

**Securities Industry and Financial Markets Association**  
**(SIFMA)**

**Sample Risk Retention “Majority-Owned Affiliate” Due Diligence Discussion Topics for**  
**Underwriters, Initial Purchasers and Placement Agents in ABS Offerings**

## INTRODUCTION

The sample discussion topics contained herein, which were developed by a SIFMA dealer working group on the risk retention rules, are intended to help guide dealers acting as underwriters, initial purchasers and placement agents in their efforts to undertake a reasonable investigation to determine if there are any material misrepresentations or omissions contained in a registration statement, prospectus or offering memorandum.

In determining whether a “majority-owned affiliate” (as defined in the Credit Risk Retention Rules) meets the requirements imposed by Regulation RR, 17 C.F.R. §246.1, et seq., implementing the credit risk retention requirement of Section 15G of the Securities Exchange Act of 1934 (the “Credit Risk Retention Rules”), below is a potential list of topics to consider. These are potential topics of focus related to the “majority-owned affiliate” requirements of the Credit Risk Retention Rules, and the actual topics of focus should be narrowed or expanded based on the circumstances and the particular asset class. This document is not intended to be prescriptive, nor is it intended to apply to every transaction. For example, a periodic (e.g., annual) discussion of some of these topics with a sponsor may be appropriate.

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## **RISK RETENTION MOA DISCUSSION TOPICS**

### **BACKGROUND**

1. Please identify the majority-owned affiliate (“MOA”) that is or will be the transferee of the ABS interest being retained in connection with the securitization transaction to satisfy the Credit Risk Retention Rules (the “Retained Interest”).
  - a. Please identify the form of the Retained Interest (e.g., horizontal, vertical or “L”-shaped).
  - b. Please identify each ABS interest owned by the MOA that was retained in connection with prior securitization transactions to satisfy the Credit Risk Retention Rules.
  - c. Please identify any ABS interest owned by the sponsor that was retained in connection with prior securitization transactions to satisfy the Credit Risk Retention Rules and that the sponsor intends to transfer to the MOA.
  - d. Please describe the legal form of the MOA and the capital structure of the MOA, including the forms of equity issued by the MOA.
  - e. Please describe any indebtedness (including repurchase agreements) that the MOA currently has or intends to incur. For example, is it proposed that the Retained Interest will be financed in any manner?
2. How is the MOA related to the sponsor?

- a. Is majority control in the MOA evidenced by at least a majority of the outstanding equity being owned by the sponsor or one of its affiliates? If such equity is owned by an affiliate of the sponsor, please describe the relationship between such affiliate and the sponsor. Is ownership of a majority of the outstanding equity of the MOA considered a “controlling financial interest” as determined under generally accepted accounting principles (“GAAP”)? Please explain how this conclusion was reached.
  - b. If neither the sponsor nor one of its affiliates own a majority of the outstanding equity of the MOA or ownership of a majority of the outstanding equity of the MOA does not constitute a “controlling financial interest” under GAAP, please describe the controlling financial interest in the MOA (as determined under GAAP) that is owned by the sponsor or one of its affiliates. If such controlling financial interest is owned by an affiliate of the sponsor, please describe the relationship between such affiliate and the sponsor and how it was concluded that such affiliate is majority controlled by or is under common majority control with the sponsor.
  - c. Will the MOA be consolidated with the sponsor or one of its affiliates for purposes of the sponsor’s or such affiliate’s financial statements? If so, and the MOA is to be consolidated on the financial statements of an affiliate of the sponsor, please identify such affiliate.
3. If 100% of the equity of the MOA is not owned by the sponsor or an affiliate that is under majority control or common majority control with the sponsor (an “Eligible Affiliate”), who are the other equity holders and in what percentages?
- a. Please describe the characteristics of all equity interests of the MOA (e.g., pari passu common equity, preferred equity with specified preference terms, etc.).
  - b. Please describe the voting and consent rights of the investors in the MOA.
  - c. Does the sponsor or an Eligible Affiliate control, directly or indirectly, 100% of such voting and consent rights in all circumstances? If no, what types of rights have been granted to the sponsor or an Eligible Affiliate?
  - d. Are you aware of any other holder of any equity or other interest in the MOA that consolidates, or is planning on consolidating, such MOA on the financial statements?

#### GAAP ANALYSIS

4. Will the MOA be consolidated with the sponsor or an Eligible Affiliate under the voting interest entity (“VRE”) model or the “variable interest entity” (“VIE”) model under GAAP?
5. If utilizing the VRE model:
  - a. If the MOA is not a limited partnership or a similar entity, does the sponsor or an Eligible Affiliate, directly or indirectly, own more than 50% of the outstanding voting equity of the MOA?
  - b. If the MOA is a limited partnership or similar entity, does the sponsor or an Eligible Affiliate, directly or indirectly, own more than 50% of the kick-out rights through

its voting interest or have substantive participating rights? *[Note: Kick-out rights include the limited partner(s)' ability to dissolve (or liquidate) the limited partnership or otherwise remove the general partner without cause. Participating rights include allowing the limited partners to participate in certain financial and operational decisions of the limited partnership that are made in the ordinary course of business.*

- c. Do any holders of the voting equity of the MOA hold substantive participatory rights that might prevent the holder of a majority of the voting equity of the MOA from consolidating the MOA on such holder's financial statements?
6. If utilizing the VIE model:
    - a. Have you determined that the sponsor or an Eligible Affiliate holds an obligation to absorb losses or the right to receive benefits of the MOA that could be potentially significant? If so, what percentage? In addition, how was "significant" determined?
    - b. What activities of the MOA (excluding activities of the issuing entity) do you consider to most significantly impact the MOA's economic performance and how did you conclude that the sponsor or an Eligible Affiliate has control over those activities?

#### CONTROLS

7. Do your internal accountants agree that the sponsor or an Eligible Affiliate holds a controlling financial interest, as determined under GAAP, in the transferee of the Retained Interest permitting the transferee to be considered a "majority-owned affiliate" under Regulation RR?
8. Have you discussed the "majority-owned affiliate" determination of the MOA with your external accountants/auditors and external legal counsel? If so, have your external accountants/auditors and external legal counsel confirmed these conclusions or if they have not affirmatively stated so, have they raised any objections to the analysis?

#### FINANCING/HEDGING ARRANGEMENTS

9. Please describe any financing arrangements (whether by means of loan financing, repurchase agreement financing, issuance of debt securities or otherwise) that are currently in place or contemplated by the MOA, and discuss why they would be permitted under Regulation RR (including under both the permitted recourse financing provisions and the restrictions on hedging and transfer).
10. Has the MOA, the sponsor or an affiliate of the MOA or the sponsor entered into, or is it contemplating entering into, any agreement, derivative or other position which is materially related to the credit risk of the Retained Interest and that would reduce or limit the financial exposure of the MOA to the Retained Interest?

11. Has the sponsor or an affiliate of the MOA entered into, or is it contemplating entering into, any agreement, derivative or other position which is materially related to the equity of the MOA held by the sponsor or an affiliate in the MOA?