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January 31, 2005

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

Re: Securities Offering Reform (file No. S7-38-04)
Impacts of Proposal in the ABS Markets

Dear Mr. Katz:

The Bond Market Association[1] (the "Association") is pleased to submit this comment letter to the Securities and Exchange Commission (the "SEC" or the "Commission") regarding the SEC's proposed rules (the "Proposed Rules") for securities offering reform and related commentary contained in Release No. 33-8501; 34-50624; IC-26649 (Nov. 3, 2004) (the "Proposing Release") as they relate to asset-backed securities ("ABS").

At the outset, we would like to note that this comment letter is intended to address only specific issues about the Proposing Release, as applied to ABS, that are most of interest to the Association and its members. This letter is not intended to apply to any securities other than ABS. We note that the Association is submitting a separate letter addressing the Proposed Rules as they relate to fixed income securities generally, other than ABS (the "General Letter"). We note that the comments and recommendations in the General Letter are focused on the non-ABS context.

The Association believes that the ABS markets, non-ABS fixed income markets and equity markets are fundamentally different, including in respect of the offering and sale process. In addition, the regulatory framework of the federal securities laws has been modified over the years to better fit the ABS markets, including with the recent adoption

[1] The Association is an international trade association representing approximately 200 securities firms and banks that underwrite, distribute and trade in fixed income securities internationally. More information about the Association and its members and activities is available on its website www.bondmarkets.com. This comment letter was prepared in consultation with the Association's MBS and Securitized Products Division.

of Regulation AB. As a result of these factors, the Association believes that the ABS market warrants different approaches to various issues from those taken by the non-ABS fixed income markets, including the liability issues discussed in both letters.

We view the proposals as an important step in the Commission's ongoing efforts to modernize the securities markets by eliminating unnecessary restrictions on communications during an offering period, while at the same time enhancing the quality and timeliness of disclosures to investors. The Association believes that the proposals represent a significant step toward achieving these goals, and we hope that our comments will be useful to the Commission as it finalizes the proposals. We appreciate the continuing efforts of the Commission and its staff to modernize the securities offering process, and we are happy to have the opportunity to participate in this important undertaking.

The Proposing Release was published on November 17, 2004. Since that time, the final Regulation AB has been adopted, which for the first time provides a comprehensive codification of the SEC's rules and policies for ABS in the important areas of registration, offering period communications, and reporting, among other matters. We are appreciative of the very constructive interaction between the Commission and ABS market participants in formulating the final Regulation AB. We believe that Regulation AB provides an excellent regulatory framework for the ABS markets, including in the important area of offering period communications, which is tailored to the unique attributes of the ABS markets and strikes an appropriate balance between enhancing the quality of disclosure while avoiding excessive regulatory burdens. In commenting on the Proposed Rules, we are eager to preserve the benefits to all ABS market participants of the very artfully crafted final Regulation AB.

The Association is concerned that the details of the application of the Proposed Rules to ABS are in many instances not definitively articulated in the Proposing Release. Rather, as a general matter, the treatment of ABS and the interaction with Regulation AB is described in only conceptual terms. Because it is not clear in many instances precisely what is being proposed as applied to ABS, and particularly in light of the recent adoption of final Regulation AB, which many ABS industry participants are still reviewing, the ABS industry is at a significant disadvantage in commenting on the proposal.

We believe that at a minimum, there should be an opportunity to have substantive discussions with staff members about the precise effect of the proposal on ABS, and an opportunity to provide a follow up comment letter on the proposal in light of those discussions. At this time, we welcome the opportunity to identify to the Commission certain areas of particular concern to the Association as the Proposed Rules would appear to relate to ABS, and possible solutions to those issues, as discussed below.

1. The terms "seasoned issuer" and "reporting issuer" should be defined, and should in all cases include ABS issuers using Form S-3.

We note that the Proposing Release does indicate in the section on "Application of the Proposals to Asset-Backed Securities" that ABS issuers offering securities registered on Form S-3 would be considered "seasoned issuers," and that ABS issuers offering securities registered on Form S-1 would be considered "non-reporting issuers." The same section also indicates that the "proposals regarding regularly released information for reporting issuers could apply . . . to information conveyed to investors in outstanding ABS, such as static pool information …" This indicates an intention that an ABS issuer can be treated as a reporting issuer.

However, we respectfully submit that this apparent intention was not realized in the Proposed Rules.

Seasoned issuers eligible to use Form S-3 receive favorable treatment under Proposed Rule 433(b)(2), in that they are allowed to use free writing prospectuses without delivery of a statutory prospectus, so long as a base prospectus meeting the requirements of Proposed Rule 430B (on which ABS issuers using Form S-3 are entitled to rely) is on file. However, Rule 433(b)(2) omits reference to issuers using Form S-3 pursuant to General Instruction I.B.5, which is the only section ABS issuers are permitted to use. Moreover, the plain language of Proposed Rule 433(b)(1), which provides less favorable treatment in the use of free writing prospectuses, would appear to apply to an ABS issuer using Form S-3, both because of the failure to reference General Instruction I.B.5, and also because of the reference to issuers not subject to Exchange Act reporting requirements at the time of filing.

Similarly, "reporting issuers" receive favorable treatment under Proposed Rule 168 which permits the regular release at any time of factual business information and forward-looking information without such release being deemed to be an offer. The provision is limited to issuers that are required to file Exchange Act reports. However, an ABS issuer is not actually required to file Exchange Act reports during the offering period for its securities.

Generally, each series of ABS is issued by a separate trust formed by a common depositor, which acts as the registrant. Since the publication of the Proposing Release, the SEC in the final Regulation AB has clarified that the "issuer" of each series of ABS is the depositor, acting solely in its capacity as depositor to the issuing entity, for all purposes under the Securities Act and the Exchange Act. As a result, for each series of ABS, the "issuer" is a separate entity. This creates results that are different than would be the case if the depositor in its corporate capacity was deemed to be the issuer at all times for all trusts that it forms. For example, because the issuer is a separate entity for each trust, Exchange Act reporting requirements arise when that trust issues its securities, and may be eligible for suspension after the first fiscal year of that trust based solely on the number of holders of record of securities in that trust.

The communications provisions of the Proposed Rules focus on communications by or on behalf of an issuer, in connection with, or around the time of, a registered offering of its securities. Consider an example in the ABS context. Suppose that ABC Finance Co., a sponsor, regularly issues separate series of ABS through its affiliated depositor, ABC Depositor. ABC Finance Co. also continuously releases factual business information about its various programs and its previously issued ABS. ABC Finance Co. is in the process of offering its ABC Series 2005-1 asset-backed securities, registered on Form S-3, and wishes to use free writing prospectuses. In this context, the only issuer engaged in a registered offering is ABC Depositor in its capacity as depositor for the ABC Series 2005-1 issuing trust. That issuer does not become a reporting issuer until the first bona fide sale of securities in that takedown. (See Exchange Act Rule 15d-22(a), as added under Regulation AB.) Technically, it would not be a "reporting issuer" during the offering period, regardless of whether other ABS transactions previously issued by ABC Finance Co. are then subject to Exchange Act reporting.

If an ABS issuer that is engaged in an offering registered on Form S-3 is treated as both a seasoned issuer and a reporting issuer for all purposes under the Proposed Rules, as appears to be intended, the fact that such an issuer may be a seasoned issuer (that is, eligible to use Form S-3), but not actually subject to Exchange Act reporting requirements until after the completion of the offering, is a mere technicality that results from the fact that ABS issuers do not need to have an Exchange Act reporting history in order to be eligible to use Form S-3, unlike non-ABS issuers.

Recommendation: In order to avoid confusion on these points, we recommend that definitions of "seasoned issuer" and "reporting issuer" be added to Rule 405 and used throughout the new rules. We further recommend that both terms be defined to expressly include any issuer of asset-backed securities that are registered on Form S-3.

2. The application of the term "ineligible issuer" to ABS should be clarified.

We also have concerns about the application of the proposed definition of "ineligible issuer" to ABS issuers. Among other things, ineligible issuers would not be entitled to rely on Proposed Rule 433, thus any attempted use of a free writing prospectus by an ineligible issuer could result in a Section 5 violation.

We note that clause (i) of the definition of "ineligible issuer" refers to any issuer that is required to file Exchange Act reports but has not filed all materials required to be filed. Again, as set forth in Regulation AB, for each series of ABS, the "issuer" is a distinct entity. For any ABS issuer, during the offering period for its securities when a free writing prospectus might be used, that issuer is not subject to Exchange Act reporting. Thus clause (i) as drafted would never be applicable to an ABS issuer prior to its issuance of securities.

In the event that clause (i) is revised to address, in the case of an ABS issuer, compliance with Exchange Act reporting with respect to other series of ABS, then we request the

opportunity to comment supplementally on that revision. In addition, we make the following comment.

Recommendation: We request that clause (i) be modified to refer only to materials required to be filed within the last twelve months. The open ended nature of the compliance testing period, as proposed, is unnecessarily long.

We understand that one policy reason for the provision in clause (i) is that, in the corporate context, Exchange Act reporting provides ongoing current disclosure about an issuer that provides an information background that in effect supplements a free writing prospectus. In the ABS context, this concept does not apply, and it is therefore particularly unnecessary to refer to an unlimited look back period. We also believe this provision is out of keeping with other provisions where Exchange Act reporting compliance is used as an eligibility criterion, such as Form S-3 eligibility where a twelve month compliance testing period applies.

In addition, clause (iii) of the definition of "ineligible issuer" refers to a shell company. The definition of "shell company" could be construed to apply to an ABS issuer during the period prior to the closing date for a transaction, before substantial assets have been transferred to the issuing entity. Under Regulation AB, the SEC has provided precise guidelines for the types of entities that can qualify as ABS issuers. We believe that as long as an ABS issuer complies with the requirements of Regulation AB, the fact that it could be technically construed to be a shell company during its offering period should not have any adverse regulatory effect, including the inability to use a free writing prospectus.

Recommendation: We request an express clarification that the definition of "shell company" shall not include an ABS issuer.

3. The application of the free writing prospectus rules to ABS information and computational materials would require substantial changes in existing procedures that work well.

Regulation AB arguably serves as a limited prototype for the free writing prospectus provisions of the Proposed Rules. Rule 167 codifies a long standing SEC position and permits a broad category of information (ABS information and computational material) to be provided prior to the delivery of the final prospectus in an ABS offering.

In some respects, the free writing prospectus proposal would represent an improvement over Rule 167, in that the permitted content is unlimited, and that the allocation of liability between issuer and underwriter more closely matches which entity was responsible for the materials. We note however that the proposal is fundamentally different from Rule 167 in several key respects, including lack of treatment as part of the registration statement, imposition of filing requirements tied to issuer use or content, and the potential application to media publications (see point 12 below). Please refer to

Attachment One to this letter, which illustrates in chart format some of the key differences between Rule 167 and Proposed Rules 164 and 433.

The Proposing Release indicates in the section on "Application of the Proposals to Asset-Backed Securities" that under the Proposed Rules ABS information and computational material would be treated in the same manner as free writing prospectuses. While not entirely clear, it appears to be intended that all provisions of Proposed Rules 164 and 433 would govern the use of ABS information and computational material, and that none of the detailed provisions of Rule 167 would carry over.

There are some elements of the new approach which differ from the existing rules and are not well suited for ABS.

In particular, we have concerns about the filing deadline under the Proposed Rules. Under Rule 167, where filing is required ABS issuers currently do not have to file until the later of: 1) the due date for filing the final prospectus, or 2) two business days after first use. The Proposed Rule would require filing of materials that are required to be filed no later than the date of first use.

Based on experience in the ABS markets, we would consider this schedule to be too restrictive. This deadline would not allow adequate time to assemble and prepare the materials for filing. In particular there may be delays in converting materials with substantial numerical data for filing on EDGAR.

In some cases the filing deadline would not allow time to determine whether filing was required. For example, Proposed Rule 433 requires that for a free writing prospectus that describes the terms of the securities, only the final version must be filed. In an ABS offering, given the iterative nature of the offering process, it could be impossible to know whether a term sheet reflected the final structure on the day it was first used. A term sheet could be used for several days before it became clear that not all classes of ABS could be sold under that structure, and that changes to the structure were necessary. The proposal would require the issuer to look forward and try to predict whether the structure was final. This is the opposite of the current approach under Rule 167, where filing for all materials is delayed at least until the due date for filing the final prospectus, at which time the issuer looks backward and excludes from the filing term sheets that described abandoned structures, or which were used before the terms were finalized provided that no investor purchased based on those materials.

In addition, there does not appear to be any policy reason why acceleration of filing is necessary. In over 10 years of use of computational materials and term sheets in the ABS market, we are not aware that investors have ever expressed a concern that the materials were not filed sooner. The timing of filing is not relevant to investors, as they would always obtain copies of the current materials from the underwriter rather than searching for them on EDGAR.

We note that under Proposed Rule 433, a free writing prospectus cannot be used by an ineligible issuer (please see the discussion under point 2 above). We do not agree with the proposed condition that use of free writing prospectuses will be disallowed if at the time of use the issuer has not filed all required Exchange Act materials. ABS issuers are not currently subject to any such requirement, and based on experience in the ABS markets there does not appear to be any need for this requirement, at least as to issuers using Form S-3. We believe that the eligibility requirements for filing on Form S-3 set an appropriate standard for Exchange Act reporting compliance. Note that the consequence of the proposal, if adopted as proposed, would be that if a Form S-3 issuer at any time becomes non-compliant in its Exchange Act reporting, it cannot use free writing prospectuses. For ABS issuers, this is tantamount to receiving a stop order. In comment letters on the proposal for Regulation AB, comments were made objecting to the possibility that an ABS issuer with an effective Form S-3 registration statement might lose access to the shelf due to post effective Exchange Act non-compliance. In the adopting release for the final Regulation AB, the SEC clarified that Exchange Act compliance is tested only at the time of filing for Form S-3 eligibility purposes.

We agree with the concept that filing should not be required unless the item is used or prepared by the issuer or contains issuer information. However, we note that in the ABS context there may be substantial amounts of disclosure about unaffiliated third parties, such as servicers, trustees, originators, sponsors, significant obligors, enhancement providers or derivatives counterparties. It is unclear whether this information is intended to be treated as issuer information under the proposal. We would argue that such information should not be treated as issuer information, because it is not prepared by the issuer and because its content is beyond the control of the issuer. For the same reasons, we would argue that information relating to the pool assets in an ABS transaction that is prepared by unaffiliated third parties should not be treated as issuer information. This would include, for example, in a commercial mortgage backed securities offering, documents such as appraisals, engineering reports and environmental reports relating to the mortgaged properties.

Recommendations:

- We recommend that the proposal be revised to carry forward the filing deadlines currently provided in Rule 167 (and Rule 426).

- We also recommend that the proposal be revised to carry forward the concept under Rule 167 (and Rule 426) that no filing is required for information relating to abandoned structures, or for materials that were used before the terms were finalized provided that no investor purchased based on those materials.

- We request that ABS issuers using Form S-3 not become ineligible for use of free writing prospectuses due to Exchange Act reporting non-compliance.

- More generally, we would advocate that Rule 167 (and Rule 426) simply be retained in its current form. Materials that fall within the definition of ABS information and computational material would continue to be covered by the provisions of Rule 167 in all respects, including all aspects relating to timing of filing, materials required to be filed, and permitted users. However, in order to fit within the fundamental elements of the Proposed Rules, materials subject to Rule 167 if filed would not be treated as part of the registration statement, and would be treated as free writing prospectuses, as well as information conveyed to the purchaser at the time of contract of sale (if applicable) for purposes of Rule 159. Also, items not constituting issuer information would not have to be filed.

- We also recommend clarification of the definition of "issuer information" in the ABS context. We recommend that any information about servicers, trustees, originators, sponsors, significant obligors, enhancement providers or derivatives counterparties, in each case that are not affiliated with the issuer, not be treated as issuer information. We also recommend that any information about the pool assets be treated as issuer information, except that information relating to the pool assets in an ABS transaction that is prepared by unaffiliated third parties (such as appraisals, engineering reports and environmental reports) should not be treated as issuer information.

4. <u>The existing framework for liability for the use of Preliminary Information, as understood by ABS market participants, provides adequate legal protections for investors.</u>

We note at the outset, as noted in the introduction to this letter, that the discussion herein relates only to ABS. The Association understands and believes that the ABS and non-ABS markets are different in critical ways, including with respect to the process of the offering and sale of ABS, and the expectations of investors and offering participants alike as to the nature of that process and associated issues of liability.

Our members' understanding is that, under current law as well as practice, if a security is sold (that is, a contact of sale is entered into) based on Preliminary Information, and if there are Material Changes between the Preliminary Information and the final prospectus, then the investor has the right to break the trade based on the Material Change until the time of settlement. (See definitions in the following paragraph.) If the investor decides

not to break the trade, and to go forward, then a final investment decision,[2] subject to no further conditions subsequent, has been made.

As used in this discussion, "Preliminary Information" means all information conveyed to the investor at the time of the contract of sale (subject to the conditions subsequent to such contract as discussed herein), whether in the form of a preliminary prospectus, free writing prospectus, ABS information and computational material, other types of term sheets, or oral representations including any agreement to provide specific terms requested by the investor. "Material Change" refers to 1) a material error in the Preliminary Information that is corrected in the final prospectus, or 2) a material change of a material term or material pool characteristic (unless within any specified tolerance) between the Preliminary Information and the final prospectus, or 3) the omission from the Preliminary Information of material information that was included in the final prospectus and that is not consistent with ABS market customs and standards for that type of transaction or prior similar transactions of the same depositor or an affiliated depositor.

Point 3 in the preceding paragraph reflects long-standing practice in the ABS market that there is an expectation on the part of investors that to the extent the final prospectus contains material terms not described in the Preliminary Information, those material terms will be consistent with ABS market customs and standards or prior similar transactions of the same depositor or an affiliated depositor. For example, the term sheet may not specify the conditions for replacing the servicer for cause, or it may not specify the ratings triggers at which a derivative would be replaced. Terms such as these may be considered material by investors, but are beyond the level of detail that is typical for a term sheet. In effect, market participants take the view that the Preliminary Information may omit material terms, so long as those terms when disclosed in the final prospectus are consistent with ABS market customs and standards or prior similar transactions of the same depositor or an affiliated depositor as expected, and therefore the inclusion of those terms in the final prospectus does not constitute a Material Change giving rise to a right to re-price or break the trade as described below.

If the underwriter believes that there are Material Changes between the Preliminary Information and the final prospectus, current standard practice is to alert the investor prior to settlement and give the investor an opportunity to break the trade, or to agree to re-price the trade. Similarly, if the investor objected to what it believed to be a Material Change between the Preliminary Information and the final prospectus, and the underwriter felt that the objection was valid, the investor would have an opportunity to break the trade, or to agree to re-price the trade. However, if the trade settles, ABS market participants generally believe that there is not an ongoing Section 12(a)(2) claim, because the information was corrected or completed in the final prospectus. In this

[2] We note that we do not attempt to identify in this letter when a contract of sale for the sale of securities becomes binding under state law. We believe that this issue should be left to state law, and should not become the subject of federal securities law. Our discussion rather focuses on the interplay between the investor's "investment decision" for purposes of the federal securities laws, the understanding of the parties as to when and under what circumstances that investment decision is final, and the appropriate timing of and standard of liability in light of ABS market practices.

context, it is important to note that the expectations of ABS investors are in line with long-standing practice; in effect, a course of dealing that has come to define when a final "investment decision" subject to no further condition subsequent, has been made in the ABS context.

This framework is consistent with the view that Section 12(a)(2) liability is based not on a snapshot of the information provided to the investor at a particular point during the offering process, but rather based on the totality of information provided during the offering process, including the final prospectus, as well as the manner in which the information is provided. It is also consistent with the view that the phrase "in light of the circumstances under which they were made" relative to the context in which material omissions are tested in Section 12(a)(2) refers to the entire offering process, and not just the period up until the time the communication in question was made.

This framework is also consistent with the view that in any contract of sale based on Preliminary Information, the investor's obligation to purchase is subject to the implicitly agreed upon condition subsequent, that there are no Material Changes as described above between the Preliminary Information and the final prospectus. Failure to allow an investor who bought based on Preliminary Information to break a trade in the event of a Material Change in the final prospectus could give rise to liability under existing federal securities laws. Accordingly, under the existing framework, the investor's right to break the trade if there is a Material Change between the Preliminary Information and the final prospectus derives directly from the protections provided to the investor under the Securities Act.

5. Proposed Rule 159 represents a substantial change from what ABS market participants have viewed as existing law as to 12(a)(2) liability as applied to ABS, and could disrupt the ABS markets.

Proposed Rule 159 would create a basis for a claim under Section 12(a)(2) based solely on an error or omission contained in the Preliminary Information provided at the time of the contract of sale, regardless of whether that error or omission was corrected in the final prospectus.

We note that we have no objection to the proposition that term sheets used in ABS offerings, and other ABS information and computational materials (to the extent required to be filed under current rules), be treated as "free writing prospectuses" and subject to liability under Section 12(a)(2). Our only objection is to the result under Proposed Rule 159 under which liability would be tested without regard to information provided after the time of contract of sale.

The Association is concerned that in situations where a contract of sale for ABS (subject to conditions subsequent as discussed herein) is entered into with the investor based on

Preliminary Information,[3] and there is a Material Change in the final prospectus, and the investor nonetheless decides to go forward and purchase the ABS notwithstanding the Material Change, under Proposed Rule 159 the underwriter would nevertheless be left with exposure under Section 12(a)(2) based on the Preliminary Information. We are especially concerned that this lingering exposure cannot be cured, even if the content of the final prospectus correctly describes the Material Change. We note in footnote 247 of the Proposing Release the reference to reforming or entering into a new contract at the time of provision of subsequent information. However, the difficulty with this approach is that since the old contract is being replaced by a different contract, the investor would have the ability to refuse to enter into the new contract for any reason. As a result, given the way the ABS markets operate today, in the event of a Material Change, the investor would effectively have the right to decline to go forward, for any reason, including reasons completely unrelated to the Material Change.

Under the existing framework, investors and underwriters alike act in a manner that reflects a belief that the legal consequence of a Material Change between the Preliminary Information and the final prospectus is limited to an ability to break the trade before settlement based on the Material Change, and does not include (i) the right to break the trade for any other reason or (ii) a potential Section 12(a)(2) claim that survives settlement.

For these reasons, the Association believes that both ABS investors and the ABS dealer community generally perceive the SEC's proposals regarding Section 12(a)(2) liability as a change from what the market previously assumed and understood to be current law.

In addition, we note that ABS are significantly less well-suited to the conceptual framework underlying the proposal than are securities that are not ABS. With ABS, there are significantly greater opportunities for there to be material information in the final prospectus that is not known at the time of pricing, such as the identity of servicers and enhancement providers, the terms of enhancement agreements, and the final composition of the pool assets.

Moreover, the Proposing Release does not seem to contemplate the iterative nature of an ABS offering. The transaction may be offered over a period of days or weeks based on Preliminary Information, with investors giving indications of interest on a rolling or staggered basis, and the structure being fine-tuned based on the input over this period from investors. Even if it were possible to provide materially complete information for contracts of sale made at the end of this process, it would likely not be possible to provide complete or as complete information to investors that agree to purchase earlier in the process.[4]

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[3] For example, in ABS transactions where term sheets are used today, these term sheets may not contain information about the offering that is materially complete as compared to a final prospectus. The SEC has codified the treatment of such term sheets for purposes of the federal securities laws in Regulation AB as "ABS informational and computational materials".

[4] We note, for example, in the corporate issuance context, that neither the corporate issuer nor the underwriter solicits or accepts feedback from investors during the offering process on the structure of its

In the Proposing Release, the SEC states that "materially accurate and complete information about an issuer and the securities being sold should be available to investors at the time of contract of sale." We submit that this is not an achievable goal in the ABS context, at least not without forcing substantial change in the manner in which ABS are offered, in light of the manner in which ABS are marketed including the inability to provide complete information until very late in the process and the willingness of investors to make conditional investment decisions based on Preliminary Information that is not complete. We believe that the SEC has acknowledged that for ABS, term sheets and other Preliminary Information may not provide complete information.

We also have substantial concerns about the practicality of Rule 159 in that it requires a factual determination as to when the contract of sale occurs[5]. The Proposing Release contemplates that the time when the investor becomes contractually obligated to purchase the securities is a factual matter determined under state law, based on a facts and circumstances test. We believe that given the various methods under which ABS in particular are offered and sold, it is actually very difficult to determine the precise moment when the investor becomes contractually obligated to purchase, and that the proposal fails to take this uncertainty into account.

In some ABS offerings, particularly those involving more plain vanilla assets and simpler structures, the underwriter may agree with the sponsor to purchase the securities at a total fixed price as much as 45 days or more prior to the settlement date. In such an offering, the price to the issuer is not affected by the prices at which the investors purchase. In this type of offering, the indications of interest from investors during the offering period (or "soft circles") are more likely to be considered binding.

In other ABS offerings, particularly those involving less generic assets or more complex structuring, the ultimate price at which the securities will clear is less certain upfront. In such offerings, the issuer and underwriter will not commit to a total price so far in advance of the settlement date. Rather, the underwriter will be engaged, and will commence a process of structuring the transaction and obtaining soft circles. Such an offering may be significantly oversubscribed, and therefore the amount to be allocated

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operations, or even on the scope or content of the offering document. In many cases, a preliminary prospectus is used and such preliminary prospectus may only omit certain very limited information, such as exact pricing information. Under current practice, all but a narrow set of modifications would require re-circulation of the preliminary prospectus. In some cases, a preliminary prospectus is not used in corporate debt offerings, but that is in the context where the specific terms of the debt securities are easily described orally and substantially all of the information relevant to the offering is information about the company, and where complete and current information about the company is available through its Exchange Act reports. This distinction further illustrates the differences between the ABS and non-ABS markets, which differences the SEC has recognized, in one form or another, since the inception of ABS.

[5] In the Proposing Release, the SEC refers to the moment when a contract of sale occurs in two different ways: 1) the time when the investor makes its investment decision, and 2) the time when the investor becomes contractually obligated to purchase the securities. We believe that only one moment was intended, and that in commenting on the proposal it is more appropriate to focus on the time when the investor enters into a binding contract to purchase (as appears intended).

and the exact price may not be final at the time of the soft circles. At a date much closer to the settlement date (for example, 4 to 7 days prior to settlement), allocations are made to each investor, the final pricing is set, and all soft circles are re-confirmed. It is only at that time that the offering is considered "priced" and the total price to the issuer is determined. In this type of offering, the soft circles are less likely to be perceived as binding until the pricing date. Moreover, it may be only at the pricing date that the underwriter takes actions consistent with entering into a contract of sale, such as writing internal trade tickets and lifting hedges.

The preceding discussion represents an oversimplification of the ways in which ABS are offered. However, the essential point is that there is no "eureka" moment when it becomes obvious that the contract for sale has become binding. That time may be as early as the soft circle, or as late as the pricing, or any time in between.

Proposed Rule 159 would in practice result in a major regulatory speed bump, because the time of the contract of sale cannot be readily determined. We would expect that issuers would demand that underwriters alter their practices so as to make clear when the contract of sale occurs, so that the issuer knows what materials form the basis of its potential Rule 159 liability and can make a risk assessment. Underwriters would perceive this pressure as interfering with their relationship with the investor, but would also have a similar need to determine when the contract of sale occurred. To the extent that contracts for sale occur over an extended period rather than at pricing, the need for the issuer and underwriter to monitor successive packages of information conveyed at various dates in order to manage liability would be even more burdensome. There could be surprises, as when an investor unexpectedly says "OK, so I'm definitely in" at a time when the information then conveyed has not been vetted to withstand Rule 159 scrutiny. We would expect that in most cases there would be substantial legal uncertainty as to the precise moment of the contract of sale, and thus the potential for unnecessary disputes, unless the manner in which underwriters deal with investors during the offering period is substantially altered.

In contrast, under the existing framework articulated above, there is no need to determine when the contract of sale occurs. If there is a Material Change between the Preliminary Information conveyed as of the time of the contract of sale and the final prospectus, the investor has the ability to break the trade or require re-pricing prior to settlement. If Preliminary Information was delivered subsequent to the time of the contract of sale, and there was a Material Change between that Preliminary Information and the final prospectus, that subsequent Preliminary Information will still be viewed as having been part of the representations made by the underwriter to the investor during the offering process, and therefore the investor would have the ability to break the trade or require re-pricing prior to settlement.

We believe that investors are adequately protected under the existing framework. If there is any shortcoming in the current framework, it is not with the adequacy of the information provided at the time of contract of sale, but rather with the effective ability of the investor to determine if the condition subsequent to such contract of sale has been

satisfied (that is, that there have been no Material Changes between the Preliminary Information and the final prospectus), given the amount of time available to review the final prospectus before settlement. We discuss these points further below.

Recommendation: We request that the SEC not proceed with the approach in Proposed Rule 159.

6. If Proposed Rule 159 is adopted, significant changes would be required to prevent disruption in the ABS markets.

If, however the SEC does adopt Proposed Rule 159, we have the following additional comments.

Recommendation: We recommend that the SEC acknowledge that under its framework of securities offering reform, underwriters and investors in ABS transactions may continue to enter into contracts of sale under which it is agreed, explicitly or implicitly, that the investor's obligation to purchase is subject to the condition subsequent that there are no Material Changes as described above between the Preliminary Information and the final prospectus. In connection with that agreement, Section 12(a)(2) liability and the timing of attachment thereof would be based on the totality of information conveyed or provided during the offering process, including the final prospectus, and the manner in which it is provided, in each case as recommended in this letter.

Recommendation: We request that the SEC revise the Proposed Rules to provide a "safe harbor" provision such that if a contract of sale for ABS is entered into based on Preliminary Information, and there is a Material Change between the Preliminary Information and the final prospectus which is corrected in the final prospectus as described above, then any Section 12(a)(2) claim must be based on the totality of information provided during the offering process, including the final prospectus, and cannot be based solely on the Preliminary Information provided at the time of the contract of sale, provided that either:

1) the underwriter pointed out the Material Change to the investor prior to settlement, and the settlement occurred;

2) the final prospectus was delivered at least 48 hours prior to settlement, and the settlement occurred; or

3) the investor did not notify the underwriter of an objection based upon a Material Change within 48 hours after delivery of the final prospectus.

The purpose of this is to give the investor a minimum period of 48 hours to make its own determination as to whether there was a Material Change. In the event that the final prospectus was not delivered at least 48 hours prior to closing, this could mean that the investor could raise an objection based on a Material Change post-settlement, however it would have to be raised no later than 48 hours after delivery of the final prospectus.

7. The concept of what is "conveyed" at the time of contract of sale should be clarified; access equals delivery.

In the context of ABS, it is not clear under the proposal as to what information will be deemed to be "conveyed" to the investor at the time of a contract of sale. We ask that specific guidance be provided regarding what information will be deemed conveyed at the time of the contract of sale for purposes of Proposed Rule 159.

In this regard we note that Proposed Rule 172 eliminates the requirement to physically deliver the final prospectus with or prior to the confirmation of sale, adopting an "access equals delivery" approach whereby investors are deemed to have access to prospectuses on file with the SEC for purposes of the requirement to deliver the final prospectus with or prior to the confirmation. While this proposal is an example of progressive rulemaking that reflects today's information technology, we feel that it does not go far enough. For all seasoned ABS issuers (that is, ABS issuers using Form S-3), we support this approach for purposes of determining what is "conveyed" at the time of contract of sale, as well as for other similar purposes under the Securities Act including: any requirement to deliver a preliminary prospectus; and in determining whether a "traditional" free writing is excluded from the Section 2(a)(10) definition of prospectus by reason of being preceded or accompanied by the final Section 10(a) prospectus.

Recommendation: We request that the following information be deemed to be conveyed to the investor at the time of the contract of sale for purposes of Proposed Rule 159, as to any ABS offering registered on Form S-3:

A. Filings on EDGAR. We believe that filing with the SEC via EDGAR should constitute physical delivery in determining what information has been conveyed to investors. Thus, any information or document filed with the SEC via EDGAR by a well-known seasoned issuer or a seasoned issuer (including an ABS issuer using Form S-3) should be deemed to be conveyed to investors. Such documents and information would include:

1. the issuer's registration statement;

2. any prospectus that the issuer files under Rule 424;

3. any Exchange Act report filed by the issuer and incorporated by reference in the issuer's registration statement;

4. any free writing prospectus of the issuer that has been filed under Rule 433 or for which a notice filing has been made;

5. any information filed on EDGAR that is in any filing pertaining to the issuer, depositor, sponsor, trustee, and any servicer, significant obligor, credit enhancer or derivatives counterparty related to the ABS transaction; and

6. Any information not covered under paragraphs 1. through 5. above and filed on EDGAR, where the filing is specifically referred to the investor.

B. Website Information. Any information on any website, where the website address is specifically referred to the investor.[6] We also recommend that there be no filing requirement for any materials including any free writing prospectus posted on an issuer website, provided that a notice filing is made regarding the existence and location of such free writing prospectus.

8. Issuers of repackaging transactions should not incur any greater liability for the financial information of the underlying issuer than is currently provided under Regulation AB.

The Proposing Release does not address disclosure liability or other issues relating to repackaging transactions. In general, repackaging transactions are asset backed securitizations where an outstanding registered security of a third-party, unaffiliated issuer that is not involved in the repackaging transaction is deposited into a trust which then issues securities to investors backed by such underlying third-party security, and the assets of the repackaging issuer may include other assets such as swap agreements and/or Treasury securities. Prior to the adoption of Regulation AB, information relating to the third-party underlying issuer in the repackaging registration statement was limited to referring to, but not incorporating, such underlying issuer's EDGAR filings under the Exchange Act, in part because the underlying issuer is not involved in the repackaging transaction and such information is otherwise available to investors via the EDGAR system. Where repackaging transactions involve "significant obligors" as defined in Regulation AB, Regulation AB contains detailed provisions addressing the type of information required to be filed, incorporated by reference or referred to, and the manner in which it may be filed, incorporated by reference or referred to and the conditions relating thereto. However, what is unclear under the proposal is whether the entirety of the underlying issuer's Exchange Act reporting will be deemed "conveyed" by the repackaging issuer, and if so, whether the repackaging issuer is thus liable for the entirety thereof.

Recommendation: We request that with respect to ABS repackaging transactions:

[6] We believe this information is consistent with "information otherwise disseminated by means reasonably designed to convey such information to investors" as articulated in the Proposing Release.

A. the registrant of a repackaging registration statement will only be deemed to have conveyed and will only be liable for, if applicable, significant obligor information as and to the extent required by Regulation AB; and

B. with respect to any information relating to the underlying issuer not covered in paragraph A. above, no such other underlying issuer information will be deemed incorporated into the repackaging registration statement or deemed delivered by the repackaging registrant.

9. Automatic registration and "pay as you go" registration fees are appropriate for all ABS issuers.

The Proposed Rules would confer a number of benefits on "well known seasoned issuers", such as automatic shelf registration and pay as you go registration fees, as well as reduced communications restrictions. Yet ABS issuers are categorically excluded from this definition.

We do not understand the policy reasons for excluding ABS issuers from these provisions.

The Proposing Release indicates that these benefits are appropriately conferred on well known seasoned issuers, because of their large and established presence in the market, the substantial amounts of information that are available to the market through Exchange Act reports, and the following of such issuers by the financial press as well as sell-side and buy-side analysts.

We believe that ABS issuers eligible for registration on Form S-3 have a comparable position in their respective markets. We note, at the outset, that ABS are required to be rated investment grade to be eligible to use Form S-3.[7] ABS issuers are also heavily scrutinized by institutional investors, underwriters, research departments of broker dealers, and rating agencies. Moreover, very substantial amounts of information about outstanding ABS transactions are generally available to the markets. Under current practices, the fact that many such issuers suspend Exchange Act reporting when permitted to do so does not meaningfully curtail the information provided to the markets, because the reports to investors that are typically required under the transaction documents will provide the vast majority of information that is required in Exchange Act reports for ABS issuers. Furthermore, in many cases such issuers provide substantial amounts of additional loan level data on an ongoing basis to investors and other market participants upon request. Finally, for ABS issuers on Form S-3, the registration statement typically does not in any event contain the material terms of the ABS transaction in question in which investors in ABS are interested; rather, these terms are typically contained in the prospectus supplement relating to the each take-down from the Form S-3 registration statement; thus, SEC staff review of these registration statements

[7] See General Instruction I.B.5 to Form S-3.

would be less meaningful in terms of protection of investors than such review in the non-ABS context.

Thus, for ABS issuers, the likelihood of improper market conditioning is as remote as is the case for well-known seasoned issuers as defined in the Proposed Rules. In addition, ABS issuers typically have needs for market access and efficient capital formation that are comparable to well-known seasoned issuers.

The above factors argue in favor of automatic shelf registration and pay as you go registration fee benefits even in the case of ABS issuers and/or sponsors that are filing on Form S-3 for the first time. Due to the nature of the ABS market, the market scrutiny and required information for first-time ABS issuers and/or sponsors is comparable to that of more seasoned ABS issuers/sponsors.

We would argue that pay as you go registration fees at a minimum would be appropriate for all issuers that are allowed to use automatic shelf registration, in light of the economies resulting from the absence of staff review of the registration statement. However, we would also argue that pay as you go registration fees would be fair for all shelf registrants, in that such an approach would level the playing field so that for all registrants (both shelf and non-shelf) the timing of payment of registration fees is linked to the receipt of proceeds from the sale of the securities registered.

Recommendation: We request that ABS issuers and affiliated depositors eligible to file registration statements on Form S-3 be conferred all of the applicable benefits that are conferred on well-known seasoned issuers, or at a minimum, that such ABS issuers and affiliated depositors have access to automatic shelf registration and pay as you go registration fees.

However, should the SEC decide not to adopt the above approach, we request that a definition of "well-known ABS issuer" be added, as proposed below, and that such issuers and affiliated depositors be afforded all of the benefits that are conferred on well-known seasoned issuers, or at a minimum that such issuers and affiliated depositors have access to automatic shelf registration and pay as you go registration fees.

The proposed definition below takes into account the technical definition under Regulation AB of the issuer in an ABS transaction as the depositor, acting solely in its capacity as depositor to the issuing entity created for that ABS transaction.

> "Well-known ABS issuer" would be defined as an ABS issuer and its related depositor as to which:
>
> > 1) the eligibility requirements for filing a registration statement for ABS on Form S-3 are satisfied with respect to such ABS issuer and its related depositor;

2) the depositor of such ABS issuer, together with all affiliated depositors in the preceding 3 years, has issued ABS registered on Form S-3 with an aggregate offering price of at least $1 billion;

3) the depositor of such ABS issuer has filed all materials which it was required to file during the last 12 calendar months under Section 13, 14 or 15 of the Exchange Act;

4) the depositor of such ABS issuer has filed in a timely manner all materials required to be filed during the 12 calendar months and any portion of a month immediately preceding the date of determination, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02 (a), 6.01, 6.03 or 6.05 of Form 8-K and if it has used (during the foregoing period) Rule 12b-25(b) of the Exchange Act with respect to a report or portion of a report, it has actually filed that report or portion within the time period prescribed by that section; and

5) the depositor of such ABS issuer is not an ineligible issuer (as we requested to amend such definition).

10. Requiring risk factor disclosure in Form 10-K reports is not appropriate for ABS issuers.

We believe it would not be appropriate to require each ABS issuer to include in its Form 10-K the risk factors typically required in a registration statement for a corporate issuer, in particular, "the most significant factors with respect to the registrant's business, operations, industry or financial position that may have a negative impact on the registrant's future performance", as set forth in Proposed Item 1A of proposed Form 10-K.

We believe the proposed required information would not assist investors in ABS issuances. As noted in the adopting release for Regulation AB, ABS issuers have not traditionally filed, and are not required to under Regulation AB to file, a Form 10-K that is comparable to those filed by corporate issuers. Rather, a Form 10-K for an ABS issuer includes information relating to the servicing and performance history of the assets backing the ABS, and certain other items which are limited in scope and tailored to the unique nature of ABS.

We continue to believe, as reflected in Regulation AB, that investors in ABS look to the nature and performance of the underlying assets, the rating of the securities and the structure of the transaction, as reported in monthly filings relating to their series.

In addition, there typically will be only one Form 10-K filed for each ABS issuance. As discussed above, Regulation AB has defined the "issuer" in an ABS transaction as the depositor, acting solely in its capacity as depositor to the issuing entity, for all purposes under the Securities Act and the Exchange Act. As such, for each series of ABS, the

"issuer" is a separate entity, distinct from the depositor (that is, the registrant). Thus, risk factor disclosure in a Form 10-K that relates to the registrant would be of no use to ABS investors in a different issuer, and requiring such disclosure would not further the goal of informing investors of material information.

Finally, we note that Regulation AB already requires ABS issuers to alert investors to certain risks on a ongoing basis; for example, disclosure of material noncompliance with servicing criteria. The SEC, in adopting Regulation AB, clearly considered, in light of the comment feedback of the industry, the types and timing of ongoing disclosures that are appropriate to ABS and important to ABS investors. We believe that the express reporting requirements under Regulation AB are sufficient to alert ABS investors to potential risks.

Recommendation: If Proposed Item 1A of proposed Form 10-K is adopted substantially as proposed, it should provide that ABS issuers are not required to include risk factor disclosure.

11. The proposed rules for factual business information must be revised to better accommodate posting of static pool information on websites by ABS issuers.

We note that the combination of Regulation AB, together with the Proposed Rule, will result in an unusual combination of possible characterizations of static pool information on an issuer website. We request that clarification be made along the following lines, in order to continue to promote the use of such websites.

We also note the requirements of Proposed Rule 168(d) that factual business information of the same type must have been previously released by the "issuer", and must be released in the ordinary course of business of the "issuer" in a manner similar to past disclosures. In light of the definition of an ABS issuer as discussed in section 1 above, these provisions require revision in order to give effect to the apparent intent that ABS issuers be able to rely on this rule.

Recommendation: Any static pool information that is required to be disclosed in an ABS offering and is provided through a website in accordance with Regulation AB will be deemed to be included in the final prospectus and part of the registration statement, except for pre-January 1, 2006 information, as provided in Regulation AB. Any static pool information that is otherwise provided through a website in connection with an ABS offering, including by means of referring to the website address in a free writing prospectus, will apparently be deemed to be a free writing prospectus, except for pre-January 1, 2006 information as provided in Regulation AB. Any other static pool information meeting the requirements of Proposed Rule 168 should be treated as factual business information. Restrictions in Proposed Rule 168 relating to the archiving of the information, or to the updating of static pool information during the offering period, should not apply to ABS issuers, as these restrictions would interfere with the routine publication of static pool data (which is typically updated monthly). We further recommend that the conditions in Proposed Rule 168 be revised to address prior activity

and the ordinary course of business of, in the case of ABS, "the issuer, the related depositor or any affiliated depositor, or the related sponsor."

12. Rating agency pre-sale reports should not be treated as free writing prospectuses.

Proposed Rule 433(f) states that media publications relating to an issuer or its securities by an unaffiliated media company will be considered a free writing prospectus prepared by or on behalf of the issuer or such offering participant, if such issuer or any person participating in the offering (or any person acting on their behalf) provided information that is published by the media company. We note that this provision, which indicates a media publication could be deemed prepared or provided by or on behalf of the issuer merely as a result of the issuer providing information that was published by the media company, is confusing when read against Proposed Rule 433(h)(3), which indicates that a communication is deemed prepared or provided by or on behalf of the issuer only if the issuer authorizes the communication and approves it before its use. It is unclear whether the standards in subsection (h)(3) are read into subsection (f).

In ABS transactions, nationally recognized statistical rating organizations rating the ABS transaction in question often publish so-called "pre-sale reports" relating such ABS. We wish to clarify that under the Proposed Rule, pre-sale reports published by such rating agencies would not be deemed to be free writing prospectuses. Given the nature of the pre-sale report process in the context of ABS, an ABS issuer or transaction participant on its behalf who provides information to a rating agency or reviews and comments on a pre-sale report published by a rating agency prior to its publication by such rating agency is not a person who "authorizes the communication or information and approves the communication or information before its use".

In the ordinary course of its ratings business, when a rating agency engages in the process of determining credit ratings to assign to an ABS transaction, the ABS issuer (or a transaction participant on its behalf) must provide certain information relating to the structure of the ABS transaction and the assets backing the ABS. The rating agency, which is accepted in the market to be independent of the transaction participants (including in respect of its determination of the appropriate requirements in order to achieve any given rating), engages in various legal and analytical processes to determine the legal and structural strength of the proposed ABS issuance, and the credit quality of the assets backing the ABS, and whether these features are appropriate for the requested rating level.

Were the requested information not to be provided by the ABS issuer or a transaction participant on its behalf, the rating agency would be both unable and unwilling to assign a rating to the proposed ABS. Ultimately, the pre-sale report, and the content thereof, is the rating agency's proprietary publication, not the ABS issuer's. In some cases, the rating agency may afford the ABS issuer or a transaction participant on its behalf to review one or more pre-publication drafts of the proposed pre-sale report and provide comment, typically to correct errors or provide updated or additional information consistent with the customary and ordinary-course content of such-presale reports.

However, the rating agency is not required to accept any such comments, and may publish such pre-sale report without reflecting any or all of such comments, in its sole discretion; neither the ABS issuer nor any transaction participant has the ability to prevent it from so doing.

In addition, once a rating agency pre-sale report is published, and in light of the independence of the rating agencies and the purposes of the pre-sale report as a rating agency publication rather than an offering document, we would request that a pre-sale report should never be deemed to a free writing prospectus, regardless of whether it is referred to or even provided by the issuer or an offering participant to an investor.

Recommendation: We request at a minimum that Proposed Rule 433(f), if adopted, be revised to incorporate the standards in Proposed Rule 433(h)(3) to the effect that the issuer or offering participant must have authorized the communication or information and approved the communication or information before its use in order for the communication to be subject to this section. We further request that the definition of "free writing prospectus" in Proposed Rule 405 be revised to expressly exclude rating agency pre-sale reports.

13. Third party analytics should not be treated as free writing prospectuses.

The final release for Regulation AB recognizes the use of third party analytic services in ABS offerings, such as Bloomberg and Intex. These services allow an issuer or underwriter to transfer or upload data about the structure and underlying assets of an ABS transaction being offered, so that investors can access the third party service to perform their own analytics. Alternatively, using software provided by the third party service, an issuer or underwriter can imbed data about the structure and underlying assets of an ABS transaction being offered into a file, which is then provided to the investor and can be used by the investor in accessing the third party service to perform its own analytics.

ABS issuers and underwriters have long had a concern that the no-action letters permitting use of "computational materials" in an ABS offering could be construed to create a filing obligation with respect to the outputs from these analytical services. These concerns have been raised in discussions with staff members.

As a result, the industry was very appreciative that in the final release for Regulation AB, the SEC clarified that in connection with the use of third party analytic services, only the "inputs, models and other information" about the structure and the collateral that were provided by the issuer or underwriter to the service are "ABS information and computational material" for purposes of the rule. It was thus made clear that the outputs from these analytical services are not subject to a filing requirement, and are not considered to be offering materials.

The Association is concerned that this may now change. We note the discussion in the Proposing Release under "Definition of Free Writing Prospectuses – Media Publications." There is language that suggests that even if the media is unaffiliated with

and not paid for by the issuer or offering participants, a media publication that is derived from a communication with the issuer or an offering participant during an offering could be deemed to be a free writing prospectus that may be subject to a filing requirement.

It is our hope that the SEC did not intend for outputs from third party analytical services to be treated in this manner, in light of the SEC's recent articulation of its position in the final release for Regulation AB.

Recommendation: We request a clarification that in connection with any ABS offering, the outputs from third party analytical services be expressly excluded from the definition of "free writing prospectus."

14. Proposed Rule 172 should be clarified to allow additional information relating to "price talk".

The Association believes that Proposed Rule 172 should be clarified to permit specific types of information for ABS, for the reasons set forth below.

In the ABS offering and sale process, which as we have noted elsewhere in this letter is different in many critical respects from non-ABS offerings, it is frequently important for dealers and investors alike to communicate regarding subscription levels in the underwriting syndicate. These communications typically take place either pre-allocation, to gauge and reflect the indications of interest within the syndicate, or post-allocation, to indicate to potential investors, for example, whether a particular class has been sold (including classes other than those of interest to the investor), and whether and the extent to which the ABS transaction or any class is oversubscribed, or if not, where the syndication is for subscription purposes at that point in time. This process is, in effect, a dialogue between dealer and investor, is important to both parties, and is integral to the pricing process for ABS as it provides so-called "price guidance" for ABS. In effect, it is information that investors request and must have in order to complete the pricing process. We refer to the above information as "Allocation Information". While it is not clear to the Association that proposed Rule 172 would not permit Allocation Information within "notices of allocations", the Association believes that this issue is of sufficient importance to ABS dealers and investors alike to warrant explicit clarification.

The Association also believes that investors desire CUSIP number information, and that this information is of an identifying nature only, and should be permitted under proposed Rule 172.

Recommendation: We request that the Commission clarify that Allocation Information as described above and CUSIP numbers are permitted information in "notices of allocation" under Proposed Rule 172 for ABS.

15. Securities Act Rule 415(a)(1)(vii) should not be deleted.

The Proposing Release requests comment as to whether it would be appropriate to delete Securities Act Rule 415(a)(1)(vii), relating to mortgage-related securities. This provision could be used to register on Form S-1 – on a delayed basis – any mortgage-backed securities that do not meet the definition of "asset backed securities" eligible to use Form S-3 contained in Regulation AB.

The Commission stated in the adopting release for Regulation AB that:

> Securities Act Rule 415 (17 CFR 230.415) permits registration of offerings of securities on a delayed or continuous basis, and paragraph (a)(1)(x) of that rule permits such registration with respect to offerings registered (or qualified to be registered) on Form S–3 . . . Certain mortgage related securities, as defined in Section 3(a)(41) of the Exchange Act (15 U.S.C. 78c(a)(41)), are permitted to be offered on a delayed basis under Securities Act Rule 415(a)(1)(vii) . . . Our actions today do not affect the continued availability of Rule 415(a)(1)(vii) for shelf registration of mortgage related securities, as defined, even if they do not meet the requirements of Form S–3. However, consistent with our movement of all asset-backed securities offerings to Form S–1 or Form S–3, to the exclusion of Form S–11, mortgage related securities offerings should use Form S–1 in lieu of Form S–11 for future transactions. Just like prior practice on Form S–11, an offering meeting the requirements of Rule 415(a)(1)(vii) could be a continuous or delayed offering on Form S–1.[8]

In light of the size and nature of the mortgage-backed securities market, and the reduction in flexibility that deletion of Rule 415(a)(1)(vii) might represent, the Association supports retention of this provision.

Recommendation: We request that the Commission not delete Securities Act Rule 415(a)(1)(vii).

16. Rule 134

Recommendation: We request that Rule 134 be further expanded for ABS issuers using Form S-3, to permit mention of the following items: the ERISA status of the ABS; CUSIP numbers; and very limited structural information such as (for each class) weighted average life, first and last payment dates.

17. Rule 139a

The proposal would revise the existing research report rules (Rules 137, 138 and 139). Some longstanding requirements would be eased. For example, in Rule 139, the

[8] Note 61 to the adopting release for Regulation AB.

requirements that the broker dealer publish with reasonable regularity, and that any recommendation be not more favorable than a prior recommendation, would be dropped.

Recommendation: To the extent that the general research report rules are liberalized, the research report rule for ABS (Rule 139a) should be similarly liberalized.

****

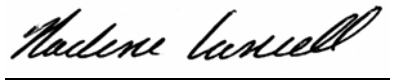
The Association appreciates this opportunity to provide its views to the Commission in connection with this important project. If it would be helpful to the Commission and its staff, we would be happy to make Association staff and member firm personnel available to meet and discuss any of the points raised in this letter. Please address any questions or requests for additional information to Nadine Cancell of the Association at 646-637-9228 or Stephen S. Kudenholdt of Thacher Proffitt & Wood LLP, the Association's special outside counsel in connection with this project, at 212-912-7450.

Very truly yours,

THE BOND MARKET ASSOCIATION

By: 

Thomas Marano,
Senior Managing Director, Bear Stearns & Co, Inc., Chair of the MBS and Securitized Products Division, The Bond Market Association

By: 

Nadine Cancell,
Vice President and Assistant General Counsel, The Bond Market Association

cc: The Honorable William H. Donaldson, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmidt, Commissioner
Alan L. Beller, Director, Division of Corporation Finance
Amy M. Starr, Senior Special Counsel, Division of Corporation Finance
Consuelo Hitchcock, Special Counsel, Division of Corporation Finance
Andrew D. Thorpe, Special Counsel, Division of Corporation Finance
Daniel Horwood, Special Counsel, Division of Corporation Finance
Anne Nguyen, Staff Attorney, Division of Corporation Finance

Attachment One to Comment Letter of The Bond Market Association
Regarding Securities Offering Reform Proposal – Impact on ABS

Comparison of Rule 164 and Rule 167

	Proposed Rule 164 **Free writing prospectus**	**Rule 167** **ABS information and computational materials**
Permitted Content	No restrictions	Content is limited to items listed in Rule 167
Permitted Users	Any issuer with a registration statement that has been filed, unless ineligible Only issuers using Form S-3 can deliver FWP without a statutory prospectus	Any ABS issuer with an effective registration statement on Form S-3 Delivery of statutory prospectus not required
Exchange Act Reporting Compliance Requirements	Issuer must have filed all materials required to be filed under Exchange Act reporting requirements (no time limit to compliance testing period)	Issuer, and the issuer for all other issuing entities formed by the depositor or any related depositor involving the same asset type, must have timely filed all materials required under Exchange Act reporting requirements for the last 12 months (in order to be eligible for Form S-3 at the time of filing)
Ineligible Users	Various entities are excluded	No provision (none needed as limited to ABS issuers on Form S-3)
Time of Filing	No later than the date of first use	The later of: 1) the due date for filing the final prospectus, or 2) 2 business days after first use

Incorporated by Reference in Registration Statement	no	Yes
Items Required to be Filed	Generally, only items used by the issuer or containing issuer information	Items are required to be filed if: 1) they were provided at any time to an investor that indicated it would purchase, or 2) they were provided to any investor after the final terms were set.
Exceptions to Filing Requirements	For items describing the terms of the securities, only the final version must be filed	Items relating to abandoned structures
Issuer Liability	Only if the issuer used the item, or the item contains issuer information	Under Section 11, all items, regardless of lack of issuer involvement in preparation or use
Underwriter Liability	Only if the underwriter used the item	Under Section 11, all items, subject to diligence defense
Media Publications	Can be free writing prospectuses and subject to filing requirements, if contain information provided by the issuer	Not within the scope of the rule