealer making a secondary market in ABS would be transacting in securities issued by another person, even if the depositor and the dealer were under common control, because the depositor acting solely in its capacity as depositor to the issuing entity is a different "issuer" from the depositor in its corporate capacity.

On another level, a depositor acting solely in its capacity as depositor to an ABS issuing entity clearly is not under common control with a dealer, even if the depositor and the dealer were under common control. A depositor acting solely in its capacity as depositor to an ABS issuing entity is not controlled in any meaningful way by the corporate parent of the depositor, but rather is constrained and controlled by the provisions of the operative documents governing the securitization transaction, which afford very little discretion to the depositor. Similarly, the ABS issuing entity is not controlled by the corporate parent of the depositor.

2. Alternative arguments

If the SEC will not at this time discontinue requiring a market making prospectus in ABS market maker transactions, we would propose that either a) any institutional investor would be able to elect to not require the delivery of a market making prospectus, or b) a market making prospectus would not be required so long as either the ABS are then rated investment grade or the purchaser is an institutional investor. We believe that this approach would be appropriate, because institutional investors are able to fend for themselves and determine what, if any, additional information is necessary to make an investment decision.

If no other changes are made in this area, we would request at a minimum that the SEC maintain what is understood as the status quo, by 1) re-affirming that in the ABS context a market making prospectus is required only where the dealer is affiliated with both the depositor and the servicer, 2) withdrawing the requirement that the pool composition tables in the prospectus must be kept current for use in ABS affiliated market making transactions as stated in footnote 86 to the Proposing Release, and 3) affirming that the only information required to be delivered to investors in ABS market making transactions is the original prospectus together with periodic reports to investors meeting the requirements of Form 10-D, Part I, which may be provided either by incorporation by reference from 1934 Act reports, or by physical or electronic delivery under existing guidelines. Where the periodic reports to investors are provided by delivery, we would also request a clarification that only the most recent periodic report would have to be provided (or otherwise clarify the period for which these reports would have to be provided).

C. Series trusts

In connection with describing the requirement that the issuing entity must be passive, the Proposing Release includes in footnote 63 an overly broad description of "series trusts" that would not qualify. It appears that the objection is to a single trust that is used as the issuing entity for separate securitizations occurring at different times.

However, the language in the footnote would appear to call into question a situation where a single trust receives conveyance of an asset pool consisting of two or more groups of assets, and simultaneously issues separate groups of ABS where the payments on each group of ABS are tied primarily or solely to the cash flows on one such group of assets. Such a transaction may or may not involve any shared credit enhancement or other interconnection between the ABS groups. Issuers may desire to use this format in order to save transaction costs. We believe that there is no question that an issuing entity used in this fashion meets the criteria that it be passive and that its activities be restricted to the ABS transaction for which it was formed. Accordingly, we request clarification of the SEC's position in this regard.

D. Prefunding Amounts

We believe that Form S-3 eligibility should not impose a 25% limitation on the amount of offering proceeds that may be devoted to otherwise traditional prefunding accounts. The 50% limitation permitted for non-shelf transactions in the Proposing Release provides flexibility that better meets the needs of issuers and investors for all ABS. We do not see a principled basis for setting different limitations depending on whether Form S-3 registration is used.

IV. Disclosure Issues

This section of our comment letter addresses issues that arise under the Disclosure section of the Proposing Release.

A. Static pool disclosure

The Association is very concerned about several aspects of the new requirements to disclose static pool data. We understand that static pool data has not been made available to all investors as to all asset types in the past, and that there is a need for minimum standards in this area. However, the proposal as drafted is too far-reaching, and needs to provide more flexibility.

1. Whose data to disclose

Association members that participate in the ABS markets will have particular difficulty in ascertaining which entity's static pool data should be disclosed.

In addition to underwriting ABS issued by non-affiliated entities, many dealers that are active in the ABS markets have affiliated finance companies that run business lines referred to as "conduits" or "principal finance" operations. These finance companies purchase financial assets of various asset types from a variety of sellers on a whole loan basis, and then aggregate, carry and ultimately sell the assets in transactions including ABS. These finance companies typically have an affiliated depositor with a Form S-3 ABS shelf registration statement. Acquisition of the financial assets may occur under a variety of types of transactions, both servicing released and servicing retained, ranging from continuous sales under "flow" delivery agreements, to small pools that would represent a small portion of a securitized pool, to large pools that might represent a substantial portion of a securitized pool. Such finance companies would have criteria and requirements for assets to be purchased, but may or may not have their own underwriting guidelines, and may rely instead on a review of the asset seller's underwriting guidelines. At the time of securitization, the finance company would be the "sponsor" under the definition in the Proposing Release.

Within this context, the question arises as to whose static pool data should be disclosed in any ABS offering initiated by the finance company. In some cases, the static pool data of the finance company for reasonably comparable pools might be appropriate, particularly if the prior pools were backed by the same asset type, the group of sellers that sold the assets included in the prior pools and their concentrations were similar to the pool being offered, and no single seller accounted for a large portion of the pool. Static pool data is less likely to be readily available from the sellers in such circumstances. On the other hand, if the pool being offered consisted primarily or exclusively of assets sold by a particular seller, then the static pool data of that seller might be more appropriate. Along the continuum there are so many possible permutations of the fact pattern, that we believe that some flexibility should be provided.

Moreover, there are other fact patterns where investors might be better served if static pool data were provided regarding an entity other than the person who by definition is the sponsor, if available. For example, assume a loan seller who is a regular ABS issuer sells a pool of loans on a whole loan basis to a loan purchaser. At a later time, the loan purchaser wants to resell the whole loans, in a securitized format, and the loan seller agrees to securitize the loans in a rent-a-shelf transaction under its registration statement. Here, the loan purchaser would technically be the sponsor, but it would make more sense to use the static pool data of the loan seller.

Accordingly, we recommend that in proposed Item 1104, in lieu of static pool data of the sponsor, the prospectus may instead include static pool data of another entity or entities, if available and if that data would be more reasonably comparable to the pool being offered.

We also request that the final regulation acknowledge that: 1) in cases where the sponsor is not affiliated with the issuer, the issuer is not required to disclose static pool data if the data cannot be obtained from the sponsor after reasonable attempts to obtain the data, and 2) in all cases the issuer is not required to disclose static pool data if the data does not exist or cannot be provided without unreasonable effort or expense.

2. <u>What data is relevant</u>

We believe that as a general rule, static pool data relating to previously securitized pools is more likely to be representative of a pool to be securitized, than would be vintage static pool data. Vintage static pool data represents the performance over time of all assets of a particular asset type, that are acquired or originated by a sponsor or other seller during a given period such as a calendar year. Assets included in a vintage pool may include assets that are not eligible for securitization. Also, assets may have been sold from the vintage pool on a servicing released basis, so that the sponsor or other seller would no longer be tracking data on those assets. In contrast, prior securitized pools of the same asset type and from the same sponsor or other seller would be more likely to be reasonably comparable to the pool being offered.

Accordingly, we recommend that the final regulation follow an approach whereby static pool data provided would be based on reasonably comparable prior securitized pools, if available, for the prior three years. To the extent that data based on such prior securitized pools was not available, then vintage static pool data would be provided.

We further believe that the proposed requirement to provide stratified subsets of the static pools for which data is provided is overreaching and unnecessary. As long as the static pools for which data is provided as a whole are reasonably comparable to the pool being securitized, such stratification would not serve any useful purpose. We believe that stratification analysis involves user driven assumptions and selection methodology that make it more appropriately a research function or an investor driven review function, and that it should not be required to be performed by the issuer or as part of the offering process. Moreover, as compared with providing data on actual static pools (especially, prior securitized pools), creating and compiling data on stratified subsets of the static pools would impose an enormous administrative burden on the provider of the information.

Instead of stratification, we recommend that for each static pool for which data is provided, brief summary information about relevant pool characteristics at pool formation be provided.

While we believe the above approach is best for many asset types, there are some assets types for which static pool data may not be meaningful. For example, in commercial mortgage-backed securities, the individual loans included in the sponsor's prior history may be unique and non-fungible, as compared to residential mortgage loans, so that static pool data on prior securitized pools may not be relevant to the pool being offered.[3] In auto loan and credit card securitizations, which use a revolving master trust structure into which new assets are continuously deposited (as opposed to discrete, fixed pools), the static pool approach may be inappropriate altogether, and should perhaps be replaced with data about the sponsor's total portfolio for the related program.

The final regulations should make clear that static pool data is not per se material and such determination should be made by the issuer taking into account the assets and features of its securitization program. Static pool data should not in any case be required if that data would not be reasonably comparable to the pool being securitized.

3. Medium for disclosure

The Proposing Release requires that static pool data be disclosed in the prospectus. We believe that the SEC should instead encourage and foster an internet based approach to disclosing static pool data.

Many issuers already use the internet to publish static pool data on a regular basis. The internet is ideally suited as a medium for this kind of disclosure. Once posted, the static pool data could be simply updated periodically. Moreover, the internet offers the ability to present information

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3 We concur with the comment letter of the Commercial Mortgage Securities Association, which recommends that for this reason static pool data should generally not be required for commercial mortgage-backed securities.

in addition to the static pool data required, including loan level data, and can be used to present data in a way that allows user interface and that can be downloaded. We believe that investors favor this type of access to information.

In contrast, printing static pool data in the prospectus, and filing the data as part of the prospectus in EDGAR, is an extremely inefficient and costly method to deliver the same information. For frequent sponsors that would be updating their static pool data each month, to a large extent the same data would be filed over and over.

We understand that there may be some concerns with providing data over the internet. We would propose that a website used for the publication of static pool data would have to be freely available to all potential users, and that a permanent record would have to be kept of the data shown on the website at any given time.

Accordingly, we recommend that the SEC allow ABS issuers to satisfy their obligation to deliver required static pool data by posting the data on a website. Under this approach, liability for the data posted would be based on 1934 Act Rule 10b-5. We believe that this is the appropriate liability standard, in that the data represents ordinary business records, and neither describes the assets being sold nor is prepared for the purpose of being used as offering information.

As a fallback position, if website posting is not allowed, we request that in lieu of including the data in the prospectus, the static pool data required to be provided for any takedown could be filed by the depositor in one or more reports on Form 8-K and incorporated by reference into the prospectus.

4. Safe harbor for selection of data

The Association is very concerned about the prospect for omissions liability for failure to provide all material static pool data, if the SEC in its final regulations requires that the data be included in or incorporated by reference in the prospectus.

First, in many cases there will be no bright line distinction between material and non-material static pool data. Rather, in many cases there may be gradations of data ranging from clearly helpful, to somewhat helpful, to possibly helpful.

Second, because the ABS markets have functioned for so long without a requirement to disclose static pool data, there is no custom and practice for which static pool data should be provided. Therefore there is no context to refer to in determining what a reasonable investor would consider to be material. Any litigation resulting from disputes as to whether all material static pool data had been provided would have unpredictable results.

Faced with this environment, ABS issuers may be forced to over-disclose static pool data, instead of focusing on the static pools that are most relevant to the investor.

We request that the SEC provide in the final regulation a safe harbor for the selection of static pool data required to be disclosed, similar to that provided for forward looking statements. Under this approach, accuracy of the data that was provided would be subject to normal liability rules, including Section 11 and 12(a)(2) of the 1933 Act if the data was included in or incorporated by reference in the prospectus. However, there would be no liability for the selection of the static pool data that was disclosed, unless the selection was knowingly misleading. This would apply both to the omission of data about static pools that arguably could be material, as well as the inclusion of data about static pools where it could be argued that such pools were not reasonably comparable and that therefore the inclusion of the data was misleading. We request a similar safe harbor for any trend analysis or discussion that may be included in the prospectus.

See also our discussion in II.B. above regarding static pool data provided by non-affiliated parties.

B. Servicers

We are also of the view that the disclosure proposed to be required for servicers is too extensive for the servicers that service only 10% of the pool assets. We recommend that the disclosure required under Item 1107 be required only with respect to servicers that are contractually responsible to the issuing entity for the servicing of at least 25% of the pool assets. Notwithstanding our proposals in VI.E. below regarding the threshold for a separate assessment of compliance for servicers in certain circumstances, we believe 25% is the appropriate materiality threshold for this level of disclosure. We also recommend deletion of the requirement in Item 1107(b)(4) for disclosure about advances on the pool assets and the servicer's overall portfolio, as we believe that this information would never be material. We also recommend a revision to Rule 436 to allow servicer rankings to be included in the prospectus in a manner similar to security credit ratings, without requiring consent of the rating agency.

C. Derivatives

The Proposing Release includes a number of provisions relating to derivatives that are of concern to the Association.

1. Threshold for financial information disclosure regarding enhancements generally

The thresholds for financial information disclosure in proposed Item 1113(b)(2) for all providers of credit enhancement and other support, including derivatives, are based on whether the provider "is liable or contingently liable" for payments representing 10% (for selected financial data) or 20% (for audited financial statements) of "the cash flow supporting any class of" the ABS.

At the outset, we note that the tests in this item are based on percentages of "the cash flow supporting any class", as compared to the more familiar formulation in proposed Item 1111 where the similar thresholds for disclosure of financial information about significant obligors are based on percentages of "the asset pool". We believe that the latter formulation is more straightforward and should be used wherever possible.

Accordingly, we recommend that the disclosure thresholds for all providers of credit enhancement and other support be based on percentages of the total principal amount (or, if greater, value) of the asset pool at initial issuance of the ABS; provided, that as to any credit enhancement or other support that by its terms relates only to one or more specific classes of the ABS, then the disclosure thresholds would be based on percentages of the total principal amount (or, if greater, value) of the related classes of ABS.

2. <u>Threshold for financial information disclosure regarding derivatives</u>

We strongly believe that the total payments that the provider "is liable or contingently liable" for is not an appropriate measure of materiality for derivatives, and should not be used for purposes of the disclosure thresholds. By custom and practice, derivatives such as interest rate caps are frequently written as uncapped contracts, so that in extreme scenarios the amounts contingently payable could exceed 20% of the asset pool.

We also understand, however, that the market value of a derivative may not be an appropriate measure of its materiality to a transaction. For example, in the case of an interest rate swap where floating rate payments based on LIBOR are exchanged for fixed rate payments at a current market rate, the market value of the contract initially may be zero. Or, in the case of an "out of the money" swap, as noted in the Proposing Release, its value may be negative.

Among participants in the derivatives market, it is necessary to evaluate the maximum probable exposure of a counterparty on a routine basis, in order to 1) make a credit decision as to counterparty risk, in the case of an unsecured contract, or 2) to set required collateral levels, in the case of a secured contract. The method of determining maximum probable exposure may vary among market participants, but a typical approach is to determine the maximum net amount that the counterparty might be required to pay under a statistical analysis using a range of scenarios that are within two (or more) standard deviations from the base case.

For example, assume a 5 year interest rate swap, with LIBOR exchanged for fixed rate payments at a then current market rate, with a non-declining notional amount of $100 million. Initially, the market value of the contract would be zero. Assuming the swap is uncapped, under very extreme scenarios the maximum possible exposure of the floating rate paying counterparty would be unlimited. However, for purposes of making a credit decision as to the floating rate paying counterparty or setting a collateral level, the maximum probable exposure of a counterparty calculated as described above would be used, which would typically be approximately $5 million in this example. We submit that in assessing the materiality of a derivative contract for purposes of the disclosure thresholds, a comparable approach would be reasonable, and would also be far superior to an assessment based on either market value or maximum possible exposure.

Accordingly, we request that for purposes of the thresholds for financial information disclosure in proposed Item 1113(b)(2), in the case of a derivatives contract, the total payments that the provider "is liable or contingently liable" for would be equal to the maximum probable exposure of a counterparty, as determined in connection with evaluating the creditworthiness of the counterparty or in determining the required collateral level for the contract if secured.

3. Financial statements

We believe that the financial statement disclosure requirements for providers of derivatives are unduly burdensome relative to the value to investors of the disclosure.

In many cases, derivatives contracts that are included in ABS transactions are provided by financial institutions indirectly through special purpose, bankruptcy remote, structured financial products companies. These companies are rated by the rating agencies separate from (and often higher than) the related financial institution, and are subject to capital requirements and other controls that are designed to maintain liquidity to cover the various derivative contract exposures in a manner designed to support the ratings. These companies generally are not consolidated for financial reporting purposes with the related financial institutions, and are not themselves 1934 Act reporting companies. Accordingly, the incorporation by reference process would not be available.

Under current industry practice, most such structured financial products companies do not make their financial information or statements available for publication.

Moreover, as a general matter, derivative contracts that are included in ABS transactions are priced and traded solely on the basis of the rating of the counterparty, without regard to the identity of the counterparty. Pricing for these derivatives contracts does not currently include any factor related to compensation for potential securities law liability for financial information about the counterparty. We are concerned that the SEC's proposals for financial disclosure for derivatives counterparties may reduce competition and result in higher pricing for derivatives contracts included in ABS transactions.

This issue posed by the disclosure requirements is compounded by the requirement under Form 10-D that updated financial information continue to be filed as to each enhancement provider meeting the disclosure thresholds.

In light of the inability to comply with these disclosure and reporting requirements under current industry practice, we request that for structured financial products companies there should be no requirement to provide financial information. Instead, the descriptive information in Item 1113(b)(1) should be revised to include all applicable credit ratings of structured financial products companies.

In some cases, the obligations of structured financial products companies under derivatives included in ABS may be guaranteed by the related financial institution parent. In that case, we request a clarification that the financial information required under Item 1113(b) may relate solely to the guarantor.

In other cases, the obligor or guarantor under a derivative may be a bank subject to regulatory reporting requirements. In that case, we request a clarification that the financial information required under Item 1113(b) may be provided by incorporating or referring to those regulatory reports.

4. Filing of agreements

Finally, the instructions to proposed Item 1113(a) would require filing of any agreement in respect of any external credit enhancement or other support, regardless of materiality. Again, as to derivatives in some cases this requirement would be extremely burdensome beyond any meaningful benefit to investors. Some ABS transactions involve the use of dozens of different derivatives contracts. The material terms of each contract should of course be described in the prospectus. Given the highly standardized nature of derivatives contracts, there is very little likelihood of there being anything of interest in the agreements that is not disclosed in the prospectus.

D. Confidential and proprietary information

There are a number of areas where the Proposing Release would require disclosure of confidential or proprietary information that is not relevant to investors. Examples include:

- Disclosure of the amount paid or to be paid for the pool assets (proposed Item 1106(b)).

- Disclosure of holders of residual or retained interests, without regard to materiality (proposed Item 1112(d)(1)).

We request that disclosure not be required as to the above items, as they are not material to investors.

E. Disclosure of transactions among securitization parties

Item 1117(b) as proposed would require disclosure of transactions among parties to the securititization that are outside the ordinary course of business or on not arms length terms, if material to the investor's understanding of the ABS. We are concerned that the instruction to this item gives as an example a warehouse line of credit provided by the underwriter to the sponsor, which we believe is a transaction that is in the ordinary course of business for such entities. The concern is that this example could cause the item to be interpreted to require far more extensive disclosure than is necessary or material. We request that this example be removed, and also that the required disclosure be limited to transactions that could materially affect the rights of the holders of the ABS.

V. <u>Communications Issues</u>

This section of our comment letter addresses issues that arise under the Communications section of the Proposing Release.

A. <u>ABS Informational and Computational Materials</u>

1. <u>Definition</u>

Proposed Item 1101(a)(1) contains a codification of the material referred to as "structural term sheets" in Public Securities Association, SEC no-action letter dated Feb. 17, 1995. However, the language was altered in a manner that causes some market participants to question whether there has been a narrowing, particularly as to matters other than payment terms such as ratings and tax treatment. We request that the language be clarified by adding "and miscellaneous similar terms" at the end of the subsection. We also recommend that the SEC clarify that it did not intend for this subsection to have a narrower meaning than did "structural term sheets" in the no-action letter cited.

2. <u>Disclaimers</u>

The Proposing Release discourages the use of inappropriate disclaimers with ABS informational and computational materials. We request, however, that the SEC clarify that there is no objection to a disclaimer that states that ABS informational and computational materials are superseded by the information in the final prospectus, to the extent that the final prospectus covers matters that are included in the ABS informational and computational materials.

3. <u>Executable code</u>

The Proposing Release discusses the use of investor analytics and third party services that are used to analyze ABS. The Proposing Release states that any "inputs, models and other information provided by the issuer or underwriter" would be ABS informational and computational materials and required to be filed. However, it is also stated that the information should be presented in an understandable form and that executable code should not be filed. Despite the SEC's efforts to clarify this point, there still seems to be some uncertainty as to what is required.

We request a clarification to the effect that, as to any inputs, models and other information provided by the issuer or underwriter either to a third party service or directly to an investor for use in connection with performing analytics on ABS being offered, as long as all information embedded in those items provided by the issuer or underwriter that constitute ABS informational and computational materials is included in other ABS informational and computational materials that are filed as required in connection with that offering, then the filing requirements have been satisfied.

4. Static pool data not a prospectus

We believe that Proposed Rules 167 and 426, when read together and with the definition of "ABS informational and computational materials", could be construed to state that all static pool data made available on a website during the offering period would be a prospectus and required to filed.

We request a clarification that static pool data that is regularly published on a website does not constitute a prospectus.

If the SEC agrees with our recommendations discussed above that required static pool data can be provided through a website, but requires that the data on the website be incorporated by reference into the prospectus for liability purposes, then we would request a clarification that (a) static pool data that is regularly published on a website and is not identified as required static pool data for an ABS offering does not constitute a prospectus, and (b) any required static pool data provided through the website is not subject to a filing requirement.

5. Liability standard

We believe that ABS informational and computational materials that is statistical information as described in proposed Item 1101(a)(4), to the extent prepared solely by the underwriter without any involvement by the issuer, should be treated differently. Due to the lack of issuer involvement, and the fact that these items focus on performance of the securities in the context of investor driven scenarios rather than disclosure about the structure or the collateral, we believe these items can be appropriately viewed not as offering materials but as analytical materials provided solely by the underwriter.

Accordingly, we request that statistical information as described in proposed Item 1101(a)(4), to the extent prepared solely by the underwriter without any involvement by the issuer, should not be deemed to be a prospectus or required to be filed under proposed Rule 426. We believe that Rule 10b-5 liability is the appropriate liability standard for such materials.

B. Rule 134 revisions for ABS

Rule 134, covering communications not deemed to be a prospectus, has never been modified to provide for ABS the full range of permitted content allowed to non-ABS issuers. In particular, there is no indication of what can be stated that is analogous to "a brief indication of the general type of business of the issuer". In order to place ABS on a level playing field with the rest of the capital markets under Rule 134, but without intending to expand the scope of Rule 134 beyond what is allowed for other securities, we propose the following changes to Rule 134:

- Revise subsections (a)(5) and (14), regarding yield and ratings for debt securities, to also relate to asset-backed securities.

- Add a new subsection (a)(15) permitting the following information for any class of asset-backed securities:

  The name of the servicer, sponsor, depositor and trustee

  As to the asset pool, the asset type, total dollar amount or value and range of asset sizes, and weighted average coupon, maturity, seasoning, loan-to-value ratio and credit score

  Class designation, amount, interest rate or formula, maturity, assumed weighted average life, priority and essential payment features, and CUSIP

  Nature of credit enhancement and any provider

  Tax, ERISA, legal investment and Rule 2a-7 characterization

C. Research report safe harbor

With regard to proposed Rule 139a, covering research reports for ABS, we recommend that the requirement in subsection (d) be dropped. This provision requires that "sufficient information is available from one or more public sources" to provide a basis for the views expressed. This requirement does not appear to be included in the research report rules applicable to non-ABS. Moreover, changes in law and practice would suggest that this requirement no longer serves any purpose. In particular, Regulation FD addresses the problem of providing material non-public information to a broker dealer, and SEC and SRO regulations governing research have been substantially tightened in regard to conflicts of interest. The new requirements to disclose static pool information in connection with an ABS offering further undercut any need for the requirement in subsection (d).

D. EDGAR

We note that filing of documents on EDGAR continues to be a labor intensive endeavor with many non-automated steps. Conversion of documents to either ASCII or HTML format involves substantial need for editing by skilled operators. We are further concerned due to the increased volume of filings that would result under a number of provisions in the Proposing Release, including the proposed discontinuation of the ability to file ABS informational and computational materials in paper format.

We strongly encourage the SEC to upgrade EDGAR to permit filing of documents in other formats, including PDF (direct output) as well as non-editable spreadsheet formats, without also requiring the same documents to be filed in either ASCII or HTML.

We further request that the SEC retain the paper hardship exemption for ABS informational and computational materials, until such time as issuers are allowed to satisfy the filing requirements by filing on EDGAR in PDF (direct output) and other formats.

VI. Reporting Issues

This section of our comment letter addresses issues that arise under the Reporting section of the Proposing Release.

A. Permitted signers of 1934 Act reports

We note that the definition of "servicer" in the Proposing Release includes entities that make allocations or distributions to holders, even if they do not perform primary servicing of the pool assets. This would appear to include entities performing these functions that are commonly referred to as "master servicer" or "administrator." The definition excludes a "naked" trustee (that is, a trustee that does not make allocations or distributions to holders). The language in the second sentence of the definition appears to also exclude a trustee that merely acts as paying agent (that is, makes allocations or distributions to holders but receives the allocations or distributions from a servicer).

We note that under the Proposing Release, if there are multiple servicers, then the 1934 Act reports (if not signed by the depositor) can only be signed by the master servicer (or entity performing similar functions). We consider this provision to be too restrictive. There may be instances where there are multiple servicers, and one of those servicers who is not acting as a master servicer may be an appropriate entity to sign the reports.

In addition, we believe that the trustee should always be an eligible signer of the 1934 Act reports, even if it is a naked trustee or a trustee that performs only paying agent functions. The fact that the trustee may perform none of the servicing (or administration) functions should not disqualify the trustee from signing the reports, in light of the fact that the depositor in almost all cases will also not perform any of those functions. This is even more necessary in repackaging transactions, which do not employ asset servicers as other asset-backed transactions do. Instead, whatever administrative and servicing duties are required will generally be performed by the trustee. Depending on the repackaging structure, however, these duties may not include payment allocations. The trustee's status as fiduciary provides a nexus to the transaction that justifies its being able to sign. The Association believes that the ABS industry will be well served by making the range of entities that are eligible to agree to sign 1934 Act reports as broad as possible, in order to foster competition and accountability.

Accordingly, we recommend that the final regulations provide that reports on Form 10-K of ABS issuers, as well as the certification required to be included in the Form 10-K report, can be signed by any of the following:

- On behalf of the depositor by the senior officer in charge of securitization of the depositor,

- On behalf of the issuing entity by the senior officer in charge of the servicing function (or, if applicable, the master servicing or administration function) of any servicer, including any servicer acting as master servicer or administrator, or

- On behalf of the issuing entity by the trustee, in its capacity as trustee

We also recommend that the final regulations provide that reports on Form 8-K and 10-D of ABS issuers can be signed either by any of the following:

- The depositor,

- A duly authorized representative of any servicer, including any servicer acting as master servicer or administrator, or

- The trustee, in its capacity as trustee

In addition, we request a clarification that reports on Form 8-K and 10-D of ABS issuers can be signed by any person acting pursuant to a power of attorney on behalf of an entity permitted to sign the report.

B. <u>Responsible party</u>

The Proposing Release contemplates that the entity that signs the report on Form 10-K will be the "responsible party" who must provide an assessment of compliance. Even under our suggested modification described in VI. E. below, whereby different entities involved in performing servicing functions would provide separate assessments of compliance, the responsible party would have a key role in determining that all required assessments had been provided. We are concerned that in many instances the depositor by default will be the entity on whose behalf the report on Form 10-K is signed, and therefore would be the responsible party. The depositor is in virtually all cases a special purpose entity with no independent staff or resources, and which does not itself perform any of the servicing functions. Moreover, in many cases (particularly where all subordinate and residual interests in the securitization are sold), the depositor and its affiliates will have no ongoing economic interest in the transaction. Therefore, the depositor is of all transaction participants generally the party that is least in a position to perform an assessment of compliance. Regardless of which entity signs the report on Form 10-K, there is no reason why it would not be appropriate for the responsible party to be a servicer, the master servicer, an administrator or the trustee. We believe that such entities would in nearly all cases be in a better position to assess compliance by various participants (including its own compliance) with the servicing criteria, as compared to the depositor.

We therefore recommend that the final regulations state that the responsible party will be either:

- The entity that signs (or whose senior officer signs) the report on Form 10-K, or
- Any other entity that is eligible to sign (or whose senior officer is eligible to sign) reports on Form 10-K of the ABS issuer, if such entity agrees to act as responsible party

C. Form 10-D and 10-K: Ongoing financial disclosure for enhancers and significant obligors

We note that Form 10-D and 10-K as proposed both require ongoing disclosure of financial information of significant obligors as well as significant providers of credit and other enhancements, for whom the thresholds for required disclosure in the prospectus are met. Proposed Item 1100(c)(2)(iii) requires the ABS issuer to undertake that if the required financial information can no longer be incorporated by reference (or referred to) from a 1934 Act report, and cannot otherwise be provided, then the ABS issuer must "terminate the transaction or that portion of the transaction".

We submit that this undertaking is simply not feasible in the context of ABS. Any forced disposition of a significant pool asset (such as, for example, a commercial mortgage loan) as a result of this undertaking would be likely to cause harm or severe harm to investors of the ABS. We do not believe that it is reasonable nor beneficial to expose investors to this risk. The risk is magnified in repackaging transactions, which are discussed in more detail in Section VII below.

We recommend instead that if any of such required financial information can no longer be incorporated by reference (or referred to) from a 1934 Act report, then the ABS issuer would only be required to file the information to the extent that it can be obtained without unreasonable effort or expense from the applicable entity. This approach would be more consistent with existing 1934 Act Rule 12b-21.

We would anticipate that over time transaction documentation will be revised to require the delivery of financial information by parties for whom ongoing financial disclosure would be required under the regulations. Failure to deliver required financial information would presumably give rise to contractual remedies, which would provide a better mechanism for obtaining the information than a forced disposition or termination.

D. Form 10-D: Changes in pool composition

Proposed Item 1119(n)(2) would require that, if any addition, removal or substitution of pool assets resulted in a material change in the composition of the pool assets taken as a whole, then the periodic report under Form 10-D must include (among other things) a complete restatement of all disclosure regarding the pool assets in the prospectus. We submit that this disclosure is not necessary. To the extent that the pool composition can be changed due to the addition of pool assets in connection with a prefunding account or a revolving period, then the prospectus should disclose the individual parameters, as well as the resulting pool level parameters, that must be satisfied in connection with the addition of any assets. As long as the parameters are complied with, no restatement of the pool composition should be required.

E. Need for separate assessments of compliance

We strongly recommend that the proposed assessment of compliance under Item 1120 be revised to permit a separate assessment of compliance by each entity (or affiliated group) performing servicing functions. The proposal to require the responsible party to assess and report on the compliance by non-affiliated entities with the SEC's proposed servicing criteria is another instance where the Proposing Release seeks to impose on ABS market participants duties and liabilities that are outside the bounds of those imposed on non-ABS capital markets participants. We are not aware of any other example where the securities laws require an issuer to file in a 1934 Act report a statement that assesses compliance by a non-affiliated entity with specified laws, regulations or rules.

The proposal indicates that the responsible party would have to use "reasonable means" to assess whether the other transaction participants were complying with the servicing criteria in all respects. While the responsible party would be entitled to "reasonably rely" on information provided by non-affiliates in making that assessment, Association members are well aware that this is cold comfort based on experience in implementing procedures to comply with the Sarbanes-Oxley certification requirements as made applicable to ABS issuers.

Yet the compliance burden imposed on the responsible party in this instance is far in excess of that experienced with Sarbanes-Oxley compliance, due to the very expansive and highly detailed nature of the SEC's proposed servicing criteria, as well as the novelty of the criteria in the sense that there was not previously in existence any single comparable set of rules or guidelines.

ABS transaction participants such as depositors, trustees, servicers and administrators are accustomed to entering into contracts with each other and relying on each other to perform their respective duties and obligations. Clearly some level of monitoring of each other's activities is necessary for such a system to work. However, until this time ABS transaction participants generally, and in particular Association members that have affiliated ABS depositor entities, have not been in the business of in effect auditing the compliance by non-affiliated entities with their servicing obligations.

Please also refer to the discussion in VI.F. below, which explains why in some cases an attestation report on an assessment of compliance that addresses compliance by multiple non-affiliated parties may not be possible.

Accordingly, we would recommend that the proposal be revised to require a separate assessment of compliance with the servicing criteria, on a platform basis, by each entity (or affiliated group) involved in performing servicing functions for an ABS transaction as specified in the following sentence. Such an assessment should be required for each of the following: every servicer, master servicer or administrator that has privity of contract with the issuing entity, the trustee to the extent that it is performing any servicing functions, and any servicer not in privity of contract with the issuing entity that as of the cut-off date is servicing 10% or more of the pool assets (but only if such servicer's activities are not covered by an assessment provided by the master servicer or another servicer). In addition, the responsible party would have the additional criterion of receiving assessments of compliance from each other entity required to provide one under this approach.

Each such separate assessment of compliance would only be required to address the activities of the entity providing the assessment, and its affiliates. However, in cases where the nature of the relationship between (a) the master servicer or any other servicer in privity of contract with the issuing entity, and (b) any other servicer to whom servicing functions have been contracted, is such that a combined assessment of compliance could receive an attestation report, then the assessment of compliance could be prepared on a combined basis.

We also request that the SEC eliminate the proposed requirement in Item 1120(c) that the report on Form 10-K describe the effects of any non-compliance with servicing criteria on the specific ABS. We are concerned that given the time needed to obtain the assessments of compliance and attestation reports, it would not be possible to make this determination by the deadline for the report on Form 10-K. We believe that an investor reviewing the assessments of compliance as filed should be able to determine whether any disclosed instances of non-compliance are either irrelevant or possibly material. Moreover, if the non-compliance was significant enough to trigger a reporting obligation under Form 8-K, then the investors would be put on notice through that mechanism, which we consider to be more appropriate.

F. Need for separate attestations

We would further recommend that in connection with the proposed revision described above, that each entity providing an assessment of compliance would have to also provide a compliance attestation by independent accountants.

In this regard, we note that the SEC's proposal for a compliance attestation on a single assessment of compliance does not appear to be workable where the servicing functions are performed by multiple non-affiliated entities, for the following reasons.

The AICPA's Statement of Standards for Attestation Engagements ("SSAE 10") governs attestation engagements, in which an accountant performs an examination of a responsible party's evaluation of the compliance of an entity with specified laws, regulations or contractual requirements. The responsible party does not have to be the entity whose compliance is being evaluated. We note that proposed Item 1120 (a)(1) on its face requires only that the responsible party be responsible for assessing compliance with all servicing criteria by all entities. However, a close review of SSAE 10 makes it clear that in order for an accountant to provide an attestation report, the responsible party must state that 1) it is responsible for the entity's compliance with the specified requirements, and 2) it is responsible for effectiveness of the entity's internal controls. In ABS transactions where there are multiple, unrelated parties performing various elements of the servicing functions, these entities generally do not assume full responsibility for the performance of these functions by the other entities, and they generally do not assume responsibility for each other's internal controls.

As a result, in many cases it would not be possible under the existing accounting guidance to obtain an attestation on an assessment of compliance that addresses compliance by multiple non-affiliated parties. However, in the case of a master servicer that hires one or more servicers to perform servicing functions, depending on the exact nature of the oversight and review by the master servicer of the servicer's activities as well as the contractual responsibility of the master servicer for the servicer's activities, it may be possible to obtain an attestation report. The key point is that the final regulations need to be flexible. They should allow a combined assessment of compliance covering multiple non-affiliated entities where an attestation report could be obtained, but also should allow separate assessments of compliance to be provided where an attestation report could not be obtained on a combined assessment of compliance.

G. Subsidiary Guarantors

It appears that Item 1100(c)(2)(ii)(D) should be revised in order to better reflect the SEC's intention. In the case where a third party significant obligor is itself S-3 eligible, Item 1100(c)(2)(ii)(A) permits the third party's publicly available information to be referred to, and Item 1100(c)(2)(ii)(D) is unnecessary. We assume that Item 1100(c)(2)(ii)(D) was intended to accommodate a case in which a subsidiary guarantor is S-3 eligible but the parent third-party is not (i.e., the converse of Item 1100(c)(2)(ii)(C)). If that is correct, we suggest Item 1100(c)(2)(ii)(D) be modified as follows (omitted items in brackets, added items underlined):

> (D) If the pool assets relating to the third party are guaranteed by a wholly owned subsidiary of the third party and the [subsidiary] <u>third</u> <u>party</u> does not meet the conditions of paragraphs (c)(2)(ii)(A) or (c)(2)(ii)(B) of this section, the criteria in either paragraph (c)(2)(ii)(A) or paragraph (c)(2)(ii)(B) of this section are met with respect to the [subsidiary] <u>third</u> <u>party</u> and the requirements of Rule 3-10 of Regulation S-X (§ 210.3-10 of this chapter) are satisfied regarding the information in the reports to be referenced.

VII. Issues Regarding Repackaging Transactions

This section of our letter addresses issues arising under the Proposing Release that are of particular significance to repackaging transactions or affect repackaging transactions differently than they affect other ABS transactions.

Repackaging transactions are, generally speaking, ABS transactions in which an outstanding debt security of a third-party issuer is securitized. The SEC staff has sometimes referred to such transactions as "resecuritization" transactions. In a repackaging, the depositor or sponsor will typically deposit a publicly traded debt security acquired in the secondary market into a trust, often together with some other asset such as a swap agreement or Treasury securities. Unlike most ABS or other capital-markets transactions, most repackaging transactions are driven by specific investor demand for a security with particular characteristics that may be impossible to obtain by purchasing a single existing security or impractical for a particular investor to obtain. As a result, in a repackaging, sponsors such as broker-dealers are generally purchasing existing assets in the public secondary market and securitizing them in response to market demand, rather than originating assets and then seeking to monetize them through securitization. The volume and variety of repackaging transactions have grown rapidly in recent years as derivative instruments have continued to evolve and investors have become more sophisticated in analyzing the combination of credit, yield and other attributes they want in a given investment. We believe that repackagings are beneficial to the investing public because they increase market efficiency and effectively provide investors a much broader range of investment choices than they would otherwise have. Accordingly, we suggest that the public interest is best served if the rules applicable to repackaging transactions are clearly defined and repackaging transactions are subject only to those requirements that are truly necessary for this unique type of ABS.

A. Failure of a Significant Obligor to Make Required Filings

Proposed Item 1100(c)(2) is of central importance to repackaging transactions. Because the obligors on the underlying securities being repackaged are not involved in the repackaging, the ability of repackaging prospectuses to present information relating to those obligors by referring to the filings made by obligors under the 1934 Act is the only practical way to ensure that investors have access to all material information when they make their initial investment decision. We welcome the formalization of that practice in the Proposed Rule. However, we believe several aspects of this item require further consideration:

1. Termination is the Only Realistic Option and is too Severe a Result

- Under the Proposed Rule, if the underlying obligor fails to maintain S-3 eligibility during the term of a repackaging transaction, either the required information must be provided by the repackaging issuer or the transaction (or relevant part of it) must terminate. Given that one of the conditions to providing information by reference in the first place is that the underlying obligor not be involved in the transaction or affiliated with the transaction participants, there is no realistic possibility that the issuer or sponsor of the repackaging will be in a position to provide the underlying obligor's financial information to the market when the obligor itself has not done so and the repackaging issuer has no control over whether the underlying obligor continues to file 1934 Act reports with respect to the underlying securities. Accordingly, if that level of reporting is the only alternative for a repackaging issuer, termination is the only likely result, and a failure by the underlying obligor to file 1934 Act reports may result in the liquidation of the related obligations held in the repackaging trust in a manner that disadvantages the repackaging's investors (e.g., a single sale of a large block of the underlying securities, or inopportune timing of the sale). We believe that such a forced liquidation of repackaging trust assets is an unnecessarily severe result, especially when one considers all of the following:

- *Repackaging Investors Disadvantaged Compared to Direct Holders*. Neither a permitted de-registration under Section 15(d) of the 1934 Act nor a default in filing by a registrant that is required to submit periodic reports has any effect on investors that hold the affected securities directly. Holders of the repackaged securities should be treated in the same manner as direct holders of the underlying securities, in that holders of the repackaged securities should be permitted to continue to hold the repackaged securities despite the fact that information about the underlying obligor may no longer be filed pursuant to the 1934 Act. If an investor in a repackaging transaction wishes to divest itself of exposure to the non-reporting obligor, it is free to do so by selling its repackaged security.

- *Inappropriate Burden on Repackaging Issuers.* As noted above, we do not believe a repackaging issuer will have the means to provide information independently. However, even if it did, we do not believe that it is appropriate to require a repackaging issuer to provide that information to investors in the repackaged securities if holders of the underlying securities are not receiving that information from the underlying obligor.

- *Termination Does Not Benefit Investors.* We believe no purpose is served by making the reporting requirement for repackaging transactions more burdensome than that of the underlying security issuance. After termination of a repackaging transaction, the underlying securities will continue to trade freely without the public filing of information, and investors who held the repackaged securities will be in no better a position, and may be worse off, than if the repackaging transaction had continued. Forcing a liquidation of the repackaging trust does not result in additional information being made available to investors in the repackaged securities.

2. Requiring Termination Before Reports are Required

- If the SEC retains the requirement that the transaction terminate upon an underlying obligor's failure to file 1934 Act reports, at a minimum it should omit the proposed requirement that the transaction terminate "before updated information regarding the third party would be required". It is extremely unlikely that an unaffiliated securitization entity that has no contractual arrangement with an underlying obligor will know in advance that the obligor is going to fail to file 1934 Act reports in a timely manner. Retaining this timing requirement makes the termination option just as illusory as the option of providing the delinquent obligor's financial information. Accordingly, we believe that the requirement is unnecessary and that the Proposed Rule should be amended to eliminate it. In the alternative, a lower threshold should be adopted for the required level of reporting after a repackaging transaction has been issued. We propose that the repackaging vehicle file a Form 8-K notifying holders of the repackaged securities that the underlying obligor has ceased reporting and directing holders of the repackaged securities to any information that the underlying obligor may make public by means other than 1934 Act reports. The repackaging vehicle would be required to file this Form 8-K within 15 days following the scheduled distribution by the repackaging trust that follows the date on which the trust became aware that the underlying issuer has ceased to report.

- In addition, if the termination requirement is maintained, the Proposed Rule should (a) expressly exempt transactions that were closed prior to the effective date of the Proposed Rule on documents that do not require termination, because the SEC staff's position has changed over the years and many existing transactions do not include this requirement (in the past the SEC staff had given informal guidance that a 12(h) exemption would be available to the repackaging vehicle if an underlying issuer ceased to file 1934 Act reports; the SEC staff also gave informal guidance that the "unwind or report" requirement did not apply if, at the time of the repackaging, the underlying issuer had public equity outstanding), and (b) provide expressly that the failure of any repackaging entity to satisfy this requirement will not affect the S-3 eligibility of the depositor or issuing entity under proposed changes to that form, because as explained above, that failure will almost always be entirely beyond their control.

B. Definition of "Asset-Backed Security": Exclusion of "Synthetic" Assets from ABS

We welcome the staff's effort to bring a greater measure of transparency to the registration of asset-backed securities, and we believe the Proposed Rule provides an opportunity for the staff to address an area in which the lack of clear, principles-based guidance has been of increasing concern to our members: The role of synthetic or derivative instruments in registered securitization transactions. Because they are a flexible and efficient tool to tailor an investment's characteristics to investors' preferences, derivative instruments (in many different forms) have become an integral part of the financial markets, including securitizations. However, in the Proposing Release, the SEC interprets the definition of "asset-backed security" to exclude all "synthetic securitizations". We believe this broad statement arbitrarily and unnecessarily excludes a wide variety of transactions from the benefits of the Proposed Rule and will mean that public ABS transactions will not benefit from ongoing developments in one of the most dynamic areas in finance today. In addition, because it fails to explain the staff's substantive policy concerns or to articulate a workable principle on which to distinguish impermissible transactions from permissible ones, the statement in the Proposing Release leaves considerable uncertainty about many existing investment products and will make it impossible for market participants to analyze with confidence whether future transactions would qualify as asset-backed securities or not.

The Proposing Release states that impermissible synthetic transactions are those that "create exposure to an asset that is not transferred to or otherwise part of the asset pool." However, the

Proposing Release does not explain why the SEC staff views this as problematic. An index-linked pass-through certificate, a total-rate-of-return swap or a credit-linked note is itself an asset whose characteristics can be described, and whose risks can be disclosed, just like any other asset. Although the SEC staff refers in Footnote 62 to the "discrete" requirement of the definition, that requirement is (as the staff notes elsewhere in the Proposing Release) intended only to prevent active portfolio management - something that is no more a necessary (or even typical) feature of synthetic instruments than it is of residential mortgage pools, for example. Without a clear rationale for the disqualification of transactions and assets deemed "synthetic", the standard will prove impossible to apply in practice, and will require market participants to continuously seek informal guidance from the SEC staff on new products in a developing industry. Two examples may help by illustrating the types of issues that require further clarification:

Example: CPI-Based Transactions.

- Transaction 1. It appears from the third paragraph of Footnote 62 that the Proposed Rule would permit a transaction in which a bond that pays a fixed rate of interest is securitized together with a fixed-to-floating interest rate swap and a LIBOR security is issued to investors. In the terms used in the Proposing Release, the interest rate swap is "used to reduce or alter risk resulting from assets contained in the pool". Indeed, a transaction such as this would be intended for investors who wish to invest in the credit of the underlying issuer but want to modify a particular attribute of the underlying bond in a way that the investors consider desirable. The transaction benefits investors by permitting specific characteristics of an underlying instrument to be modified to better suit their investment objectives, in this case by modifying the risk profile of the underlying bond with respect to interest rate exposure.

- Transaction 2. Would the SEC staff interpret the definition of "asset-backed security" to exclude a transaction in which the same fixed-rate bond is securitized together with an interest rate swap under which the counterparty receives the same fixed rate as above and pays a rate determined by reference to changes in the Consumer Price Index ("CPI"), and a CPI-based security is issued to investors? We strongly urge the SEC staff to conclude that a CPI-indexed (or similar) security falls within the definition of "asset-backed security". If this would not qualify as an asset-backed security, what is the determinative difference between this and the transaction described in the preceding paragraph? LIBOR does not relate naturally to "the value of or payment on" the fixed-rate bond any more than the CPI does; one is a measure of the cost of interbank borrowings among a group of banks in London and the other is a measure of the cost of a defined basket of goods and services in the United States. Both of them may be useful in a securitization transaction precisely <u>because</u> they introduce payments based on a measure not otherwise used by the assets in the pool. It is by doing so that they "reduce or alter" the risk presented by some attribute of those assets. In this example, both swaps reduce the risk that the value of the fixed-rate bond or its associated payments will be eroded by changing economic conditions. Depending on their individual assessments and situations, investors could rationally prefer one or the other to fixed interest payments. How are practitioners and market participants to distinguish between those attributes of an underlying investment that may be "reduced or altered" to suit a particular investment desire and those that may not be, and which external references are permissible to achieve this end and which are not?

- *Similar Transactions.* Some issuers, including the U.S. Treasury, have issued bonds in which the principal or interest payments are indexed to the CPI. Would a CPI-based security based on an asset pool that held such a bond (and no swap) qualify as an "asset-backed security"? Could a securitization vehicle hold a CPI-based instrument, swap its payments for a LIBOR-based rate of return, and issue securities that pay LIBOR-based interest? We believe this analogy can be extended to other indices as well, including commodity and equity indices. These are the types of questions that arise constantly in practice, and without further guidance they will be no easier to answer with assurance after the Proposed Rule is implemented than they are now. As the securitization market develops, issuers and investors will identify new base rates and indices upon which to base the coupon on an asset-backed security. We would like to work with the SEC staff to formulate clear guidelines so that market participants may independently identify which structures are, and which structures are not, "asset-backed securities". We believe as a policy matter that synthetic pass-through securities of this type should be included in the definition of asset-backed securities in order to satisfy investors' demands that are not met through other types of public offerings. Registration of these securities on Form S-1 is not feasible given the need to act upon these issuances quickly. Further, these types of indexed securities are publicly issued in the corporate market, and we can think of no policy reason why these securities should not be permitted in the asset-backed market and particularly in the repackaging area.

Example: Single-Name Credit-Linked Transaction.

- *Transaction 1.* It is clear that a trust that holds a typical corporate loan or bond and issues a single tranche pass-through certificates to of investors would qualify as an asset-backed security issuer under the Proposed Rule.

- *Transaction 2.* Consider an example in which a market intermediary constructs a synthetic instrument that replicates the credit exposure of that investment. A trust issues a single tranche of securities and uses the proceeds to buy U.S. Treasury securities. At the same time, it enters into a credit default swap with a financial institution which references a single, specifically identified reference obligation of a single named obligor that is qualified to use Form S-3 and is current in its 1934 Act filings. The reference obligation may not be changed during the term of the transaction. The notional amount of the swap is equal to the principal amount of the securities issued by the trust (i.e., the swap is not leveraged), and the maturity of the trust securities is the same as the maturity of the reference obligation. If the issuer of the reference obligation enters bankruptcy or fails to make a timely payment on the reference obligation, the swap counterparty has the right to deliver that reference obligation to the trust in exchange for the liquidation proceeds of the Treasury securities. The trust then delivers the reference obligation to the investors following those deliveries, and the trust (having no remaining assets at that point) terminates and the trust's securities are cancelled. If the issuer of the reference obligation does not enter bankruptcy or fail to make timely payments, the investors receive interest payments equal to the periodic payment on the Treasury securities plus the periodic premiums paid by the swap counterparty under the credit default swap, and are repaid their principal investment on the trust's scheduled termination date from the payments on the Treasury securities.

- *Disclosure is an Adequate Solution.* Based on the Proposed Rule, it is clear that the SEC staff would not permit the second transaction to qualify as an asset-backed security, but what is the reason for differentiating between the two transactions? Elsewhere in the Proposing Release the staff notes its conviction that even the most complex structures can be described clearly and accurately, so the motivating concern cannot be that investors would not be made to understand the terms of their investment or the swap itself. The disclosure concerning the underlying bond and its issuer will be the same in either transaction. In the synthetic transaction, investors must assess the creditworthiness of the swap counterparty as well as the obligor on the underlying bond. Yet in the case of other types of swaps, the staff has provided specific guidance in the Proposed Rule concerning the disclosure necessary if an intermediating party's credit is material to a purchase of asset-backed securities, and presumably similar disclosure would be required in this case. What is the policy objection to a transaction in which the risks and structure can be disclosed to investors just as fully as in the transaction it replicates?

- *Definition of ABS - - "convert to cash".* In this example, both the financial asset held by the ABS issuer (the credit default swap) and the underlying asset (the reference obligation) "by their terms convert into cash within a finite time period". The derivative instrument is not being employed to bring within the technical definition of "asset-backed security" a specific asset that otherwise would not meet the definition (such as a perpetual equity security, for example).

Other Clarifications

- *Repurchase Agreements.* Would a securitization that included repurchase agreements for securities, or securities lending agreements, be considered "synthetic" under the Proposed Rule?

- *Other Derivative Instruments*. We believe that arguments can also be made for other types of derivative instruments related to currencies, commodities and equities, although we realize these present additional concerns that would need to be addressed. We would welcome an opportunity to evaluate these other derivatives in light of the SEC's policy concerns.

- *Interaction with Investment Company Act Definition.* We suggest that the SEC specifically state that an issuer that only issues "asset-backed securities" as defined in Proposed Rule also by definition meets the requirements of Rule 3a-7 under the Investment Company Act and is therefore not an "investment company" under that Act. However, because we believe the staff's interpretation of the term "asset-backed security" under the Proposed Rule is in certain respects more restrictive than is warranted by either the words or the purpose of the definition in Rule 3a-7, we urge the staff to indicate clearly that failure to qualify as an issuer of asset-backed securities for purposes of the Proposed Rule will not in itself disqualify an entity from relying on Rule 3a-7 under the Investment Company Act.

The effect of interpreting the Proposed Rule as the staff suggests in Footnote 62 will be to chill the development of new products that could benefit investors and to engender a stream of individual inquiries to the staff of the kind that is intended to be rendered unnecessary by the Proposed Rule. We urge the staff to consider carefully the growing importance of synthetic instruments and the benefits they can bring to investors by efficiently providing investment alternatives that would otherwise be unavailable or impractical for investors to replicate by other means. One of the chief benefits of incorporating synthetic instruments into securitizations is that they permit transactions to be structured in which investors assume only the risks they choose. Throughout the Proposed Rule, the staff has thoughtfully responded to the complexities of the securitization market by analyzing the concerns presented by particular structures or asset types and prescribing structural limitations or augmented disclosure requirements aimed at addressing those concerns without impeding the further development of the public securitization markets. We ask that the staff respond to the complexities of synthetic instruments and securities in a similar manner. We believe the best course of action would be for market participants to work proactively with the staff to better understand the staff's concerns about the use of synthetics in public securitizations and to shape limitations that address those concerns. At a minimum, as part of the Proposed Rule, the staff should articulate the substantive concerns that motivate its position on synthetics and should formulate a definition that can be consistently applied to new instruments in a manner that excludes instruments for which those concerns cannot be addressed by disclosure or other means, and permits the rest to be included as public ABS transactions. At a minimum, we believe that an ABS transaction should be allowed to substantially replicate, by the use of synthetics or derivatives, any investment that would otherwise be permitted.

C. Application of Specific Items to Repackaging Transactions

Several specific requirements of the Proposed Rule, while appropriate for typical asset securitization transactions, do not easily or usefully apply to repackaging transactions. We suggest that the SEC include as part of the Proposed Rule an express statement of those provisions that would apply (or in the alternative, a list of those provisions that would not apply) to repackagings. Without such guidance, the Proposed Rule would constitute an unnecessary maze of regulations, some intended and some not intended to be applicable to repackaging transactions, leading to their inconsistent application and likely to ultimately result in a regime further developed based upon informal statements from the SEC staff. Experienced industry participants, and even more so prospective sponsors seeking to access the asset-backed regime, will benefit from such clarification. Examples of provisions of the Proposed Rule that should not apply to repackagings, or should apply only in modified form, include:

- Items 1104(c) (requiring information about the sponsor's securitization experience and history and origination procedures), 1104(e) (requiring static pool data) and 1109 (requiring information on originators) should not apply to repackagings because the sponsor of a repackaging will not have underwritten and originated the underlying securities in the way that the sponsor of a traditional ABS transaction will have underwritten and originated the receivables or other assets underlying those transactions, and so such information would be irrelevant;

- Item 1106(i) (requiring information about the purchase price for the pool assets) should not apply to repackagings because the principal assets in a repackaging will typically be publicly traded securities with readily available price quotes;

- Item 1110 (requiring statistical and other data concerning the pool assets) should be modified for repackagings to instead require a general description of each security being repackaged and a reference to the original registration statement for that security, since repackagings do not generally involve large asset pools but rather one or a few discrete assets;

- Item 1112(c) (requiring a separate table of all fees and expenses to be paid or payable out of the cash flows) should not apply to transactions such as repackagings, in which fees and expenses are often paid by the depositor and even if they are not, only one or a minimal number of fees are typically paid out of cash flows;

- Item 1112(f) (requiring the title of a class of securities with a termination feature that may be exercised when 25% or more of the original principal balance of the pool assets is still outstanding to include the word "callable") should not apply to repackagings (which may be required to terminate upon a reporting failure by a pool's significant obligor, and the structure of which may include a limited call right held by a third party), as the rule is directed toward clean-up redemptions by a servicer;

- Items 1120 (compliance with applicable servicing criteria) and 1121 (servicer compliance statement) should be modified as they apply to repackagings. Repackagings do not generally employ a servicer or equivalent entity with discretion over decisions concerning assets, but use only a passive trustee that merely passes through payments received on the assets. Much of the information required by these rules will therefore be irrelevant, and requiring a public accounting firm's attestation report is not market practice for these transactions and is unnecessary given the extremely limited range of "servicing" activities;

- Item 1100(c)(2) (permitting information on significant obligors to be referred to rather than incorporated in certain cases) should be revised to permit similar treatment for information concerning foreign governments and subdivisions that register securities on Schedule B and file annual reports on Form 18-K, and for obligors that are exempt from Securities Act registration and Securities Exchange Act reporting but make publicly available substantially equivalent information (such as municipal obligors that provide information to nationally recognized municipal securities information repositories within the meaning of Securities Exchange Act Rule 15c2-12 and banks whose reports to regulators are publicly available);

- The requirement in proposed General Instruction V.A to Form S-3 that a separate base prospectus and form of supplement be filed for each country of origin of the pool assets should not apply to repackaging prospectuses as they typically do not provide extensive information on the underlying securities, and the relevant disclosures will instead be in the filings relating to the underlying security;

- The discussion under III.B above with respect to market making prospectuses applies with even greater force to repackaging transactions, in which (a) there is no servicer and the depositor has no ongoing role in administering the trust, (b) the trustee is not generally affiliated with the depositor and (c) because the principal assets are third-party publicly traded securities, it is even less likely that the issuer, sponsor or depositor may have material non-public information with respect to those securities; and

- Form 10-D should be required to be filed only on a quarterly basis for repackaging transactions that pay monthly, since the information required by Item 1119 is either inapplicable or of limited utility in the case of a repackaging because both assets and distributions will generally not be subject to significant fluctuation due to the nature of the assets and the lack of active management or servicing.

Of course, where relevant the disclosure for a repackaging transaction would include information concerning the above items. However, the existence of very specific rules that are stated to apply to all ABS transactions but cannot sensibly be applied as written to repackagings can only cause uncertainty and variations in practice when repackagings registrants attempt to comply. We would welcome an opportunity to discuss with you the various ways in which the Proposed

Rule could be clarified to address directly the differences between repackaging transactions and other ABS issuances.

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The Association and its members appreciate the opportunity to comment on the Proposing Release. Should you have any questions about the comments in this letter, please do not hesitate to contact Nadine Cancell at 646-637-9228.

Respectfully submitted,

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