

August 3, 2010

**VIA ELECTRONIC MAIL**

Ms. Elizabeth Murphy, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

RE: Proposed Rule on Asset-Backed Securities  
File Number S7-08-10, Release Nos. 33-9117, 34-61858  
*75 Federal Register 23328, May 3, 2010*

Dear Ms. Murphy:

The American Bankers Association (ABA)<sup>1</sup> and the ABA Securities Association (ABASA)<sup>2</sup> appreciate the opportunity to comment on the notice of proposed rulemaking issued by the Securities and Exchange Commission (Commission) to amend the offering process, and disclosure and reporting requirements for asset-backed securities (ABS). Our members serve as originators, issuers, sponsors, underwriters, trustees and in corporate agency capacities across the broad spectrum of securitization transactions.

The proposal is intended to address deficiencies in the markets for ABS that were exposed during the recent financial crisis and that led to the subsequent lack of investor confidence that brought serious challenges to the ABS market. Accordingly, the proposal addresses two aspects of the securitization process, among others, that have drawn the most criticism: the lack of transparency in very complex transactions, and the misalignment of incentives between originators and sponsors on the one hand, and investors on the other.

The proposal would provide far greater transparency for ABS transactions by means of vastly expanded disclosures to investors in publicly offered ABS. In addition, the proposal would require issuers of ABS offered in reliance on the regulatory safe harbors for private offerings to provide to investors upon request, the same disclosure that would have been required had the securities been issued publicly. The proposal seeks to

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<sup>1</sup> The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at [www.aba.com](http://www.aba.com).

<sup>2</sup> ABASA is a separately chartered affiliate of the ABA that represents those holding company members of the ABA that are actively engaged in capital markets, investment banking, and broker-dealer activities.

align better the economic incentives of participants in the securitization process who structure the transactions with those of the investors who purchase the securities by imposing on sponsors a risk retention requirement. Finally, the proposal would also modernize the offering process for ABS and eliminate the use of credit ratings as a criterion for eligibility for shelf registration.

Subsequent to the Commission issuing this proposal, on July 21, 2010, sweeping financial reform legislation was signed into law. The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or the Act) addresses some of the same issues as this proposal, including risk retention and disclosure requirements for ABS, and we presume that this regulatory effort will comprise part of the implementation of the Act by the SEC.

## **SUMMARY OF ABA POSITION**

ABA and ABASA recognize and understand the concerns that have been raised about the role that securitization, and in particular securitization of residential mortgages, played in this crisis. We do not disagree that the additional transparency and appropriate alignment of interests will benefit ABS investors, and we generally support efforts to effect those changes.<sup>3</sup> However, we believe that certain guiding principles should inform the deliberative processes addressing securitization, whether as part of interagency rulemaking efforts mandated by the Dodd-Frank Act, or on the part of the Commission with respect to amendments to ABS offering and disclosure requirements.

First, there must be a single uniform regulatory regime that applies to all participants in the securitization market. Currently, there are outstanding two regulatory proposals—this proposal and that of the Federal Deposit Insurance Corporation with respect to that agency’s securitization safe harbor—and legislation that would substantively reform the securitization process. All of these reforms address what are essentially the same issues but in different ways. Now that the Dodd-Frank Act has become law, ABA and ABASA believe it imperative that all reforms to this market comport with and adhere to the requirements of the legislation as part of the implementation of that statute. Thus, for example, any risk retention proposal must be developed through the interagency process specified in the legislation and not by individual agencies acting on their own initiative.<sup>4</sup>

Moreover, in the agency market for residential mortgage-backed securities (RMBS), the Federal Housing Finance Agency (FHFA) has proposed new, more robust reporting requirements with respect to mortgages to be securitized by Fannie Mae and Freddie Mac.

While we believe the FHFA requirements are similar to the Commission’s proposed disclosure points for RMBS in substance, the proposed form in which the disclosure points are to be submitted to FHFA is incompatible with this Commission proposal. Our

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<sup>3</sup> ABA and ABASA generally support the comments submitted by the American Bar Association and the American Securitization Forum.

<sup>4</sup> ABA and ABASA have expressed these same concerns directly to FDIC in our comment letter to the agency available at <http://www.fdic.gov/regulations/laws/federal/2010/10c08AD53.PDF>.

members originate mortgages for both the agency and private mortgage securitization markets, and the costs to comply with two separate disclosure regimes will necessarily either increase costs for the ultimate consumer or force originators to choose between the two markets rather than serve both. And the confusion will not aid investor understanding.

Second, in its deliberations the Commission should weigh the costs and benefits attendant to the proposed securitization reforms against the need for the return of a vibrant securitization market. It is beyond question that historically the securitization markets have provided a significant portion of this nation's funding and investment needs. It is also beyond question that in order to improve our economy, loan originations and securitizations must be increased. Indeed, both the Administration and Congress have consistently urged bankers to increase their lending to creditworthy individuals and businesses. Yet the uncertainty of the costs of complying with coming reforms—not simply in the securitization market, but also with respect to capital, liquidity and the myriad rules entailed in financial regulatory legislation—serves as a significant counterweight to increased lending. A robust securitization market is critical to meet those needs, and we are concerned that the costs that will necessarily be incurred to comply with this proposal may cause some issuers—particularly for smaller transactions—to withdraw from this market or curtail their lending.

Third, the regulations that will ultimately govern the various types of asset classes must reflect the unique characteristics of each class. Congress has clearly mandated such treatment with respect to risk retention requirements, and we believe that a close examination of the transaction structures, disclosure, risk retention aspects and representations and warranties among the various asset classes will reveal significant dissimilarities.

We believe it is important to recognize that both the proposal and the Act are a direct response to a financial crisis that was largely centered on housing-related issues. The remedial provisions of the several regulatory proposals and the Dodd-Frank Act are aimed squarely at the RMBS market and are intended to ensure that issuers and/or originators take responsibility for the underwriting standards of the mortgages underlying the securitization.

We believe fundamentally that any new or revised disclosure requirements should satisfy the traditional standard in the securities market—materiality to the investment decision. In addition, we strongly believe that any new requirements must be tailored to each asset class. We are concerned that (i) burdensome disclosure requirements that do not meet the materiality threshold and (ii) across-the-board imposition of disclosures and risk retention requirements, irrespective of asset-class differences, will needlessly stifle growth in the securitization market. Accordingly, to have a broad, economically viable securitization market across asset classes going forward, we strongly urge the Commission (and other agencies) to tailor the requirements for each asset class based on the specific characteristics of the class and materiality to investors.

Fourth, ABA and ABASA believe that “more” disclosure is not necessarily “better” disclosure for investors. In promulgating disclosure standards, we urge the Commission to balance the likely realizable benefits to investors from the proposed disclosure requirements against the costs to issuers of providing the information, which costs must necessarily be passed on to investors and ultimately to consumers and small businesses. We are concerned that disclosures that may be of minor incremental value to investors may come with very high costs to issuers and consumers.

Finally, Congress has clearly expressed its concerns about the impact of securitization reforms on the viability of the securitization markets and the availability of credit for new lending. Section 941 of the Dodd-Frank Act requires the Federal Reserve Board in consultation with the Commission and the other bank regulatory agencies to study and report within 90 days of enactment on the combined impact by asset class of the new risk retention requirements and Financial Accounting Statements 166 and 167, along with statutory and regulatory recommendations for eliminating any negative impacts of these requirements. ABA and ABASA strongly believe it would be unwise for the SEC to move forward with this proposal until the conclusions of this study are made available.

## **DISCUSSION**

### **I. A UNIFIED REGULATORY REGIME FOR ALL PARTICIPANTS IS NECESSARY FOR EFFICIENT OPERATION OF THE SECURITIZATION MARKETS**

That securitization has become a critical source of funding and liquidity for mortgage and consumer credit markets is widely accepted.<sup>5</sup> Both the Commission and the Obama Administration have affirmed the need to “restart” the securitization market because of its importance to our economy and, as a funding mechanism, to the housing market. At present, participants in the capital markets generally face substantial uncertainty about the future of the securitization market due to the impact of legislative changes and current accounting changes, as well as various regulatory rulemakings. Much of the uncertainty in the securitization market derives from the different schemes for risk retention and disclosure, among other things, being raised by the Act, the Commission, and the FDIC. We cannot emphasize enough that for the securitization market to serve its function as a robust, economically feasible source of funding, it is critical that a single set of standards be in place for all of its participants.

ABA and ABASA strongly believe that imposing differing regulatory regimes on securitization market participants, whether for bank versus nonbank sponsors or government agency markets, will increase costs to originators, sponsors and ultimately to

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<sup>5</sup> American Bar Association, *Securitization in the Post-Crisis Economy: An ABA Business Law Section White Paper*, November 20, 2009, pg. 7, available at [http://meetings.abanet.org/webupload/commupload/CL116000/newsletterpubs/BusinessLaw\\_AssetSecuritizationReforms.pdf](http://meetings.abanet.org/webupload/commupload/CL116000/newsletterpubs/BusinessLaw_AssetSecuritizationReforms.pdf).

investors. To the extent that the market contracts and/or that transactions become significantly more expensive, the costs of conflicting regulatory regimes will necessarily decrease the availability of credit, which would harm consumers and small businesses.

## **II. DISCLOSURE PROVISIONS OF THE PROPOSAL**

Regulation AB, adopted in 2004, currently requires disclosure of material, aggregate information about the composition and characteristics of the asset pool underlying ABS. The current proposal is intended to modernize and reform the disclosure requirements for securities that are offered pursuant to Regulation AB and establish ongoing reporting requirements for such offerings. The proposal would also extend the disclosure requirements to privately placed ABS offered pursuant to Regulation D and Rule 144A which we discuss at Part III of this letter.

We also note that Section 942 of the Act requires the Commission to adopt regulations requiring each issuer of an ABS security to disclose “asset-level or loan-level data *if such data are necessary for investors to independently perform due diligence*” [emphasis added].

The proposal contemplates disclosure of general data about the transaction and underlying collateral as well as information about each loan or asset in the asset pool with respect to the terms of the asset, obligor characteristics, and underwriting of the asset. In addition, the proposal would require disclosure of any exceptions from the disclosed underwriting standards. The data would have to be updated when new assets are added to the pool underlying the securities, and on an ongoing basis. The proposal enumerates 46 general data points for all asset classes as well as specific data points for eleven identified asset classes including, for example, 137 data points for RMBS, and 61 data points for commercial mortgage-backed securities (CMBS).

As discussed below, ABA and ABASA have a number of concerns about the proposed disclosure requirements.

### **A. Accuracy of the Data**

We are concerned that a number of the data points to be disclosed date from the time the loan was originated, with the result that they may be inaccurate by the time the loan is securitized. The borrower’s employment situation or credit score may have changed, or property values may have changed, to name but a few such circumstances. To the extent that such a data point—for example, borrower’s income—is used to calculate other data points—for example, debt-to-income ratio—the inaccuracies are compounded.

Moreover, in many credit card securitizations, the underlying accounts have existed for more than 60 months, making the original data not only stale, but largely irrelevant as a predictive measure of credit quality. In addition, a number of data points must be obtained through borrower representations that may be difficult to verify or that may change from

time of origination. Accordingly, ABA and ABASA urge the Commission to clarify for liability purposes that such data are not part of the prospectus or registration statement.

With respect to liability for inaccurate disclosure of data points, ABA and ABASA urge the Commission to clarify that liability is based on their aggregate materiality in the context of the entire asset pool, the full offering disclosures and whether the securitization structure and documentation provide adequate remedies. We believe it inevitable that there will be errors in documents produced by even the most diligent issuer, if only due to human error. Such errors, even if material to a particular loan, should not subject the issuer to the potential remedy of rescission of the entire issuance. Rather, only errors in disclosures of facts that are material to the transaction as a whole should give rise to such a draconian remedy.

## **B. Availability of the Data, Competitive Concerns**

### **1. Availability**

Issuers should not be required to capture data required by the proposal, unless such data are material to investors. In addition, issuers of one category of ABS should not be required to capture data solely because such data are relevant to another class of ABS. For example, exceptions to disclosed underwriting standards, may have relevance in the residential mortgage market, due to the standardization of underwriting criteria by Fannie Mae and Freddie Mac; however, for other asset classes, like commercial mortgage loans, broad underwriting standards may not even exist. The underwriting of commercial mortgage loans collateralizing CMBS (which often involve a small number of very large properties) may be very specific to the property in question and may be a unique, highly negotiated loan where the concept of an “exception” is not particularly applicable.

### **2. Competitive Concerns**

Moreover, we understand from our members that the proposal would require disclosure of proprietary information that could enable competitors to reverse engineer confidential pricing and underwriting strategies, thus undermining issuers’ business models. For example, in the case of prime auto ABS, the requirement to include zip codes could lead to identification of individual dealers and their pricing strategies. For many asset classes, underwriting strategies themselves are deemed to be proprietary information. We strongly urge the Commission to address appropriately these concerns so that the business models of issuers are not harmed.

As noted above, ABA and ABASA recognize that the various reform proposals and legislation are directed at the RMBS market. However, we strongly urge the Commission to ensure that any new or revised disclosure elements be material to investors, whether directed at the RMBS market or another asset class. We believe that rather than taking the broad position that disclosing a greater number of data points for all asset classes is always

better, the Commission should adopt a judicious approach that emphasizes the materiality of the information to investment decisions. In addition, disclosure in the form of narrative rather than data points may serve to address concerns about confidentiality.

Because of the enormous impact this proposal will have on the viability of the securitization markets, we urge the Commission to expend the time necessary to balance appropriately the need for enhanced disclosure to investors in particular asset classes with costs to issuers, both in terms of financial resources and competitive concerns. We note that the Act imposes no time frame in which disclosure rulemaking must be completed.

In summary, ABA and ABASA believe the Commission should take the time necessary to ensure that the resulting disclosure rules, have the intended impact of restoring investor confidence in and revitalizing ABS markets, rather than instead having the opposite impact of driving issuers from those markets.

### **3. Grandfathering**

Finally, ABA and ABASA believe that the proposal should apply only to loans or assets *originated* after the effective date of the final rule. Holders of loans or other financial assets originated or acquired prior to implementation of a final rule may simply not have or be able to access the data points required by the proposal. The inability to comply with the proposal is further exacerbated in the case of loans that were originated by entities that are no longer in business.

#### **D. Utility of the Data to Investors, Cost to Issuers**

As stated above, while we generally support loan-level disclosure requirements that are material to investors, ABA and ABASA are concerned that the breadth of the proposed disclosures may be of little value to investors. For example, in securitizations that are collateralized by thousands of individual accounts or assets, detailed loan level information would likely be of little value to investors. The Commission has recognized this in the case of credit card securitizations and, accordingly, has proposed disclosure of grouped asset data. While we question the utility of providing grouped asset data for investors in credit card ABS, we believe that similar treatment should be afforded securitizations where individual loan level data are not material to investors.

ABA and ABASA believe the costs to provide the increased level of disclosure in many assets classes may well be completely disproportionate to the incremental value of that disclosure to investors. For example, while CMBS transactions typically involve fewer but larger assets, and consequently provide investors detailed loan level data, similarly detailed information for a securitization involving thousands of assets is prohibitively expensive and unreasonable. Congress has directed the Commission to require loan-level disclosure only to the extent it is necessary for investors to perform independent due diligence. We strongly question its utility and fear that it will significantly undermine the continued use of securitization as a funding mechanism.

Because this disclosure regime is generally untested in the marketplace, there are significant uncertainties both as to the costs to obtain and process the required data points as well as the usefulness of the data to investors. We urge the Commission to proceed cautiously until there is more clarity as to the impact of this proposed disclosure regime on the securitization market, and in particular, to each separate asset class.

To the extent that costs of providing the disclosure, the competitive impact on business models, or the potential legal risks outweigh the advantages of securitization as a funding mechanism, issuers may choose to leave the market or pass along increased costs to investors and borrowers. Either result clearly will negatively impact the cost and availability of credit. For these reasons, ABA and ABASA believe that the Commission should carefully tailor the disclosure requirements by asset class and require only that disclosure that can be obtained without undue cost and that is demonstrated to be useful to investors.

### **E. Waterfall Computer Program**

The Commission has proposed that as part of an ABS offering, issuers provide a waterfall computer program of the contractual cash flow provisions of the securities in the form of downloadable source code in Python that would allow the user to input information from the required data points. Thus, the Commission believes investors would be better able to conduct their own evaluations of ABS and may be less likely to be dependent on the opinions of credit rating agencies.

First, ABA and ABASA disagree with the Commission's underlying premise that investors' lack of understanding of complicated securitization structures resulted in poor investment decisions. Our members have informed us that third-party vendors providing services similar to the proposed waterfall computer program were widely used in the RMBS market before the crisis unfolded. Providing investors with yet another model (at great expense) will have no impact on the validity of the assumptions that go into the model.

Moreover, the proposal describes the required waterfall computer program as one that not only models the cash flows set forth in the offering and transaction documents, but also offers predictive capabilities based on the investor's assumptions of future performance throughout the life of the transaction.<sup>6</sup> It then asserts that the issuer or the underwriter generally will have a computer model of the waterfall program.

To the contrary, ABA and ABASA believe that not all issuers currently have such waterfall computer programs. We understand that the existing models range from the very complex to simple spreadsheets, and that few, if any, of the existing models use the Python programming language. Furthermore, existing models are designed simply to allocate existing cash and losses among the various tranches on an aggregate, rather than loan-level basis.

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<sup>6</sup> See, proposed definition of Item 1113(h) of Regulation AB, 75 *Fed. Reg.* 23328 at 23429.

In addition to the obvious costs required to develop the waterfall computer program, the proposal raises serious concerns about issuers' liability for errors in programming and errors by users, as well as the ability to obtain comfort from independent third parties as to potential liability, among others. We leave to others to address the technical complexities involved in developing and testing the proposed model. Suffice it to say, ABA and ABASA believe the waterfall computer program as proposed is unworkable, and the Commission should not go forward with this aspect of the proposal.

### **III. DISCLOSURE APPLICABLE TO PRIVATE OFFERINGS OF STRUCTURED FINANCE PRODUCTS**

The proposal would extend to transactions that are currently exempt from registration in reliance on the regulatory safe harbors of Rules 144, 144A and 506, the disclosure requirements that would be applicable to publicly offered ABS. These safe harbors are designed expressly for participants in the market who are sufficiently sophisticated as to not need the extensive disclosure available for publicly registered securities. The Commission believes that extending these disclosure requirements to privately placed ABS would remedy concerns about the lack of transparency in this market.

Specifically, the proposal would condition the availability of the safe harbors on a covenant by the issuer of "structured finance products" to provide to investors and transferees, upon request, the same initial and continuing disclosures that would be available if the offering was publicly registered. The term "structured finance product" is broadly defined in the proposal and could reach transactions well beyond what we believe is intended by the Commission. Issuers would be required to notify the Commission of such initial offerings, and failure to abide by the covenant would be enforceable by the Commission.

ABA and ABASA believe that this aspect of the proposal is a fundamental departure from the Commission's historic treatment of sophisticated investors. We believe rather that if adopted, issuers will simply turn to other statutory exceptions from registration requirements such as under Sections 4(1) and 4(2) of the Securities Act with the limitations attendant to those exceptions, or exit the market. Accordingly, we strongly oppose any extension of registration or disclosure requirements to privately placed ABS.

#### **A. The Proposed Disclosure Requirements Should Not Be Imposed on Privately Placed Securities**

The legislative history of the Securities Act and subsequent judicial interpretations clearly demonstrate that the basis for the exemption from registration requirements in Section 4(2) of the Securities Act is that certain "sophisticated" investors did not need the information otherwise available in the prospectus and registration statement.<sup>7</sup> Rules 144, 144A and

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<sup>7</sup> In its report on the 1933 Act, the House of Representatives stated that "Congress recognized that, under certain carefully limited circumstances, it might be unnecessary for an issuer to make available through the registration process all the information material to an intelligent evaluation of securities because certain persons in certain circumstances already have access to such information through other channels." H.R. Rep.

506 are longstanding rules of the Commission intended to provide certainty to issuers and underwriters concerning the availability of the exemptions from registration under Sections 4(1) and 4(2) of the Securities Act for transactions by persons other than an issuer, underwriter, or dealer, or for transactions that are not offered to the public.<sup>8</sup> For example, the safe harbor for resales under Rule 144A was appropriately crafted to define the characteristics of investors who are sufficiently knowledgeable to make their own investment decisions without the need for prospectus-type information.

The Commission cites the lack of transparency in the market for collateralized debt obligations as a rationale for extending disclosure obligations to the private market. However, we reiterate our belief that there are great variances among the different asset classes and that concerns specific to one asset type should not dictate the requirements for all asset classes.

Importantly, ABA and ABASA do not believe it is likely that extending the proposed disclosure requirements to transactions conducted in reliance on the above safe harbors will achieve the desired result. Many of the investors who were most adversely impacted by losses from structured products, in fact, had all of the information required to analyze the transactions. We disagree with the premise that mandating extensive disclosures to sophisticated investors will necessarily improve their analyses of securitization transactions.

Rather, we believe that faced with the cost of complying with the proposed disclosure mandates, issuers who wish to avail themselves of the private market will do so in reliance on the statutory exemptions without the comfort provided by the regulatory safe harbors, or they will exit the securitization markets in the face of legal uncertainties.<sup>9</sup> Either alternative will increase costs for both investors and borrowers.

## **B. The Definition of “Structured Finance Products” Should Be Narrowed**

The Commission would extend the proposed disclosure requirements to any securitization of “structured finance products” defined to include ABS as defined in Regulation AB, synthetic ABS, collateralized mortgage obligations, collateralized debt obligations, collateralized bond obligations, collateralized debt obligations of asset-backed securities, collateralized debt obligations of collateralized debt obligations, or *a security that at the*

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No. 73-85 (1933). Similarly, the U.S. Supreme Court stated in *SEC v. Ralston Purina*, “Since exempt transactions are those as to which ‘there is no practical need for \* \* \* [the bill’s] application,’ the applicability of § [4(2)] should turn on whether the particular class of persons affected need 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.’” 346 U.S. 119, 125 (1953) (ellipsis and brackets in the original). These statutory exemptions are unaffected by the proposal.

<sup>8</sup> See, Sections 4(1) and 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d.

<sup>9</sup> We note that should issuers rely on the Section 4(2) exemption, investors in such securities may not be able to sell the securities later because of the unavailability of the regulatory resale exemption of 144A. This would materially reduce liquidity for such investors.

*time of the offering is commonly known as an asset-backed security or a structured finance product [emphasis added].*

We believe that this broad definition could conceivably extend to covered bonds, trust-preferred securities, and certain pooled investment vehicles. ABA and ABASA do not believe it is the Commission's intent that the proposal apply to such securities; therefore, we urge the Commission to define "structured finance product" more narrowly in any final rule.

#### **IV. NEW CONDITIONS FOR SHELF ELIGIBILITY**

A key goal of the Commission in developing the proposal is to reduce the potential for undue reliance on credit ratings by investors. In support of this objective, the proposal would eliminate as a condition for eligibility for offering ABS under a shelf registration statement the current requirement that the securities be rated investment grade at the time of the offering. In place of the ratings requirement, the proposal sets forth four new conditions for shelf eligibility:

- A 5 percent vertical risk retention requirement;
- Third-party opinions concerning repurchase obligations;
- A depositor CEO certification; and
- An ongoing undertaking to provide ongoing reporting under the Securities Exchange Act of 1934.

As a preface to our discussion of these conditions, we note the importance of shelf eligibility to participants in the securitization markets, and urge the Commission to ensure its continued availability in practice. This mechanism provides issuers with flexibility to access the market at the most optimum time at a reduced cost, while at the same time providing investors with disclosure that does not differ materially from that provided in offerings currently registered on Form S-1. Accordingly, we urge the Commission to ensure that the new eligibility criteria are neither so costly nor fraught with legal risk as to eliminate their use as a practical matter.

Following is a discussion of each of these conditions as impacted by the passage of financial regulatory legislation by Congress.

##### **A. Risk Retention**

The proposal would require sponsors of all asset classes of ABS or their affiliates to retain a minimum of five percent of the nominal amount of each tranche sold or transferred to investors. We recognize that one goal of both the proposal and the legislation is to align better the interests of originators and sponsors with those of investors. This risk retention condition to shelf eligibility reflects the prevailing view, based on the recent experience in the RMBS market, that a sponsor that has the potential to suffer losses alongside its investors is more likely to undertake the due diligence necessary to ensure that the assets

underlying the securities are underwritten to high-quality standards.<sup>10</sup> This aspect of the proposal has now been superseded by enactment of financial regulatory legislation.

Section 941 of the Act similarly imposes a five percent risk retention requirement on “securitizers,” but expressly provides a complete exemption from that requirement for “qualified residential mortgages,” a term to be defined by the federal banking agencies, the Department of Housing and Urban Development, and the FHFA. In addition, the legislation provides that ABS that are collateralized by one or more assets that are *not* “qualified residential mortgages” may have a risk retention requirement that may be less than five percent. Section 941 also addresses possible forms of risk retention for CMBS.

The legislation requires the Commission, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation to jointly promulgate the risk retention rules by asset class, and the agencies must specify for each asset class the underwriting and loan characteristics that indicate reduced credit risk. The agencies are afforded significant authority to issue exemptions or adjustments for classes of institutions or assets from the risk retention requirement if such exemptions (1) help to ensure high-quality underwriting and encourage appropriate risk management practices, (2) improve customer access to credit, or (3) otherwise are in the public interest or protect investors. We urge the Commission to eliminate the risk retention element of its proposal and rely on the required interagency regulations to address this issue.

We note further that sponsors and originators can retain risk in many ways—not just simply in the form of a vertical slice. Accordingly, when addressing the possible forms of risk retention in the interagency discussions, ABA and ABASA believe it is critical to review the risk retention elements that may already be embedded in the structures of particular classes of transactions. Examples include overcollateralization generally, the seller interest in credit card securitizations, or a third-party purchaser’s retention of the first-loss piece in CMBS transactions. We strongly believe that the form of risk retention should be based on asset class and not an across-the-board formulation applicable to the entire securitization market.

As discussed previously, the Act also requires the Federal Reserve Board in consultation with the Commission and the other bank regulatory agencies to study and report within 90 days of enactment on the combined impact by asset class of the new risk retention requirements and Financial Accounting Statements 166 and 167, along with statutory and regulatory recommendations for eliminating any negative impacts of these requirements. We note that, although the Commission believes that the accounting treatment for risk retention will not require consolidation of a securitization entity onto the sponsor’s balance sheet, the Commission concedes that this is a “facts and circumstances” issue that does not have a single answer. Therefore, it is possible that a sponsor may incur increased capital charges as a result of the risk retention requirement. This is precisely the type of issue we hope will be addressed more fully in the study, and we further hope that the conclusions

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<sup>10</sup> In the case of a revolving-asset master trust, the retention requirement is satisfied by retaining an owner’s interest whose cash flows are at least equal to 5 percent of those paid to investors and represents a claim to the same pool of assets as the securities held by investors and an equivalent prior to those securities.

will inform the interagency rulemaking so that securitization can continue as a viable funding mechanism. Accordingly, ABA and ABASA reiterate our strong belief that it would be unwise for the agencies to move forward with any risk retention regulations until the conclusions of this study are made available.

## **B. Third-Party Review of Repurchase Obligations**

To ensure that representations and warranties given by originators and sponsors offer meaningful protection for investors, the proposal requires as a condition for eligibility for shelf registration that the party making the representations and warranties furnish, on a quarterly basis, an opinion from a third party concerning any asset as to which the trustee has alleged a breach, but which was not repurchased or replaced because the representing party disputed the breach. We note at the outset that representations and warranties are not intended to serve as a guarantee of performance, but rather incidental recourse.

### **1. The Commission Should Defer to Market Participants to Resolve Issues Concerning Breaches of Representations and Warranties**

While ABA and ABASA generally support efforts to provide investors with stronger enforcement of representations and warranties, we are concerned that the disclosure through third-party opinions concerning repurchase requests that are not honored will not resolve enforcement issues when the parties disagree on the legitimacy of a breach claim. The proposal does not specify who would be eligible to provide such an opinion; nor does it provide any standard for analyzing whether or not a material breach has occurred or been cured, or for ensuring that the trustee has actual knowledge of potential breaches. Importantly, the proposal does not require a mechanism for resolving disputes between the parties as to whether a breach occurred. Thus, as proposed, we believe this provision would merely exacerbate investor frustrations about ineffective repurchase provisions.

A major issue, as the Commission acknowledges, is that the representation and warranties provisions of existing transactions typically do not provide a process for determining whether a breach has occurred or a mechanism to compel the obligated party to provide the supporting documents to make such a determination. The lack of such provisions has made it difficult for investors and trustees to demonstrate the existence of a breach. Nevertheless, assuming that the proposal is properly developed with specificity and the third-party opinions are issued, it still fails to resolve a basic issue: what happens when the parties reach an impasse over the materiality of a breach. The Commission may wish to consider binding arbitration or a bidding process to determine materiality. Absent a mechanism, the third-party opinions, which will necessarily entail expenses for research and due diligence, will not resolve investor concerns and will simply increase the cost of the transaction to issuers.

We understand that the American Securitization Forum has begun work on model repurchase provisions that are intended to address the deficiencies that RMBS investors experienced during the financial crisis. ABA and ABASA believe that rather than impose a

costly system for producing third-party opinions that may, in the end, provide no real resolution to breach disputes, the Commission should defer to market participants to continue their negotiations to develop commercially reasonable solutions to repurchase issues.

## 2. Concerns of ABA Corporate Trustees

The Commission has asked whether it should condition shelf eligibility on receipt of a certification from the trustee in offerings of the same asset class by the depositor or its affiliates to the effect that all required opinions have been obtained or that the trustee provide notice if such opinions are not obtained. ABA's corporate trustee members adamantly oppose any suggestion that an issuer's eligibility for shelf registration be dependent on the actions of the ABS trustee. We believe it wholly inappropriate to condition ongoing eligibility for shelf registration on the actions of any party other than the issuer. Accordingly, we strongly recommend that the Commission *not* adopt any requirement that would condition shelf eligibility on a certification or notice by the trustee with respect to third-party opinions or any other issue.

The duties of trustees in asset-backed transactions are, prior to default, generally ministerial in nature. Trustees typically act in accordance with instructions set forth specifically in the transactions documents or in accordance with instructions of transaction parties that are within the scope of authority delegated to such parties in the transaction documents. As proposed, the requirement that trustees are to monitor and enforce breaches of the representations and warranties is totally lacking in specificity and runs counter to the types of activities explicitly undertaken by trustees in such transactions.

If the trustee must have a role in monitoring and/or reporting under the Securities Exchange Act of 1934 (Exchange Act) of notices of breach, demands for repurchase, actual repurchases and delivery of any required third-party opinions, the proposed rules need to make it clear that the trustee must have actual knowledge of each of these events and provide a conduit for receiving the information to be monitored and/or reported. Often, especially when the trustee serves in a nominal capacity, the trustee has no knowledge of an identified breach or that a repurchase demand has been asserted by another party against the obligated party. The trustee can only monitor and report on items/activities for which it has actual knowledge.

Therefore, for the proposal to be workable, the Commission must require that the transaction documents ensure that the trustee is in the chain of information with respect to every aspect of potential assertions of breaches of representations or warranties. Following are examples of specific areas that are of concern to trustees:

- In non-mortgage ABS transactions, the trustee typically does not prepare monthly holder reports or Exchange Act reports. Rather, the issuer or servicer is generally responsible for generating the monthly payment date reports, SEC filings and other required reports. As a result, the trustee will not have access to information pertaining to potential breaches.

- Most ABS have a monthly distribution report. To capture and report repurchase obligation information on Form 10-D, the obligated parties must have a contractual responsibility to provide the repurchase obligation information, as of a date prior to each distribution date, to the party responsible for filing the Exchange Act reports on behalf of the trust.

The proposed rules would also need to specify the level of information to be included on Form 10-D with respect to previous transactions/filings. Further clarification and guidance is needed for incorporation by reference to previous transaction filings.

In addition, the Commission will have to specify the type of third party that is competent to assess whether a breach has, in fact, occurred and whether it is material.

*a. The Commission Should Issue Guidance for Breach Assessments*

ABA and ABASA believe that the Commission should issue guidance on how to make an assessment of the alleged breach; and, if a breach has occurred, whether it is material. Such guidance should also describe the types of breaches that would always be material and adverse to investors. Alternatively, the Commission could mandate a process for determining materiality.

The guidance should further clarify the impact of a cure period on the determination that a breach has occurred. Currently, the process operates as follows:

- A notice of breach and request to cure or repurchase is delivered and the obligated party has a “cure period” as defined in the governing documents. This notice may be delivered by any party to the transaction (not just the trustee).
- If the breach is not cured or the loan repurchased by the expiration of the cure period, then a formal demand for repurchase is made by the party responsible for enforcing the repurchase obligation (which is typically the trustee or securities administrator).

It is unclear from the proposal whether the third-party opinion is required only in the case of breaches for which the cure period has passed, a formal demand has been made and repurchase has been refused, or whether the requirement for a third-party opinion is triggered before the end of the cure period.

*b. Content of the Third-Party Opinion*

The Commission should require that each third-party opinion should clearly state one of the following conclusions:

- The breach is material and the obligated party must repurchase the loan;
- The breach is not material and therefore the loan is not subject to repurchase; or
- The breach has been cured and therefore the loan does not have to be repurchased.

We recognize that the conclusion that the obligated party must repurchase the loan raises enforcement issues that are not addressed in the proposal. Nonetheless, if the provision is to have any efficacy in the market, we believe the option for such a conclusion is necessary. Moreover, the Commission should provide a mechanism to resolve impasses between the investor and the obligated party.

Finally, any assessment of a potential breach will require the independent third party to have access to sensitive/confidential information. The proposed rule should determine how privacy or confidentiality concerns with the third party will be addressed.

### **C. Depositor CEO Certification**

The third new condition for shelf eligibility under the proposal is a requirement that the issuer file a certification signed by the chief executive officer of the depositor certifying that, at the time of each offering or takedown off a shelf, to such person's 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," and that such person has "reviewed the prospectus and the necessary documents to make such certification."

ABA and ABASA are concerned that the proposed form of CEO certification, which cannot be altered, appears to require the officer to express an opinion as to the future performance of the particular assets. We believe that such a forward-looking statement is inappropriate and is akin to a personal guarantee. To the extent that this certification is intended as a substitute for the current investment grade rating requirement, it would be most appropriately provided by the registrant rather than an individual officer. Alternatively, an officer certification could be appropriate if limited to the disclosures made in the offering (in accordance with traditional materiality standards) and not the performance of the assets.

### **D. Undertaking to File Ongoing Exchange Act Reports**

The fourth new criterion for shelf eligibility is a requirement to file ongoing Exchange Act reports, which has effectively been mooted by the enactment of financial regulatory legislation which eliminated the existing exemption for ABS issuers whose securities are held by fewer than 300 persons.

## **CONCLUSION**

In conclusion, ABA and ABASA urge the Commission to coordinate action on its proposal within the context of financial regulatory legislation and other regulatory proposals to achieve a single uniform regulatory regime for all participants in the securitization markets. We believe that in formulating revisions to this proposal, the Commission should

balance the need for increased transparency and alignment of incentives within the securitization markets with the need to revitalize this market as a critical funding mechanism in our economy. ABA and ABASA believe that this overarching goal can be best achieved by specifically tailoring the necessary changes to each discrete asset class of ABS. Finally, we also have considerable operational concerns about the proposal and have addressed those which we deem to be the most significant.

As always, ABA, ABASA and our members remain available to discuss these positions with the Commission and staff throughout their consideration of the proposal. In the meantime, if you have any questions on the foregoing, please contact the undersigned.

Sincerely,



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Center for Securities, Trust & Investment

Associate General Counsel  
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