SIFMA

Securities Industry and Financial Markets Association

August 2, 2010

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

U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090
Attn: Elizabeth M. Murphy, Secretary

Re: Asset-Backed Securities, Release Nos. 33-9117; 34-61858; File No. S7-08-10

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is pleased to respond to the request for comment by the Securities and Exchange Commission (the "SEC" or the "Commission") on the Commission's Release Nos. 33-9117, 34-61858, Asset-Backed Securities; Proposed Rule (the "Proposing Release").[2]

SIFMA is a diverse organization whose membership includes many of the largest and most significant participants in the United States capital markets. Our members and their affiliates include financial institutions that sponsor securitization transactions; special-purpose companies that issue asset-backed securities ("ABS") and other structured finance products; broker-dealers that act as underwriters, placement agents or initial purchasers in offerings of structured finance products; and asset managers that include some of the largest, most experienced investors in ABS and other structured finance products.

SIFMA's members have directly experienced the pain of the recent financial crisis and the collapse of the structured finance markets, and are acutely sensitive to what is at stake as both government and the private sector work to rebuild these vital markets. There is a long way to go. Markets for some asset classes, such as ABS backed by motor vehicle loans, appear to be functioning relatively well, while others – such as the primary market for newly-issued private label residential mortgage-backed securities ("RMBS"), which is so important to our nation's economic recovery – barely function at all. Some changes in the offering process for ABS and in disclosure and reporting in ABS offerings are needed if investor confidence in the structured finance markets is to be restored.

---

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

[2] Asset-Backed Securities; Proposed Rule, 75 Fed. Reg. 23328 (May 3, 2010).

The regulatory changes that the Commission has proposed are substantial. Some of the proposed changes were anticipated by market participants; others were not. Some of the proposed changes clearly would benefit investors and contribute to the recovery of the ABS markets. In other cases the proposed changes could stifle markets by imposing costs that exceed their benefits, or by imposing compliance burdens that may be extremely difficult to satisfy. At all times our guiding principle is that regulation of the securitization industry must be considered and managed holistically, with effective practices for all participants, measuring positive investor benefits against the funds, resources, and assumed risks necessary to comply with more vigorous transparency standards. This assessed balance of costs and benefits will be necessary to the reinvigoration of a national and global securitization industry capable, in the context of high transparency, of drawing massive global funding in support of America's consumer and commercial financing needs. In this letter we express our support for many of the Commission's proposals, offer our own alternative recommendations that we believe would improve the functioning of the securitization markets, and in some cases urge the Commission to reconsider its approach.

SIFMA's diverse membership has brought varied perspectives to our examination of the Proposing Release. Our member financial institutions that act as securitization sponsors, issuers and underwriters (which we refer to as our "dealer and sponsor members"), and our member asset managers (which we refer to as our "investor members"), often have brought differing views to the table. However, thoughtful discussions between these two groups have yielded a consensus opinion, guided by the terms and spirit of the policy statement described above, and a common approach to many of the issues raised by the Commission's proposed rulemaking. In some cases our dealer and sponsor members and our investor members retain divergent views, and in those instances we have reflected the opinions of both constituencies in this letter. To the extent that this letter references a specific subset of our members, it reflects a view held only by that group of members, and does not indicate the acquiescence of another group of members to that opinion.

SIFMA wishes to extend our thanks to the Commission for the obvious care and extraordinary effort involved in generating a proposed rulemaking as comprehensive as the Proposing Release. We appreciate and support many of the proposed rules, and while we believe that modification of some of the proposals is appropriate, we are convinced that those modifications will help to restore investor confidence in, and stimulate the recovery of, the structured finance markets. We have endeavored to offer constructive recommendations that will make the markets for ABS and other structured finance products more transparent, more stable and more efficient. We appreciate your consideration of our views.

Summary of Comments

SIFMA supports many of the Commission's proposals. We also present our own recommendations on key aspects of the proposed rules, and we address in detail significant issues that we believe deserve the Commission's consideration.

Securities Act Registration

- SIFMA supports regulations that give investors sufficient time to review information about a securities offering before deciding whether to invest. But a five business day period to review a preliminary prospectus, as the Commission has proposed for shelf offerings, is longer than is needed in some ABS offerings, and five business days is generally more time than is needed to review a material change to a preliminary prospectus. We request adjustments to these time periods as described below.

- We urge the Commission not to prohibit shelf registration of ABS.

- Our dealer and sponsor members are very concerned that the proposed certification of the chief executive officer of the depositor that would be required to be filed as an exhibit to the registration statement in each shelf offering of ABS is unreasonable, and that officers of many ABS issuers would be unwilling to sign it. Our investor members, however, support a requirement for a meaningful certification of an officer of the depositor. We propose below an alternative form of certification that our dealer and sponsor members believe would be acceptable to many (but not all) ABS issuers, and is acceptable to our investor members.

- Our investor members strongly favor improved mechanisms for enforcement of representations and warranties, particularly in RMBS transactions, and do not believe that the third-party verification scheme that the Commission has proposed would provide much benefit to investors. Below we present an alternative that was developed jointly by our dealer, sponsor, and investor members.

- We request that the Commission modify the proposed penalties for noncompliance with shelf eligibility requirements. As proposed the penalties are extremely harsh, and could have a material adverse effect on a sponsor's business even in the case of minor instances of noncompliance. We also request limited, but important, changes to Form 8-K reporting requirements in order to avoid unnecessary suspension of issuers' shelf eligibility.

Disclosure Requirements

- Although our dealer and sponsor members and our investor members have differing views regarding approaches to compliance with the Commission's proposed asset level data ("ALD") disclosure requirements, they agree on the importance of standardized asset-level information. Our investor members believe that the mandatory provision of ALD is a key component of the recovery of the securitization markets, and strongly support the SEC's proposal. While not disagreeing with the need for standardization of asset-level disclosure in principle, our dealer and sponsor members are concerned that a rigid approach could render entire pools of assets unsecuritizable in the most liquid securitization markets due to a single or small number of unavailable data fields, which is not an outcome they believe to be appropriate. They therefore urge a more flexible, yet comprehensive, ALD disclosure regime.

- In addition, we propose changes in certain of the data fields, and raise important issues regarding application of the ALD requirements to assets originated before the effectiveness of the new rules. We also express our members' concerns regarding resecuritizations, data that may be unavailable to an issuer, what constitutes the appropriate measurement date, and other matters.

- We ask that the Commission reconsider the proposed requirement that grouped account data be filed in offerings of ABS backed by credit card or charge card receivables.

- We ask that the Commission clarify that the cash flow waterfall computer program that will be required to be filed by ABS issuers as part of each ABS prospectus will be a simple cash flow program that only details the payment priority waterfall described in the prospectus. The Proposing Release is ambiguous regarding precisely what sort of program must be filed. In addition, our investor members urge the Commission to ensure that the filed waterfall computer program is usable in conjunction with an available cash flow engine.

- Our investor members request that Regulation AB be amended to require certain additional disclosure regarding representations and warranties and servicing practices.

Definition of Asset-Backed Security

- We ask that the Commission apply a 20 percent prefunding limit to ABS offerings on proposed Form SF-1 rather than the 10 percent limit that has been proposed.

Exchange Act Reporting Proposals

- We ask the Commission to reconsider its proposal to reduce from five percent to one percent the threshold for requiring the filing of a current report under Item 6.05 Form 8-K, and we ask the Commission not to add proposed Item 6.09 to Form 8-K.

- We urge the Commission to clarify that the amendment of Section 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") by the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") applies only prospectively.

Privately Offered Structured Finance Products

- SIFMA's dealer and sponsor members and our investor members have disparate views on the Commission's proposals for regulation of private offerings of structured finance products. Our investor members agree with the principle that disclosure in Rule 144A/Regulation D transactions should not differ from that of transactions executed under the Regulation AB regime, and therefore support the Commission's approach. However, SIFMA's dealer and sponsor members express significant concern regarding the impact of the proposed rule changes on the viability of the Rule 144A and Regulation D markets, and the impact this may have on the availability of credit previously funded through securitization.

- In addition, we raise important issues regarding proposed Rule 192 and the Commission's proposed definition of "structured finance product," and ask the Commission to provide clarification. We urge the Commission not to change its interpretation of what constitutes an "underwriter," not to impose additional conditions on the availability of the Regulation S safe harbor, and not to impose additional restrictions on private offerings, such as limiting the total number of investors or imposing a minimum holding period before securities may be resold in reliance on Rule 144A.

I. Securities Act Registration

A. Summary

SIFMA supports the Commission's proposals to require an integrated prospectus for each shelf offering of ABS, to require more timely filing of transaction documents, and to permit "pay-as-you-go" shelf registration fees. While we support the proposal to require a minimum time period between filing of a preliminary prospectus in a shelf offering and the first sale of securities, we request some adjustments to the time periods proposed. Our members agree that five business days are not always needed to review a preliminary prospectus, and that an additional five business days are not necessary to review a material change to a preliminary prospectus. Reflecting the combined views of both our dealer and sponsor members and our investor members, we propose that a full five business days be available for review of the preliminary prospectus in any shelf registered offering of RMBS, commercial mortgage-backed securities ("CMBS"), or ABS backed by floorplan receivables, corporate debt or new or uncommon asset classes, or in any resecuritization, with shorter time periods required for other asset classes. We further propose that an additional two business days be required for any material change to the preliminary prospectus.[3]

We support the Commission's goal of conditioning shelf eligibility on matters other than the ratings of the offered securities; however, below we present alternative recommendations with respect to certain of the Commission's proposed new conditions. In particular, while our investor members support requiring a certification of the chief executive officer of the depositor in connection with each shelf offering, our dealer and sponsor members believe that the proposed form of certification is inappropriate. Therefore, SIFMA suggests an alternative form with which we believe many issuers would be comfortable, and which our investor members find acceptable. The Commission's proposal for third-party verification of material breaches of representations and warranties does not adequately address the concerns of our investor members, so we have proposed as an alternative an enforcement and dispute resolution mechanism for claims of material breaches of representations and warranties.

We object to the severity of the penalty for noncompliance with the proposed new shelf eligibility conditions, and we offer alternative proposals below.

B. Offering Process Reform in Shelf Offerings

1. Preliminary Prospectus Requirements

Proposed Rules 424(h) and 430D generally would require that a preliminary prospectus be filed before the first sale of securities in a shelf offering. We support this concept. We also support the proposal to amend Rule 15c2-8(b) to repeal the exemption of ABS offered on a shelf registration statement from the requirement that a broker-dealer deliver a copy of the preliminary prospectus at least 48 hours before sending a confirmation of sale.

We strongly agree with the premise that investors should be given sufficient time to review disclosure prior to the time of sale. However, our members, taken as a whole, do not fully support the time periods embedded in proposed Rules 424(h) and 430D, which would require that a preliminary prospectus for an offering of ABS backed by any asset class be filed a full five business days before the first sale of securities in the offering, subject to an additional five business day delay if there is a material change to the preliminary prospectus. Reflecting the concerns of both our dealer and sponsor members and our investor members, SIFMA recommends that proposed Rules 424(h) and 430D be revised to require that the preliminary prospectus for a shelf offering of ABS be filed:

- at least two business days before the date of the first sale in the offering, in the case of ABS backed by bank credit card or charge card receivables;

[3] SIFMA's investor members believe that proposed Rule 424(h) should serve as a model for ABS offerings that are not subject to this proposed rule.

- at least three business days before the date of the first sale in the offering, in the case of ABS backed by private label credit card or charge card receivables, motor vehicle loans or leases, student loans, or equipment loans or leases; and

- at least five business days before the date of the first sale in the offering, in the case of ABS backed by any other asset class, including residential or commercial mortgage loans.

We refer to this period of two, three or five business days, as applicable, between the filing of the preliminary prospectus and the first sale of securities as the "initial review period." In lieu of the proposed additional five business day waiting period for any material change to the preliminary prospectus in a shelf offering of ABS backed by any asset class, we propose that instead an additional two business days should be required in addition to the initial review period.

There is no analog to the proposed five business day waiting period for ABS in the Commission's rules for any other type of security, no matter how complex. In the Proposing Release, the Commission analogizes each takedown off an ABS shelf registration statement to an initial public offering.[4] Nevertheless, the Commission has not imposed such a strict requirement even in an initial public offering of equity securities of an operating company that may have a very complicated structure, operations and/or finances, and whose future prospects may be extremely speculative. The only requirement with respect to filing or delivery of a preliminary prospectus in these offerings is imposed by Rule 15c2-8(b), which requires (and will require for ABS if the proposed amendments are adopted) that the preliminary prospectus be provided at least 48 hours before the trade confirmation is sent. The Commission's proposal would impose a unique and lengthy waiting period between the filing of the preliminary prospectus and the initial sale of securities for shelf offerings of ABS. While we support the concept of requiring a waiting period for sales of ABS, our proposal to differentiate among asset classes reflects the views of our dealer and sponsor members, who believe that requiring a full five business days for all asset types is excessive and unduly burdensome, and those of our investor members, who require a full five business day review period for those asset categories that present the most complexity.

We would like to emphasize that any required waiting period between the filing of a preliminary prospectus and the first sale of securities should be viewed as a minimum period. We hope that investors will insist on, and issuers will provide, more time or more information as necessary in the case of unusually complex transactions.

We believe that triggering a new waiting period of the same length as initial review period for *any* material change in the preliminary prospectus would impose undue delay that is not justified by a commensurate benefit. Most material changes to the disclosure at this phase of the offering process are limited and would be easily identifiable. Once an investor has had adequate time to review a preliminary prospectus, our members agree that two additional

[4] 75 Fed. Reg. at 23334.

business days would be sufficient to review any changes. Therefore, we request that an additional two business day waiting period be required for any material change to the preliminary prospectus in a shelf offering. These two business days should be in addition to the required initial review period.[5] In addition, we believe that the rules should provide for an exception to the basic requirement that investors be provided two business days in addition to the full initial review period to review the preliminary prospectus and any correction, amendment or supplement. If a corrected preliminary prospectus (or amendment or supplement thereto) is filed within one business day following the date on which the initial preliminary prospectus was filed, then following the filing of such corrected preliminary prospectus (or amendment or supplement) the initial review period should apply.

We also request a technical clarification to proposed Rule 424(h). As proposed, a preliminary prospectus would be required to be filed at least five business days before the date of the first sale in the offering, or if used earlier, the second business day after first use. Read literally, this language would appear to provide that if, for example, a preliminary prospectus is used six business days prior to the first sale in the offering, it must be filed no later than four (rather than five) business days before the date of the first sale of securities. We ask that the Commission provide guidance as to whether this is the intended result. If not, we ask that proposed Rule 424(h) be revised to make clear that a preliminary prospectus must be filed not later than the earlier of (i) the applicable number of business days before the date of the first sale of securities or (ii) the second business day after first use.

2. Other Proposed Requirements

We support the Commission's proposal that an integrated prospectus be filed for each takedown of ABS from the shelf on Form SF-3, rather than a base prospectus and prospectus supplement as currently is the case. Although this will increase costs for issuers of ABS, an integrated prospectus would be easier to read and understand, and would eliminate the confusion that may be caused by the inclusion in a base prospectus of information not related to a particular offering. However, the prospectus that is filed as part of a shelf registration statement for ABS may itself be confusing and difficult to read because of the need to present in bracketed sections of a single prospectus information that, under current practice, is typically presented in various forms of prospectus supplement. This would be particularly true of Form SF-3 filings for offerings of RMBS, which may be issued in the form of pass-through certificates pursuant to a pooling and servicing agreement or trust agreement or in the form of notes issued pursuant to an indenture. The Commission may wish to consider in such cases permitting the filing as part of the registration statement of two prospectuses – one for offerings of certificates and one for offerings of notes – in order to facilitate easier understanding of the types of offerings contemplated by the registration statement.

[5] For example, in a shelf offering of student loan ABS in which there is a material change to the preliminary prospectus, the rules should require that there be at least two business days following the filing of the corrected preliminary prospectus (or amendment or supplement thereto), and a total of at least five business days (an initial period of three business days plus the additional two business days) following the filing of the original preliminary prospectus, before the initial sale of the ABS to investors.

We support the proposed requirement that final forms of the material transaction documents be filed on or prior to the date on which the final prospectus is required to be filed, subject to our comments below related to the possible loss of Form SF-3 eligibility as a result of the failure to timely make that filing.

We support the Commission's proposal to permit "pay-as-you-go" registration fees for shelf issuers of ABS. This method of payment of registration fees will be of significant benefit to shelf issuers of ABS in view of the Commission's proposal to limit each shelf registration statement to a single asset class.

3. Response to Additional Request for Comment

In the context of the proposed new requirements for shelf eligibility for ABS issuers, the Commission asks whether it should prohibit ABS issuers from using shelf registration altogether, and what the impact would be if it did so.[6] We urge the Commission not to prohibit the use of shelf registration for ABS. The elimination of shelf registration for ABS, combined with the lack of flexibility and delayed timing for the use of a non-shelf registration statement such as proposed Form SF-1, would reduce the volume of public offerings of ABS, which would have the effect of reducing both transparency with respect to and liquidity of those securities and would negatively impact the availability and cost of credit for consumers and other borrowers.

C. <u>Proposed New Conditions to Shelf Eligibility</u>

As a substitute for the current requirement of Form S-3 that each class of registered ABS have an investment grade credit rating from at least one nationally recognized statistical rating organization ("NRSRO"), the Commission has proposed four new shelf eligibility criteria that would apply to all asset-backed securities offered on proposed Form SF-3. To the extent that the Commission determines that it is no longer appropriate to condition shelf eligibility on an investment grade credit rating, we agree that other criteria could potentially provide for "a certain quality and character" of the offered securities.[7] However, we believe that the proposed conditions can be greatly improved, and we set forth our recommendations below.

1. Risk Retention

The Dodd-Frank Act requires coordinated rulemaking among the Commission, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the U.S. Department of Housing and Urban Development and the Federal Housing Finance Agency to impose risk retention requirements for all ABS, not just ABS registered for the shelf under proposed Form SF-3. SIFMA asks that the Commission take this recent legislative mandate into account, and not impose as a condition to

---

[6] 75 Fed. Reg. at 23347.
[7] 75 Fed. Reg. at 23338.

shelf eligibility a duplicative risk retention regime that would be inconsistent with and impose more onerous risk retention requirements than those imposed by the Congress. Because all ABS will (absent an applicable exemption) be subject to the risk retention requirements to be promulgated under the authority of the Dodd-Frank Act, we ask that the Commission not require additional or inconsistent risk retention as a condition to shelf eligibility.

SIFMA will provide detailed commentary reflecting the views of both our dealer and sponsor members and our investor members at the time that the jointly-conceived risk retention rules are proposed. In the meantime, both member groups urge the SEC to focus on this joint initiative, which will impose retention rules more broadly and consistently, rather than impose conditions to shelf eligibility that may not be consistent with what ultimately results from the joint rulemaking process.

In contemplation of this upcoming coordinated rulemaking, our dealer and sponsor members support tailored risk retention rules for each major asset class, including the amount, form, and duration of required retention. In their view, because the risk profile of various asset classes differs materially, this should be reflected in any risk retention requirements. They believe that the Dodd-Frank Act correctly reflects this consideration. In addition, in order to encourage appropriate risk management practices, our dealer and sponsor members believe that only direct hedging of the securities owned by the retaining party, and not hedge positions tangentially related to the retained securities, should be prohibited. They support the formulation used by the Commission in the Proposing Release, that the retained interest should be "net of hedge positions directly related to the securities or exposures taken by such sponsor or affiliate."[8]

In order to facilitate ABS issuance by aggregators, our dealer and sponsor members believe that the required risk retention should be able to be satisfied by one or more of several parties, including sponsors, affiliates of the sponsor, originators, and arrangers. In their view, imposing risk retention requirements on the sponsor only could eliminate rent-a-shelf transactions, which some small securitizers have used to access the capital markets.

Our investor members are primarily concerned that the required risk retention should serve to align the interests of the sponsor and investors on a long-term basis. As such, the investor members support a "vertical slice" risk retention regime wherever possible, recognizing that this model may not be appropriate for certain types of securitization transactions, such as revolving master trusts and CMBS.

Our dealer and sponsor members believe that risk retention rules should be tailored to the characteristics of the underlying assets and transaction type, which in some cases would indicate

---

[8] 75 Fed. Reg. at 23446. Thus, as the Commission stated, and as SIFMA's dealer and sponsor members concur, "hedges of market interest or currency exchange rates, would not be taken into account in the calculation of the sponsor's risk retention for purposes of the net five percent risk retention requirement. Hedges tied to securities similar to the ABS also would not be taken into account in the calculation of the sponsor's risk retention. For instance, holding a security tied to the return of a subprime ABX.HE index would not be a hedge on a particular tranche of a subprime RMBS sold by the sponsor unless that tranche itself was in the index." 75 Fed. Reg. at 23339.

that a vertical slice approach is appropriate, but in other cases may indicate that an alternative form of risk retention best achieves the objectives of the retention requirements. The forms that risk retention takes for different types of assets and transactions are a very important consideration, and our dealer and sponsor members believe that this issue should be a primary focus of the joint regulatory effort. In addition, our dealer and sponsor members believe that because certain types of ABS backed by high-quality assets reflect decreased credit risks, exemptions should be provided for such securitizations, and support the provisions of the Dodd-Frank Act that provide for exemptions to risk retention requirements for assets that meet underwriting standards jointly promulgated by the regulators, in addition to the exemption for "qualified mortgages" within the meaning of the Dodd-Frank Act.

To the extent that the Commission acts to impose a risk retention requirement as described in the Proposing Release, we request that, with respect to risk retention relating to revolving master trusts, the requirement that "payments of the originator's interest are not less than five percent of payment of the securities held by investors collectively" be eliminated. We believe that the requirement that originators retain a minimum of five percent of the securitized exposures sets an appropriate standard for risk retention with respect to revolving master trusts, and that the additional requirement regarding payments is not necessary or appropriate. Under certain limited circumstances, a transaction structure may provide that all available funds would be distributed to the noteholders, in which case the originator would not receive a payment in respect of its retained interest. The requirement that originators receive a payment not less than five percent of payments to all investors could adversely affect payments to noteholders by reallocating to the originator funds that would have otherwise been distributed to the noteholders.

2. Commitment to File Ongoing Periodic Reports

The Dodd-Frank Act repeals, with respect to ABS, the provision of Section 15(d) of the Exchange Act that permitted most ABS issuers to suspend reporting after their first fiscal year, and authorizes the Commission to determine whether to permit suspension of reporting for ABS backed by various asset types, not just ABS registered for the shelf as the Commission has proposed. Regardless of how the Commission determines to implement this provision, we support, in principle, the goal of providing investors with more access to information on an ongoing basis. However, so long as investors receive the information that they need to evaluate the offered securities and make an informed investment decision, our dealer and sponsor members believe it is important that the reporting burden be manageable and, if implemented as a condition to shelf eligibility, that it not result in frequent loss of shelf eligibility. Below, we describe several proposed changes to the new reporting requirements and relatively minor changes to the existing reporting requirements that could significantly ease the reporting burden for many shelf issuers, while still allowing for timely filing of period reports reflecting all information required to be reported.

As also discussed below, it is extremely important that the Commission clarify that the Dodd-Frank Act's amendment of Section 15(d) will only be applied prospectively.

3. Certification by the Chief Executive Officer of the Depositor

As a partial replacement of the current condition to ABS shelf eligibility requiring an investment grade credit rating by at least one NRSRO, the Commission has proposed that the issuer file as an exhibit to the registration statement a certification of the chief executive officer of the depositor that, to his or her knowledge, "the securitized assets backing the issue have characteristics that provide a reasonable basis to believe that they will produce, taking into account internal credit enhancements, cash flows at times and in amounts necessary to service any payments of the securities as described in the prospectus."[9]

SIFMA's investor members view a certification by the chief executive officer of the depositor with respect to the disclosure as valuable, and believe that such a certification is an appropriate condition to shelf registration as the associated risk of liability would incentivize issuers to more carefully review their securitizations. However, SIFMA's dealer and sponsor members do not support the proposed certification requirement because they believe that issuers should not be effectively required to predict the future performance of the ABS or their underlying pool assets, a concern acknowledged by our investor members. Therefore, our dealer and sponsor members propose that the chief executive officer of the depositor or the senior officer in charge of securitization of the depositor[10] instead be required to execute an alternative certification that addresses the prospectus disclosure as follows: "Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading."

We believe that more depositors would be willing to execute this revised form of certification, which our investor members find to be acceptable, than would be willing to execute the certification proposed by the Commission.

In the Proposing Release, the Commission states its view that the proposed certification "would be an explicit representation by the chief executive officer of the depositor of what is already implicit in th[e] disclosure contained in the registration statement."[11] Our dealer and sponsor members disagree, and believe that the proposed form of certification is inappropriate.

The Commission further states that "[s]imilar to the existing requirement that the securities must be investment grade, the proposed requirements are designed to provide for a certain quality and character for asset-backed securities that are eligible for delayed shelf registrations."[12] However, SIFMA's dealer and sponsor members believe that an assessment of the quality of an asset-backed security should not be based on a certification of an officer of the depositor. Management's opinion as to future performance might be relevant to a decision as to

---

[9] 75 Fed. Reg. at 23420.
[10] An annual report on Form 10-K filed by an ABS issuer may be signed by the senior officer in charge of securitization of the depositor.
[11] 75 Fed. Reg. at 23345-23346.
[12] 75 Fed. Reg. at 23338.

whether to invest in, for example, corporate obligations. In view of the nature of an operating company as a managed enterprise whose future prospects may be highly dependent upon such factors as the quality of its products or services, relevant markets, competition, corporate strategies and management's ability to adjust to changing circumstances, management's view of the company's ability to pay its obligations on an ongoing basis may be relevant to an investor's determination as to whether to invest in that company's debt. Even so, the SEC imposes no requirement that an officer of an issuer of corporate debt directly certify as to his or her prediction that the company will be able to make payments when due, either on its obligations generally or on the registered debt.

ABS, of course, differ substantially from corporate debt. ABS are backed by a discrete pool of receivables with respect to which the depositor plays no role other than to acquire the pool and convey it to the issuing entity. The characteristics of the securitized receivables are described in the prospectus. SIFMA's dealer and sponsor members believe that neither the depositor nor any of its officers can reasonably be expected to make any prediction as to whether the receivables "will produce . . . cash flows at times and in amounts necessary to service any payments on the securities," and that such a certification would be of little value. Our dealer and sponsor members believe that it would be inconsistent to require such a certification in the case of ABS, where it is not reasonable to expect that the certification would be reliable or useful, yet not in the case of corporate debt, where such a certification arguably would be more relevant.

In the Proposing Release, the Commission states that it "preliminarily believe[s] the potential focus on the transaction and the disclosure that may result from an individual providing a certification should lead to enhanced quality of the securitization."[13] The Commission then elaborates: "For instance, a depositor's chief executive officer may conclude that in order to provide the certification, he or she must analyze a structural review of the securitization. *Rating agencies would also conduct a structural review of the securitization when issuing a rating on the securities."*[14] Thus, the Commission proposes to replace the existing requirement that shelf-registered ABS have an investment grade credit rating from at least one NRSRO with a requirement that, in effect, an officer of the depositor undertake to perform his or her own credit analysis and certify as to the result. SIFMA's dealer and sponsor members do not believe that this is appropriate.

Whatever the flaws of the credit rating agencies or their rating processes may be, their job is to undertake independent credit analyses of securities and transaction structures. In the view of our dealer and sponsor members, it is not the role of the depositor and its officers to undertake any sort of credit analysis. They are not trained to do so, and any conflict of interest inherent in rating agency credit analysis would be magnified exponentially were such an analysis to be effectively required to be undertaken by an affiliate of the issuer. Given the Commission's express intent to reduce reliance on credit analyses by NRSROs,[15] our dealer and sponsor

---

[13] 75 Fed. Reg. at 23345.
[14] 75 Fed. Reg. at 23345 (footnote 140) (emphasis added).
[15] 75 Fed. Reg. at 23415.

members find it anomalous that shelf eligibility would instead be conditioned on a credit analysis by an officer of the depositor.

More importantly, SIFMA's dealer and sponsor members believe that the proposed form of certification would impose an unreasonable burden on the signatory. In their view, no officer of the depositor should be required to directly predict, or express any specific view as to, the future performance of a discrete pool of receivables or any securities backed by those receivables. Numerous factors that cannot be appropriately assessed by an officer of the depositor may influence the ability of the pool assets to "produce . . . cash flows at times and in amounts necessary to service any payments of the securities." These may include, for example, changes in prevailing interest rates, national or regional economic downturns, overall declines in collateral value, legislative or regulatory changes, and many others. Disclosure regarding these risks is appropriately required in the prospectus, and readers will have the opportunity to examine the disclosure and to weigh whether the potential return is sufficient to compensate for these risks. The purpose of providing more detailed disclosure regarding the receivables and the ABS is to "give investors better tools to evaluate the underlying assets and to determine whether or not to invest in the instrument and at what price."[16] An opinion of an officer of the depositor cannot substitute for this kind of analysis.

The Commission states that "any issues in providing the certification would need to be addressed through disclosure in the prospectus. For instance, if the prospectus describes the risk of non-payment, or probability of non-payment, or other risks that such cash flows will not be produced or such payments will not be made, then those disclosures would be taken into account in signing the certification."[17] However, because the language of the proposed certification does not refer to the disclosure in the prospectus other than to state that the signatory has "reviewed the prospectus," does not provide that the signatory may rely on the disclosure in the prospectus, and "could not be altered,"[18] it is not clear how the disclosure would be "taken into account" by the signatory. SIFMA's dealer and sponsor members believe that this uncertainty is unfair to ABS issuers and potentially misleading. If a prospectus were, for example, to include disclosure under Risk Factors delineating various reasons that cash flows on the pool assets may not be sufficient to service payments on the securities, the extent to which the certification relies on that cautionary disclosure would be unclear.

In the Proposing Release, the Commission states that the proposed certification is similar to certifications of Exchange Act periodic reports required by these rules because those certifications "also refer to the disclosure."[19] Our dealer and sponsor members disagree. In those certifications, an officer of a non-ABS issuer certifies that, to his or her knowledge, a specified periodic report does not contain a material misstatement or omission, and that specified financial statements fairly present in all material respects the financial condition, results of operations and cash flows of the registrant. The periodic reports contain financial information

---

[16] 75 Fed. Reg. at 23416.
[17] 75 Fed. Reg. at 23346.
[18] 75 Fed. Reg. at 23346.
[19] 75 Fed. Reg. at 23346.

about the company and its operations, but do not require that the officer make any current certification as to whether there is reason to believe that the issuer will be able to pay its obligations in the future.

In summary, SIFMA's dealer and sponsor members believe that the proposed certification, in its current form, is simply not a document that an officer of an ABS depositor could reasonably be asked to sign.

In order to address these concerns, our dealer and sponsor members propose a form of certification of the chief executive officer or senior officer in charge of securitization that would be consistent with the certifications of Exchange Act periodic reports currently required of officers of corporate issuers under Exchange Act Rules 13a-14 and 15d-14. This certification would appropriately address the disclosure included in the prospectus, rather than a belief as to future cash flows from the pool assets or as to the quality of the ABS: "Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading." This form of certification would confirm that the depositor's chief executive officer or senior officer in charge of securitization has taken steps to verify the disclosure specific to the offering, but would not place the signatory in the position of making a prediction – however qualified – as to future performance of the ABS. Our investor members believe that this form of certification is acceptable.

Because such a certification would be consistent with the certifications of Exchange Act periodic reports currently required of officers of corporate issuers under Exchange Act Rules 13a-14 and 15d-14, ABS issuers could use internal procedures similar to those that have been developed for corporate issuers' senior officers in giving their certifications. In the adopting release for the required corporate certifications, the Commission stated, "we are not requiring any particular procedures for conducting the required review and evaluation. Instead, we expect each issuer to develop a process that is consistent with its business and internal management and supervisory practices."[20] The Commission went on to recommend the formation of a disclosure committee for issuers as one means of accomplishing this. Issuers have used a variety of other means to help senior officers to develop appropriate factual support for their required certifications, such as requiring sub-certifications of disclosure committee members and other employees who are knowledgeable about or helped to prepare the disclosure in question and on whom the certifying officers believe that they can reasonably rely. We believe that, while there is no one-size-fits-all solution, any or all of these mechanisms may be appropriate for a particular ABS issuer.

[20] Certification of Disclosure in Companies' Quarterly and Annual Reports, 67 Fed. Reg. 57276, at 57280 (Sept. 9, 2002).

4. Third-Party Verification Regarding Repurchase Obligations

The mechanisms for enforcement of asset-level representations and warranties in asset-backed transactions – particularly RMBS transactions – have been a source of great frustration for SIFMA's investor members. In many existing transactions, these mechanisms have not functioned effectively. In some cases, the standard for determining whether a material breach of a representation and warranty has occurred, and whether repurchase of or substitution for the affected pool asset is therefore required, is unclear. In others, investor members believe that claims for repurchase or replacement of defective pool assets have not been made when appropriate. At the same time, our dealer and sponsor members have been subject in many cases to claims for material breaches of representations and warranties that they believe are without basis in fact, and that have sometimes been asserted without any specific grounds other than delinquency in payment.

We believe that reform of the enforcement provisions for material breaches of asset-level representations and warranties, particularly in RMBS transactions, is an important element of the recovery of the ABS markets.[21]

As a partial replacement of the current condition to ABS shelf eligibility requiring an investment grade credit rating by at least one NRSRO, the Commission has proposed that the transaction documents be required to provide that the party that is obligated to repurchase (or substitute for) pool assets that are in material breach of a representation or warranty[22] must provide to the securitization trustee, on at least a quarterly basis, a certificate or opinion of an unaffiliated third party regarding pool assets not repurchased or substituted for[23] after a demand for such was made. This certificate or opinion would state that the affected pool asset was not in material breach of a representation or warranty. Although we appreciate the Commission's proposal and applaud it as a step in the right direction, we believe that the proposed requirement for a third-party opinion or certificate as a condition to shelf registration does not adequately address our members' concerns – which we believe are widely shared in the ABS markets – regarding enforcement of representations and warranties.

---

[21] Requests for repurchase of or, where permitted, substitution of new pool assets for, assets as to which a material breach of a representation or warranty is alleged to have been identified, are primarily a phenomenon associated with RMBS transactions. The Commission may therefore wish to consider whether the recommendation that we have outlined below should be applicable in all respects to ABS other than RMBS, and whether for some types of ABS these recommendations may be inapplicable. It would be rare for repurchase of pool assets due to a material breach of a representation or warranty to be requested in, for example, motor vehicle loan or lease transactions. In credit card securitizations, receivables that are required to be removed are reassigned to the seller's interest in the pool of receivables. Although it probably would not be practical to establish completely different representation and warranty enforcement mechanisms for every asset class, it may, for example, be unnecessary to appoint (and pay a fee to) an independent credit risk manager in transactions in which ABS are backed by assets other than residential mortgage loans.

[22] Or, of course, the obligated party may cure the breach, if the breach is of a type that is susceptible to cure.

[23] In some transactions, the party that is obligated on the asset-level representations and warranties may, at its option, if it is determined that a material breach of a representation or warranty has occurred as provided in the transaction documents, either repurchase the affected pool asset for the specified purchase price or substitute for the defective asset another pool asset having substantially similar characteristics.

Our dealer and sponsor members are concerned that the proposed requirement may not be workable in practice, and that the opinions or certificates of third parties would be of minimal value to investors. The party responsible for providing the opinion or certificate would need to make not only a technical determination as to whether a breach has occurred but also a determination that the breach is material and adverse. It is not clear who would be qualified to provide the opinion or certificate, or who would be willing to undertake the responsibility to do so. As noted by the Commission in the Proposing Release, this would not be an appropriate responsibility for accountants.[24] We believe that it would also be an inappropriate subject for a legal opinion, as the conclusions as to which the third party would be required to opine would generally be matters of fact, not law.

In addition, the proposed requirement for a third party opinion or certificate would not address the most significant concerns of investors – the absence in most transactions of a party that is specifically charged with enforcement of representations and warranties, and an effective mechanism for requiring repurchase of (or substitution for) a defective pool asset when a material breach has been identified.

As an alternative, our dealer and sponsor members have developed a more practical mechanism that would be genuinely beneficial to investors. We recommend an independent enforcement process that would be feasible for issuers to undergo while at the same time providing investors with an effective mechanism to ensure that representations and warranties would be enforceable. This process would involve appointment of an independent party that would be responsible for enforcing representations and warranties, and requiring that if a claim could not otherwise be resolved the dispute would be submitted to binding arbitration. We ask that the Commission condition shelf eligibility under Form SF-3 on the transaction documents implementing the process described below for repurchase claims for material breaches of representations and warranties.[25] We outline this recommendation in significant detail; SIFMA's dealer and sponsor members and our investor members share the view that in order for this process to operate effectively, the criteria described below should be satisfied. We recognize that the Commission may not wish to include this amount of detail in the General Instructions to Form SF-3. If the Commission chooses to adopt but abbreviate the requirement by, for example, providing that the transaction documents must specify detailed procedures sufficient to implement the requirement, we ask that the Commission cite the procedures described in this letter as procedures that, if included in the transaction documents, would satisfy this shelf eligibility criterion.[26]

---

[24] 75 Fed. Reg. at 23345.

[25] As discussed below, our investor members believe that additional disclosure should be required in the prospectus regarding asset-level representations and warranties and the remedies for material breach, so that investors would be able to more easily enforce repurchase or substitution obligations for material breaches.

[26] We believe that if the Commission chooses to adopt our recommendation for enforcement of representations and warranties in shelf offerings of ABS, it is likely that this mechanism will be adopted as a model for other ABS transactions.

For each transaction in which ABS are to be offered pursuant to a shelf registration statement,[27] the transaction documents should provide that an independent credit risk manager ("CRM")[28] would be appointed to represent the interests of the securityholders. The CRM would be provided by the custodian or other party that maintains the physical loan files or electronic credit underwriting files with electronic access to all loan and credit underwriting files. The CRM would have access to all underwriting guidelines and any other documents necessary to reunderwrite the loans, whether on the basis of asset performance or otherwise. A risk management fee would be paid to the CRM alongside other service providers, before investors are paid, through the cash flow waterfall. A simple majority vote of investors, by interest, could terminate the CRM and appoint a successor.

It would be the responsibility of the CRM to determine whether it is appropriate to assert against the sponsor or other obligated party (each a "seller") a claim of a material breach of a representation or warranty with respect to any pool asset, and if so, to assert that claim on behalf of the securitization trust. The transaction documents would provide that claims may be made by the CRM either on its own initiative in the interests of all investors in the aggregate, or as directed by an investor, subject to the following standards:[29]

- A claim may be initiated by the CRM if it has a good faith reasonable belief that:
  - On the basis of documented and verifiable evidence (other than the performance of the pool asset alone, except in the case of a violation of an early payment default condition), a representation or warranty has been breached,
  - The breach has materially and adversely affected the interests of investors with respect to the affected pool asset,[30] and
  - Seeking repurchase or replacement of the pool asset or a cure of the breached representation or warranty is in the best interests of all investors in the transaction, in the aggregate.

- A claim may be initiated by the CRM on behalf of the trust upon the direction of an investor or group of investors if those investors' interests represent at least 25 percent (by principal balance) of the total interest in the entire pool of securitized assets. This criterion is designed to reduce the likelihood of claims brought by investors that may

---

[27] Or at least, for each RMBS shelf offering. As noted above, the Commission may wish to consider whether all of these requirements would need to be satisfied for transactions in which ABS are backed by assets other than residential mortgage loans.

[28] The CRM should not be affiliated with the issuer or sponsor, and should not be the same institution hired by the sponsor or underwriter to perform pre-closing due diligence work on the pool assets.

[29] In order to facilitate the assertion of appropriate claims for material breaches of representations and warranties, the transaction documents should require that the securitization sponsor or any other party obligated on representations and warranties notify the CRM after any public disclosure of a settlement between such obligated party and any governmental body or regulatory agency regarding violations of predatory lending or other laws specifically relating to the pool assets.

[30] The breach of certain representations and warranties specified in the transaction documents, such as representations related to predatory lending and compliance with law, would be deemed to be material.

acquire small interests in ABS in the secondary market in order to assert claims for the purpose of securing settlement payments outside of the trust that do not benefit other investors. As in the case of claims brought by the CRM on its own initiative on behalf of the trust, investor claims for material breaches of representations and warranties must be based on a good faith reasonable belief that:

  - On the basis of documented and verifiable evidence (other than the performance of the pool asset alone, except in the case of a violation of an early payment default condition), a representation or warranty has been breached, and
  - The breach has materially and adversely affected the interests of investors with respect to the affected pool asset.[31]

- Investors representing at least five percent of the total interest in the pool may ask the CRM to initiate a claim. The CRM must then poll investors to determine whether investors representing a total of 25 percent of the interest in the pool assets agree.

  - In order to enable investors to determine whether five percent or more of securityholders want to make such a request, the transaction documents would provide a mechanism for securityholders, acting through the CRM and/or the trustee, to determine whether other securityholders share their view.

- Investors whose interests in the ABS do not represent at least 25 percent of the interest in the entire pool of securitized assets would be entitled to direct the CRM to pursue a claim for material breach of a representation or warranty only if they agree to pay directly any costs associated with pursuit of the claim, including arbitration costs and reunderwriting costs incurred after the date of the request.

The transaction documents would provide that the seller must either comply with the applicable remedy provisions of the transaction documents or respond with specificity as to the reasons why a material breach has not occurred. Remedies would include cure of the breach, repurchase of the affected pool asset for the purchase price specified in the transaction documents, or, if applicable and if provided in the transaction documents, substitution of a pool asset having substantially similar characteristics as the defective pool asset (exclusive of any defects). If after review the seller and the CRM agree that no material breach has occurred, the claim would be withdrawn with prejudice.

If the parties could not agree within 180 days following the date of notice of a claim for repurchase of a pool asset (or another remedy) due to an alleged material breach of a

---

[31] The CRM would provide access to loan documentation, underwriting guidelines and other relevant documents to investors upon request, consistent with applicable privacy laws and the securities laws, for the purpose of investigating potential claims for material breaches of representations and warranties. Investors seeking this information would be required to sign standard confidentiality agreements in the form prescribed for each transaction. Any associated costs would be borne by the requesting investors.

representation or warranty as to whether a material breach has occurred, the dispute could, at the option of either the CRM or the obligated party, be referred to a binding arbitration proceeding before an independent arbitrator (or panel of arbitrators).[32] In order to avoid excessive costs, arbitration proceedings would take place semiannually. The arbitrators would either require performance of a remedy available under the transaction documents or determine that no material breach occurred. All arbitration decisions would be final and non-appealable.

Costs of arbitration would be borne by the losing party. If the arbitrators rule against the seller, the seller must reimburse all costs of the arbitrators as well as reasonable costs, expenses and legal fees of the CRM or the asserting investor(s), as applicable, related to the arbitration proceedings. If the arbitrators rule in favor of the seller, then (i) if the claim was brought by the CRM on behalf of the trust, the arbitration costs and the seller's reasonable costs, expenses and legal fees would be reimbursed by the trust, and (ii) if the claim was brought by the CRM on behalf of an investor or group of investors whose interests do not comprise 25 percent of the interests in the entire pool of securitized assets, the reasonable costs, expenses and legal fees of the seller would be paid by that investor or group of investors. This method of cost allocation would permit the CRM or individual investors to pursue valid claims through binding arbitration, but would discourage baseless or frivolous claims made for the purpose of forcing settlements outside of the trust.

The status of all requests for repurchase of a pool asset (or other remedy) on the basis of an asserted breach of a representation or warranty, including cures, repurchases, failures to repurchase, arbitration proceedings, and associated costs and expenses, should be required to be reported in distribution reports on Form 10-D.

D. Compliance with Shelf Eligibility Requirements

In our view, the combination of the proposed new shelf eligibility requirements and the Commission's proposed frequent testing of eligibility would make maintenance of shelf eligibility extremely difficult for many issuers of ABS.

1. Effect of Noncompliance on Shelf Eligibility

The Commission's proposed penalties for compliance failures are extremely harsh. A single late Exchange Act filing, a single late filing of the proposed certification of the chief executive officer (or, as we suggest, the senior officer in charge of securitization) of the depositor, or a single late filing of a transaction document, would result in loss of shelf eligibility for a full year – not only for the depositor in question, but for any affiliated depositor with respect to the same class of underlying assets. This is quite a severe result, given that even an ABS issuer's best efforts sometimes cannot prevent a late filing. Even loss of use of a shelf

[32] For a standard three-arbitrator panel, each of the CRM and the seller would appoint one arbitrator, with the third appointed by mutual agreement or, if the parties cannot agree, by the arbitration forum specified in the transaction documents. For a single arbitrator, the CRM and the seller would appoint the arbitrator by mutual agreement (or, if they cannot agree, the arbitration proceeding would default to a standard three-arbitrator panel).

registration statement for a quarter, much less an entire year, could have seriously adverse consequences for a sponsor's business by cutting off an important avenue for accessing the capital markets. Because the loss of use of a shelf registration statement could have such a material adverse effect on a bank or finance company, we believe that it should not occur automatically, especially when the failure to comply could be caused by an act of god or other event completely outside the control of the issuer. For example, much of the information required to be included in ongoing Exchange Act reports is (and will be) required to be provided by third parties such as servicers. The new requirement for ongoing reporting by ABS issuers will exacerbate the issuer's burden, and the risk.

We request that loss of shelf eligibility due to technical noncompliance with filing requirements not occur automatically, but rather occur only if the staff of the Commission determines – based upon the issuer's explanation for the compliance failure – that the issuer has not shown good cause why its shelf eligibility should not be suspended. As described below, we also ask that the Commission provide limited relief from certain existing reporting burdens. In addition, we ask that the penalties for noncompliance be revised to be less draconian, and more consistent with the nature of an issuer's compliance failure. In our view, shelf eligibility should be suspended only if (and only for the period) that the staff of the Commission determines is appropriate in the particular case, and for a full year only in the case of an egregious compliance failure. As we envision it, an ABS shelf issuer would be required to report to the Commission staff promptly, at the conclusion of the required quarterly review of compliance, any compliance failure identified by the issuer, together with the reason for the failure and, if applicable, its arguments as to why shelf eligibility should not be suspended. Following receipt of that report, the Commission staff would notify the issuer as to whether the issuer may continue to utilize its shelf registration statement and, if not, for how long.

With regard to Exchange Act reporting failures, we note that the proposed rules already would require disclosure of such failures, which will permit investors to weigh the frequency and materiality of such occurrences in making an investment decision even if shelf eligibility is not suspended.

As discussed above, the proposed new deadline for filing transaction documents as exhibits to the registration statement takes on increased importance in view of its effect on shelf eligibility. Therefore, we ask that the Commission clarify the meaning of the deadline for filing the transaction documents related to a shelf takedown in certain circumstances. In some cases, transaction documents must be corrected after filing in order to (for example) correct an error or conform the terms of the documents to the disclosure in the prospectus. We request that the Commission clarify that if the documents that are required to be filed as exhibits are timely filed in substantially final form, the fact that any such document is subsequently amended or otherwise corrected will not be viewed by the Commission as constituting a failure to have timely filed the corrected document.

2. Certain Form 8-K Reporting Requirements

We also request that the Commission provide limited relief with respect to certain existing requirements for filing of Current Reports on Form 8-K. Some events that trigger a reporting requirement are completely outside the control of the issuer, and may not be known by the issuer prior to the reporting deadline. For these items, we request that the reporting obligation instead be triggered when the issuer knew of the occurrence, if outside the issuer's control, rather than upon occurrence of the event itself.

The first of these items is Item 6.02, Change of Servicer or Trustee. Currently, an issuer is required to file an 8-K within four business days after a servicer or trustee is removed, replaced or substituted. A transfer of servicing by a servicer or subservicer without notice to the issuer – even if in breach of the servicer's contractual agreements – would trigger a reporting requirement, even though the issuer would be unaware of the transfer and, even with the exercise of careful diligence, could not reasonably have known about it. Therefore, we request that the event triggering a reporting requirement under this item be the issuer's knowledge or receipt of notice of the removal, replacement or substitution of a trustee or servicer.

The second of these items is Item 6.04, Failure to Make a Required Distribution. Failure of a trustee or securities administrator to make a distribution as and when required under the transaction documents could be (and often is) discovered weeks or months after the occurrence. This may occur because, for example, a trustee or securities administrator made a simple mathematical error in calculating the amount distributable on each class of ABS. Therefore, we request that the Commission clarify that the event triggering a reporting requirement under this item is the issuer's knowledge or receipt of notice of the failure to make a required distribution.

In neither case would the receipt of information by investors be materially delayed. An ABS issuer can file a current report on Form 8-K only after the issuer becomes aware that such a report is required to be filed. The only result of the requested changes would be that issuers would not be penalized for events that are wholly outside their control.

II. Disclosure Requirements

SIFMA supports improvements in disclosure for offerings of ABS, including many of the Commission's proposals. We comment on certain of those proposals below.

We agree that disclosure of asset-level data as part of the prospectus and in periodic reports is appropriate. Our investor members believe that availability of standardized asset-level data is a necessary and key element of restoring investor confidence in the ABS markets. They recognize that this will impose costs and burdens on ABS issuers, but the receipt of the information needed to make an informed investment decision is their primary concern. Our dealer and sponsor members agree that availability of standardized asset-level data is a key element of restoring investor confidence in the ABS markets, but they are very concerned that an inflexible application of the ALD requirements would have a particularly severe impact on aggregators and smaller originators, and they ask the Commission to weigh the costs against the benefits in crafting final rules.

While the Commission's efforts are comprehensive, in certain areas we also suggest the requirement of additional disclosures even beyond what the Commission has proposed.

A. Asset-Level Data

1. Summary

SIFMA supports the Commission's desire to provide investors with additional disclosure regarding pool asset characteristics and performance in connection with public offerings of ABS, and believes that the availability of asset level data is important to an investor's investment decision. We believe that standardized, consistent disclosure of asset-level information is a critical component of the restoration of investor confidence required to drive investors' engagement in the securitization markets. Our investor members, in particular, applaud the SEC for proposing to mandate standardized disclosure at the asset level.

However, we do have concerns regarding some of the Commission's proposed ALD fields. After weighing the importance of each proposed data field in Schedules L and L-D against the costs and feasibility of providing it, we provide, in the attached Annex, comments on those fields that we believe should be modified or deleted and on additional fields that we believe should be added.

Our investor members believe that the foremost concern in considering the ALD requirements should be disclosure of information reasonably required to make an informed investment decision. With that in mind, our investor members believe that all of the ALD fields, subject to the comments contained in the attached Annex, should be mandatory.

Our dealer and sponsor members believe that a "provide-or-explain" regime would be an appropriate alternative to requiring disclosure of each proposed ALD field in every instance. To the extent that an issuer is not able to disclose any ALD field, the issuer should be required to identify the undisclosed ALD field and explain why that ALD field was not provided. The "provide-or-explain" regime is discussed in more detail below.

Our views on carve-outs for resecuritizations, a reasonable transition period, grandfathering of legacy assets, the application of Rule 409, the measurement date for ALD, and grouped account data also are set forth below.

2. Specific Comments on Proposed Schedules L and L-D

We have carefully reviewed each ALD field listed in proposed Schedules L and L-D. The Annex to this letter identifies ALD fields which we believe should be (i) reformulated in order to provide information that would be more useful than the information called for by the proposed schedule, (ii) added to Schedule L or L-D because, although not included in the proposed rules, the added fields would provide useful additional information regarding the pool characteristics and performance, or (iii) removed because their inclusion raises privacy issues or other concerns and we believe that they are not material. In our view, reformulating the ALD fields identified in the Annex as proposed would help to achieve the Commission's desire for increased transparency, would provide issuers, sponsors and servicers with clearer guidance regarding the information that is to be provided, and would facilitate more informed investment decisions.

The Annex identifies certain ALD fields that would require the disclosure of proprietary information. Competitors or other interested parties seeking information about originators would be able to use these ALD fields to monitor an originator's business activities. We have requested that these ALD fields be reformulated or deleted in order to protect originators' proprietary information.

The Annex also identifies changes that should be made in order to protect the privacy of obligors and to permit sponsors and servicers to comply with legal and regulatory requirements regarding the protection of personally identifiable information. We request that the Commission coordinate with other regulatory agencies to ensure that required disclosure of ALD fields would not conflict with any applicable limitations on such disclosure.

We are requesting the removal only of ALD fields whose omission we believe would not adversely impact the recipient's ability to make an informed investment decision. While we support the disclosure of data that facilitates an informed investment decision, requiring information that is not material merely increases the costs to issuers of providing that information, without a corresponding benefit. Issuers should not be prevented from accessing the securitization markets solely because they are unable to provide information that would not be of material value.

In addition to the comments that refer to specific fields listed on proposed Schedules L and L-D, our investor members request that the categories related to FICO credit scores be realigned into 25-point buckets rather than 50-point buckets as proposed. While our investor members appreciate the various issues associated with disclosure of FICO scores, credit score is often the most useful tool for an investor to evaluate a portfolio of consumer loans and the existing categories are too broad to permit investors to conduct a proper analysis. Our investor members submit that a FICO score of 650 reflects a substantially different credit profile than a score of 699, but both scores would be disclosed as in the same category under the proposed rules. Providing more granular credit score data would better permit investors, in the view of our investor members, to make an informed investment decision.

3. Investor Members Support Mandatory Disclosure

Although SIFMA supports the Commission's desire to provide investors with additional disclosure regarding pool asset characteristics and performance in connection with public offerings of ABS, our members have differing views on how to best implement the Commission's ALD proposal.

SIFMA's investor members believe that ensuring that investors receive all of the information needed to make an informed investment decision is paramount. They applaud the Commission's recognition of the importance of asset-level disclosure, and believe that all of the proposed ALD fields should be mandatory. In the view of our investor members, any asset for which any less than all of the required ALD fields could be produced should not be included in an asset pool backing either publicly offered ABS or ABS offered in reliance on Rule 144A or Rule 506 of Regulation D.

In the opinion of our investor members, the relative size of the securitization sponsor or asset originator does not affect the importance of the ALD fields to investors in making an investment decision. They believe that all securitizers, regardless of their size, should be subject to the same ALD requirements. In their view, securitizers that are unable to provide all of the ALD fields should be permitted to securitize assets only through statutory private placements under Section 4(2). By restricting these securitizers to the statutory private placement market, our investor members believe they would be able to directly negotiate for due diligence rights and access to information to the extent necessary to make an informed investment decision.

SIFMA's investor members, therefore, request that the Commission require issuers to disclose all of the ALD fields for each asset backing ABS offered either publicly or in reliance on Rule 144A or Rule 506 of Regulation D. However, if the Commission is inclined to limit the scope of the ALD requirement or to not require that all ALD fields be disclosed in every instance, our investor members believe that the Commission should consult with the investor community before making specific determinations with respect to ALD disclosure.

4. Dealer and Sponsor Members Support Provide-or-Explain Regime

SIFMA's dealer and sponsor members support a provide-or-explain regime for ALD disclosures. Under this proposal, if an issuer omits disclosure of any ALD field, the issuer would be required to identify the omitted field and explain why the data was not disclosed. Investors would be able to determine whether the omitted disclosure is useful to them, whether or not to invest, and if so at what price. Our dealer and sponsor members believe that this approach would subject issuers to market forces that would compel them to provide the appropriate level of ALD disclosure, while at the same time increasing the standardization, utility and availability of those ALD fields. The dealer and sponsor members do not believe that any particular financial asset, or pool of assets, should be permanently foreclosed from securitization in the public or Rule 144A markets simply because one ALD field, or a few fields, are not available. Of course, issuers should provide clear disclosure as to what ALD will and will not be provided, so that an informed investment decision can be made based upon the information available.

Although our dealer and sponsor members agree that ensuring that issuers provide the information needed to make an informed investment decision is an important objective, they also believe that the Commission should weigh the costs of compliance with those requirements against the benefits of increased disclosure. Our dealer and sponsor members emphasize the significance of the burden on originators and servicers that would be imposed by the ALD disclosure and reporting requirements as proposed. Originators and servicers may need to update their origination and servicing platforms because some of the proposed ALD requirements include information that is not currently collected by originators during the underwriting process or by servicers after origination. These updated platforms would also need to undergo extensive testing before the information could be relied upon for reporting purposes. Originators may need to revise their credit manuals and form contracts and retrain their loan origination personnel to ensure that the additional information is collected, and servicers may need to update their collection guidelines. Originators and servicers may also need to review whether collection of any additional information they are required to gather during the origination or servicing process or release of information they are required to disclose in connection with a securitization could violate applicable federal, state or local laws or regulations. These systems upgrades, training programs and legal reviews will impose a material financial burden and require significant time to implement.

SIFMA's dealer and sponsor members are particularly concerned about the effect of the proposed ALD requirements on smaller originators and servicers. As currently proposed, the ALD requirements would most likely prevent some securitizers, in particular smaller originators, from accessing capital through the securitization markets. Smaller originators and servicers may not be able to incur the costs of a potentially massive overhaul of their current systems and practices. Originators and servicers that are unable to comply with the proposed ALD requirements would not be able to directly access the securitization markets, and as a result, the value of their portfolio assets would likely be reduced due to lower liquidity.

In the view of our dealer and sponsor members, the proposed ALD requirements could also significantly impede the "aggregator" securitization market. Aggregator securitizations involve a securitizer (an "aggregator") that acquires whole loans from originators for the purpose of securitizing the aggregated pool of loans. Aggregators may not have access to the expanded ALD from some originators, and would therefore be unable to purchase loans from those originators. SIFMA's dealer and sponsor members urge the Commission to recognize the importance of aggregators in facilitating access to the capital markets by smaller originators. Not only could smaller originators be foreclosed from participating directly in the securitization markets because they would no longer be able to conduct their own offerings of ABS, but the ALD disclosure requirements also could keep them from participating indirectly in the securitization markets because they would no longer be able to sell loans to aggregators.

Our dealer and sponsor members are concerned that, as a result, small originators may lose a significant source of funding and liquidity at a time when access to funds is at a premium. Furthermore, because whole loans potentially could not be sold by these small originators to be securitized by others, the value of these loans would be diminished in comparison to loans originated by large institutions able to comply with the ALD requirements. The loss of access to the securitization markets and the reduction in value of the assets may force some small originators out of business, resulting in fewer sources of credit available to consumers and businesses. Consumer and business financing could become concentrated in a few large institutions. In particular, the system of mortgage financing could become further concentrated in a few large institutions, or with government-sponsored entities.

Our dealer and sponsor members believe that utilizing the provide-or-explain approach would help to alleviate these concerns, while still facilitating a significant enhancement of disclosure in securitization transactions.

5. Resecuritizations

Compliance costs for delivery of the proposed ALD in many resecuritizations could be high due to the need to provide enormous amounts of information. Additionally, as addressed below, compliance would simply not be feasible for resecuritizations of existing ABS, because the underlying transaction documents do not provide for delivery of the contemplated information. SIFMA supports an exemption from the proposed ALD requirements for resecuritizations, so long as the pool assets are sufficiently "seasoned." We believe that the appropriate minimum seasoning timeframe is 12 months.[33]

If the Commission elects not to exempt resecuritizations from the proposed ALD requirements as we have requested, our members agree that it would be appropriate for the rules to apply only to a class of underlying securities that represents at least some minimum percentage of the asset pool. Our dealer and sponsor members support setting this disclosure threshold at 10 percent or more of the asset pool, which is the same concentration level at which disclosure would be required in a registered offering with respect to a significant obligor under Item 1112 of Regulation AB. Our investor members would support a substantially lower percentage.

6. Transition Period

Under the proposed rules, issuers would need to file all of the ALD included in Schedule L in connection with each ABS offering, and would need to file all of the ALD included in Schedule L-D on a periodic basis; issuers would of course bear the risk of liability if the ALD is materially inaccurate. Therefore, updates to underwriting and servicing platforms would need to undergo extensive testing before the information could be relied upon for disclosure or reporting purposes.

SIFMA's dealer and sponsor members support an extended transition period for implementation of the ALD disclosure requirements, and they believe that 18 months should be sufficient. This transition period would allow originators and servicers to implement platform modifications necessary to comply with the ALD requirements and would also allow smaller originators and servicers to examine the feasibility of converting their platforms to comply with the ALD requirements.

Our investor members, while acknowledging the need for a transition period with respect to the ALD disclosure requirements, believe that it should be no longer than the one-year maximum proposed by the Commission.

---

[33] The imposition of a one-year seasoning requirement would prevent the use of a resecuritization structure as a mere device to circumvent the asset-level disclosure requirements.

7. Grandfathering

Our members agree that assets originated prior to the end of the transition period should be grandfathered. Until the end of the transition period, originators and servicers may not have completed the modifications to their platforms required in order to comply with the ALD requirements. If assets originated before the end of the transition period are not exempted from the ALD requirements and an originator is unable to satisfy the ALD requirements, then that originator would not be able to securitize those assets and the market value of those assets would be adversely affected. Our dealer and sponsor members believe that this argument supports a permanent exemption of those assets from any ALD requirements. However, our investor members believe that the importance of ALD to investors is such that the grandfathering period for assets originated prior to the end of the transition period should be limited to an additional one year following the end of the transition period.

As noted above, ABS that are currently outstanding or are issued prior to applicability of the new rules could not be resecuritized in a public offering if the proposed ALD requirements were to apply. We request that ABS issued prior to the end of the transition period be grandfathered by exempting resecuritizations of such ABS from the ALD requirements, as discussed above.

8. Applicability of Rule 409

Our dealer and sponsor members request that the Commission clarify the circumstances under which issuers may rely on Rule 409 under the Securities Act of 1933, as amended (the "Securities Act") for the omission of limited ALD fields in a registered offering, or may make a similar determination in a Rule 144A or Regulation D offering to the extent that Regulation AB disclosure is required, particularly if the Commission chooses to reject their provide-or-explain proposal. For example, if an issuer is unable to provide data responsive to a single ALD field for an asset pool because the information is unknown and not reasonably available, is that pool ineligible for securitization in a public offering? Would ABS backed by that pool be ineligible for a private offering under the Rule 144A or Regulation D safe harbors?

9. Measurement Date

We believe that the measurement date for ALD provided as part of a Rule 424(h) preliminary prospectus or a prospectus filed with a registration statement on Form SF-1, as applicable, may be the cut-off date. Proposed Item 1111(h)(1) specifies that the measurement date for the ALD provided with a 424(h) preliminary prospectus or a Form SF-1 prospectus, as applicable, should be "a date designated by the registrant that is as recent as practicable." Under certain circumstances, the most recent practical date may be the cut-off date, and this result is not expressly prohibited by the proposed rules. However, a request for comment in the Proposing Release appears to imply that the measurement date should be a date different from the cut-off date.[34] We therefore request that the Commission clarify that the measurement date may be the same as cut-off date, and that if the ALD to be filed with the final prospectus would be identical to the ALD previously filed, then the prior filing may be incorporated by reference into the final prospectus and re-filing of the ALD would not be required.

10. Grouped Account Data

Our members believe that the proposal to require grouped account data for ABS backed by certain asset classes should be drastically scaled back. Issuers of credit card or charge card ABS already provide delinquency and loss experience data as well as yield and payment rate information. Our members believe that this information, along with the other information currently disclosed by issuers in stratification tables, should be enhanced to provide the performance data and pool characteristics necessary for investors to make informed investment decisions. While our members agree that existing disclosure could be improved, they believe that requiring that extensive grouped account data be disclosed would not provide investors with meaningful significant additional information regarding pool performance, and our dealer and sponsor members are concerned about the significant financial burden that they believe this would impose on issuers. In order to present the grouped account data that is proposed to be required, an issuer would essentially need to capture asset level data and then manipulate that data into 14,256 grouped account data lines.

SIFMA's members believe that for ABS backed by credit card and charge card receivables, limited grouped account data, along with expanded performance data and stratification tables that are standardized, would provide meaningful information for users to assess and to monitor a transaction, and would facilitate comparative analyses among different issuers.

B. Waterfall Computer Program

1. Summary

SIFMA supports and values efforts to increase the clarity of disclosures made to investors in connection with structured finance transactions. We believe that clear, unambiguous disclosure regarding pool asset characteristics and transaction mechanics is essential to attracting investors back to the ABS markets and maintaining healthy markets in the future. We appreciate the Commission's efforts to minimize the need for complicated textual disclosures of matters that may be more appropriately, and accurately, disclosed in other ways.

Both our investor members and our dealer and sponsor members support the Commission's proposal to require filing of a cash flow waterfall computer program, to the extent that it is limited to a simple program that clearly describes how projected cash flows from pool

---

[34] *See* 75 Fed. Reg. at 23356-23357, where the Commission asks whether there are "any data fields that would be inappropriate or too burdensome to supply as of two different measurement dates (*i.e.,* the measurement date and the cut-off date)."

assets flow down the payment waterfall to each tranche of ABS. However, the Proposing Release is ambiguous. It is not clear to us whether the Commission intended to require only such a simple waterfall program, or also to require that the program integrate a cash flow engine and a valuation engine that combines the newly-proposed asset-level data, the cash flow model and the waterfall program into a complete analytic model.

We request that the Commission clarify that the scope of the program that is required to be filed is limited to the cash flow waterfall. In lieu of requiring ABS issuers to provide and file a complete open source valuation model including a cash flow engine, our investor members request that the Commission require that a complete cash flow engine capable of utilizing the waterfall program and ALD file be available at the time that the prospectus is filed, and that this requirement be permitted to be satisfied by the availability of a commercial, closed-source solution at the issuer's cost until completion of the initial distribution of the ABS. After that time, in our investor members' view, access to the cash flow engine should be at the investor's cost.

If the Commission instead requires that the filed program constitute a complete valuation model, then our dealer and sponsor members request that the Commission apply a lower standard of liability to the cash flow engine and other elements of the program (other than the specific waterfall element), similar to that applied to historical static pool information under Item 1105(d) of Regulation AB. They would also request that the Commission permit this requirement to be satisfied in part with a closed-source program.

2. *Filing the Waterfall Program and Providing Separate Access to a Cash Flow Engine*

Both our investor members and our dealer and sponsor members support the Commission's proposal to require the filing of a cash flow waterfall computer program, to the extent that it is limited to a description of how projected cash flows are allocated through the payment waterfall to each tranche of ABS.

In addition, SIFMA's investor members want to ensure that the waterfall computer program is actually usable in conjunction with an available cash flow engine. Therefore, they request that the Commission require that there be made available to potential investors for the duration of the initial distribution of the ABS, at the cost of the ABS issuer, the opportunity to use a cash flow engine that can accommodate the required ALD fields or (as described below) rep lines as inputs, and produce outputs usable by the waterfall computer program. This requirement could be satisfied by ensuring the availability of an appropriate closed-source, commercial solution to investors who desire to use it and who will accept reasonable conditions of use from the vendor.

For many asset classes, current modeling norms use representative lines of data ("rep lines") as inputs of pool asset characteristics rather than asset-level data files. Rep lines group individual assets into categories, which are then modeled by the cash flow engine as if they were individual assets. For some asset classes, the proposed asset-level data files may be so large that the waterfall computer program could take hours or days to complete its analysis, if the analysis is possible at all. Instead of requiring that the cash flow engine be capable of considering each individual pool asset separately, the Commission should permit the cash flow engine to accept rep lines generated from the ALD files for the purpose of simplifying and expediting the analytical process. We recommend that where rep lines are used, the method by which the rep lines are created from the ALD and any simplifying assumptions in the methodology be required to be disclosed.

If the Commission adopts this proposed requirement, we ask for clarification that there would be no Securities Act liability for this third-party cash flow engine, or for the integration of this cash flow engine with the asset-level data file and with the filed waterfall computer program. We believe that such liability should only apply to statements of fact made in the waterfall computer program itself regarding the transaction mechanics detailed therein and in the transaction agreements.

3. Ambiguities in the Proposing Release

Our dealer and sponsor members ask the Commission to note several ambiguities in the portions of the Proposing Release dealing with the cash flow waterfall computer program requirement. They recognize, as the Commission stated in its Proposing Release, that receipt of "only a textual description of [payment] information in the prospectus . . . may make it difficult for [investors] to perform a rigorous quantitative analysis of the ABS."[35] Disclosure explaining payment priorities, trigger events and other features of the payment waterfall in an ABS transaction should clearly indicate how cash receipts are allocated to each class of investors in the ABS. The Proposing Release also notes that it is often impossible for investors to convert the priority of payment rules set forth in the operative documents into computer code for use in quantitative analysis before making an investment decision.[36] They generally support disclosure requirements that provide investors with the tools to make more informed investment decisions, and as such generally support requirements that would make disclosure of the payment waterfall clearer and easier to understand.

Our dealer and sponsor members agree with the Commission's statement that the waterfall computer program "is a necessary but not a sufficient tool for carrying out quantitative analysis of an ABS."[37] As recognized in the Proposing Release, a thorough quantitative analysis of a series of ABS requires:

- asset-level information, or grouped account data, describing the assets underlying the series of ABS, which would be required to be provided by an ABS issuer under the asset-level data requirements discussed above;

[35] 75 Fed. Reg. at 23378.
[36] 75 Fed. Reg. at 23378.
[37] 75 Fed. Reg. at 23378 (footnote 339).

- a collateral cash flow model that combines asset-level information with a series of assumptions regarding losses, prepayments, collateral valuation, and other factors, and outputs a projection for cash flows arising from the pool assets;

- the waterfall computer program, which accepts as input the projection of cash flows (as well as current outstanding balances of all tranches of ABS) and allocates cash, based on the provisions in the transaction documents, to third parties (such as servicers and custodians) and investors in each tranche of ABS; and

- an application that we will call a cash flow engine, which combines the previous three elements with certain additional assumptions (such as changes in interest rates) to the cash flows allocated to a particular tranche of ABS and produces a net present value for each tranche.

Together, these four items would allow an investor to project, using its own assumptions, expected cash flows for the life of a tranche of ABS and, therefore, a net present value of that ABS. Our dealer and sponsor members applaud the Commission's encouragement of market participants to "be able to conduct *their own* evaluations of ABS and be less dependent on the analysis of third parties such as credit rating agencies."[38]

Of the above four elements required to conduct a quantitative analysis of a series of ABS, two require normative judgments about the best way to project cash flows based on various inputs, and the other two are merely sets of facts to which those judgments are applied. We believe there is some ambiguity between the text of the Proposing Release, which states that the waterfall program "is a necessary but not a sufficient tool for carrying out quantitative analysis of an ABS," and Proposed Item 1113(h)(1)(ii), which states that the filed code must provide "a user with the ability to programmatically input . . . [t]he user's own assumptions regarding the future performance and cash flows coming from the pool assets underlying the asset-backed security, including but not limited to assumptions about future interest rates, default rates, prepayment speeds [and] loss-given-default rates . . . ."[39] In its comments in the Proposing Release, the Commission recognizes that in addition to the waterfall program filed as part of the prospectus, "investors will still have to build or acquire from a vendor other elements of a complex cash flow and valuation model," and states that investors should be able to generate cash flow simulations by "running the waterfall computer program in combination with other internally-developed or commercially available . . . models, cash flow engines or computational services."[40] It is not clear, however, that these interpretations are reflected in proposed Item 1113(h).

One interpretation of proposed Item 1113(h) would be to require an ABS issuer to incorporate an open source cash flow engine, along with the functionality to change assumptions

---

[38] 75 Fed. Reg. at 23378 (emphasis added).
[39] 75 Fed. Reg. at 23378 (footnote 339); 75 Fed. Reg. at 23429 (Proposed Item 1113(h)(ii)(A)).
[40] 75 Fed. Reg. at 23378 (footnote 339), 75 Fed. Reg. at 23379.

relating to valuation (such as future interest rates), into the waterfall computer program itself. As described below, a program with such functionality would be enormously complex and would require many subjective judgments as to how to perform the calculations.

Another interpretation, taking into account the Commission's statements in the Proposing Release, would be that the required waterfall computer program would function solely as one part of a broader program that encompasses each of the four items described above, with the investor responsible for providing its own cash flow engine and overall valuation model. If this is the case, the ability to programmatically input all of the relevant assumptions would be a function of the cash flow engine, not the required waterfall computer program. Similarly, a cash flow engine, not the required waterfall computer program, would be the program that takes the asset-level data file as an input before passing projected cash flows to the waterfall computer program. The investor would be responsible for integrating all of these facets into its own overall valuation model.

4. Why the Filed Program Should Be Limited to a Simple Cash Flow Model

SIFMA's dealer and sponsor members believe that the role of mandatory disclosure requirements is to equip investors with sufficient tools to analyze securities, but not to make judgment calls on investors' behalf. In their view, requiring ABS issuers to file a computer program that includes a complete cash flow engine would have the effect of requiring issuers not only to disclose factual information but also to perform analytical tasks that could assist investors in determining whether to participate in an offering. A fully-functional waterfall computer program, with an embedded cash flow engine, could comprise millions of lines of computer code, the operation and use of which could be enormously complex. Both our dealer and sponsor members and our investor members support the filing of a clear and simple waterfall computer program that would help investors to conduct their own analytic reviews of ABS transactions.

In the view of our dealer and sponsor members, there are several other reasons why the scope of the filed waterfall computer program should be limited to a description of how projected cash flows are allocated through the payment waterfall to each tranche of ABS. Commercial and proprietary modeling systems have been developed to apply assumptions about losses, prepayment and other variables to pool asset information in order to generate projected cash flows for the life of a transaction. Not only would it be onerous to require ABS issuers to create open source cash flow engines and incorporate that functionality into their waterfall computer programs, but more importantly, the usefulness to investors would be limited because the modeling methodologies would not be the same as those developed for existing systems.

Our dealer and sponsor members believe that the Commission's rules should facilitate investors' use of modeling techniques that emphasize the variables that they, in their own proprietary determinations, deem to be important, in conjunction with a clear, concise description of transaction mechanics. This goal would not be satisfied by providing a rudimentary projection model that may focus on different variables than investors' own models.

There are many ways to project cash flows based on a particular set of assumptions, and even the decision as to what types of variables to consider will affect the projections. Our dealer and sponsor members would prefer to leave to investors the ability to make these decisions, rather than forcing them to rely on issuers or the Commission to determine what methodology works best. If dealers and sponsors are required to provide a fully-functional cash flow model, due to the extremely significant amount of work this would require, they would be incentivized to decrease their support for third-party vendor modeling systems, which they do not believe would be a desirable result. Furthermore, if each dealer provides a distinct and non-interoperable cash flow model, modeling data and resources will become less centralized and less efficient, as investors will be forced to utilize numerous incompatible programs. Such an environment would likely lead to inconsistent forecasting among models and great expense to support acquisition, installation and certification of a new model as required by the Commission, as well as increased costs and inefficiency of hiring appropriate personnel to run and interpret these models.

The concerns of our dealer and sponsor members about being required to file a fully-functional cash flow engine also focus on expense and liability. A program that accomplishes all four of the items discussed above and that could, "when downloaded and run by an investor, provide the user with the ability to automatically input the user's own assumptions . . . [and] produce a programmatic output . . . of all resulting cash flows associated with the ABS,"[41] would be extraordinarily complex and expensive to build, and more importantly, our dealer and sponsor members believe it would be of limited usefulness to those who already use available commercial or proprietary software to analyze ABS transactions. The expense to issuers would involve substantial development costs for a computer program that could consist of millions of lines of code, as well as the cost of obtaining data on asset price projections or other inputs to the cash flow engine that might not normally be collected by issuers. Our dealer and sponsor members are concerned that the costs of compliance with a requirement to file a fully-functional valuation model would significantly impact issuance volume and, at the very least, make ABS transactions significantly more expensive, without offering a commensurate benefit.

For these reasons, as described above, we support the filing of a simple waterfall computer program, not the cash flow engine or the computer system that integrates the waterfall program and ALD file into a complete valuation model, and we request that the Commission clarify the proposed rules in this regard. Furthermore, because we believe that the waterfall computer program should provide investors with a description of transaction mechanics that they could translate into code usable in their own existing computer systems, we support the requirement in the Proposing Release that this waterfall computer program be fully open source. However, this descriptive code should be permitted to utilize routines of other, closed-source components of a collateral model without including the source code of those routines, some of which can be extremely lengthy and complicated. The open-source waterfall computer program should present the user with a clear expression of the payment priority rules located in the operative documents, and should be permitted to rely on other closed-source components of a complete model for complex computations. We acknowledge that issuers, underwriters and

[41] 75 Fed. Reg. at 23379.

others could have potential liability for this program under Sections 11 and 12(a)(2) of the Securities Act, but we believe that issuers will be able to accurately describe payment priorities, trigger events and other waterfall features in this program.

5. Dealer and Sponsor Member Concerns if the Commission Requires that the Program Include a Cash Flow Engine

While we support disclosure requirements (and associated liabilities) for clear, useful facts that investors need to understand the nature of particular ABS, our dealer and sponsor members believe that liability under Sections 11 and 12(a)(2) of the Securities Act is not appropriate for a computer program that also performs analytical tasks that rely on subjective judgments. Therefore, if the filed computer program is required to include an embedded cash flow engine, our dealer and sponsor members propose a lower standard of liability for this aspect of the program.

Available defenses are limited under Sections 11 and 12(a)(2). The issuer is, essentially, strictly liable for material misstatements or omissions under Section 11 of the Securities Act, and while a due diligence defense is available to underwriters and to directors and officers of the issuer, it is unclear what form or extent of diligence of a cash flow engine would be sufficient for purposes of the defense. Likewise, under Section 12(a)(2) of the Securities Act, a defense of reasonable care is available to all parties, but it is unclear what steps a defendant would need to have taken regarding a cash flow engine in order to establish that it had exercised reasonable care. It is highly unlikely, for example, that an accounting firm will be able to provide any comfort as to the integrity of a cash flow engine, because such a program would need to correctly output projected cash flows based on several variables, each of which could be changed by the user. In addition, we are uncertain as to the potential for liability that may arise due to user misunderstanding or misuse of such a cash flow engine, given that investors would be able to download and run the program independently rather than simply review disclosures of factual information.

As a result of the possibility of near-strict liability under Sections 11 and 12(a)(2) of the Securities Act applying to a cash flow engine, our dealer and sponsor members believe that issuers of ABS that would otherwise have been offered publicly could feel compelled to confine such offerings to the private markets. They do not believe this is the Commission's intent, but are concerned that attaching liability for an item that cannot be subject to adequate diligence would deter public issuance.

Therefore, if the Commission were to require filing of a fully-functional integrated program containing a cash flow/valuation engine, our dealer and sponsor members propose a lower standard of liability. This standard of liability could be similar to the standard that applies to certain historical static pool information under Item 1105(d) of Regulation AB. If the cash flow waterfall computer program is required not only to contain descriptions of factual information but also to have the ability to generate projected cash flows, it should not be deemed to be a prospectus or part of a prospectus, or part of the registration statement. Of course, the antifraud provisions of the Securities Act and the Exchange Act would continue to apply. This would alleviate issuer concerns that no reasonable amount of due diligence could fully mitigate the risk of liability under Sections 11 and 12(a)(2) of the Securities Act.

Also, if the filed computer program must include a functional cash flow engine, our dealer and sponsor members ask that the number of allowable inputs to such a system be limited rather than infinitely variable. They do not believe that issuers should be required to provide a cash flow engine that is infinitely versatile in order to model useful cash flow projections, as such an engine would produce speculative results that may or may not be realistic, depending on the inputs. SIFMA's dealer and sponsor members recommend that issuers be permitted to limit the number of user input variables, provided that any such limitations are disclosed and that the end result is usable for its intended purpose. Each additional variable greatly increases the complexity of a cash flow engine, causing the source code to become increasingly complicated, the accuracy of such a program to be more difficult to verify, and user errors to be more likely. End users would, of course, always be able to use their own proprietary or commercially-available modeling systems to add functionality or complexity, if they wish.

In addition, if the filed computer program must include a cash flow engine, our dealer and sponsor members would request that the Commission reconsider the proposed requirement that it be able to "allow the use of the proposed asset-level data file that will be filed at the time of the offering and on a periodic basis thereafter." As described above, for many asset classes, current modeling norms use rep lines rather than asset-level data files. Instead of requiring that the cash flow engine consider each individual pool asset separately, the Commission should permit the cash flow engine to use rep lines generated from the ALD files for the purpose of simplifying and expediting the analytical process.

Finally, if the filed waterfall program is required to contain a cash flow engine, our dealer and sponsor members encourage the Commission to reconsider whether the program should be written in a specific open source, interpreted programming language. Current systems are often written in closed source, compiled programming languages, and our dealer and sponsor members believe that the Commission should encourage continuity for several reasons. First, market participants should not be required to use different technology than they currently use to perform analytical tasks related to ABS transactions. Python and other open source programming languages are not typically used by issuers or underwriters and, therefore, there may be greater technical obstacles and expense involved if the waterfall computer program is required to be written in Python or another open source language. Second, choosing an open source, interpreted language would expose modeling techniques that are often considered proprietary by the companies that created the cash flow engine. As such, the engine would be likely to be simplified in order to protect this intellectual property, and therefore would be of substantially less utility. Finally, use of an interpreted, open source programming language could create implementation problems for end-users, as technical problems could occur when compiling or running the program on different types of computers with different hardware, operating systems, installed software, and differing versions of libraries and other files needed to compile and execute the waterfall computer program. These problems would likely not have occurred in testing, but the issuer cannot know with requisite detail the specifications of the end users' computer systems. Issuers are not in a position to provide this level of technical support. While we understand the Commission's emphasis on openness and transparency in how calculations are performed, we believe that platform flexibility can also tend to increase confusion when external factors (such as a user's computer settings) can produce differing results.

C. Other Matters

1. Representations and Warranties; Repurchase or Substitution of Pool Assets

The Commission's proposal would require that issuers describe any representation and warranty related to fraud in the origination or, alternatively, state that no such representation or warranty is provided. We support this disclosure requirement. In addition, SIFMA's investor members recommend that the Commission require disclosure of all asset-level representations and warranties, and the related enforcement provisions, in the prospectus. Although Item 1111 of Regulation AB requires that issuers summarize the representations and warranties and "describe briefly" the related remedies, our investor members believe that more detailed disclosure should be provided.

Because many factors can affect the need for, or feasibility of, the delivery by the sponsor or another seller of pool assets of certain representations and warranties in any particular transaction, a prescribed list of standard representations and warranties that must be included in every ABS transaction would not be appropriate. However, detailed disclosure of the asset-level representations and warranties being provided would permit investors to readily compare various transactions involving the same asset class or similar asset classes.

The prospectus should also describe, in adequate detail, the procedures for enforcement in the event of a material breach of a representation or warranty. SIFMA's investor members believe that this disclosure should be sufficiently detailed to permit an investor to understand the available remedies.

The Commission has proposed that ABS issuers disclose, if the sponsor or an originator is obligated to repurchase or replace pool assets due to breaches of representations or warranties, on a pool by pool basis, the amount (if material) of the publicly securitized assets originated or sold by the sponsor or originator that were the subject of a demand to repurchase or replace due to breach of the representations and warranties concerning the pool assets in the prior three years, including the percentage of that amount that were not then repurchased or replaced.[42] SIFMA's investor members believe that this disclosure should be more detailed, including the number (and percentage by principal balance) of claims for breach, cures, completed repurchases, substitutions, failures to repurchase, and claims referred to arbitration, as well as the associated costs and expenses borne by each securitization trust in connection with claims for breaches of representations and warranties. However, the disclosure proposed by the Commission and the

---

[42] 75 Fed. Reg. at 23421.

additional disclosure described above should be limited to information related to assets of the same type as those underlying the ABS described in the prospectus. In addition, our dealer and sponsor members strongly believe that issuers should be required to disclose the above information only to the extent that the activity relates to securitizations that occur after the effective date of the new disclosure requirements, as it is highly unlikely that the data necessary to support these disclosures will have been captured for many transactions that close prior to that time. Our investor members disagree – they believe that issuers should be required to make the disclosures described above beginning on the effective date of the new rules, regardless of the date of the securitization in question (other than the three-year look-back already embedded in the proposed rules).

We believe that the issuer should be required to disclose whether the sponsor or other obligated party is required to repurchase or replace any pool asset if the asset becomes delinquent in payment in the first 90 days (or other period) after origination.

2. Servicing

In adopting Regulation AB in 2004, the Commission recognized the key roles played by servicers in ABS transactions. While the proposed rules provide for some additional disclosure regarding servicing practices, SIFMA's investor members believe that the proposed disclosure requirements are insufficient. Investors believe that a lack of transparency with respect to the activities, policies, and procedures of servicers of mortgage loans has been a critical failure in the current securitization process. Investors currently are often unable to obtain, comprehend, and compare information regarding the "how and why" of the servicing of loans that collateralize securities they own or intend to purchase. As the financial crisis of the last several years has unfolded, this lack of transparency has contributed to the exodus of investors from the RMBS markets. Therefore, we recommend that additional disclosure be required in all ABS offerings regarding servicing of the pool assets, as described below.

Under the Commission's proposal, asset-level data would include, among other items, information regarding advances, loan modifications and collateral disposition. In addition, Items 1108 and 1111 of Regulation AB would be amended to require certain disclosures regarding loan modifications and any interest retained by the servicer in the transaction. These additional disclosures will be useful to investors. We support expanded disclosure requirements for numeric and coded data regarding servicing at the asset level and the added pool-level disclosure as proposed, but our investor members believe that investors would benefit from additional pool-level disclosures regarding servicing practices, methodologies and standards in order to better understand how servicers perform their duties. Our investor members therefore request that Items 1108, 1111 and 1121 of Regulation AB, as applicable, be revised to require that each ABS prospectus include additional pool-level disclosure regarding servicer loss mitigation activity, particularly loan modifications, as described below.

The Commission has proposed to require a description of the provisions in the transaction agreements governing modification of the assets, as well as disclosure regarding how modifications may affect cash flows from the assets or to the securities. This disclosure, while helpful, is viewed by our investor members as insufficient. It is important to our investor members that investors receive the information necessary to enable them to understand how each servicer intends to execute its loss mitigation responsibilities, as well as how a servicer's practices may change over time – not simply its obligations under the transaction agreements, which may specify what is required but not how the requirements will be fulfilled.

Our investor members request that, in addition to what has been proposed, disclosure be required regarding each servicer's loan modification criteria and practices, where applicable, including any loss mitigation policies, methodologies and standards used to qualify borrowers for modification programs (including the servicer's practices for determining whether default is reasonably foreseeable), in order that investors will be better able to understand the circumstances under which borrowers may be eligible for loan modifications. Disclosure should also include a description of the types of inputs used in net present value ("NPV") models used by servicers to weigh loss mitigation alternatives against foreclosure proceedings, formulas or other calculations for rate decreases or other term modifications, how forbearance and other partial reductions of principal are treated, and details of methodologies used by servicers to advance interest and principal on delinquent loans and to reimburse those advances. Distribution reports should include information regarding any material changes in these items.

Although disclosure of the provisions of the transaction agreements would provide investors with an understanding of the minimum standard of performance that is contractually required of a servicer, a description of the actual servicing practices would be far more useful. We believe that this request for additional disclosure is analogous to the Commission's proposal to amend Item 1111 of Regulation AB to require that originators disclose not only their underwriting criteria but also changes in underwriting criteria, the extent to which those criteria may be overridden, and information regarding pool assets that do not meet the disclosed standards. As in the case of asset origination, our investor members believe that servicing will be better understood if investors have access to information regarding not only the basic servicing standards but also servicers' actual practices.

3. *Financial Condition of Sponsors, Originators and Servicers*

The Commission has proposed to require that information be provided regarding the financial condition of the sponsor and each 20 percent originator that is obligated to repurchase or replace pool assets due to material breaches of representations and warranties, to the extent that there is a material risk that the financial condition of the sponsor or originator could have a material impact on such party's ability to repurchase defective pool assets (or on the pool, in the case of the sponsor; or on origination, in the case of an originator). Further, in the Proposing Release, the Commission requests comment as to whether financial information regarding such parties should be required in every ABS offering, whether financial information should be required of all servicers and sponsors, and whether disclosure of audited financial statements should be required.

Our investor members support these proposals. However, our dealer and sponsor members strongly object to any blanket requirement in all ABS offerings, without regard to materiality, for disclosure of financial information regarding sponsors, originators or servicers. A requirement for disclosure of audited financial statements would, in their view, be unreasonable. As the Commission of course clearly understands, these parties' credit does not back the ABS, and our dealer and sponsor members strongly believe there should be no implication that such is the case.

Many participants in the ABS markets are private companies whose financial statements are not otherwise disclosed. Our dealer and sponsor members object to the public disclosure of financial statements of companies whose securities are not publicly traded, on the grounds that it would be intrusive and unnecessary. Our investor members believe that information regarding the financial condition of parties that are obligated on representations and warranties is important, and suggest that financial statements of private companies not be required to be filed publicly, but be made available upon request subject to execution of an appropriate confidentiality agreement.

In the opinion of our dealer and sponsor members, concerns about the creditworthiness of parties obligated on representations and warranties can be adequately addressed through appropriate disclosure to the extent that a party's financial condition would be material. This disclosure would be required under the proposed rules, and our dealer and sponsor members do not object to this requirement. However, our dealer and sponsor members believe that disclosure of financial information where there is no material risk to the securitization would be, by definition, unnecessary, and could divert attention from the relevant substance of the disclosure in the prospectus. In their view, inclusion of financial statements of the sponsor or other party in an ABS prospectus could lead to an inaccurate perception of financial backing of an ABS transaction by the sponsor or another party.[43]

III. Definition of an Asset-Backed Security

The Commission has proposed to revise the Regulation AB definition of "asset-backed security" by, among other things, substantially decreasing the limitation on the amount of prefunding that is permitted as an exception to the discrete pool requirement. Currently, the amount of prefunding may not exceed 50 percent of the offering proceeds (or, in the case of master trusts, 50 percent of the aggregate principal balance of the asset pool whose cash flows support the ABS). The Commission has proposed to reduce the prefunding limit from 50 percent to 10 percent.

We believe that the Commission's desire to maintain the integrity of the discrete pool requirement for ABS under Regulation AB can be addressed by reducing the limit on prefunding

[43] Of course, disclosure of financial information, including under some circumstances audited financial statements, is entirely appropriate when the party whose financial information is being disclosed is responsible for making payments on the securities and the exposure to that party is significant, such as in the case of an insurer or derivative counterparty.

from 50 percent to 20 percent, while imposing a 10 percent limit in the case of shelf offerings on Form SF-3. A 20 percent limit would be more consistent with market practice than the 10 percent proposed by the Commission, as noted by the Commission in the Proposing Release.[44] A 20 percent limit also would be more restrictive than the limitation on prefunding that is applicable to ABS that are eligible for sale to ERISA plans in reliance on what are known as the Underwriter Exemptions.[45]

We point out that in an offering on Form SF-1 where the 20 percent limit would be applicable, the Commission staff would have the opportunity to review and comment on the disclosure. As noted above, we agree that a 10 percent limit on prefunding is appropriate in a shelf offering.

IV. Exchange Act Reporting Proposals

As discussed above, we note that the Dodd-Frank Act repeals, with respect to ABS, the provision of Section 15(d) of the Exchange Act that permitted most ABS issuers to suspend reporting after their first fiscal year, and authorizes the Commission to determine whether to permit suspension of reporting for ABS backed by various asset types.

Regardless of how the Commission determines to implement this provision, we generally support the goal of greater transparency, and we appreciate that ongoing reporting by shelf issuers is one way to achieve this. However, we strongly urge the Commission to consider the unique burdens that the current reporting requirements impose on ABS issuers. We have proposed above some limited changes to Form 8-K filing deadlines and reporting requirements that would help to mitigate our concerns without in any way reducing the amount of information available to investors.

A. Proposed Changes to Form 8-K

We ask the Commission to reconsider the proposed change in Form 8-K Item 6.05, which currently requires disclosure if a material pool characteristic at the time of issuance changes by more than five percent from the description included in the final prospectus. We agree that the composition of the pool should be consistent with what is disclosed to investors during the marketing period. However, it is inevitable that at times minor changes to the composition or condition of pool assets may occur. The Commission historically has recognized this fact, and

---

[44] 75 Fed. Reg. at 23390 (footnote 423).

[45] The U.S. Department of Labor has granted prohibited transaction exemptions to most broker-dealers that participate in offerings of ABS that have the effect, generally, of facilitating the offer and sale of ABS that satisfy certain criteria to pension plans and other retirement arrangements that are subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). These prohibited transaction exemptions are customarily referred to as the "Underwriter Exemptions." The strict fiduciary responsibility and prohibited transaction provisions of ERISA would in many cases effectively prevent pension plans and other retirement arrangements from investing in ABS, absent an exemption. Among the criteria that must be met in order to satisfy the Underwriter Exemptions is that pool assets purchased by an issuing entity after the closing date must have a total value no greater than 25 percent of the total principal amount of the securities offered.

has provided for a limited exception from Form 8-K filing requirements for such minor changes. The Commission has apparently determined that the previous exception was too broad, and has proposed to change the threshold for this item from five percent to one percent. Such a change would, in our view, make this item far too easy to trigger in many instances, because a variance as small as one percent in any particular pool characteristic could be caused by a change in the asset pool affecting one-tenth of one percent, or even less, of the pool balance. The problem would be particularly acute in securitizations of residential mortgage loans, but could also affect other asset classes, depending on asset type, pool size and other factors. We believe that the following example may be useful in illustrating the problem:

Assume that in an offering of RMBS backed by a pool of first lien residential mortgage loans having a total principal balance of $250 million, the final prospectus discloses that, as of the cut-off date, 10.0 percent of the mortgage loans (by principal balance) are secured by properties located in the state of Texas. Under current Item 6.05 of Form 8-K, a current report would be required to be filed if, for example, due to discovery of a material breach of a representation and warranty with respect to one or more loans secured by properties located in other states, those loans are removed from the pool and replaced by one or more loans secured by Texas properties, causing the Texas concentration to increase to 10.5 percent – an increase of $1,250,000 in principal balance (in this example). Under Item 6.05 as proposed, a current report would be required to be filed if the substitution of even a single loan having a principal balance of $250,000 (in this example) resulted in an increase in the Texas concentration to 10.1 percent. A similar result could occur due to a substitution of (or change in identification of) even a single loan of a different property type (condominium versus cooperative, for example), occupancy type, frequency of mortgage rate adjustment in the case of adjustable rate mortgage loans, and so forth.

Even in offerings of ABS backed by relatively large asset pools, a requirement that a current report on Form 8-K be filed to report changes as small as one percent in any material characteristic could result in frequent filings of current reports having little or no value to investors.

For these reasons, our dealer and sponsor members support a reduction to three percent, which is acceptable to our investor members. In our view, this would allow for *de minimis* changes in the pool without requiring unnecessary filings, while still notifying investors of changes of any significance.

Finally, we do not support the Commission's proposal to add a new Item 6.09 to Form 8-K, which would require that a current report on Form 8-K be filed to report any material change in the sponsor's interest in the securities of any ABS issuing entity. As proposed, this requirement is inappropriately broad. How many of the securities of a particular issuer or series are initially retained by the sponsor may depend upon a variety of factors, such as the initial success of the offering. In our view, ongoing monitoring of the sponsor's sales effort or its later purchases of securities is not material. If the Commission determines to retain this requirement, we believe that it should be limited to reporting material changes in the sponsor's retention of risk, to the extent that any such retention is ultimately required either pursuant to rulemaking under the Dodd-Frank Act or as a condition to shelf eligibility.

B. Amendment of Section 15(d) of the Exchange Act

Section 15(d) of the Exchange Act automatically suspends the Exchange Act reporting obligation for each class of securities that is held of record by fewer than 300 investors at the beginning of a fiscal year (other than the year of issuance). As noted above, the Dodd-Frank Act repeals this provision of Section 15(d) solely with respect to ABS, and authorizes the Commission to determine whether to permit suspension of reporting for ABS backed by various asset types, as necessary or appropriate in the public interest or for the protection of investors.

In our view, this amendment to Section 15(d) should apply only to ABS issued after the effectiveness of the Dodd-Frank Act, and reporting obligations for ABS issued before that date should continue to be suspended as provided in Section 15(d) before the amendment. We ask that the Commission clarify this result through the regulatory authority granted by the Dodd-Frank Act, either by amending Rule 15d-22 appropriately, by issuing an exemptive order, or by other appropriate means, for the following reasons.

Historically, at least for term ABS (as opposed to ABS issued by master trusts), ABS issuers have almost uniformly suspended reporting under Section 15(d) after the fiscal year of issuance, because most ABS are held of record by fewer than 300 persons. As the Commission understands, Exchange Act reporting for ABS issuers is often dependent on the actions of third parties other than the depositor or sponsor. For example, Regulation AB requires servicer assessments of compliance and related accountants' attestations. ABS issuers also sometimes contract with third parties, including trustees and servicers, to compile the information required for Exchange Act reports, or even to prepare the reports. Because Section 15(d) as in effect before the Dodd-Frank Act did not generally require continued reporting after the year of issuance, ABS transaction documents in many cases do not require the relevant third parties to provide the necessary information. Without such contractual obligations in place, ABS issuers would not have the means to begin generating or providing the required information anew. If revised Section 15(d) were applied to them, then as of the beginning of the next fiscal year following the effectiveness of the Dodd-Frank Act, they would be in violation of their reporting obligations – with all of the attendant consequences, including the loss of shelf eligibility for that depositor and all other affiliated depositors with respect to the same asset class.

We do not believe that it could reasonably have been intended that the amendment of Section 15(d) apply retroactively to outstanding ABS. Such an interpretation would impose an unreasonable burden – in fact, it would impose requirements that would be impossible to satisfy – on ABS issuers. The ABS markets are already experiencing significant disruption due to many factors, including recent and pending statutory and regulatory changes. Further disruption of these markets should be avoided. We ask that the Commission act promptly to clarify that the amendment to Section 15(d) applies only on a prospective basis.

V. Privately Offered Structured Finance Products

A. Summary

We appreciate the concerns expressed by the Commission that disclosure in private offerings could be improved in some cases. However, the historic increase in regulation of the private markets that has been proposed could significantly reduce transaction volume and liquidity in the Rule 144A market, which for many years has been an important alternative to the heavily regulated public markets for large institutional investors.

SIFMA's dealer and sponsor members believe that the proposed disclosure requirements for private offerings to large institutional investors are excessive and unnecessary, and that broad, vague disclosure requirements for some transaction types could make offerings of these structured finance products in reliance on Rule 144A difficult or impossible. SIFMA's dealer and sponsor members ask that the Commission give serious consideration to an alternative approach. They believe that, in offerings made in reliance on Rule 144A, an appropriate balance can be achieved by increasing the amount and quality of information required to be provided to investors that satisfy the current standard for a qualified institutional buyer (a "QIB"), while designating a new class of qualified institutional buyer – a qualified institutional buyer / structured finance, or "QIB/SF" – as to which no enhanced information requirement would apply. A QIB/SF, due to its relative size or its experience with structured finance products, would be better positioned than another QIB to determine what information it needs to make an investment decision and to ensure that it receives that information.

SIFMA's investor members agree that the Commission's proposals could seriously alter the Rule 144A markets, but generally support the Commission's proposals. In their view, ABS investors should have access to substantially the same prescribed information regardless of the markets in which the securities trade, unless the securities are offered in a transaction exempt under Section 4(2) of the Securities Act. Our investor members do not support our dealer and sponsor members' proposal to create a new Rule 144A market for QIBs/SF, even though most of them would qualify as QIBs/SF under the proposed definition. They believe that creating a safe harbor for ABS sold to QIBs/SF would result in a market with materially reduced liquidity that would not be significantly better than that of the Section 4(2) private placement market, and would enable the perpetuation of limited transparency for structured finance products in a manner that would not engender the strengthening of securitization markets.

Both of our member groups are concerned that the broad definition of "structured finance product" that has been proposed could be construed in ways not intended, and we request clarification as to the scope of the definition.

In addition, we ask that the Commission reconsider its approach to proposed Rule 192 – in particular, the proposed characterization of the failure of an issuer in a Rule 144A or Rule 506 offering to provide any of the newly required information, however inadvertent the failure or immaterial the omitted information, as "fraud or deceit."

B. General Response to the Proposal by Investor Members

SIFMA's investor members support the Commission's proposal to require, as a condition to reliance on the Rule 144A safe harbor for resales of structured finance products, that the transaction documents grant to securityholders or prospective purchasers the right to obtain from the issuer, upon request, the same information that would be required to be provided if the offering were registered on Form SF-1 or Form S-1, as well as the same ongoing information that would be required if the issuer were required to file periodic reports under the Exchange Act.

As described below, the investor members agree that limited exceptions to these requirements are appropriate, such as for resecuritization transactions. In general, however, our investor members are of the view that substantially similar information should be provided to investors regardless of whether ABS or other structured finance products are offered and sold in registered public offerings or in transactions exempt from registration by virtue of the Rule 144A safe harbor.

The investor members recognize that the Commission's proposed regulatory changes could significantly reduce transaction volume in the Rule 144A market. Many offerings of structured finance products that would have been undertaken in reliance on Rule 144A might, under the proposed rules, be made as private placements in reliance on Section 4(2), and those securities might be substantially less liquid than securities eligible for resale under Rule 144A. But our investor members do not view the potential limited liquidity of many structured finance products as a result of the proposed changes to Rule 144A as a significant concern. Moreover, the investor members believe that they may have greater ability to negotiate for receipt of additional information in a true private placement transaction than in a Rule 144A offering.

C. General Response to the Proposal by Dealer and Sponsor Members

SIFMA's dealer and sponsor members appreciate the concern expressed by the Commission regarding the adequacy of disclosure in some private offerings of structured finance products. In particular, the Commission has cited collateralized debt obligations ("CDOs") as having been central to the financial crisis.[46] Our dealer and sponsor members are acutely aware that during the financial crisis investors – as well as transaction sponsors – incurred large losses on certain structured securities that, as a result, may now be perceived as types of securities having a high level of risk.

The proposed changes in regulations applicable to private offerings to institutional investors would, in almost all private offerings of structured finance products as they are commonly conducted, substantially eliminate the principal distinctions between registered public offerings and private offerings to large institutional investors, by requiring issuers to covenant to

---

[46] 75 Fed. Reg. at 23393-94.

provide initial disclosure consistent with that in an offering registered on Form SF-1 and ongoing reporting as if the issuer were required to report under Section 15(d) of the Exchange Act. This broad regulation of exempt private transactions would represent a historic shift in Federal regulation of the securities markets, requiring that every issuer of structured finance products provide the full, broad range of disclosure required to be provided in public offerings for the protection of every investor, including individuals and small institutions, to even the largest, most sophisticated institutional investors in a private offering.[47]

In the view of SIFMA's dealer and sponsor members, the scope of the proposal is unjustified, and the proposed changes could significantly impair the functioning of the private markets for structured finance products and reduce the availability of credit. They believe that there remains an important role for negotiated transactions in which securities are purchased by large institutional investors that have the resources and experience to fend for themselves.

In the view of SIFMA's dealer and sponsor members, intrusive regulation of the private markets is inconsistent with the history and purpose of the private placement exemptions from registration under the Securities Act. Section 4(2) was adopted to exempt transactions "where there is no practical need for [the Act's] application . . . ."[48] As expressed by the Supreme Court, the applicability of this exemption depends "on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'"[49] In the Proposing Release, the Commission acknowledges that "[a]s the [financial] crisis unfolded, investors increasingly became unwilling to purchase [asset-backed] securities, and today, this sentiment remains, as new issuances of asset-backed securities, except for government-sponsored issuances, have recently dramatically decreased."[50] In the view of SIFMA's dealer and sponsor members, sophisticated investors are capable of acting in their own interests when they wish to do so. Sophisticated investors can request additional information, and if their request is not satisfied, they can decline to invest. The dealer and sponsor members believe that this ability has been demonstrated by recent developments in the ABS markets, including transactions in which investors negotiated for improved disclosures and stronger representation and warranty mechanics, as well as updates to various shelf registration statements that suggest greater issuer attention to these matters.

Our dealer and sponsor members acknowledge that the proposed rules address only Rule 144A and Rule 506 under Regulation D, two safe harbor exemptions from registration under the Securities Act, and that even if the proposals were adopted, the statutory private placement

---

[47] We recognize, of course, that the Commission has proposed as a condition to reliance on the Rule 144A and Rule 506 safe harbors that the transaction documents provide that this disclosure be provided upon an investor's request. As a practical matter, however, this would mean that every issuer of structured finance products would need to compile and be prepared to provide all of the disclosure that would have been required in a registered public offering, whether or not any investor ultimately requests the information.

[48] H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933).

[49] *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953).

[50] 75 Fed. Reg. at 23330.

exemption of Section 4(2) (and the private resale exemption known as "Section 4(1½)") would remain available and unchanged. However, the private structured finance markets have grown to rely on these safe harbors, particularly on the ability to effect resales to qualified institutional buyers in reliance on Rule 144A, and the volume of securities sold in reliance on the safe harbors (especially those sold in the Rule 144A market) dwarfs the amount sold in reliance on the statutory exemption. Drastically limiting the availability of the safe harbors, as has been proposed, could force many transactions into the less liquid, less transparent statutory private placement market. SIFMA's dealer and sponsor members believe this to be an undesirable result in view of the Commission's stated desire to increase the amount of information available about these securities.

The Commission has not proposed similar draconian changes to its private offering rules for other types of investments that may be perceived as having relatively greater risk but whose issuers also rely on the regulatory safe harbor exemptions from registration, such as small company stock (often sold in reliance on Regulation D) and high yield debt (often sold in transactions relying on Rule 144A). It is very difficult to distinguish, on policy grounds, ABS and other structured finance products from these types of securities, but the Commission has not proposed to impose such onerous new requirements on anything other than structured finance products. SIFMA's dealer and sponsor members do not agree with the Commission's unsupported statement that "the costs of information asymmetry for ABS issuances can differ significantly from those incurred in the issuances of most other securities. . . . [, u]nlike the securities of other companies where information needed to value the securities might be able to be gleaned from a review of basic summary information and discussions with management . . . ."[51] In order to fully assess the risk of investing in, for example, stock of a small company, an investor might want to review much of the information that would be included in a Securities Act registration statement and ongoing Exchange Act reports, such as current GAAP financial statements and management's discussion and analysis of financial condition and results of operations. But the Commission is not proposing that these items be required in order for a small company to take advantage of the exemption provided by Rule 506 when making an offering solely to accredited investors. The rules would still rely on the ability of sophisticated investors to fend for themselves in acquiring the information they deem important.

To impose such stringent regulation on the private ABS markets – while leaving the private markets for other securities that may be perceived as risky untouched – would impose an unfair burden on the structured finance markets that could disadvantage structured finance issuers to the detriment of the credit markets, in the view of our dealer and sponsor members. We do not mean to suggest that similar rules should be imposed in other market sectors. To the contrary, the dealer and sponsor members point out the danger of a slippery slope into unwarranted regulation, as they believe that there should always remain an important place for negotiated transactions between issuers and large institutional investors.

---

[51] 75 Fed. Reg. at 23394.

Our dealer and sponsor members are concerned that the imposition of the proposed disclosure requirements in private transactions may make it impossible, as a practical matter, to execute certain types of transactions in any markets other than the Section 4(2) markets. Securities that do not fall within the definition of "asset-backed security" under Regulation AB would be eligible to be offered publicly only through a full registration on Form S-1. While the proposed new rules do not impose specific disclosure requirements with respect to such securities, the Proposing Release makes it clear that the review of an S-1 filing would afford the Staff the opportunity to comment on the disclosure it believes to be appropriate.[52] To the extent that such securities fall within the proposed definition of "structured finance product" but not within the narrower definition of "asset-backed security," in an offering undertaken in reliance on Rule 144A or Rule 506 under Regulation D, Form S-1 level disclosure would be required to be made available to investors upon request – but, as implicitly acknowledged by the Commission in the Proposing Release, it is not clear what the content of that disclosure would be.[53] The result is a set of disclosure requirements that are extensive while at the same time vague – raising a high bar to compliance, and exposing issuers to potential liability for failure to provide required information.

While the Commission's concerns appear to be focused on the amount of information available to investors in private offerings of certain types of structured finance products, such as managed CDOs and synthetic CDOs,[54] the proposed changes to the safe harbors would affect every security within the broad definition of "structured finance product." One example is collateralized loan obligations, or CLOs. The Commission acknowledges that CLOs are very similar in structure to CDOs, except that instead of the types of "underlying assets including subprime mortgage-backed securities and derivatives, such as credit default swaps referencing subprime mortgage-backed securities, and even tranches of other CDOs" that became common for CDOs, they hold "corporate loans, loan participations or credit default swaps tied to corporate liabilities."[55] CLOs increase the amount of money available for lending to companies and reduce the costs of those loans to the borrowers. The uncertainty of the disclosure required for a Rule 144A offering of a CLO could make such offerings impossible, and drastically diminish a valuable source of cost-effective financing.

Other types of structured transactions that have come to be relied upon by market participants for capital raising, financing or risk management purposes would be difficult or even impossible to execute in the Rule 144A market under the proposed rules. Some types of transactions that could be left in this disclosure limbo include, by way of example,[56] insurance-linked securities, whole business securitizations, future flow securitizations, securitizations of

[52] 75 Fed. Reg. at 23389 (footnote 413).
[53] 75 Fed. Reg. at 23396.
[54] 75 Fed. Reg. at 23396.
[55] 75 Fed. Reg. at 23330 (footnote 28).
[56] We wish to emphasize that we have cited certain types of transactions as examples only. It is not our intent to list every type of transaction that may serve a valuable function in the capital markets, and we ask that the omission of any transaction type from this brief list of examples not be viewed as implying that other types of transactions do not also fill important roles.

film rights, securitizations of franchise fees, securitizations of patent royalties or other intellectual property licensing fees, securitizations of charged-off assets or assets more than 50 percent of which are delinquent in payment, securitizations of leases where the residual values being monetized exceed the limits specified by the Regulation AB definition of "asset-backed security," and securitizations of non-revolving assets where the revolving period exceeds one year. Some of these types of transactions were once thought to be exotic, but have since become staples of the structured finance markets and perform a valuable capital-raising function. Nevertheless, uncertainty over what disclosure would be required under the proposed rules could have the practical effect of closing the Rule 144A market to these transactions.

Any securitization that pools a novel asset type or uses a novel structure could confront the same uncertainty. SIFMA's dealer and sponsor members do not believe that it was the Commission's intent to unduly stifle innovation or to virtually close the Rule 144A market to a broad swath of types of structured finance transactions, both commonplace and innovative. They urge the Commission to consider the potential unintended consequences of an overly broad disclosure mandate and to reconsider the breadth of the proposed information requirements. The dealer and sponsor members believe that the Commission should carefully consider, in addition to the needs of investors, the importance of fostering – or at least not stifling – credit creation and appropriate productive innovation in the capital markets.

While our dealer and sponsor members do not seek to minimize the importance of adequate disclosure to investors, they note that many of the institutions that suffered large financial losses on holdings of structured finance products had sponsored the issuance of those products and therefore had access to detailed information regarding the pool assets and other aspects of the transactions. More fulsome disclosure requirements would not have prevented or even mitigated those losses. Unfortunately, there may be future occasions when macroeconomic events once again result in losses on investments, even where extensive transaction-specific disclosure has been provided – and no amount of required disclosure can fully mitigate the risk of these events.

For all of these reasons, SIFMA's dealer and sponsor members object to the proposed new rules regarding privately-offered structured finance products, and we urge the Commission to reconsider. They believe that, if adopted, these rules would make it difficult, and in some cases impossible, to offer structured finance products other than in reliance on the statutory private offering exemption. They believe it is evident that sophisticated investors in these products are capable of acting in their own interests when they wish to do so. Sophisticated investors can request additional information, and if their request is not satisfied they can decline to invest. SIFMA's dealer and sponsor members urge the Commission not to adopt these proposed changes.

D. Considerations Regarding Further Regulation of the Private Structured Finance Markets

If the Commission determines that new regulation of the private markets for structured finance products is required, then for all of the reasons discussed above, SIFMA's dealer and sponsor members ask the Commission to carefully consider the importance of striking an appropriate balance before it imposes new disclosure requirements on private transactions. Disclosure regarding private offerings of structured finance products should of course be adequate to provide a basis for investors, considering the disclosure in the light of their own investment objectives and other relevant factors, to form an investment decision. However, the disclosures required by the safe harbors should not overwhelm investors with unnecessary information, nor should they unnecessarily burden sponsors and issuers with excessive costs – which, of course, ultimately are borne by investors – without providing a commensurate benefit.

Below, our dealer and sponsor members recommend specific changes in the proposed disclosure requirements, some of which also are supported by our investor members, and some of which are opposed. The dealer and sponsor members propose an alternative approach to regulation of offerings of structured finance products to the largest institutional investors, which is one of the proposals opposed by the investor members.

1. Grandfathering with Respect to Securitizations Generally

If the Commission adopts the requirement that issuers in Rule 144A and Rule 506 offerings of structured finance products covenant to provide the same disclosures as if the transaction were registered, or imposes any significant new disclosure requirements on these transactions, SIFMA's dealer and sponsor members request that assets originated or issued prior to the effective date of the new rules be grandfathered. If the assets in question were not originated in a manner that allows timely collection of the required data, then that data likely will never be available. Absent a grandfathering provision, these assets would forever be foreclosed from being pooled into products sold in not only the public market, but also the Rule 144A market, thereby creating a class of assets that can never be efficiently financed and whose value would be permanently reduced.

2. Resecuritizations

For resecuritizations,[57] the proposed disclosure requirements would be impossible to meet if the underlying securities were issued prior to effectiveness of the proposed rules, and potentially unduly burdensome thereafter. We note that, unlike some types of structured finance products, resecuritizations often use very simple structures involving a single class of underlying securities or a small number of underlying classes. These are valuable "de-risking" transactions for institutional holders of the underlying securities whose ratings have been downgraded or that have otherwise become impaired. In some cases, resecuritizations are actually structured by

[57] We wish to emphasize that in this letter we use the term "resecuritization" as the Commission used it in the Proposing Release, to refer to repackagings of fixed pools of ABS, most frequently RMBS. Resecuritizations do not include CDOs.

investors. However, for securities currently outstanding or issued before the proposed rules become effective, access to the information that would be required under the proposed rules might never be available to a resecuritizer. Further, even for securities issued after the effective date, if the number of underlying securities in an asset pool is large, providing complete disclosure as to, for example, every loan underlying every ABS, could be practically impossible and, if provided, could constitute such an overwhelming volume of information as to be useless to an investor.

For these reasons, SIFMA's investor members join our dealer and sponsor members in requesting that resecuritizations of ABS that occur not less than one year after issuance of the underlying ABS[58] be excepted from the proposed expanded information requirements of Rule 144A and Regulation D.

In addition, as discussed above with respect to securitizations generally, SIFMA's dealer and sponsor members request that, if the information requirements of Rule 144A and Regulation D as they are proposed to be revised apply to resecuritizations, these rules apply only to underlying securities that are issued on or after the effective date of the proposed rules. In addition, our members agree that, if the information requirements of the proposed rules apply to resecuritizations, it would be appropriate for those rules to apply only to a class of underlying securities that represents at least some minimum percentage of the asset pool. Our dealer and sponsor members would support 10 percent or more of the asset pool – the same concentration level at which disclosure would be required with respect to a significant obligor under Item 1112 of Regulation AB. Our investor members would support a substantially lower percentage.

E. An Alternative Approach that Would Preserve the Vitality of the Private Markets for Structured Finance Products

Unless the Commission withdraws its proposal to require extensive new disclosures in the Rule 144A market for structured finance products (which SIFMA's dealer and sponsor members have requested and would strongly support, but which our investor members would strongly oppose), SIFMA's dealer and sponsor members believe that it is important to preserve the availability of the Rule 144A market as it stands today for transactions involving the largest, most sophisticated institutional investors. Therefore, they propose that the Commission designate a new class of QIB – what we have termed a "qualified institutional buyer/structured finance," or "QIB/SF" – to which resales could be made in reliance on the Rule 144A safe harbor as it exists today, without compliance with the proposed additional disclosure requirements. As noted above, our investor members do not support this proposal, even though most of them would qualify as QIBs/SF under the requirements proposed by our dealer and sponsor members.

Offerings to QIBs/SF in reliance on Rule 144A would be required to satisfy the same requirements as offerings to other qualified institutional buyers, as currently defined in Rule

[58] The one-year seasoning requirement would ensure that a resecuritization is a *bona fide* transaction rather than a mere device to circumvent the information requirements.

144A(a)(i), subject to the following new standards. In order to qualify as a QIB/SF an investor would need to, instead of merely owning and investing on a discretionary basis at least $100 million in securities of non-affiliates: (i) own and invest on a discretionary basis at least $1 billion in securities (of any kind) of non-affiliates, or (ii) own and invest on a discretionary basis at least $100 million in structured finance products, or (iii) own and invest on a discretionary basis at least $100 million in securities of non-affiliates, and also be a sponsor, or an affiliate of a sponsor, of at least $100 million in structured finance products. Our dealer and sponsor members believe that these requirements would put a QIB/SF in a significantly better position than a "plain vanilla" QIB, due to the QIB/SF's relative size and/or its experience in investing in or sponsoring structured finance products, to evaluate the information it needs to make an informed investment decision and insist on receiving that information – and not information that is costly to prepare and would not aid the investor in making its investment decision.

This proposal would create a Rule 144A market where offerings of structured finance products in which substantial additional disclosure is made available to all QIBs would exist side-by-side with a market in which large, sophisticated institutional investors would be free to choose the level of disclosure they require. On the one hand, a QIB/SF might wish to receive the more extensive disclosures proposed by the Commission at the cost required to provide those disclosures, in which case it could invest in securities offered to all QIBs. On the other hand, a QIB/SF might decide that it can make its own determination as to the information it needs to evaluate a potential investment, in which case it could invest in structured finance products offered only to QIBs/SF. As there will continue to be structured finance products for which the proposed information is simply not available, a QIB/SF could also choose to invest in those products if it decided that the information available to it was sufficient for its purposes.

SIFMA's dealer and sponsor members believe that this is a more balanced approach than a one-size-fits-all rule that mandates disclosure and reporting equivalent to that required in a registered offering for even the most experienced investors – including investors that may themselves have participated in the structuring of the transaction, not an uncommon occurrence in the structured finance markets. This approach avoids the potential for shutting offerings of certain types of structured finance products out of the Rule 144A market, while at the same time ensuring that investors that are afforded the option to make their own determination as to the level of information needed must satisfy a higher standard of indicia of sophistication.

F. More Specific Comments

In addition to these general principles, on behalf of both groups of our members, we would like to respond to several more specific issues raised by the Proposing Release.

1. Rule 192

Proposed Rule 192 under the Securities Act would require a structured finance product issuer to provide the initial and ongoing information that the issuer covenanted to provide to investors as a condition of relying on Rule 144A or Rule 506, and would characterize a failure to provide this information as engagement in a "transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser" of the securities.[59] According to the Proposing Release, an investor could "take appropriate action under [the] transaction agreements," but Rule 192 would allow the Commission to "bring an action for violation of Rule 192."[60] In the Proposing Release, the Commission notes that "failure to provide such information upon request may constitute a fraud in the offer of securities," and then goes on to refer to Section 17(a)(3) of the Securities Act, the general antifraud provision of the Securities Act, which the Supreme Court has held does not require proof of scienter.

While we understand the purpose of promulgating a rule requiring the issuer to provide the covenanted information, it is not clear to us why the failure to provide the required information should be defined as *per se* fraudulent conduct. The Commission could bring an enforcement action against an issuer without defining such a failure as fraud. As the Commission notes, investors would have the right to take action based on breach of the operative documents. Most Circuit Courts have held that there is no private right of action under Section 17(a).[61] However, to the extent that there is such a cause of action, if a failure to provide covenanted information is defined as fraudulent, it is unclear whether Rule 192 would provide an automatic right of recovery no matter how small or meaningless the failure, without any consideration of the materiality of the information that was not provided. Similarly, Rule 10b-5(c) proscribes acts that "operate or would operate as a fraud or deceit" in connection with the purchase or sale of a security. If the failure to provide covenanted information is defined as fraudulent, it is unclear whether Rule 192 would provide a shortcut for an investor to bring a claim under Rule 10b-5 without the need to prove the materiality of the omitted information.

These implications are very troubling. Any serious doubt as to whether Rule 192 would operate to cause an issuer's inadvertent failure to provide required information, or an issuer's failure to provide information deemed immaterial, to constitute fraud in connection with a sale of securities would force any prudent issuer of structured finance products out of the Rule 144A market.

We do not believe that it is appropriate to expand the concept of securities fraud in this way, or that this was the Commission's intent. We therefore urge the Commission to delete the portion of proposed Rule 192 defining the failure to provide requested information as a fraud or deceit, or at a minimum to clarify the proposed rule to make it clear that such a failure will only be deemed a fraud if and to the extent that the information that was required to be, but was not,

---

[59] 75 Fed. Reg. at 23396 (footnote 472).
[60] 75 Fed. Reg. at 23397.
[61] *See Maldonado v. Dominguez,* 137 F.3d 1, 7 (1st Cir. 1998); *Finkel v. Stratton Corp.,* 962 F.2d 169, 175 (2d Cir. 1992); *Newcome v. Esrey,* 862 F.2d 1099, 1103-1105 (4th Cir. 1982); *Landry v. All American Assurance Co.,* 688 F.2d 381, 391 (5th Cir. 1982); *Schlifke v. Seafirst Corp.,* 866 F.2d 935, 943 (7th Cir. 1989); *Deviries v. Prudential-Bache Securities, Inc.,* 805 F.2d 326, 328 (8th Cir. 1986); *In re Washington Public Power Supply System Sec. Litig.,* 823 F.2d 1349, 1352 (9th Cir. 1987); *Bath v. Bushkin,* 913 F.2d 817, 819-820 (10th Cir. 1990); *Currie v. Cayman,* 835 F.2d 780, 784 (11th Cir. 1988).

provided, contained a material fact necessary in order to make statements made by the issuer, in the light of the circumstances under which they were made, not misleading.

In addition, we do not believe that it is, or should be, the Commission's intent that a failure of an issuer of structured finance products to provide *any* of the information required under the transaction documents, no matter how trivial or without regard to the availability of such information, would subject the issuer to an SEC enforcement action. We request that the Commission clarify that only such a failure that is material would constitute a violation of Rule 192. Our dealer and sponsor members request clarification that information that would otherwise be required to be provided need not be provided if such information is not known or reasonably available to the issuer, consistent with Rule 409 under the Securities Act.

2. Short-Term Products

Short-term products, such as asset-backed commercial paper, may present different issues and require different treatment from the types of term products to which the proposed rules are directed. We urge the Commission to consider these differences in proposing final rules and to provide exemptions from inappropriate requirements.

3. Structured Finance Products that are Not Asset-Backed Securities

If the Commission adopts the requirement that issuers in Rule 144A and Rule 506 offerings of structured finance products covenant to provide the same information as if the transaction were registered, we request clear guidance as to what disclosure would be required for structured finance products that fall outside of Regulation AB's definition of "asset-backed security." For these products, as to which Regulation AB does not and will not provide clear disclosure guidelines, the nature and extent of the information that would be required to be made available to investors upon request is not clear. As described above, the absence of clear guidance could jeopardize or, as a practical matter, eliminate the ability of issuers of these products to rely on the Rule 144A or Regulation D/Rule 506 safe harbors. Therefore we strongly encourage the SEC to promulgate guidance prior to the effectiveness of the rule changes, in the form of "no action" letters or other interpretive releases, for these affected asset classes.

4. Instruments That Are Not Structured Finance Products

If the Commission adopts the requirement that issuers in Rule 144A and Rule 506 offerings of structured finance products covenant to provide the same information as if the transaction were registered, we request further guidance regarding the scope of "structured finance products" that are covered by the new rules. We do not believe that this term should be construed to cover any security or money market instrument that may be secured or backed by a pool of self-liquidating financial assets, but which primarily relies on the general credit of another party (*i.e.*, the security or instrument bears recourse to a specific operating company, municipality or other credit source). In our view, such securities and instruments are more akin to corporate or municipal debt than to the structured finance products that the proposed disclosure requirements are intended to cover.

One type of security that should be excluded from the coverage of the proposed rules based on this guiding principle is a certificate issued in an enhanced equipment trust certificate ("EETC") transaction, and we request that the Commission adopt this position. In an EETC transaction, trust certificates are sold in order to finance the purchase of equipment (usually an aircraft) by an owner trust. The owner trust then leases the aircraft to an airline, and issues notes to a pass-through trust, which then issues the certificates to investors. Payments on the lease are routed to the investors through the notes and then the certificates. Upon expiration of the lease and maturity of the notes and certificates, the airline may exercise a purchase option to regain title to the aircraft. In a variant structure, an airline owns the aircraft outright and issues notes secured by a mortgage on the aircraft, and the debt service payments on the notes are routed through the certificates. Upon maturity of the notes and certificates, the airline owns the aircraft free and clear. In both cases, investors rely on the creditworthiness of the airline (*i.e.*, the ability of the airline to make its lease or mortgage payments).

In our view, which we understand to be the consensus view of industry participants, EETCs should not be treated as a structured finance product, but rather as similar to a corporate secured bond. We note the approach taken by the SEC staff in the American Airlines, Inc. no-action letter dated July 28, 1987,[62] where the Staff took a no-action position regarding the conclusion that the sole "issuer" in an EETC transaction for purposes of the Securities Act, the Exchange Act, and the Trust Indenture Act of 1939, as amended, is the airline obligor on the underlying equipment lease. The types of information that generally would be required to be provided pursuant to the proposed rules would be directed to asset characteristics and performance, which are quantitative and objective. EETCs, however, are essentially corporate credits, as the underlying lease or notes supporting the securities are wholly dependent on repayment by the company sponsoring the EETC transaction. Therefore, the type of information that is required to make an appropriate investment decision for EETCs is different than that required for ABS and similar products – much more similar to the information that would be required to assess an investment in corporate debt or equity, private offerings of which the Commission has not proposed to further regulate.

We also believe that covered bonds – *i.e.*, full recourse debt instruments secured by a pool of mortgage loans and/or other debt obligations – should not be considered to be structured finance products subject to the application of the proposed rules, and we request that the Commission adopt this position. Among other things, covered bonds are untranched, are not considered to be securitized exposures under Basel II[63] and, consistent with the more general

[62] American Airlines, Inc., SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2373 (July 28, 1987).
[63] We also note that two proposed liquidity ratios included in the Basel Committee on Banking Supervision's ongoing efforts to overhaul international bank capital standards apply the same haircuts to covered bonds as to corporate bonds for the purposes of measuring high quality liquid assets available to a bank in a stress scenario and for measuring required stable funding that would need to be obtained during a prolonged credit market event. Basel

interpretive principle discussed above, they are full recourse to the issuer and rated in a manner linked to the credit quality of the issuer. Again, the information required to assess an investment decision in covered bonds is much more akin to the information that would be required to assess an investment in corporate debt or equity, private offerings of which the Commission has not proposed to further regulate.

Securities issued in a tender option bond transaction should also not be treated as structured finance products, or subject to the proposed rules, and we request that the Commission confirm this view. A tender option bond program is a financing transaction in which municipal securities are deposited into a trust, which issues a class of variable rate securities with an embedded tender or liquidity option (tender option bonds), and a class of securities representing a claim on the residual cash flows of the trust. Tender option bonds are generally offered and sold privately to money market investors and the residual securities are generally offered and sold privately to mutual funds, insurance companies and banks. They are distinguishable from ABS and related structured products in that the securities underlying tender option bonds are exempt from the registration requirements of the Securities Act,[64] and the long-term ratings for the structure generally are derived from a single credit source (*e.g.*, specific tax revenues) and not a pool of different credit sources.[65] Although the tender option securities themselves are not exempt from registration, they are commonly considered to be municipal finance products, not structured finance products. Notably, they are not rated by structured finance groups at rating agencies, but rather by their municipal securities experts. The availability of the tender option trust structure is important to the markets for municipal securities, providing an additional outlet for their sale.

We believe that it was clearly not the Commission's intent that interests in real estate investment trusts, hedge funds, private equity funds and similar private investment vehicles be treated as structured finance products, and we request that the Commission clarify this point when it adopts final rules. While such investment vehicles may hold pools of assets, those assets may or may not be self-liquidating. Further, the interests in the vehicle do not bear principal or interest obligations (whether direct or pass-through) and thus are much more akin to a traditional equity investment in a pool of assets – there are no obligations to be "collateralized."

Committee on Banking Supervision Consultative Document: "International framework for liquidity risk measurement, standards and monitoring," December 2009, available at http://www.bis.org/publ/bcbs165.pdf.

[64] We note that the municipal securities market is subject to broad self-regulation by the Congressionally-created Municipal Securities Rulemaking Board (MSRB), whose mission it is "to protect investors and the public interest by promoting a fair and efficient municipal securities market." *See* http://www.msrb.org/About-MSRB/Mission-and-Programs.aspx. In addition to other rulemaking functions, the MSRB provides investors with straightforward access to comprehensive trade data, official statements (including the official statement relating to the underlying securities in a tender option bond transaction) and other continuing disclosure documents. *See* http://www.msrb.org/Market-Disclosures-and-Data/Access-Data/Trade-Data.aspx.

[65] The long and short-term ratings on tender option bonds are a pass-through of the long-term rating of the underlying securities or short-term rating of the relevant liquidity provider, as the case may be. The residual securities do not have a short-term rating.

There may be other types of securities for which exclusion from the definition of "structured finance product" is appropriate. We ask that the staff of the Commission give careful consideration to any no-action requests that may be submitted in this regard.

5. Filing of Offering Circular

In the Proposing Release, the Commission requests comment on whether an offering circular used in connection with an offering of structured finance products in reliance on Rule 144A or Rule 506 should be required to be filed with the SEC, and if so, whether the filing should be non-public and, if public, whether there would be any general solicitation concerns. Obviously, general solicitation is prohibited in a Regulation D/Rule 506 offering by Rule 502(c), and although Rule 144A does not by its terms prohibit general solicitation the staff of the Commission has taken the view that general solicitation is prohibited in a Rule 144A offering as well. We believe that it would be inconsistent with the private offering rationale, which relies in significant part on there being no general solicitation for the offered securities, to require a publicly available filing of the offering circular. The only time public availability could be required is after all of the securities are sold.

In the view of our dealer and sponsor members, at that point, making the offering circular publicly available would be of no help to potential investors in making an investment decision. If the offering circular were not available publicly, what would be the purpose of requiring it to be filed with the Commission? For these reasons, in their view, the Commission should not require that the offering circular be filed.

Our investor members acknowledge the general solicitation concerns of the dealer and sponsor members, but believe that the public availability of the offering circular would be of great interest to investors in the secondary markets. Therefore, they would support a requirement that the offering circular be filed after the sale of all of the offered securities, or appropriate action or guidance from the Commission that would mitigate the general solicitation concerns associated with the filing of offering documents.

6. Definition of "Underwriter"

In the Proposing Release, the Commission asks whether it should interpret the definition of ''underwriter'' to include any sales of ABS where information that would be required in the registered context is not provided. We strongly urge the Commission not to take any such action, which (as anticipated by the Commission in its request for comment) would have the effect of completely prohibiting all sales of ABS as to which the information proposed to be required by the safe harbors is not available. Such a proposal would be inconsistent with the Commission's acknowledgement that "issuers may conduct offerings in reliance on a statutory exemption under the Securities Act without seeking the safe harbor provided by Rule 506 of Regulation D or without representing that the securities are eligible for sale under Rule 144A."[66] In effect, the Commission would be attempting to do indirectly what it cannot do directly under

[66] 75 Fed. Reg. at 23394.

the statutory powers granted to it by the Securities Act – to ban the offer and sale of securities that happen to be currently in disfavor.

7. Regulation S

In the Proposing Release, the Commission asks whether changes similar to those proposed with respect to Rule 144A and Rule 506 offerings should be adopted under Regulation S for offshore transactions. We strongly oppose any such changes to Regulation S. As noted by the Commission in the adopting release for Regulation S, the purpose of the Regulation was "to clarify the extraterritorial application of the registration requirements of the Securities Act . . . , " which is "based on a territorial approach" that "recognizes the primacy of the laws in which a market is located."[67] To limit the types of offerings that may be conducted offshore in reliance on Regulation S – by definition, offerings in foreign jurisdictions with insufficient jurisdictional contacts in the United States to subject them to regulation – would be inconsistent with the rationale of and basis for Regulation S.

We note that foreign jurisdictions generally impose their own regulatory schemes that reflect the judgment of those governments as to what disclosures or other protections are required with respect to offerings of securities to persons in such jurisdictions.

8. Initial Purchaser Holding Period and Other Changes to Safe Harbors

We note that some of the Commission's requests for comment regarding the proposed regulation of the private markets are located in the section of the Proposing Release dealing with proposed Rule 430D.[68] The Commission asks whether it should impose more restrictions on private offerings of ABS, such as perhaps limiting the number of total investors in a Regulation D/Rule 506 offering of ABS, or impose fewer restrictions on private offerings. Restricting the number of purchasers would inhibit marketing efforts and is, in our view, unnecessary in an offering that is limited to sophisticated investors.

In addition, the Commission asks whether it should require that the initial purchaser or investor hold the securities for a minimum period of time prior to resales in reliance on Rule 144A. We strongly oppose any such proposal, which would seriously undermine the underpinnings of the Rule 144A market. As the practice has developed, the "initial purchaser" in a Rule 144A offering usually is an institution that purchases and then resells the offered securities to QIBs, similar to the role of an underwriter in a public distribution. Such institutions are intermediaries, and intend to exit these positions as quickly as possible – in general, almost immediately. They would not be willing to take the risk of holding the securities for a period of time any more than an underwriter in a public distribution wishes to hold, rather than resell, the offered securities. As such, a requirement for a minimum holding period would make traditional Rule 144A offerings essentially impossible.

---

[67] Offshore Offers and Sales, SEC Release No. 33-6863, 55 Fed. Reg. 18,306, 18,306-08 (May 2, 1990).
[68] 75 Fed. Reg. at 23336.

Similarly, any requirement that subsequent purchasers hold their securities for any specific period of time would render those investments substantially more illiquid than they are currently, and would clearly harm investors by reducing the value of these securities and materially impairing the ability of investors in such securities to raise cash when needed or to manage risk. We believe that this proposal is unwise, and we urge the Commission not to act on it.

VI. Codification of Staff Interpretations

We support the Commission's proposal to codify certain staff interpretations regarding registration of ABS.

We agree that, where the asset pool backing ABS includes a collateral certificate or a special unit of beneficial interest ("SUBI") that is required to be registered in accordance with Rule 190, as described in the Proposing Release,[69] no separate fee should be charged for the registration of the collateral certificate or SUBI. We also support the proposed inclusion in Form SF-3 of a provision that would codify the Commission staff's position that ABS shelf issuers are not required to incorporate by reference into the prospectus information filed in annual reports on Form 10-K or distribution reports on Form 10-D. We agree with the view expressed by the Commission and its staff that information included in a current report on Form 8-K that is filed prior to the termination of the offering should be incorporated into the prospectus.

VII. Transition Period

In view of both the extensive and detailed nature of the disclosure requirements and the scope of proposed changes to disclosure and reporting practices in the private markets, SIFMA's dealer and sponsor members believe that a one year transition period would be the minimum needed – and may not be sufficient. In particular, our dealer and sponsor members are concerned that a longer transition period should be provided for compliance with the asset-level data requirements, for which many securitizers are unprepared.

Our investor members agree that a transition period should be permitted in order to allow time for compliance with the new rules, but believe that this transition period should not exceed one year.

Conclusion

SIFMA supports proposed changes in SEC rules that will increase transparency and help to restore investor confidence in the ABS markets. We support improved disclosure, improved reporting, more time for investors to review a preliminary prospectus before making an investment decision, and a better mechanism for enforcement of representations and warranties.

---

[69] 75 Fed. Reg. at 23399.

These are laudable goals. But the Commission's comprehensive proposal sometimes reaches too broadly, or imposes burdens that are heavier than is justified by the perceived benefit. We urge the Commission to carefully consider the observations and recommendations set forth in this letter, and to take care to avoid adopting unnecessarily onerous regulations that could impede the recovery of the fragile structured finance markets.

We greatly appreciate your consideration of the views set forth in this letter, and we would be pleased to have the opportunity to discuss these matters further with you or with any member of the Commission staff. Please feel free to contact the undersigned at 212-313-1359, for Richard Dorfman, or 212-313-1389, for Tim Cameron.

Sincerely yours,

Richard A. Dorfman
Managing Director
Head of Securitization

Timothy W. Cameron, Esq.
Managing Director
Asset Managers Group

ANNEX: SPECIFIC COMMENTS TO PROPOSED ASSET-LEVEL DATA FIELDS

Table 1 – Schedule L Item 1. General Item Requirements

Item No.	Comment
1(a)(2)	For corporate debt and resecuritizations, we believe it is appropriate to include the CUSIP number, ISIN number, or other industry standard identifier.
1(a)(8)	For certain assets, forbearance plans can change scheduled payoff dates after the loan is originated. We believe it is appropriate to use the asset maturity date as of the date that the asset is deposited into the securitization trust.
1(a)(9)	There should be a specified "Not Applicable" or "N/A" option for assets that do not have an original amortization term, such as floorplan receivables.
1(a)(12)	The proposed title, "amortization type," does not describe the two options, fixed or adjustable. We suggest changing the title to "interest rate type."
1(a)(13)	There should be a specified "Not Applicable" or "N/A" option for assets that do not feature an interest-only term.
1(a)(15-19)	There should be a specified "Not Applicable" or "N/A" option for corporate debt securities. In addition, for Item 1(a)(16), assets with servicing fees not calculated based on a percentage would also require an "N/A" option.
1(a)(19)	Certain types of assets do not provide for exceptions to underwriting criteria. For these asset classes, our dealer and sponsor members intend to respond "No" for this item.

Table 2 – Schedule L Item 2. Residential Mortgages Item Requirements

Item No.	Comment
2(a)(1)	Because some first-time home purchases do not qualify for the tax credit under the American Recovery and Reinvestment Act of 2009, the Commission should clarify whether the definition of option 6 is intended to capture all first time home purchases (where the purchaser has not owned a principal residence in the past three years) or those which qualify for the credit under the ARRA.

2(a)(5)	We believe it is appropriate to separately disclose modifications that reflect permanent amendments to loan documents. As such, we request that this item be divided into two fields, one reflecting modifications that are permanent amendments to loan documents and another reflecting forbearances, temporary or trial modifications, or any other temporary changes to repayment terms that are not permanent amendments to loan documents.
2(a)(8)	The Commission should clarify what payments should be included in this field – for example, whether payoff of other unrelated debt or repaying the original lender should be included.
2(a)(15)	Issuers expressed some concern that this field is not captured with any specificity by servicers. Because the methodology with regard to a servicer's ceasing to advance funds is usually based on the servicer's determination of nonrecoverability of advances, an "N/A" or "Not Applicable" option should be provided.
2(a)(16)	Only subordinate liens known to the securitization sponsor should be required to be disclosed here, as it is common that first lienholders are not aware of junior liens that are attached to property after the first lien mortgage is underwritten.
2(a)(17)(ii)	The Commission should clarify what codes are acceptable to satisfy this field, as the definition of "loan type" is not present.
2(a)(17)(iii)	There should be a specified "Not Applicable" or "N/A" option for situations where the most senior loan is not a hybrid loan. Also, there should be a specified "Unknown" option for circumstances where the junior lienholder is unaware of the terms of the most senior loan.
2(a)(17)(iv)	There should be a specified "Not Applicable" or "N/A" option for situations where the most senior loan does not feature negative amortization.
2(a)(21)(i)	Issuers expressed some concern that this field is not captured by certain servicer systems, which may treat each modified loan as a new loan.
2(a)(21)(ii)	Additional options should be provided for forgiveness of principal, rate reductions, maturity extensions and forgiveness of interest.

2(a)(21)(iv-v)	Calculations of both front-end and back-end debt-to-income ratios are likely to differ among originators based on the specific calculations used and the definition of "total monthly income." In the absence of a standard public definition, our dealer and sponsor members believe it is appropriate to report this item as the originator calculates the ratios. Our investor members support the standardization of the definitions of front-end and back-end debt-to-income ratios and believe that this item should be disclosed in accordance with such standardized definitions.
2(b)(3)	Sales prices can be significantly outdated (for refinances) and are generally not material. Appraisal values and loan-to-value ratios are disclosed in other items. If not deleted, the item should include an "N/A" option for refinances.
2(b)(9), 2(b)(14)	Some providers of AVM confidence scores may not permit such scores to be publicly released. Our investor members believe that AVM confidence scores should always be disclosed when such AVM models are used.
2(b)(10)	This field should only require property values obtained by the securitization sponsor, and our investor members would include affiliates in this context.
2(b)(15)	This field should only require junior loans that are actually known to the securitization sponsor, as many junior loans are originated after the senior loan. SIFMA's investor members expect that reasonable efforts would be undertaken to discern the presence of junior loans.
2(b)(17)	This field should be deleted; when an original LTV was calculated is immaterial, because Item 2(b)(7) provides the original valuation date and the original loan amount is provided at origination.
2(c)(1-2), 2(c)(5-6)	The Commission should not require the disclosure of proprietary credit scores that could be reverse-engineered by competitors of the securitization sponsor. In the case that the originator used a proprietary credit score to originate the loan, we believe disclosure of such proprietary score should not be required as long as an alternative credit score (such as FICO) is provided.
2(c)(4-6), 2(c)(8), 2(c)(10), 2(c)(12)	There should be an "N/A" option provided for assets that do not have a co-obligor.

2(c)(7-8), 2(c)(11-12)	The Commission should provide a definition of "partially" verified income and employment.
2(c)(14)	Our dealer and sponsor members intend to provide information about other mortgaged properties of the obligor as of the time of the origination of the related pool asset.
2(c)(15)	The Commission should clarify what types of monthly payments should be included in this field. For example, the Commission should specify whether credit card payments for purchases that are fully paid off each month should be included.
2(c)(21)	The Commission should only require this field to include taxes, insurance payments, and homeowners' association payments.
2(c)(25)	SIFMA's dealer and sponsor members believe that this item should be limited to direct obligations (rather than co-signed or guaranteed obligations of another obligor), whereas our investor members believe that guaranteed or co-signed obligations should be included. Both groups of our members agree that this disclosure should be limited to obligations on residential property that resulted in foreclosure within the last seven years (so that such foreclosure would appear on a credit report).
2(d)(2)	The Commission should confirm that the percentage that is disclosed in this field should represent the total percentage of the original loan balance that is covered by insurance, *e.g.*, 40% for an insurance policy that covers payment default only from 60% of the loan balance to 100% of the balance.
2(d)(6)	This item is immaterial to investors and should be deleted. Investors would not benefit from disclosure of mortgage insurance certificate numbers.

Table 4 – Schedule L Item 4. Automobile Loan Item Requirements

Item No.	**Comment**
4(a)(2)	The Commission should provide a standard definition of "subvented" as used in this and other items throughout the two schedules. It would be helpful to understand exactly what types of subsidies are intended to be captured in this data field.

4(c)(4-6), 4(c)(8), 4(c)(10), 4(c)(12), 4(c)(14), 4(c)(16), 4(c)(18-20)	Credit, income, and employment information regarding some co-obligors is not typically disclosed and in many cases not collected. Only information relating to the obligor or co-obligor upon which the credit decision was based should be disclosed. In addition, any co-obligor fields should include an "N/A" option for assets with only one obligor.
4(c)(7-20)	These items regarding obligor and co-obligor income and employment are not commonly collected by issuers. If required to be disclosed, an "N/A" option should be provided for use where these items are not collected.

Table 5 – Schedule L Item 5. Automobile Lease Item Requirements

Item No.	**Comment**
5(a)(2)	The Commission should provide a standard definition of "subvented" as used in this and other items throughout the two schedules. It would be helpful to understand exactly what types of subsidies are intended to be captured in this data field.
5(b)(9)	We believe it is appropriate to disclose base residual values as defined in the transaction documents whenever possible.
5(c)(4-6), 5(c)(8), 5(c)(10), 5(c)(12), 5(c)(14), 5(c)(16), 5(c)(18-20)	Credit, income, and employment information regarding some co-obligors is not typically disclosed and in many cases not collected. Only information relating to the obligor or co-obligor upon which the credit decision was based should be disclosed. In addition, any co-obligor fields should include an "N/A" option for assets with only one obligor.
5(c)(7-20)	These items regarding obligor and co-obligor income and employment are not commonly collected by issuers. If required to be disclosed, an "N/A" option should be provided for use where these items are not collected.

Table 6 – Schedule L Item 6. Equipment Loan Item Requirements	
Item No.	**Comment**
6(b)(1)	These categories of equipment types are rather limited. Many types of equipment collateralizing securitized loans would fall outside the specified categories, and many other types of equipment could fall within more than one category. For example, a shipping container could be considered "Maritime" or "Transportation" related. The categories should have explicit definitions that permit issuers to easily categorize equipment.

Table 7 – Schedule L Item 7. Equipment Lease Item Requirements	
Item No.	**Comment**
7(b)(1)	These categories of equipment types are rather limited. Many types of equipment collateralizing securitized loans would fall outside the specified categories, and many other types of equipment could fall within more than one category. For example, a shipping container could be considered "Maritime" or "Transportation" related. The categories should have explicit definitions that permit issuers to easily categorize equipment.
7(b)(3)	We believe it is appropriate to disclose base residual values as defined in the transaction documents whenever possible.
7(c)(2)	Our dealer and sponsor members are concerned that disclosure of this item could inadvertently reveal customer relationships of lessors for equipment types that are only leased by a small number of lessees around the world. However, our investor members believe that geographic location is important and therefore should be disclosed. Both groups agree that, in addition, lessees are typically located in many countries around the world, so disclosure of a U.S. zip code would be insufficient. The Commission should expand allowable inputs to include ISO country codes for international assets.

Table 8 – Schedule L Item 8. Student Loan Item Requirements	
Item No.	**Comment**
8(a)(3)	Some current student loan data systems treat loans that come out of a deferment or forbearance period as a new loan. Therefore, we believe it is appropriate to disclose the number of years the loan has been in repayment since the later of origination or the last deferment or forbearance period.

8(b)(2)	Issuers often do not track the geographic location of student borrowers on an ongoing basis. In addition, the Commission should clarify whether the location specified in this item is the location of the school, the home address, the permanent address, or some other address.
8(c)(1-6)	Issuers typically track the score used to underwrite the loan only, rather than both the obligor score and any co-obligor score.
8(c)(3)	For student loans underwritten using a credit score different than FICO, please add an "N/A" option to the categories for this item.
8(c)(4-6), 8(c)(8), 8(c)(10), 8(c)(12), 8(c)(14), 8(c)(16), 8(c)(18-20)	The co-obligor fields should include an "N/A" option for student loans made without a co-obligor.
8(c)(7-20)	Many student loan obligors have no income or employer (as full-time students), so there should be an "N/A" option for all income and employment verification fields.

Table 9 – Schedule L Item 9. Floorplan Financing Item Requirements

Item No.	**Comment**
9(c)(1-2)	These items are inapplicable because the obligor on floorplan receivables is typically a business entity, not an individual, and does not have a credit score.

Table 10 – Schedule L Item 10. Corporate Debt Item Requirements

Item No.	**Comment**
10(e-f)	A "Not Applicable" or "N/A" option should be provided for these fields with regard to corporate debt securities that are not SEC-registered.

Table 11 – Schedule L-D Item 1. General Item Requirements

Item No.	**Comment**
1(b)	For corporate debt and resecuritizations, we believe it is appropriate to include the CUSIP number, ISIN number, or other industry standard identifier.

1(f)(5)	The Commission should clarify whether this item should include negative amortization or prepayments.
1(g)(1)	The Commission should clarify this item to require disclosure only of fees earned by the primary servicer.
1(g)(6)	This item, regarding servicing advance methodology, is not applicable to some asset classes, including student loans. Therefore, the Commission should provide an "N/A" or "No advance obligation" option to the extent that the servicer does not have an obligation to make servicing advances.
1(i)(1)	The Commission should clarify that this item is intended to track whether a repurchase request has been made before the repurchase has been completed. In addition, the Commission should provide an option for repurchase requests that were initiated but the parties later agreed that the repurchase was not required.
1(i)(3)	Transaction documents will contain the identity of the party that is obligated to make repurchases based on breaches of representations and warranties. Therefore, our dealer and sponsor members believe that this item should be deleted. Our investor members believe that multiple parties could provide representations and warranties for a pool of assets, and that the party responsible for repurchases of individual asset may differ, therefore this item should remain.
1(i)(4)	The Commission should clarify what codes should be used to fulfill this item.
1(l)(2)(i-iii)	An "N/A" category should be added to each of these items since prepayment penalties are not typically applicable to certain asset classes, such as auto loans.

Table 12 – Schedule L-D Item 2. Residential Mortgages Item Requirements

Item No.	Comment
2(a)(1)	The Commission should add a category for strategic defaults, where the servicer has determined that the borrower has the ability to pay the loan but is choosing not to make payments.
2(a)(3)	The Commission should clarify what this item is intended to capture. Also, there should be an "Other" option and an "Unknown" option for this item, as there are for Items 2(a)(1) and 2(a)(2).

2(b)(1), 2(b)(3)	These two items should be deleted, as the interest rate of an adjustable loan, which is the sum of an index and a margin, cannot be determined in advance because the index value changes over time. As such, the payment at next reset cannot be calculated in advance.
2(c)(2)	This item should be deleted, as disclosing the bankruptcy case number would permit the reader to obtain personally-identifying information about the borrower. The bankruptcy case number is immaterial to RMBS investors since those investors will not have the ability to provide any direction to the trustee as to how to proceed on the bankruptcy case.
2(c)(8)	Whether the bankruptcy trustee receives post-petition payments and then forwards them on to the servicer is not material and this item should be deleted.
2(e)(6)	The Commission should add a "Fixed Rate" option for adjustable-rate loans that are modified to fixed interest rates, and as such no longer have a margin.
2(e)(7)	The description of this item should be changed to reflect that, if the servicer is no longer advancing principal and interest, it should disclose the principal and interest payment that would be in effect if the loan were current.
2(e)(8-15), 2(e)(19-22)	The Commission should add a "Fixed Rate" option for fixed-rate original loans or fixed-rate modified loans.
2(e)(45-46)	The Commission should clarify whether reimbursable modification escrow, corporate, and servicing fee advances with respect to the loan that are not capitalized should be included in this item. Our investor members request that all such advances, whether capitalized or not capitalized, be disclosed separately.
2(j)(2)	The Commission should specify what circumstances would result in the selection of the "Denied" option.
2(l)	In addition to these items, we ask that the Commission consider adding a field indicating whether an extension from the IRS, for REMIC purposes, has been requested and/or granted for REO property that has been held in a REMIC trust for close to the three-year period for which a REMIC may hold REO property.

2(m)(1)(iv-v)	These two fields should be combined, as the granularity separating attorney fees from costs is immaterial to securitization investors.
2(m)(1)(vii-xii)	These fields should be combined, as the granularity specifying these types of expenses is immaterial to securitization investors.
2(m)(1)(xiii)	Because it is atypical that a securitization would be liable for reimbursement of prior advances, which themselves would be atypical, this item should be deleted.
2(m)(2)(ii)	The Commission should clarify the definition of "held in suspense" used in this item.

Table 13 – Schedule L-D Item 3. Commercial Mortgages Item Requirements

Item No.	**Comment**
3(a)(1)	The definition as listed in the proposing release appears to be incorrect, as it is identical to the definition of Item 3(a)(2).
3(d)(9)	We ask that the Commission consider adding a field for economic occupancy percentage, which would incorporate spaces rented but not yet physically occupied by tenants.
3(d)(14)	This definition should read "Provide total number of square feet leased by the largest tenant."

Table 14 – Schedule L-D Item 4. Automobile Loan Item Requirements

Item No.	**Comment**
4(a)	The Commission should provide a standard definition of "subvented" as used in this and other items throughout the two schedules. It would be helpful to understand exactly what types of subsidies are intended to be captured in this data field. Any subsidies provided are typically made at origination, therefore ongoing disclosure about subvention is unnecessary.

Table 15 – Schedule L-D Item 5. Automobile Lease Item Requirements

Item No.	Comment
5(a)	The Commission should provide a standard definition of "subvented" as used in this and other items throughout the two schedules. It would be helpful to understand exactly what types of subsidies are intended to be captured in this data field. Any subsidies provided are typically made at origination, therefore ongoing disclosure about subvention is unnecessary.
5(b)	Please add a category "Not Updated" for leases that do not have residual values updated during the reporting period.

Table 17 – Schedule L-D Item 7. Equipment Lease Item Requirements

Item No.	Comment
7(a)	Please add a category "Not Updated" for leases that do not have residual values updated during the reporting period.

Table 19 – Schedule L-D Item 9. Floorplan Financing Item Requirements

Item No.	Comment
9(c)(1-3)	These items are inapplicable because the obligor on floorplan receivables is typically a business entity, not an individual, and as such the obligor does not have a credit score.