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On May 3, 2010 the Securities and Exchange Commission proposed significant revisions to Regulation AB and other rules regarding the offering process, disclosure and reporting for asset-backed securities.



Federal Register

**Monday,
May 3, 2010**

Part II

**Securities and
Exchange
Commission**

**17 CFR Parts 200, 229, 230 et al.
Asset-Backed Securities; Proposed Rule**

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 229, 230, 232, 239, 240, 243, and 249

[Release Nos. 33-9117; 34-61858; File No. S7-08-10]

RIN 3235-AK37

Asset-Backed Securities

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing significant revisions to Regulation AB and other rules regarding the offering process, disclosure and reporting for asset-backed securities. Our proposals would revise filing deadlines for ABS offerings to provide investors with more time to consider transaction-specific information, including information about the pool assets. Our proposals also would repeal the current credit ratings references in shelf eligibility criteria for asset-backed issuers and establish new shelf eligibility criteria that would include, among other things, a requirement that the sponsor retain a portion of each tranche of the securities that are sold and a requirement that the issuer undertake to file Exchange Act reports on an ongoing basis so long as its public securities are outstanding. We also are proposing to require that, with some exceptions, prospectuses for public offerings of asset-backed securities and ongoing Exchange Act reports contain specified asset-level information about each of the assets in the pool. The asset-level information would be provided according to proposed standards and in a tagged data format using extensible Markup Language (XML). In addition, we are proposing to require, along with the prospectus filing, the filing of a computer program of the contractual cash flow provisions expressed as downloadable source code in Python, a commonly used open source interpretive programming language. We are proposing new information requirements for the safe harbors for exempt offerings and resales of asset-backed securities and are also proposing a number of other revisions to our rules applicable to asset-backed securities.

DATES: Comments should be received on or before August 2, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-08-10 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-08-10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for Web site viewing and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Katherine Hsu, Senior Special Counsel in the Office of Rulemaking, at (202) 551-3430, and Rolaine Bancroft, Special Counsel in the Office of Structured Finance, Transportation and Leisure, at (202) 551-3313, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Rule 30-1¹ of the Commission's Rules of General Organization,² Items 512³ and 601⁴ of Regulation S-K;⁵ Items 1100, 1101, 1102, 1103, 1104, 1106, 1110, 1111, 1121, and 1122⁶ of Regulation AB⁷ (a subpart of Regulation S-K); Rules 139a, 144, 144A, 167, 190, 401, 405, 415, 424,

¹ 17 CFR 200.30-1.

² 17 CFR 200.1 *et al.*

³ 17 CFR 229.512.

⁴ 17 CFR 229.601.

⁵ 17 CFR 229.10 *et al.*

⁶ 17 CFR 229.1100, 17 CFR 229.1101, 17 CFR 229.1102, 17 CFR 229.1103, 17 CFR 229.1104, 17 CFR 229.1106, 17 CFR 229.1110, 17 CFR 229.1111, 17 CFR 229.1121 and 17 CFR 229.1122.

⁷ 17 CFR 229.1100 through 17 CFR 229.1123.

430B, 430C, 433, 456, 457, 502 and 503⁸ and Forms S-1, S-3 and D⁹ under the Securities Act of 1933 ("Securities Act");¹⁰ Rules 11, 101, 201, 202, 305, and 312¹¹ of Regulation S-T,¹² and Rules 15c2-8 and 15d-22¹³ and Forms 8-K, 10-D, and 10-K¹⁴ under the Securities Exchange Act of 1934 ("Exchange Act")¹⁵ and Rule 103¹⁶ of Regulation FD.¹⁷ We also are proposing to add Items 1111A and 1121A¹⁸ to Regulation AB and Rule 192,¹⁹ Rule 430D,²⁰ Form SF-1,²¹ Form SF-3²² and Form 144A-SF²³ under the Securities Act.

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⁸ 17 CFR 230.139a, 17 CFR 230.144, 17 CFR 230.144A, 17 CFR 230.167, 17 CFR 230.190, 17 CFR 230.401, 17 CFR 405; 17 CFR 230.415, 17 CFR 230.424, 17 CFR 230.430B, 17 CFR 230.430C, 17 CFR 230.433, 17 CFR 230.456, 17 CFR 230.457, 17 CFR 230.502, and 17 CFR 230.503.

⁹ 17 CFR 239.11, 17 CFR 239.13 and 17 CFR 239.500.

¹⁰ 15 U.S.C. 77a *et seq.*

¹¹ 17 CFR 232.11, 17 CFR 232.101, 17 CFR 232.201, 17 CFR 232.202, 17 CFR 232.305 and 17 CFR 232.312.

¹² 17 CFR 232.10 *et seq.*

¹³ 17 CFR 240.15c2-8 and 17 CFR 240.15d-22.

¹⁴ 17 CFR 249.308, 17 CFR 249.310, and 17 CFR 249.312.

¹⁵ 15 U.S.C. 78a *et seq.*

¹⁶ 17 CFR 243.103.

¹⁷ 17 CFR 243.100 *et seq.*

¹⁸ 17 CFR 229.1111A and 17 CFR 229.1121A.

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²⁰ 17 CFR 230.430D.

²¹ 17 CFR 239.44.

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I. Executive Summary

A. Background

The recent financial crisis highlighted that investors and other participants in the securitization market did not have the necessary tools to be able to fully understand the risk underlying those securities and did not value those securities properly or accurately. The severity of this lack of understanding and the extent to which it pervaded the market and impacted the U.S. and worldwide economy calls into question the efficacy of several aspects of our regulation of asset-backed securities. In light of the problems exposed by the financial crisis, we are proposing significant revisions to our rules governing offers, sales and reporting with respect to asset-backed securities. These proposals are designed to improve investor protection and promote more efficient asset-backed markets.

Securitization generally is a financing technique in which financial assets, in many cases illiquid, are pooled and converted into instruments that are offered and sold in the capital markets as securities. This financing technique makes it easier for lenders to exchange payment streams coming from the loans for cash so that they can make additional loans or credit available to a wide range of borrowers and companies seeking financing. Some of the types of assets that are financed today through securitization include residential and commercial mortgages, agricultural equipment leases, automobile loans and leases, student loans and credit card receivables. Throughout this release, we refer to the securities sold through such

vehicles as asset-backed securities, ABS, or structured finance products.

At its inception, securitization primarily served as a vehicle for mortgage financing. Since then, asset-backed securities have played a significant role in both the U.S. and global economy. At the end of 2007, there were more than \$7 trillion of both agency and non-agency²⁴ mortgage-backed securities and nearly \$2.5 trillion of asset-backed securities outstanding.²⁵ Securitization can provide liquidity to nearly all major sectors of the economy including the residential and commercial real estate industry, the automobile industry, the consumer credit industry, the leasing industry, and the commercial lending and credit markets.²⁶

Many of the problems giving rise to the financial crisis involved structured finance products, including mortgage-backed securities.²⁷ Many of these mortgage-backed securities were used to collateralize other debt obligations such as collateralized debt obligations and collateralized loan obligations (CDOs or CLOs), types of asset-backed securities that are sold in private placements.²⁸ As the default rate for subprime and other mortgages soared, such securities, including those with high credit ratings, lost their value.²⁹ CDOs were noted, in

particular, to have contributed to the collapse in liquidity during the financial crisis.³⁰ As the crisis unfolded, investors increasingly became unwilling to purchase these securities, and today, this sentiment remains, as new issuances of asset-backed securities, except for government-sponsored issuances, have recently dramatically decreased.³¹ The absence of this financing option has negatively impacted the availability of credit.³²

The financial crisis highlighted a number of concerns with the operation of our rules in the securitization market. Certain regulations for asset-backed securities rely on the ratings for those securities provided by the ratings agencies, and much has been written about the failures of those ratings accurately to measure and describe the risks associated with certain of those products that were realized during the financial crisis.³³ In addition, investors have expressed concern regarding a lack of time to analyze securitization transactions and make investment decisions.³⁴ While the Commission historically has not built minimum time periods into its registration process to deliberately slow down the market,³⁵

mortgages and the write-down of AAA-rated and super-senior tranches of CDOs as contributing factors to the financial crisis).

²⁴ See, e.g., The Report of the Counterparty Risk Management Policy Group III ("CRMPG III"), *Containing Systemic Risk: The Road to Reform*, August 6, 2008 (the "2008 CRMPG III Report"), at 53 (noting that lack of comprehension of CDO and related instruments resulted in the display of price depreciation and volatility far in excess of levels previously associated with comparably rated securities, causing both a collapse of confidence in a very broad range of structured product ratings and a collapse in liquidity for such products). Another type of asset-backed security that is privately offered is asset-backed commercial paper (ABCP), which was increasingly collateralized by CDOs and RMBS from 2004 through 2007. The ABCP market severely contracted during the crisis. See PWG March 2008 Report at 8.

³¹ See, e.g., David Adler, "A Flat Dow for 10 Years? Why it Could Happen," *Barrons* (Dec. 28, 2009) (noting that new securitization issuances, except those sponsored by the government, have largely come to a halt). In 2008 through the end of September, annualized issuance volumes for overall global securitized and structured credit issuance were approximately \$2.4 trillion less than in 2006. See Global Joint Initiative to Restore Confidence in the Securitization Market, *Restoring Confidence in the Securitization Markets* (Dec. 3, 2008) at 6.

³² *Id.*

³³ See, e.g., The PWG March 2008 Report at 2, 8 (noting that the performance of credit rating agencies, particularly their ratings of mortgage-backed securities and other asset-backed securities, contributed significantly to the financial crisis).

³⁴ See discussion in Section II.B.1 below.

³⁵ See, e.g., Section IV.A. of *Securities Offering Reform*, Release No. 33-8591 (Jul. 19, 2005) [70 FR 44722] (release adopting significant revisions to registration, communications and offering process under the Securities Act) (the "Offering Reform Release") (stating that Rule 159 would not result in a speed bump or otherwise slow down the offering process).

and instead has believed investors can insist on adequate time to analyze securities (and refuse to invest if not provided sufficient time), we have been told that this is not generally possible in this market, particularly in an active market.³⁶ In addition, market participants have expressed a desire for expanded disclosure relating to the assets underlying securitizations.³⁷ Investors have complained that the mechanisms for enforcing the representations and warranties contained in securitization transaction documents are weak, and thus are not confident that even strong representations and warranties provide them with adequate protection. In the private market, we believe that, in many cases, investors did not have the information necessary to understand and properly analyze structured products, such as CDOs, that were sold in transactions in reliance on exemptions from registration.³⁸ As a result of these and other factors, the financial crisis resulted in an absence of confidence in much of the securitization market.

We are proposing a number of changes to the offering process, disclosure, and reporting for asset-backed securities, which are designed to enhance investor protection in this market.³⁹ The proposals are intended to provide investors with timely and sufficient information, including information in and about the private market for asset-backed securities, reduce the likelihood of undue reliance on credit ratings, and help restore investor confidence in the representations and warranties regarding the assets. Although these revisions are comprehensive and therefore would impose new burdens, if adopted, we believe they would protect investors and promote efficient capital

³⁶ See discussion in Section II.B.1 below.

³⁷ See also discussion in Section III.A.1 below.

³⁸ The assumption that sophisticated investors are able to fend for themselves in a private asset-backed securities transaction has also been questioned. Cf. Financial Services Authority, *The Turner Review: A Regulatory Response to the Global Banking Crisis*, March 2009 (the "Turner Review"), at 39 (finding that "the crisis also raises important questions about the intellectual assumptions on which previous regulatory approaches have largely been built").

³⁹ Our proposals, if adopted, would not affect the applicability of the Investment Company Act (15 U.S.C. 80a-1 *et seq.*) to ABS issuers, including the availability of exclusions from such Act. See, e.g., Section 3(c)(1) or Section 3(c)(7) (15 U.S.C. 80a-3(c)(1) and 80a-3(c)(7)) (for private transactions); Rule 3a-7 [17 CFR 270.3a-7] (for public and private transactions). Our proposals are not intended to affect the application of the Investment Company Act, including the availability of these exclusions, to ABS issuers.

²⁴ Agency securities are securities issued by the government-sponsored enterprises, Ginnie Mae, Fannie Mae or Freddie Mac.

²⁵ See American Securitization Forum, Study on the Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets (June 17, 2009), at 16 (citing to statistics on outstanding residential mortgage-backed securities and outstanding U.S. ABS collected by the Securities Industry and Financial Markets Association), available at http://www.americansecuritization.com/uploadedFiles/ASF_NERA_Report.pdf.

²⁶ See testimony of Micah Green, President of the Bond Market Association, Before the Senate Basel Committee on Banking Supervision, A Review of the New Basel Capital Accord, (June 13, 2003), available at <http://banking.senate.gov>.

²⁷ A report by the U.S. Government Accountability Office (GAO) notes that 75% of subprime loans were packaged into securities in 2006. See U.S. Government Accountability Office, *Financial Regulation: A Framework for Crafting and Assessing Proposals to Modernize the Outdated U.S. Financial Regulatory System* (Jan. 2009) at 26.

²⁸ CDOs are typically sold as a private placement to an initial purchaser followed by resales of the securities to "qualified institutional buyers" pursuant to Rule 144A. Pools comprising the CDOs may consist of various types of underlying assets including subprime mortgage-backed securities and derivatives, such as credit default swaps referencing subprime mortgage-backed securities, and even tranches of other CDOs. CLOs are similar to CDOs except that they hold corporate loans, loan participations or credit default swaps tied to corporate liabilities.

²⁹ See, e.g., The President's Working Group on Financial Markets, Policy Statement on Financial Market Developments, March 2008 (the "PWG March 2008 Report") at 9 (discussing subprime

formation. The proposals cover the following areas:

- Revisions to the shelf offering process and criteria and prospectus delivery requirements;
- Securities Act and Exchange Act disclosure requirements, including new requirements to disclose standardized asset-level information or grouped asset data and a computer program that gives effect to the cash flow provisions of the transaction agreement (often referred to as the “waterfall”); and
- Changes to the Securities Act safe harbors for exempt offerings and exempt resales for asset-backed securities.

In addition, we are proposing clarifying, technical and other changes to the current rules. The proposals are designed to address issues that contributed to or arose from the financial crisis. These proposals are also designed to be forward looking; some of these proposals are designed to improve areas that have the potential to raise issues similar to the ones highlighted in the financial crisis.

Our proposals are generally consistent with global initiatives that seek to improve practices in the securitization market.⁴⁰ These initiatives include calls by international organizations to require greater disclosure by issuers of securitized products, including initial and ongoing information about underlying asset pool performance.⁴¹ Our focus on both the public and private markets for securitized products is supported by recommendations from international regulators about the type of disclosure that should be provided to investors in the private markets.⁴²

B. Securities Act Registration

Securities Act shelf registration provides important timing and flexibility benefits to issuers. An issuer with an effective shelf registration statement can conduct delayed offerings “off the shelf” under Securities Act Rule 415 without further staff clearance. Under our current rules, asset-backed securities may be registered on a Form S-3 registration statement and later offered “off the shelf” if, in addition to meeting other specified criteria,⁴³ the securities are rated investment grade by

a nationally recognized statistical rating organization (NRSRO). As described in detail in Section II.B.3. below, we are proposing to repeal that criterion and establish other criteria for shelf eligibility. We are also proposing changes to the Securities Act rules and forms for issuances of asset-backed securities.

We have undertaken a Commission-wide effort to consider whether references to NRSRO credit ratings in all the Commission’s regulations are necessary or appropriate and whether they could cause investors to unduly rely on ratings.⁴⁴ In this release, we are proposing to eliminate the current means of establishing shelf eligibility for an ABS transaction based on the credit ratings of the securities to be issued.⁴⁵ Instead, we are proposing to require for shelf eligibility the following:

- A certification filed at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor⁴⁶ that the assets in the pool have characteristics that provide a reasonable basis to believe that they will produce, taking into account internal credit enhancements, cash flows to service any payments due and payable on the securities as described in the prospectus;
- Retention by the sponsor of a specified amount of each tranche of the

⁴⁴ See *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 58070 (July 1, 2008) [73 FR 40088] (proposing amendments to rules and forms under the Securities Exchange Act); *References to Ratings of Nationally Recognized Statistical Ratings Organizations*, Investment Company Act Release No. 28327 (July 1, 2008) [73 FR 40124] (proposing amendments to rules under the Investment Company Act and the Investment Advisers Act); *Security Ratings*, Securities Act Release No. 8940 (July 1, 2008) [73 FR 40106] (proposing amendments to rules and forms under the Securities Act and the Securities Exchange Act) (“2008 Proposing Release”).

⁴⁵ As part of the Commission-wide effort to consider whether references to NRSRO credit ratings are necessary, we proposed to replace the ratings requirement in the shelf eligibility criteria in the 2008 Proposing Release. See also Section II.A. below. We reopened the comment period in October 2009. *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Release No. 33-9069 (Oct. 5, 2009) [74 FR 52374]. After considering comments, we are withdrawing this part of the proposals in the 2008 Proposing Release, and we are proposing different ABS shelf eligibility requirements to replace the investment grade ratings requirement.

⁴⁶ We use the term “depositor” to mean the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity. For ABS transactions where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term depositor refers to the sponsor. For ABS transactions where the person transferring or selling the pool assets is itself a trust, the depositor of the issuing entity is the depositor of that trust. See Item 1101(e) of Regulation AB.

securitization,⁴⁷ net of the sponsor’s hedging (also known as “risk retention” or “skin-in-the-game”);

- A provision in the pooling and servicing agreement that requires the party obligated to repurchase the assets for breach of representations and warranties to periodically furnish an opinion of an independent third party regarding whether the obligated party acted consistently with the terms of the pooling and servicing agreement with respect to any loans that the trustee put back to the obligated party for violation of representations and warranties and which were not repurchased; and
- An undertaking by the issuer to file Exchange Act reports so long as non-affiliates of the depositor hold any securities that were sold in registered transactions backed by the same pool of assets.

We also are proposing to replace Forms S-1 and S-3 with new forms for registered ABS offerings—proposed Forms SF-1 and SF-3—and to revise the shelf offering structure for those securities. Form SF-3 would be the form used for ABS shelf offerings.

Given many ABS investors’ stated desire for more time to consider the transaction and for more detailed information regarding the pool assets,⁴⁸ we are proposing to revise the filing deadlines in shelf offerings to provide investors with additional time to analyze transaction-specific information prior to making an investment decision. These changes are designed to promote independent analysis of ABS by investors rather than reliance on credit ratings. Under the proposed ABS shelf procedures, an ABS issuer would be required to file a preliminary prospectus with the Commission for each takedown off of the proposed new shelf registration form for ABS (Form SF-3) at least five business days prior to the first sale in the offering.⁴⁹ Under the

⁴⁷ We use the term “sponsor” to mean the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity. See Item 1101(l) of Regulation AB.

⁴⁸ See discussion in Section III.A.1 below regarding our proposals relating to asset-level information.

⁴⁹ Pursuant to Exchange Act Rule 15c2-8(b) [17 CFR 240.15c2-8(b)], with respect to ABS, a broker-dealer is exempt from the requirement that a preliminary prospectus be delivered to prospective investors at least 48 hours prior to sending a confirmation of sale if the issuer of the securities has not previously been required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 280). We also are proposing to repeal this exception from Rule 15c2-8(b) such that a broker-dealer would be required to deliver a preliminary prospectus at least 48 hours prior to sending a confirmation of sale in

⁴⁰ See *Improving Financial Regulation—Report of the Financial Stability Board to G20 Leaders*, (Sept. 25, 2009) (“The official sector must provide the framework that ensures discipline in the securitisation market as it revives.”).

⁴¹ *Id.*

⁴² International Organization of Securities Commissions, *Final Report of the Task Force on the Subprime Crisis* (May 2008) (discussing the types of disclosure that, following the model offered by the types of disclosure mandated in the public markets, private investors may want issuers to provide).

⁴³ See discussion of other criteria in fn. 70 below.

proposal, issuers would use one prospectus for each transaction and the current practice of using core or base prospectuses plus supplements would be eliminated for ABS.

C. Disclosure

In 2004, we adopted a new set of rules prescribing the disclosure requirements for asset-backed issuers.⁵⁰ Many disclosure requirements of Regulation AB are principles-based. Regulation AB currently requires that material, aggregate information about the composition and characteristics of the asset pool be filed with the Commission and provided to investors. As described in detail in Sections III, IV and V below, we are proposing additional, and, in some cases, revised disclosure requirements for ABS offerings and ongoing reporting.

For each loan or asset in the asset pool, we are proposing to require disclosure of specified data relating to the terms of the asset, obligor characteristics, and underwriting of the asset. Such data would be provided in a machine-readable, standardized format so that it is most useful to investors and the markets. Under our proposal, issuers would be required to provide the asset-level data or grouped account data at the time of securitization, when new assets are added to the pool underlying the securities, and on an ongoing basis.

We are proposing to require the filing of a computer program (the “waterfall computer program,” as defined in the proposed rule) of the contractual cash flow provisions of the securities in the form of downloadable source code in Python, a commonly used computer programming language that is open source and interpretive. The computer program would be tagged in XML and required to be filed with the Commission as an exhibit. Under our proposal, the filed source code for the computer program, when downloaded and run (by loading it into an open “Python” session on the investor’s computer), would be required to allow the user to programmatically input information from the asset data file that we are proposing to require as described above. We believe that, with the waterfall computer program and the asset data file, 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.

connection with an issuance of ABS, including those issued by ABS issuers exempted from the requirement to file reports pursuant to Section 12(h) of the Exchange Act.

⁵⁰ See the 2004 ABS Adopting Release.

We also are proposing additional requirements to refine current disclosure requirements for asset-backed securities. Among other things, we are proposing to require:

- Aggregated and loan-level data relating to the type and amount of assets that do not meet the underwriting criteria that is specified in the prospectus;
- For certain identified originators, information relating to the amount of the originator’s publicly securitized assets that, in the last three years, has been the subject of a demand to repurchase or replace;
- For the sponsor, information relating to the amount of publicly securitized assets sold by the sponsor that, in the last three years, has been the subject of a demand to repurchase or replace;
- Additional information regarding originators and sponsors;
- Descriptions relating to static pool information, such as a description of the methodology used in determining or calculating the characteristics of the pool performance as well as any terms or abbreviations used;
- That static pool information for amortizing asset pools comply with the Item 1100(b) requirements for the presentation of historical delinquency and loss information; and
- The filing of Form 8-K for a one percent or more change in any material pool characteristic from what is described in the prospectus (rather than for a five percent or more change, as currently required).

We also are proposing to limit some of the existing exceptions to the discrete pool requirement in the definition of an asset-backed security. This is intended to not only address recent concerns arising out of the financial crisis but also serve to protect against future practices of participants along the chain of securitization that could result in the addition of assets into a securitization pool without a clear understanding of their quality.

D. Privately-Issued Structured Finance Products

A significant portion of securities transactions, including the offer and sale of all CDOs and ABCP, is conducted in the exempt private placement market, which includes both offerings eligible for Rule 144A resales and other private placements.⁵¹ CDOs

⁵¹ CDOs often permit the active management of their pool assets, which could include engaging in activities the primary purpose of which is to protect or enhance the returns of their equity holders. Such CDOs typically would not meet the requirements of

are typically sold by the issuer in a private placement to one or more initial purchaser or purchasers in reliance upon the Section 4(2) private offering exemption in the Securities Act, which is available only to the issuer, followed by resales of the securities to “qualified institutional buyers” in reliance upon Rule 144A.⁵² Subsequent resales may also be made in reliance upon Rule 144A. Rule 144A provides a safe harbor for resellers from being deemed an underwriter within the meaning of Sections 2(a)(11) and 4(1) of the Securities Act⁵³ for the sale of securities to qualified institutional buyers. If the conditions of the Rule 144A safe harbor are satisfied, sellers may rely on the exemption from Securities Act registration provided by Section 4(1) for transactions by persons other than issuers, underwriters or dealers.⁵⁴

Some have concluded that the events of the financial crisis have demonstrated that a lack of understanding of CDOs and other privately offered structured finance products by investors, rating agencies and other market participants may have significant consequences to the entire financial system.⁵⁵ For example, the ratings of these products proved inaccurate, which significantly contributed to the financial crisis.⁵⁶ This lack of understanding by credit rating agencies, investors, and other market participants indicates that the offering processes and disclosure

Rule 3a-7 under the Investment Company Act because that rule includes conditions that are intended to permit an issuer to engage only in limited activities that do not in any sense parallel typical ‘management’ of registered investment company portfolios. Accordingly, these CDOs usually rely on one of the private investment company exclusions, both of which condition the exclusion in part on the issuer not making a public offering. See fn. 39 above.

⁵² In general, a qualified institutional buyer is any entity included within one of the categories of “accredited investor” defined in Rule 501 of Regulation D, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers not affiliated with the entity (or \$10 million for a broker-dealer).

⁵³ 15 U.S.C. 77b(a)(11) and 15 U.S.C. 77d(1).

⁵⁴ See Section II.A. of the *Resale of Restricted Securities*, Release No. 33-6862 (Apr. 30, 1990) [55 FR 17933] (the “Rule 144A Adopting Release”).

⁵⁵ See, e.g., The PWG March 2008 Report (noting that originators, underwriters, asset managers, credit rating agencies and investors failed to obtain sufficient information or conduct comprehensive risk assessments on instruments that were often quite complex and also noting that downgrades were even more frequent and severe for CDOs of ABS with subprime mortgage loans as the underlying collateral). See also the Turner Review, at 20 (finding that “the financial innovations of structured credit resulted in the creation of products—e.g. the lower credit tranches of CDOs or even more so CDO-squared—which had very high and imperfectly understood embedded leverage.”).

⁵⁶ See *id.*

available in the public and private market were inadequate to provide appropriate investor protection. Further, these securities are issued by special purpose vehicles whose only purpose is holding financial assets, with numerous parties involved in the securitization process.⁵⁷ As a result, information about those assets and the structure of the vehicle is critical to an informed investment decision.

The safe harbors of Rule 144A and Regulation D that provide the ability to rely on an exemption from registration do not impose specific requirements on the disclosures provided to investors if those investors meet certain size requirements. However, the financial crisis has called into question the ability of our rules, as they relate to the private market for asset-backed securities, to ensure that investors had access to, and had sufficient time and incentives to adequately consider, appropriate information regarding these securities.⁵⁸

We are proposing to require enhanced disclosure by asset-backed issuers who wish to take advantage of the safe harbor provisions for these privately-issued securities.⁵⁹ In addition, in order to provide additional transparency with respect to the private market for these securities, we are proposing amendments to Rule 144A to require a structured finance product issuer to file a public notice on EDGAR of the initial placement of structured finance products that are eligible for resale under Rule 144A. As we believe that the Commission may benefit from the availability of more information about private placements of structured finance products, we are proposing to require that in submitting such notice, the issuer undertakes to provide offering materials to the Commission upon written request.

⁵⁷ See also discussion in Section VI. below.

⁵⁸ An assessment of whether the protections of the Act are needed often focuses on whether the purchasers of securities can “fend for themselves.” *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953). Historically, whether this test is met turned on whether information necessary or appropriate to make informed decisions is realistically available to the purchasers. See *id.* The Supreme Court also noted that “We agree that some employee offerings may come within § 4(1), e.g., one made to executive personnel who because of their position have access to the same kind of information that the Act would make available in the form of a registration statement.” *Id.* at 125. See also *Lawler v. Gilliam*, 569 F.2d 1283 (4th Cir. 1978) (discussing the Supreme Court’s observation in *Ralston* that an offering to those who are shown to be able to fend for themselves is a transaction ‘not involving any public offering’ and the ruling that an essential requirement is access to the kind of information that registration would disclose).

⁵⁹ We are also proposing to make conforming changes to Regulation D, Form D and Rule 144.

All of our proposals, if adopted, would apply to new issuances of asset-backed securities. Therefore, the proposed rules, if adopted, would not impose new requirements on outstanding asset-backed securities.

II. Securities Act Registration

We are proposing a number of changes to the Securities Act registration process for the offer and sale of asset-backed securities. These changes include proposed new eligibility criteria for shelf offerings and changes to the shelf offering process.

A. History of ABS Shelf Offerings

In 1984, mortgage related securities, a subset of asset-backed securities, were first permitted to be offered on a “shelf” basis. Contemporaneous with the enactment of Secondary Mortgage Market Enhancement Act of 1984 (SMMEA),⁶⁰ which added the definition of “mortgage related security” to the Exchange Act, we amended Securities Act Rule 415 to permit mortgage related securities to be offered on a delayed basis, regardless of which form is utilized for registration of the offering.⁶¹ SMMEA defined a mortgage related security to include a security that has a high investment grade credit rating.⁶²

In 1992, in order to facilitate registered offerings of asset-backed securities and eliminate differences in treatment under our registration rules between mortgage related asset-backed securities (which could be registered on a delayed basis) and other asset-backed securities of comparable character and quality (which could not), we expanded the ability to use “shelf offerings” to

⁶⁰ Public Law 98-440, 98 Stat. 1689.

⁶¹ See *Shelf Registration*, Release No. 33-6499 (Nov. 17, 1983) [48 FR 5289]. Mortgage related securities, including such securities as mortgage-backed debt and mortgage participation or pass through certificates, may be offered on a delayed basis under Rule 415. See 17 CFR 230.415(a)(1)(vii). SMMEA was enacted by Congress to increase the flow of funds to the housing market by removing regulatory impediments to the creation and sale of private mortgage-backed securities. An early version of the legislation contained a provision that specifically would have required the Commission to create a permanent procedure for shelf registration of mortgage related securities. The provision was removed from the final version of the legislation, however, as a result of the Commission’s decision to adopt Rule 415, implementing a shelf registration procedure for mortgage related securities. See H.R. Rep. No. 994, 98th Cong., 2d Sess. 14, reprinted in 1984 U.S. Code Cong. & Admin. News 2827; see also Release No. 33-6499 (Nov. 17, 1983) [48 FR 52889], at n. 30 (noting that mortgage related securities were the subject of pending legislation).

⁶² The term, “mortgage related security” is defined to include “a security that is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization.” 15 U.S.C. 78c(a)(41).

other asset-backed securities.⁶³ Under the 1992 amendments, offerings of asset-backed securities rated investment grade by an NRSRO⁶⁴ could be registered on Form S-3.⁶⁵ The eligibility requirement’s definition of “investment grade” was largely based on the definition in the existing eligibility requirement for non-convertible corporate debt securities.⁶⁶

The 1992 amendments did not prescribe specific disclosure requirements for ABS offerings; disclosure in ABS offerings was based largely on market practices and SEC staff guidance.⁶⁷ At the end of 2004, the Commission adopted new rules and amendments under the Securities Act and the Exchange Act addressing the registration, disclosure and reporting requirements for asset-backed securities.⁶⁸ In the 2004 amendments (“2004 ABS Adopting Release”), we prescribed specific ABS disclosure requirements for the first time, which are largely principles-based. In addition, under the 2004 amendments, we retained the investment grade ratings condition to ABS Form S-3 eligibility⁶⁹ and added additional shelf eligibility conditions.⁷⁰

⁶³ See *Simplification of Registration Procedures for Primary Securities Offerings*, Release No. 33-6964 (Oct. 22, 1992) [57 FR 32461].

⁶⁴ The security is an “investment grade security” for purposes of form eligibility if, at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories which signifies investment grade, typically one of the four highest categories. See General Instructions I.B.2 and I.B.5 of Form S-3.

⁶⁵ Under Securities Act Rule 415, securities registered on Form S-3 or Form F-3 may be offered on a continuous or delayed basis. See 17 CFR 230.415(a)(1)(x).

⁶⁶ See Release No. 33-6964.

⁶⁷ See *id.* The 1992 release explained that the Commission did not intend to change the character or quality of the disclosure that is customary in these offerings and explained generally the type of disclosure that was expected for ABS offerings.

⁶⁸ See 2004 ABS Adopting Release. In 2003, we raised the question whether to eliminate ratings reliance from our shelf eligibility requirements in a concept release where we requested comment on alternatives to the investment grade ratings component of Form S-3 eligibility for ABS and debt offerings. See *Rating Agencies and the Use of Credit Ratings under the Federal Securities Laws*, Release No. 33-8236 (Jun. 4, 2003) [68 FR 35258].

⁶⁹ We noted in 2004, however, that the Commission was engaged in a broad review of the role of credit ratings agencies in the securities markets and the use of credit ratings for regulatory purposes. See Section II.A.3.c of the 2004 ABS Adopting Release.

⁷⁰ In addition to investment grade rated securities, an ABS offering is eligible for Form S-3 registration only if the following conditions are met: (i) Delinquent assets must not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date; and (ii) with respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the

In 2008, we proposed several changes to our rules and form requirements that reference investment grade ratings (the "2008 Proposing Release"), including a proposal to revise shelf eligibility criteria for ABS offerings and primary offerings of non-convertible debt by replacing the investment grade ratings component.⁷¹ Our proposal would have replaced investment grade ratings with a requirement that sales registered on Form S-3 be made in minimum denominations and only to qualified institutional buyers, as defined in Rule 144A. We reopened comment on the 2008 Proposing Release on October 5, 2009.⁷²

We received comment letters from 35 commenters on the 2008 Proposing Release. Commenters generally opposed the proposed amendments that would have replaced investment grade ratings references in certain rules and the shelf eligibility criteria.⁷³ Some commenters on the proposed amendments to ABS

physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date. See General Instruction I.B.5 of Form S-3. Moreover, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor are or were at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on Form S-3 subject to the requirements of Section 12 or 15(d) of the Exchange Act (15 U.S.C. 78l or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to Section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). Such material (except for certain enumerated items) must have been filed in a timely manner. See General Instruction I.A.4 of Form S-3. We are not proposing changes to these other eligibility conditions.

⁷¹ See the 2008 Proposing Release.

⁷² See Release No. 33-9069. We also held a Credit Rating Agency Roundtable on April 15, 2009 to consider further information on ratings and rating agencies. Materials related to the roundtable, including an archived webcast and a transcript of the roundtable, are available at <http://www.sec.gov/spotlight/cra-oversight-roundtable.htm>.

⁷³ See comment letters from American Bar Association (ABA); American Electric Power, American Securitization Forum (ASF), Arizona Public Service Company, Boeing Capital Corporation (Boeing), Cadwalader Wickersham & Taft LLP (Cadwalader), Charles Schwab, Constance Curnow, Davis Polk & Wardwell (Davis Polk), Debevoise & Plimpton (Debevoise), Dewey & LeBoeuf, Dominion Resources, Inc., Edison Electric Institute, Incapital, LLC, Manulife Financial Corporation, Mayer Brown LLP (Mayer), Merrill Lynch Depositor, Inc., Mortgage Bankers Association, PNM Resources, Inc., Securities Industry and Financial Markets Association, Southern Company, WGL Holdings, Inc., and Wisconsin Energy Corporation. The public comments are available at <http://www.sec.gov/comments/s7-18-08/s71808.shtml>.

shelf eligibility noted that the proposed eligibility requirements would result in many ABS issuers registering offerings on Form S-1⁷⁴ or selling the securities privately.⁷⁵ After considering comments, we are withdrawing this part of the 2008 proposal and are proposing different replacements to the ratings requirement in the shelf eligibility criteria for ABS issuers that we believe are better measures of quality, and therefore, are more appropriate eligibility criteria. We are also proposing several changes to restructure the registered ABS offering process.

B. New Registration Procedures and Forms for Asset-Backed Securities

1. New Shelf Registration Procedures

Under existing rules, as with offerings of other types of securities registered on Form S-3 and Form F-3, the shelf registration statement for an offering of asset-backed securities will often be effective before a takedown is contemplated. Pursuant to existing Securities Act Rules 409 and 430B,⁷⁶ the prospectus in the registration statement may omit the specific terms of a takedown if that information is unknown or not reasonably available to the issuer when the registration statement is made effective.⁷⁷ For ABS offerings off the shelf, because assets for a pool backing the securities will not be identified until the time of an offering, information regarding the actual assets in the pool and the material terms of the transaction are sometimes only included in a prospectus or prospectus supplement that is filed with the Commission the second business day after first use.⁷⁸ This information includes information about the pool, underwriting criteria for the assets and exceptions made to the underwriting criteria, identification of the originators of the assets and other information that

⁷⁴ 17 CFR 239.11.

⁷⁵ See, e.g., comment letters from ABA dated September 12, 2009; ASF; Boeing; Cadwalader; Davis Polk; Debevoise; and Mayer. As the proposal in the 2008 Proposing Release did not add requirements to the safe harbors for privately-issued asset-backed securities, these commenters did not assess whether additional requirements would have changed the result.

⁷⁶ 17 CFR 230.409 and 17 CFR 230.430B.

⁷⁷ The prospectus disclosure in the registration statement is often presented through a "base" or "core" prospectus and a prospectus supplement. We are proposing to eliminate this type of presentation for asset-backed issuers. See Section II.D.1. below.

⁷⁸ An instruction to Rule 424(b) requires that a form of prospectus or prospectus supplement relating to a delayed offering of mortgage-backed securities or an offering of asset-backed securities be filed no later than the second business day following the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

is keyed off the identification of specific assets for the pool.

We recognize that asset-backed issuers have expressed the need to use shelf registration to access the capital markets quickly.⁷⁹ We understand that the creation of an asset pool to support securitized products is a dynamic and ongoing process in which changes can take place up until pricing. As a result, our proposals today generally maintain the fundamental framework of shelf registration for ABS offerings.

However, we also recognize that it is important for investor protection that ABS investors have not just adequate information to make an investment decision, but also adequate time to analyze the information and the potential investment. For the most part, each ABS offering off of a shelf registration statement involves securities backed by different assets, so that, in essence, from an investor point of view, each offering is like an initial public offering with respect to the ABS issuer. Information regarding the assets is an important piece of information for investors to use to conduct an analysis of the ability of those underlying assets to generate sufficient funds to make payments on the securities. Furthermore, some have noted the lack of time to review transaction-specific information as hindering the investors' ability to conduct adequate analysis of the securities.⁸⁰ We believe that a more orderly process for asset-backed securities offerings with improved investor protections, where investors and underwriters have additional time to assist their review of offerings, may be needed, even if issuers may not always be able to time their offering in a way that takes advantage of short term price peaks. Therefore, we are proposing rules designed to increase the amount of time that investors have to review information regarding a particular shelf takedown and promote analysis of asset-

⁷⁹ Notably, according to EDGAR, in 2006 and 2007, only three ABS issuers filed registration statements on Form S-1 that went effective.

⁸⁰ See, e.g., Section I.B. of CFA Institute Centre for Financial Market Integrity and Council of Institutional Investors, *U.S. Financial Regulatory Reform: The Investor's Perspective*, July 2009 (noting that securitized products are sold before investors have access to a comprehensive and accurate prospectus, noting that each ABS offering involves a new and unique security, and recommending that the Commission adopt rules to improve the timeliness of disclosures to investors); Dr. William W. Irving's testimony concerning "Securitization of Assets: Problems and Solutions" Before the Senate Banking, Housing and Urban Affairs Subcommittee on Securities, Insurance, and Investment (Oct. 7, 2009), at 11 (recommending that there be ample time before a deal is priced for investors to review and analyze a full prospectus and not just a term sheet). The testimony is available at <http://banking.senate.gov/public/>.

backed securities in lieu of undue reliance on security ratings for shelf offerings.

(a) Rule 424(h) Filing

We are proposing to require an asset-backed issuer using a shelf registration statement on proposed Form SF-3 to file a preliminary prospectus containing transaction-specific information at least five business days in advance of the first sale of securities in the offering. This requirement, if adopted, would allow investors additional time to analyze the specific structure, assets, and contractual rights regarding each transaction. Requiring that such information be filed at least five business days before the first sale of securities in the offering is designed to balance the interest of ABS issuers in quick access to the capital markets and the need of investors to have more time to consider transaction-specific information. We considered whether a longer minimum time period than five business days would be more appropriate.⁸¹ However, we are proposing five business days, because we preliminarily believe that the proposals discussed below that require the filing of standardized and tagged loan-level information and a computer program that gives effect to the cash flow provisions of the transaction agreement could reduce the amount of time required by investors to consider transaction specific information. Our requests for comment on the proposed new procedures below include questions about the appropriate amount of time investors need to consider transaction specific information.

Under our proposal, with respect to any takedown of securities in a shelf offering of asset-backed securities where information is omitted from an effective registration statement in reliance on newly proposed Rule 430D, a form of prospectus meeting certain requirements must be filed with the Commission by a means reasonably calculated to result in filing in accordance with proposed Rule 424(h) (the "Rule 424(h) filing" or "Rule 424(h) prospectus") at least five business days prior to the first sale of securities in the offering.⁸² If the preliminary prospectus is used earlier than such five business days to offer the securities, then it must

be filed by the second business day after first use.

As discussed below, we are proposing new Rule 430D to provide the framework for shelf registration of ABS offerings. The proposed rule explains what information may be omitted from the prospectus filed with the effective registration statement and what information must be contained in the Rule 424(h) filing. Under new Rule 430D, as proposed, the Rule 424(h) filing must contain substantially all the information for the specific ABS takedown previously omitted from the prospectus filed as part of an effective registration statement,⁸³ except for the information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds or other matters dependent upon the offering price. The information required to be filed pursuant to proposed Rule 424(h) would include, among other things, information about the specific asset pool that is backing the securities in the takedown and the waterfall computer program discussed in Section III below. Proposed Rule 430D would provide that a material change in the information provided in the Rule 424(h) filing, other than offering price, would require a new Rule 424(h) filing and therefore, a new five business-day waiting period.⁸⁴ The new Rule 424(h) filing would be required to reflect the change and contain substantially all the information required to be in the prospectus, except for pricing information. For example, if a credit enhancement (that was contemplated in the registration statement) is added to the transaction after a Rule 424(h) filing is filed, we would expect the issuer to file a new Rule 424(h) filing that reflects the credit enhancement and wait an additional five business days before the first sale in the offering. This is designed to provide investors with information and time sufficient to conduct a thorough analysis of new information relating to the offering.

So long as a form of prospectus has been filed in accordance with Rule 430D, ABS issuers could continue to utilize a free writing prospectus or ABS informational and computational

materials in accordance with existing rules.⁸⁵ However, because we believe that investors should have access to a comprehensive prospectus that contains substantially all of the required information, a free writing prospectus or ABS informational and computational materials could not be used for the purpose of meeting the requirements of proposed Rule 424(h). For liability purposes, a Rule 424(h) filing would be deemed part of the registration statement on the date such form of prospectus is filed with the Commission, or if the preliminary prospectus is used earlier than five business days in advance of the first sale of securities in the offering, then the date of first use.⁸⁶ A final prospectus for ABS offerings would continue to be filed pursuant to Rule 424(b). Consistent with Rule 430B for shelf offerings of corporate issuers, under proposed Rule 430D the filing of the final prospectus under Rule 424(b) would trigger a new effective date for the registration statement relating to the securities to which such form of prospectus relates for purposes of liability under Section 11 of the Securities Act.⁸⁷

⁸⁵ ABS informational and computational materials, as defined in Item 1101 of Regulation AB [17 CFR 229.1101], may be used in accordance with Securities Act Rules 167 and 426 [17 CFR 230.167 and 17 CFR 230.426]. Materials that constitute a free writing prospectus, as defined in Securities Act Rule 405 [17 CFR 230.405] may be used in accordance with Securities Act Rules 164 and 433 [17 CFR 230.164 and 17 CFR 230.433].

⁸⁶ This is consistent with the existing provisions for other preliminary prospectuses. See Rule 430B(e). We also propose in this release to repeal the exception to the prospectus delivery requirement in Exchange Act Rule 15c2-8(b) for shelf-eligible asset-backed securities. See Section II.C. below.

⁸⁷ 15 U.S.C. 77k. The proposed rule does not change the treatment of ABS offerings for purposes of Rule 159 [17 CFR 230.159]. Rule 159 provides the following:

(a) For purposes of section 12(a)(2) of the Securities Act only, and without affecting any other rights a purchaser may have, for purposes of determining whether a prospectus or oral statement included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

(b) For purposes of section 17(a)(2) of the Act only, and without affecting any other rights the Commission may have to enforce that section, for purposes of determining whether a statement includes or represents any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

⁸¹ Some have suggested that investors be provided with up to two weeks to analyze asset information. See, e.g., Joshua Rosner, *Securitization: Taming the Wild West*, Roosevelt Institute's *Make Markets be Markets* (Mar. 3, 2010), at 73.

⁸² Sale includes "contract of sale." See fn. 31 and accompanying text of the Offering Reform Release.

⁸³ For example, the Rule 424(h) filing would include the waterfall computer program that we are proposing to require, as discussed in Section III.B.1 of this release. We believe that investors need adequate time to run the waterfall computer program using the asset data filed with the Rule 424(h) filing.

⁸⁴ Whether a change is material for purposes of the proposed requirement would depend on the facts and circumstances. See *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-449 (1976). See also *Basic v. Levinson*, 485 U.S. 224, 231 (1988).

(b) New Rule 430D

Currently, the framework for ABS shelf offerings, along with shelf offerings for other securities, is outlined in Rule 430B of the Securities Act. Rule 430B describes the type of information that primary shelf eligible and automatic shelf issuers may omit from a base prospectus in a Rule 415 offering⁸⁸ and include instead in a prospectus supplement, Exchange Act report incorporated by reference, or a post-effective amendment.⁸⁹ We are proposing new Rule 430D to provide the framework for delayed shelf offerings of asset-backed securities pursuant to Rule 415(a)(1)(vii), as proposed to be revised. If we adopt Rule 430D, existing Rule 430B would no longer apply to ABS offerings.

Proposed Rule 430D would require that with respect to each offering, substantially all the information previously omitted from the prospectus filed as part of an effective registration statement, except for the omission of information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds or other matters dependent upon the offering price, be filed at least five business days in advance of the first sale of securities in the offering in accordance with Rule 424(h). Thus, an issuer may not omit such information (other than offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds or other matters dependent upon the offering price) from the Rule 424(h) filing.

We are proposing conforming revisions to the undertakings that are required by Item 512 of Regulation S-K⁹⁰ in connection with a shelf registration statement. For the most part, ABS issuers would continue to provide the same undertakings that are currently required of ABS issuers conducting shelf offerings. We are proposing a conforming revision to the undertakings relating to the determination of liability under the Securities Act as to any purchaser in the offering. It would require an undertaking that each prospectus filed by the registrant pursuant to Rule 424(h) would be

(c) For purposes of section 12(a)(2) of the Act only, knowing of such untruth or omission in respect of a sale (including, without limitation, a contract of sale), means knowing at the time of such sale (including such contract of sale).

⁸⁸ Under Rule 430B, a form of prospectus filed as part of a registration statement for offerings of asset-backed securities may omit information unknown or not reasonably available pursuant to Rule 409.

⁸⁹ See also Section V.B.1.b of the Offering Reform Release.

⁹⁰ 17 CFR 229.512.

deemed part of the registration statement as of the date the prospectus was deemed part of, and included in, the registration statement (i.e., the date it was filed with the Commission, or, if the prospectus was used and filed earlier, the second business day after first use).⁹¹ Also, under our proposed revision to Item 512 of Regulation S-K, an issuer would be required to undertake to file the information required to be contained in a Rule 424(h) filing with respect to any offering of securities.

Request for Comment

- We request comment on our proposal to establish a minimum period of time available to investors to review registered ABS offering prospectuses. Are we correct that investors need additional time? Would the proposed timeline for filing the proposed preliminary prospectus at least five business days prior to the date of first sale pose problems for market participants? If so, how could we address those concerns while still providing investors with sufficient time to analyze the securities?

- Is the proposed five business days sufficient time for investors? Should the required minimum number of days that the Rule 424(h) filing must be filed before the first sale be longer (e.g., six, seven, eight, or ten business days) or shorter than what we are proposing (e.g., two or four business days)? Given the increased amount of information that would be made available to investors under this proposal, would investors need more time to consider transaction specific information? Is our belief that the filing of standardized and tagged asset-level information and a computer program that gives effect to the cash flow provisions of the transaction agreement could reduce the amount of time investors need to consider transaction-specific information correct?

- We are cognizant that having a transaction exposed to the markets for some period of time causes concerns to some issuers and underwriters in some instances. However, we also note situations in which transaction-specific information regarding ABS is provided to other deal participants for a longer period prior to selling the securities seemingly with no or minimal effect on the issuer's ability to sell securities. We note, in particular, that the Federal Reserve Board requires information to

⁹¹ This is consistent with the existing undertaking in Item 512 for prospectuses that are filed pursuant to Rule 424(b)(3). See Item 512(a)(5)(i)(A) of Regulation S-K [17 CFR 229.512(a)(5)(i)(A)].

be provided to it regarding the assets pledged to the Term Asset-Backed Securities Loan Facility (TALF) at least three weeks prior to the subscription date.⁹² Similarly, rating agencies receive information prior to rating transactions.⁹³ If there are issues raised by exposing the transaction publicly to the markets, please provide us with specific information about the concerns and ways we can revise the proposal to address them.

- Under our proposal, the Rule 424(h) filing would not be required to include information dependent on pricing. Is that appropriate? If not, what information should be required to be included and how would an issuer have access to the information in the timeframe that we are proposing?

- Under our proposal, if a material change to the disclosure other than to pricing information occurs, the issuer would be required to file a new Rule 424(h) prospectus with updated information. Is this requirement specific enough? Should we, instead or in addition, specify particular changes that would trigger a filing, or conversely, that would not trigger a filing? Should we, for example, provide that a new Rule 424(h) filing would be required if the asset pool has changed by a certain amount? If so, what should that amount be (e.g., 1%, 5%, or 10% of the final asset pool)? How would other changes be described, such as changes to the waterfall? Would it be appropriate to allow a material change without requiring a new Rule 424(h) filing and a new five-day waiting period? Should the new Rule 424(h) filing be required as proposed to reflect the change and contain substantially all the information required to be in the prospectus, except for pricing information? Should we only require that the change be reflected in a supplement?

- The requirement to file a new Rule 424(h) filing would trigger another five-day waiting period before the first sale. Is this approach appropriate and workable? If the issuer is required to re-file the preliminary prospectus, as proposed, should the issuer be required to wait another five business days before the first sale, as proposed? If not, how long should the issuer be required to wait?

⁹² Each issuer wishing to bring a TALF-eligible ABS transaction to market is required to provide, at least three weeks prior to the subscription date, information to the Federal Reserve Bank of New York including, but not limited to, all data on the transaction the issuer has provided to any NRSRO.

⁹³ See *Amendments to Rules for Nationally Recognized Statistical Rating Organizations*, Release No. 34-59342 (Feb. 2, 2009) [74 FR 6456].

- Are there any aspects of the Rule 424(h) filing that we should specify must be substantially set at the time it is required to be filed?

- Are there any changes, other than the ones we are proposing, to the Item 512 undertaking that should be made? Is our proposed change to incorporate the Rule 424(h) filing in the undertakings relating to liability so that the Rule 424(h) filing shall be deemed part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement appropriate?

- We have designed the proposed process for ABS shelf registration to strike a balance between facilitating registered ABS offerings and providing investors a meaningful opportunity to analyze the securities. Would our proposal to require that the Rule 424(h) prospectus be filed at least five business days before the first sale make shelf registration sufficiently less attractive to issuers that they would avoid the registered market? If so, are there ways to address this concern? Below, we are proposing to require more disclosure for private offerings of asset-backed securities that rely on the Commission's safe harbors that allow issuers to rely on an exemption from registration. Should we impose even more restrictions on private offerings of asset-backed securities than what is proposed below? For example, should we condition reliance on Rule 506 of Regulation D on a limitation of the total number of purchasers in an ABS offering, even for offerings to accredited investors or qualified institutional buyers? Alternatively, should we impose fewer restrictions on private offerings of asset-backed securities?

- Should we also require, or require instead, that the initial purchaser or investor hold the securities for a period of time prior to resales in reliance on Rule 144A to better ensure that such resales of asset-backed securities are not a distribution? Could that better ensure that the public registered ABS market operates appropriately and that the existing safe harbors do not inappropriately erode the public markets? If we were to add these additional restrictions on private offerings, what would be the impact on the broader market for structured securities? Would requiring a holding period discourage investors from purchasing ABS in exempt private placements? Would these offerings all be done as public deals, or would these offerings cease to be conducted at all? Should we provide for fewer restrictions—for example, should we require a subset of loan-level disclosures

in the context of an exempt private offering? Should issuers or sponsors have the option of providing only certain information? Or would these rules reduce the aggregate amount of transactions? What would be the economic effect?

2. Proposed Forms SF-1 and SF-3

In order to distinguish the ABS registration system from the registration system for other securities, we are proposing to add new registration forms that would be used for any sales of a security that meets the definition of an asset-backed security, as defined in Item 1101 of Regulation AB.⁹⁴ These new forms, which would be named Form SF-1 and Form SF-3,⁹⁵ would require all the items applicable to ABS offerings that are currently required in Form S-1 and Form S-3 as modified by the proposed amendments noted below. Offerings that qualify for delayed shelf registration⁹⁶ would be registered on proposed Form SF-3, and all other offerings would be registered on Form SF-1.⁹⁷

Proposed Form SF-1 would not contain all the items that are currently required by Form S-1. Specifically, the proposed form would not include the instructions as to summary prospectuses, as we do not believe that the summary prospectus instructions are relevant for ABS offerings. Also, we are proposing to substitute the item in existing Form S-1 permitting incorporation by reference by reporting companies of previously filed Exchange Act reports and documents with an item that is more tailored to asset-backed securities on proposed Form SF-1. As discussed in Section I.D.1 below, we are proposing that ABS issuers file a single prospectus for each takedown with all of the information required by Regulation AB because we believe ABS offerings are more closely akin to initial public offerings. Therefore, we are proposing to limit incorporation by reference to certain disclosures. In particular, as discussed below,⁹⁸ we are proposing to permit an ABS issuer to incorporate by reference into proposed Form SF-1 information by the time of effectiveness of the registration statement the information that is

⁹⁴ 17 CFR 229.1101(c).

⁹⁵ The proposed forms would be referenced in 17 CFR 239.44 and 17 CFR 239.45.

⁹⁶ In this release, we also refer to such offerings as shelf offerings.

⁹⁷ We also propose to make conforming changes throughout our rules to refer to the new forms, as appropriate. *See, e.g.*, proposed revisions to Securities Act Rules 167 and 190(b)(1) and the exhibit table in Item 601 of Regulation S-K.

⁹⁸ *See* Sections III.A.4., III.B.1.d., and III.E.4. below.

required to satisfy certain disclosure requirements (*i.e.*, static pool information filed pursuant to Item 6.08 of Form 8-K, asset data filed pursuant to Item 6.06 of Form 8-K, and the waterfall computer program filed pursuant to Item 6.07 of Form 8-K).⁹⁹ We also are proposing to permit ABS issuers structured as revolving asset master trusts to incorporate by reference certain asset-level disclosures that would have been provided in previously filed Form 10-Ds.¹⁰⁰

We are proposing to revise some disclosure requirements that are currently located in Form S-3 but would be moved to proposed Form SF-3. As discussed in the sections immediately following this discussion, we are proposing changes to shelf eligibility for ABS issuers, which will now become the eligibility criteria for proposed Form SF-3. In addition, we are proposing to change an eligibility requirement in existing Form S-3 relating to delinquent filings of the depositor or an affiliate of the depositor for purposes of proposed Form SF-3. For Form S-3, an issuer is not eligible for registration on the form if the depositor or an affiliate of the depositor, with respect to a class of asset-backed securities involving the same asset class, has not filed the Exchange Act reports required to be filed or has not filed such reports in a timely manner for a period of twelve months prior to the filing of the registration statement.¹⁰¹ However, for certain specified reports, including reports on Form 8-K pursuant to Item 6.05, untimely filing does not result in loss of eligibility.¹⁰² We are proposing to repeal the existing exception from the filing timeliness requirement for Item 6.05 Form 8-K reports. Item 6.05 Form 8-K reports, which we discuss in further detail below, are required to be filed if there is a change in the asset pool characteristics from the description of the asset pool provided in the final prospectus and thereby provide important information regarding the composition of the assets. Under proposed Form SF-3, the untimely filing of an Item 6.05 Form 8-K report by the depositor or affiliate of the depositor, with respect to a class of asset-backed securities involving the same asset class, during the twelve

⁹⁹ *See* General Instruction IV. and Item 10 of proposed Form SF-1 and Item 11 of proposed Form SF-3.

¹⁰⁰ We are proposing to require ABS backed by floorplan receivables to include the performance information of assets that were part of the pool prior to the current offering. *See* Section III.A.1.e.iv. below.

¹⁰¹ General Instruction I.A.4 of Form S-3.

¹⁰² *Id.*

calendar months and any portion of a month immediately preceding the filing of the registration statement would result in the loss of form eligibility for up to twelve months from the time the report was due.¹⁰³ As discussed in Section V.C.1 below, we also are proposing to lower the threshold amount of change that would trigger a filing requirement for Item 6.05 Form 8-K reports from five percent of any material pool characteristic to one percent.

Request for Comment

- We request comment on our proposal to move the registration statement item requirements for ABS offerings into new forms that would apply only to asset-backed issuers. Would the proposed new forms create any difficulties? If so, please specify.

- We are proposing to move the items applicable to asset-backed securities from Forms S-1 and S-3 to proposed Forms SF-1 and SF-3, with some exceptions noted. Do the proposed forms omit any requirement for asset-backed issuers that should be included? Do any of the requirements need further revisions?

- The proposed Form SF-1 would not include the instructions as to summary prospectuses that are included in Form S-1. Is there any reason we should provide these instructions in proposed Form SF-1 for ABS issuers?

- Are our proposed instructions for incorporation by reference appropriate?

- Should we repeal the existing carve-out for the untimely filing of an Item 6.05 Form 8-K, as we are proposing to do? Why or why not?

3. Shelf Eligibility for Delayed Offerings

We are proposing to eliminate the ability of ABS issuers to establish shelf eligibility in part by means of an investment grade credit rating. This is part of our broad ongoing effort to remove references to NRSRO credit ratings from our rules in order to reduce the risk of undue ratings reliance and eliminate the appearance of an imprimatur that such references may create.¹⁰⁴ In place of credit ratings, we are proposing to establish four shelf eligibility criteria that would apply to mortgage related securities and other asset-backed securities alike. These proposed requirements, along with the other current requirements,¹⁰⁵ would determine an asset-backed issuer's eligibility to register for a delayed shelf

offering. Similar to the existing requirement that the securities must be investment grade, the proposed requirements are designed to provide for a certain quality and character for asset-backed securities that are eligible for delayed shelf registrations.

(a) Risk Retention

Risk retention requirements have been discussed by some market participants as one potential way to improve the quality of asset-backed securities by better aligning the incentives of the sponsors and originators of the pool assets with investors' incentives. A chain of securitization may involve multiple participants that may serve the function of originator, sponsor, servicer, or trustee.¹⁰⁶ One concern that has been debated is whether the model of securitization where loan originators do not hold the loans they originate but instead repackage and sell them as securities may create a misalignment of incentives between the originator of the assets and the investors in the securities, which misalignment may have contributed to lower quality assets being included in securitizations that did not have continuing sponsor exposure to the assets in the pool.¹⁰⁷ The theory underlying a risk retention requirement is that if a sponsor retains exposure to the risks of the assets, the sponsor is more likely to have greater incentives to include higher quality assets in the pool. Because we believe that securitizations with sponsors that have continuing risk exposure would likely be higher quality than those without, we are proposing, among other things, to replace the investment grade ratings requirement in the ABS shelf eligibility conditions with a condition

¹⁰⁶ Under Regulation AB, "servicer" means any person responsible for the management or collection of the pool assets or making allocations or distributions to holders of the asset-backed securities. The term "servicer" does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer. See Item 1101(j) of Regulation AB. In some cases, one party may act in two or more different roles, such as when a bank and/or affiliated party of the bank serves in all three functions of originator, sponsor, and servicer of an ABS offering. In contrast, in the case of so-called aggregators, the sponsor acquires loans from many other unaffiliated sellers before securitization.

¹⁰⁷ See, e.g., European Central Bank, *The Incentive Structure of the 'Originate to Distribute Model'*, December 2008, at 5 (noting that securitization is fundamentally vulnerable to certain adverse behavior since agents seek to maximize their benefits while principals cannot fully observe and control the agents' actions); Amiyatosh Purnanandam, "Originate-to-Distribute Model and the Subprime Crisis" (Apr. 27, 2009), available at <http://ssrn.com/abstract=1167786>.

that the sponsor of any securitization retain risk in each tranche of the securitization on an ongoing basis. Such a requirement has colloquially been referred to as "risk retention," or "skin in the game." We believe that the proposed risk retention requirement for shelf eligibility would distinguish the types of securities that are of a sufficient quality and character to be shelf eligible while avoiding the possibility of undue reliance on ratings.

Risk retention requirements are being considered in the U.S. and internationally. In the U.S., proposals with such requirements have come in several different forms.¹⁰⁸ Risk retention requirements have recently garnered support.¹⁰⁹ On the other hand, some are

¹⁰⁸ The Federal Deposit Insurance Corporation ("FDIC") recently solicited public comments regarding proposed amendments to a "safe harbor" rule from the FDIC's statutory authority to disaffirm or repudiate contracts of an insured depository institution ("IDI") with respect to transfers of financial assets by an IDI in connection with a securitization or a participation (the "FDIC Securitization Proposal"). The FDIC Securitization Proposal also includes risk retention requirements for purposes of providing a safe harbor for IDIs, although in a different context from our proposal which would require risk retention as a condition to shelf eligibility. See Federal Deposit Insurance Corporation, *Advance Notice of Proposed Rulemaking Regarding Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After March 31, 2010* (Jan. 7, 2010) [75 FR 934]. The comment letters are available at <http://www.fdic.gov/regulations/laws/federal/2010/10comAD55.html>. See also H.R. 4173, 111th Cong., (bill that would require a creditor or securitizer to retain five percent of the credit risk on any loan that is transferred, sold, or conveyed); Senate proposal, 111th Congress, "Restoring American Financial Stability Act of 2010" (bill that would require five percent risk retention). The Senate bill contemplates joint rulemaking regarding the risk retention requirement with the SEC, the FDIC and the Office of Comptroller Currency and the House bill contemplates joint rulemaking with the SEC, the National Credit Union Administration Board, the Board of Governors of the Federal Reserve system, the Office of the Comptroller of the Currency, the Office of Thrift Supervisors and the FDIC.

¹⁰⁹ See, e.g., CFA Institute Centre for Financial Market Integrity and Council of Institutional Investors, "U.S. Financial Regulatory Reform: The Investor's Perspective," July 2009 (recommending that ABS sponsors should be required to retain a meaningful residual interest in their securitized products). See, e.g., U.S. Department of Treasury, *A New Foundation: Rebuilding Financial Supervision and Regulation*, June 17, 2009; H.R. 1728, 111th Cong. § 213 (2009). In addition, risk retention by originating lenders has been a component of several guaranteed loan programs administered by the United States Department of Agriculture (USDA) since 1972, when amendments to the Consolidated Farm and Rural Development Act (7 USC 1921 *et seq.*) expanded the USDA's lending authority to include guarantees of farm and rural development loans issued by commercial lenders. For example, under its guaranteed farm loan program, the Farm Service Agency can guarantee up to 90% of a loan issued by a commercial lender to an eligible farmer,

¹⁰³ We are also proposing to amend Rule 415 to require a quarterly evaluation of form eligibility on proposed Form SF-3. See Section II.B.3.e. below.

¹⁰⁴ See Release No. 33-9069.

¹⁰⁵ See fn. 70 above.

concerned that mandatory risk retention will not necessarily result in improved asset quality, may not be calibrated to reflect the risk in any given pool and across different asset classes, and may conflict with various other goals and purposes of securitization.¹¹⁰

In addition, in its January 2009 framework, a working group on financial reform in the Group of Thirty recommended that regulated financial institutions be required to retain a meaningful portion of the credit risk of the financial assets they are packaging into securitized and other structured credit products.¹¹¹ On May 6, 2009, the European Union adopted an amendment to the Capital Requirements Directive, which sets out the rules for Basel II implementation in Europe, that will, upon effectiveness, prohibit a credit institution from investing in a securitization unless there is disclosure from the originator, sponsor, or original lender that one of them will retain, on an ongoing basis, a net economic interest in the securitized credit risk of at least five percent.

We are proposing to make risk retention a part of the shelf eligibility conditions for asset-backed issuers. Under our proposal, Form SF-3 would require that, as a condition to shelf eligibility, the sponsor or an affiliate of the sponsor retain a net economic interest in each securitization in one of the two following manners:

- Retention of a minimum of five percent of the nominal amount of each of the tranches sold or transferred to investors, net of hedge positions directly related to the securities or exposures taken by such sponsor or affiliate;¹¹² or

but that lender must retain the full amount of the unguaranteed portion in its portfolio for the life of the loan. See 7 CFR 762.160. Similar conditions are required for guaranteed loan programs administered by the USDA's Rural Housing Service. See, e.g., 7 CFR 3575.4. See also comment letter from MetLife on the FDIC Securitization Proposal ("MetLife FDIC Letter") (generally supporting credit risk retention because it aligns interests with investors and noting that retention should represent a vertical pro rata slice of all securitization obligations, as long as retaining the interest does not cause unintended consolidation issues for the issuer) and comment letter from Consumers Union on the FDIC Securitization Proposal (supporting retention of ten percent of an economic interest because it would create stronger incentives for accurate underwriting).

¹¹⁰ See, e.g., comment letter from American Securitization Forum and comment letter from American Bar Association on the FDIC Securitization Proposal.

¹¹¹ See Group of Thirty, *Financial Reform: A Framework for Financial Stability* (Jan. 15, 2009), at 51. The Group of Thirty, established in 1978, is a private, nonprofit, international organization composed of representatives of private and public institutions.

¹¹² Under the proposed condition, no sponsor may purchase or sell a security, derivative, or other

- In the case of revolving asset master trusts, retention of the originator's interest of a minimum of five percent of the nominal amount of the securitized exposures, net of hedge positions directly related to the securities or exposures taken by such sponsor or affiliate, provided that the originator's interest and securities held by investors are collectively backed by the same pool of receivables, and payments of the originator's interest are not less than five percent of payments of the securities held by investors collectively.¹¹³

Under the proposed eligibility requirement, the net economic interest required to be retained to be shelf eligible would be measured at issuance (or at origination in the case of originator's interest), and then maintained on an ongoing basis.¹¹⁴

Also, proposed Form SF-3 would require disclosure relating to the interest that is retained by the sponsor.¹¹⁵

Retention of five percent net economic

financial product or enter into an agreement with any third party, in which the terms or payments (or lack of payment) of any of the loans or other assets that underlie the ABS are a material term of that financial product or agreement, if the financial product or agreement in any way reduces or limits the financial exposure of the sponsor to less than five percent of the nominal amount of the ABS. Thus, hedges of market interest or currency exchange rates, would not be taken into account in the calculation of the sponsor's risk retention for purposes of the net five percent risk retention requirement. Hedges tied to securities similar to the ABS also would not be taken into account in the calculation of the sponsor's risk retention. For instance, holding a security tied to the return of a subprime ABX.HE index would not be a hedge on a particular tranche of a subprime RMBS sold by the sponsor unless that tranche itself was in the index.

¹¹³ Currently, credit card ABS structures typically include an originator's interest, which is *pari passu* with the investors' interest in the pool of receivables.

¹¹⁴ In 2009, the EU Commission called on Committee of European Banking Supervisors (CEBS) to provide technical advice on the amendment to the Capital Requirements Directive (*i.e.*, Article 122a of the EU Capital Requirements Directive) which will prohibit a credit institution from investing in a securitization unless there is disclosure from the originator or sponsor that it has retained risk. Among other things, the EU Commission requested the CEBS consider the adequacy of the minimum 5% retention requirement to meet the goal of avoiding misaligned incentives and of mitigating systemic risks from securitization markets. See publication of the Committee of European Banking Supervisors, "CEBS today received a call for technical advice—second part on article 122a of the amended CRD," available at <http://www.c-ebs.org/Publications/Calls-for-Advice/2009/CEBS-today-received-a-call-for-technical-advice-s.aspx> and Committee of European Banking Supervisors, "Call for Technical Advice on the Effectiveness of a Minimum Retention Requirement for Securitizations," Oct. 30, 2009.

¹¹⁵ See discussion of proposed requirement relating to sponsor's interest in Section III.C.3. below.

interest is intended to align incentives of sponsors with investors, such that the quality of the assets in the pool or other aspects of the offering is likely to be higher than for a securitization without risk retention, and, thus, should be an appropriate partial substitute for the existing investment grade ratings requirement in the ABS shelf eligibility conditions. If we adopt a risk retention condition to shelf eligibility, we preliminarily believe that five percent is an appropriate amount of risk to require sponsors to retain and balances our goal of requiring some exposure to risk without overburdening the capital structure of sponsors.¹¹⁶

In constructing the risk retention shelf eligibility condition, we also considered, but are not proposing, an option of retaining risk through the retention of randomly selected exposures for purposes of meeting shelf eligibility conditions. If issuers retain randomly selected exposures, we believe the economic effects, including incentive alignment, should be approximately the same as retaining a fixed percentage of the nominal amount of each tranche, if the randomization is properly implemented. However, we believe that it would be both difficult and potentially costly for investors and regulators to verify that exposures were indeed selected randomly, rather than in a manner that favored the sponsor.

We believe that the proposed two different ways that a sponsor could retain risk to satisfy the risk retention shelf eligibility condition would likely result in better incentive alignment, and, consequently higher quality securities, than retention of only the residual interest in a securitization.¹¹⁷ "Horizontal risk retention" in the form of retention of the equity or residual interest could lead to skewed incentive structures, because the holder of only the residual interest of a securitization may have different interests from the holders of other tranches in the securitization and, thus, not necessarily

¹¹⁶ See H.R. 4173, 111th Cong., (bill requiring five percent risk retention); Senate proposal, 111th Congress, "Restoring American Financial Stability Act of 2010" (bill requiring five percent risk retention).

¹¹⁷ A particular issuance of asset-backed securities often involves one or more publicly offered classes as well as one or more privately placed classes. In most instances, the subordinated classes, or residual interests, which are typically privately placed, act as structural credit enhancement for the publicly offered senior classes by receiving payments after, and therefore absorbing losses before, the senior classes. Cash flows from the pool assets back both the senior classes and the subordinate classes, and thus allocation of the cash flows to the subordinated classes could affect directly or indirectly the publicly offered classes.

result in higher quality securities. The proposed ways that a sponsor could satisfy the risk retention shelf eligibility condition—either by retaining a “vertical” slice of the securitization, by which we mean taking a portion of the economic risk in each class of security that is being offered, or, in the case of revolving exposures, the originator’s interest, would create a direct, shared interest with all the investors in the performance of the underlying assets.

We recognize that there are differing views on the effectiveness of risk retention policies as a means to align the incentives of securitization transaction parties with the interests of investors, both as an intrinsic matter and as compared with other alternatives, as well as concerns about the collateral consequences on the securitization markets associated with conditioning shelf eligibility on risk retention. Some note that originators and other financial institutions active in the mortgage securitization chain suffered massive losses in the financial crisis as a result of their direct and indirect exposure to asset underperformance and, therefore, risk retention exposes financial institutions who are sponsors to too much risk.¹¹⁸ Another criticism of risk retention posits that different forms of risk retention, such as retention of the equity piece, may lead issuers to screen assets that go into the pool differently.¹¹⁹ One industry group has asserted that other forms of requiring potential loss exposure, such as more stringent representations and warranties regarding the assets in the pool, may be preferable to outright retention of an economic interest in the securities.¹²⁰ Nevertheless, we believe it appropriate at this time to propose the risk retention requirement detailed herein, balancing various considerations that will need to

be accounted for before reaching any final determination as to the best way to proceed.

Although sponsors in the past may have initially held a portion of the securitization, such retention often had different motivations and different effects than retention as we propose it. In many cases, sponsors held small portions. These portions were often a small horizontal slice of the securitization and, therefore, would have been unlikely to have driven the sponsor to focus on the quality of the loans or other underlying assets in order to protect that interest. Also, retention of that small portion of those securities may have been due to an inability or lack of incentive to sell those securities. This was often because the securities had a lower return or carried lower spread, and thus were of little interest to investors seeking yield, while the higher returning securities were sold. Many of the retained securities were securities backed by similarly ranked tranches of ABS, which magnified rather than diversified risk. It may be the case that originators and/or underwriters underestimated the risk of both higher (senior) and lower (subordinated) tranches, but their retention practices did not result in the sort of overall risk assessment that our proposal would entail.¹²¹ Thus, retaining risk in that manner would have been unlikely to have the same impact on loan originations, risk analysis, or underwriting—and the resultant asset quality—as the risk retention requirement that we are proposing for ABS shelf eligibility.

In keeping with our belief that incentives are best aligned and quality of assets most significantly impacted if the sponsor retains an equal proportion of all tranches or the economic equivalent, we are proposing to require that, if sponsors select the second risk retention option, they retain a claim whose cash flows are at least five percent of those paid to investors, at all times and in all scenarios. This requirement means that the originator’s interest must ultimately be a claim to the same pool of assets as the securities held by investors and must be equivalent in seniority to these securities. The originator’s interest would, therefore, be the economic equivalent of retaining a fixed

proportion of the nominal amount of all tranches held by investors. We understand that it is a typical practice for credit card ABS to retain an originator’s interest in the pool.

For both options, we are proposing to require risk retention net of hedge positions directly related to the securities or exposures taken by the sponsor or its affiliate. This would mean that sponsors would not be able to simply “resell” the specific risks related to the retained securities or asset pool underlying them and remain shelf eligible. The purpose of risk retention is to align the sponsor’s incentives with the investors’ incentives by exposing each of them to the same risks which thereby promotes higher quality securities in ABS shelf offerings than without risk retention by the sponsor. However, we are primarily concerned with the risks that are under the direct or indirect control of the sponsor (such as the quality of the originator’s underwriting standards and the extent of the review undertaken to verify the information regarding the assets). Therefore, hedge positions that are not directly related to the securities or exposures taken by the sponsor or affiliate would not be required to be netted under our proposal. Such positions would include hedges related to overall market movements, such as movements of market interest rates, currency exchange rates, or of the overall value of a particular broad category of asset-backed securities.

As noted above, the proposed risk retention shelf eligibility condition would apply to the sponsor or affiliate of the sponsor. Our proposal is intended to provide an incentive for the sponsor to take additional steps to consider the quality of the assets that are securitized by exposing sponsors to the same credit risk that investors will be exposed to. We believe that there may be reasons to impose these risk retention requirements on the sponsor rather than the originator. Where a non-affiliated aggregator acts as the sponsor of a transaction,¹²² the costs of monitoring risk retention born by an originator rather than the sponsor may be disproportionately high because the securitization may include many originators where each originator may have contributed a very small part of the assets in the entire pool. In addition, if risk retention were imposed on each originator rather than the sponsor, the amount of risk held by each originator may be small. As such, the incentives afforded through risk retention may be

¹¹⁸ See Committee on Capital Markets Regulation, *The Global Financial Crisis: A Plan for Regulatory Reform*, May 2009 (“Committee on Capital Markets Regulation Financial Crisis Report”), at 130.

¹¹⁹ See, e.g., Ingo Fender and Janet Mitchell, “The future of securitisation: How to align incentives?” BIS Quarterly Review, Sept. 2009 available at http://www.bis.org/publ/qrtpdf/r_qt0909e.pdf (study that claimed to show having the originator or arranger retain the equity tranche of a securitization may lead to lower screening effort than other retention schemes and that recommended regulators focus on disclosure of the scale and nature of risk retention).

¹²⁰ For example, the ASF has proposed model representations and warranties designed to enhance the alignment of incentives of mortgage originators with those of investors in mortgage loans. See American Securitization Forum Press Release, “ASF Proposes Risk Retention and Issues Final RMBS Disclosure and Reporting Packages,” July 15, 2009, available at <http://www.americansecuritization.com/story.aspx?id=3460>.

¹²¹ See Gillian Tett, *Fool’s Gold* (2009); International Monetary Fund, *Global Financial Stability Report: Navigating the Financial Challenges Ahead* (Oct. 2009) at 25 (noting that retention of the senior tranche was motivated mainly by difficulties placing them), available at <http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf>.

¹²² See discussion in fn. 106 regarding aggregators.

diminished or rendered less effective. With risk retention imposed on sponsors, we believe that sponsors would have the appropriate incentives and mechanisms to ensure that originators' lending standards are consistent with the quality and character of the ABS to be offered off of the shelf. Therefore, we believe it is more appropriate to impose risk retention requirements on the sponsor than the non-affiliated originator.¹²³

Under our proposal, a sponsor may still conduct a public offering without risk retention. However, such offering would be required to be registered on proposed Form SF-1 rather than proposed Form SF-3. Those offerings would not be eligible for delayed shelf registration, which would subject them to a longer period before they could be completed since a new registration statement would need to be filed and become effective before an offering could be completed. This would allow additional time for the investors to analyze the offering.¹²⁴

We have also considered other ancillary impacts of our proposed risk retention shelf eligibility condition. For example, we considered the impact of the shelf eligibility condition on financial reporting. We note that the Financial Accounting Standards Board's newly-issued Statements of Financial Accounting Standards No. 166 and 167, contained in FASB's Accounting Standards Codification, Topic 860, Transfers and Servicing, and Topic 810, Consolidation, respectively, change the accounting for transfers of financial assets and the criteria for consolidation of variable interest entities. Substantially all types of special-purpose entities used in asset-backed securitization transactions are, for accounting purposes, variable interest entities.

The accounting guidance for consolidation requires a party to consolidate a variable interest entity if it has a variable interest in the securitization that is a controlling financial interest in the variable interest entity. The accounting guidance specifies that a party has a controlling financial interest if it has variable interests with both of the following characteristics: (a) The power to direct

the activities of a variable interest entity that most significantly impact the variable interest entity's economic performance, and (b) the obligation to absorb losses of the variable interest entity (or the right to receive benefits from the variable interest entity) that could potentially be significant to the variable interest entity. Only one party, if any, is expected to have a controlling financial interest in a variable interest entity.

A sponsor that retains an economic interest in each tranche of securities, as we are proposing to require as a condition for shelf eligibility, generally will have a variable interest in the asset-backed securitization entity. However, satisfaction of the proposed risk retention condition would not, by itself, be determinative as to whether a sponsor's variable interests would be a controlling financial interest resulting in consolidation. This is the case because each sponsor will need to evaluate the facts and circumstances related to each particular transaction in light of the FASB's newly-issued guidance, including whether the sponsor has the power to direct the activities that most significantly impact the variable interest entity's economic performance. In some cases, the economic performance of the variable interest entity is most significantly impacted by the performance of the assets that back the securities. In those cases, the activity that most significantly impacts the performance of the assets could be, for example, management of asset delinquencies and defaults or, as another example, selecting, monitoring, and disposing of collateral securities.

We expect the effect of the FASB's newly-issued guidance, together with the effect of satisfaction of our proposed risk retention condition for shelf eligibility (or retention of risk for other reasons), to generally increase the instances in which financial assets (and corresponding financial obligations) continue to be reported in the financial statements of the reporting entity that transfers the financial assets. However, the accounting and consolidation determinations for any particular transaction will depend on judgments about the related facts and circumstances.

We understand that the isolation of the assets comprising the pool from claims of other creditors is important to ABS investors.¹²⁵ Currently, credit card

issuers typically retain an originator's interest in the pool, so our proposed risk retention shelf eligibility condition should not impact those issuers. Our proposed shelf eligibility requirement of retaining a vertical slice of the securities offered is not intended to have an impact on the isolation of the underlying assets, and we are not aware of any reason to believe it would. The proposed shelf eligibility condition would be to hold an interest in all the securities sold to investors and not the underlying assets directly nor the residual interest. True sale opinions are typically required on the transfer of assets from the originator to the depositor. This proposed shelf eligibility condition would apply to the sponsor, which may not necessarily be the originator. Thus, we believe the shelf eligibility condition should not impact whether there has been a true sale at law of the assets and therefore not change the analysis in the event of bankruptcy, insolvency, receivership or conservatorship of the originator or the sponsor.

Request for Comment

- Should we continue to condition shelf eligibility on requirements that are related to the quality of an ABS offering? Should we, as proposed, replace references to investment grade credit ratings with a risk retention requirement and/or the other criteria discussed below, which are intended to increase the likelihood of higher quality securities than securities that are not required to meet such criteria? Is there a possibility that, by establishing a risk retention requirement or any other criteria based on quality, investors may unduly rely on an appearance that incentives are aligned or that the security has greater quality and consequently be less inclined to expend effort to perform their own analyses creating a similar situation that over-reliance on ratings created? Do the policy bases for shelf eligibility suggest eligibility criteria based on quality of securities are appropriate? Conversely, are expedited offerings inconsistent with an attempt to promote independent analysis of asset-backed securities and reduce the likelihood of undue reliance by investors on credit ratings and therefore, should we not allow ABS offerings to be shelf registered? Should we continue to allow short-form registration for asset-backed securities? Given that each asset-backed security

¹²³ As discussed in Section III.C.3 below, we also propose to add requirements for disclosure of any interest in the securities that is retained by the sponsor or originator.

¹²⁴ As we are proposing to require in Section III.C.3 below, if the offering does not include risk retention by the sponsor, an issuer should provide clear disclosure that the sponsor of the offering is not required by law to retain any risk in the securities and may sell any interest initially retained at any time, as applicable.

¹²⁵ See The Bond Market Association, International Swaps & Derivatives Association, and Securities Industry Association, "Special Purpose Entities (SPEs) and the Securitization Markets," (Feb. 1, 2002) available at <http://www.isda.org/speeches/pdf/SPV-Discussion-Piece-Final>

Feb01.pdf (noting that securitizations would not take place without the ability to establish SPEs, as investors do not want to take on any risk associated with the seller).

offering off the shelf is akin to an initial public offering with respect to the particular issuer, is the premise of most other short form registration (*i.e.*, that an eligible issuer enjoys a widespread market following) applicable to issuers of asset-backed securities?

- We request comment on risk retention as a condition to eligibility for a delayed ABS shelf offering. Would the proposed risk retention condition address concerns relating to the misalignment of incentives and lead to higher quality securities in registered ABS shelf offerings? Is this an appropriate condition for shelf eligibility? Would the requirement incentivize sponsors to consider the quality of the assets being underwritten and sold into the securitization vehicle?

- Is five percent an appropriate amount of risk for the sponsor to retain in order for the offering to be shelf eligible? Should it be higher (*e.g.*, ten or 15%)? Should it be lower (*e.g.*, one or three percent)? Should the amount of required risk retention be tied to another measure?

- Should the risk retention condition require retention of risk by sponsors (as proposed) or by originators?

- Are there other better ways to address alignment of incentives, and thus quality of the securities, in the aggregator situation? Should we require in that situation that all originators and the sponsor retain some risk?

- Should sponsors be permitted to satisfy the risk retention condition through a different form of risk retention than what is proposed (*e.g.*, retention of first loss position or retention of first loss position in conjunction with retention of some form of vertical slice of the securitization)? Should the risk retention condition relate to retention of the mezzanine tranche? Should the risk retention condition depend on the type and quality of the assets, the structure of the securities and expected economic condition? How could we structure a shelf eligibility condition to take those variables into account?

- We considered but are not proposing an alternative way to satisfy the risk retention shelf eligibility condition based on retention of randomly-selected exposures. We are concerned about the ability to subsequently demonstrate the randomness of the random selection process, including for purposes of monitoring or auditing. Should we include this alternative? Are there any mechanisms that we could adopt that would ensure adequate monitoring of the randomization process if such an alternative were permitted? For example, would our concerns be

addressed if the sponsor was required to provide a third party opinion that the selection process has been random and that retained exposures are equivalent (*i.e.*, share a similar risk profile) to the securitized exposures? Would this be sufficient? Would this opinion resemble a credit rating, raising the same issues that rule reliance on credit ratings has had? If this approach were taken, should we impose any requirements on the characteristics of such a third party? Should that third party be considered an expert for purposes of the registration statement?

- If we adopted a random selection alternative, should we require the same disclosure regarding the securitized exposures that are subject to risk retention that is required for the assets in the pool at the time of securitization and on an ongoing basis? Should the shelf eligibility condition require that the retained exposures be subject to the same servicing as the securitized exposures?

- Instead of requiring risk retention as a condition for shelf eligibility, should risk retention be made voluntary for shelf-eligible offerings and issuers only be required to add specified disclosure on the interest that the sponsor or other transaction participants retain? In other words, instead of mandating a certain amount of risk retention, should the requirement be that issuers disclose the percentage of risk retained and in what form? As discussed in greater detail in section III.C.3 of the release, we are also proposing to revise Items 1104, 1108 and 1110 of Regulation AB to require disclosure regarding the sponsor's, a servicer's or a 20% originator's interest retained in the transaction, including amount and nature of that interest. This information would be required for both shelf and non-shelf offerings. If those proposed risk retention disclosure requirements were adopted, would there be a need for or a significant incremental benefit from mandating specific minimum risk retention as a condition of shelf eligibility? Could this incremental benefit be achieved strictly through a market-based mechanism—for example, through fully-disclosed ABS covenants in which the sponsor pre-commits to retain a minimum percentage of the risk of the deal, as opposed to a regulatory requirement? Is the disclosure proposed to be required below sufficient to achieve such a benefit, and if not, what additional disclosures should we require? Would disclosure of the risk retention be a sufficient indicator of shelf-eligible offerings? Should we condition shelf eligibility on requiring the sponsor to covenant that it would maintain a

minimum percentage of risk retention? If so, should we provide any limitations on the covenant (*e.g.*, what percentage of tranche or assets must be retained, manner of sponsor's retention, no hedging)? What are the limitations to a market-based mechanism for risk retention? Would such a transaction covenant be credible and enforceable? Would requiring this transaction covenant, along with disclosure of risk retention pursuant to the covenant, sufficiently distinguish those offerings that should be made shelf eligible from those that should not?

- Should net economic interest be measured at the time of origination/issuance as proposed? Would a different measurement date be more appropriate (*e.g.*, the securitization cut-off date)? If the interest were measured at the time of securitization cut-off date, could this cause issuers to change various terms? Is the amount of retention that is required to be retained on an ongoing basis appropriate? Why or why not?

- Should revolving asset master trusts be permitted to satisfy the shelf eligibility requirement by retaining the originator's interest, as proposed? In those cases, should we require as proposed that the originator's interest and securities held by investors are collectively backed by the same pool of receivables, and payments of the originator's interest are not less than five percent of payments of the securities held by investors collectively? Is that typical in credit card issuances?

- Are the proposed netting provisions appropriate? Do we need to provide more guidance on what kind of hedges would be netted against the retained risk? Is the proposed "directly related" standard appropriate? Is it sufficiently clear what type of hedges would be allowed? Are there certain forms of hedges that we should indicate would not be netted against the retained risk? Is there any concern that sponsors may inadvertently hedge the economic risk required to be retained? If so, do we need to address that and what is the best way for us to address it? Should we expand the proposed netting provisions to other types of hedging? Should we narrow the proposed netting provisions in any way?

- Should the sponsor be allowed to sell off the retained interest after a certain point in time while non-affiliates of the depositor still hold securities and still remain shelf eligible? If so, when? Would that undermine the purpose of the condition? If not, why not?

- Should there be an alternate condition to the risk retention shelf eligibility condition? For instance, should risk retention apply to RMBS

that are backed by mortgages that are not qualified mortgages, as defined H.R. 1728,¹²⁶ a recent legislative proposal?¹²⁷ Would it be appropriate to require risk retention unless full

¹²⁶ See, e.g., Mortgage Reform and Anti-Predatory Lending Act, H.R. 1728, 111th Congress.

¹²⁷ At § 203 in H.R. 1728, a qualified mortgage is defined as a mortgage:

(i) That does not allow a consumer to defer repayment of principal or interest, or is not otherwise deemed a 'non-traditional mortgage' under guidance, advisories, or regulations prescribed by the Federal Banking Agencies;

(ii) That does not provide for a repayment schedule that results in negative amortization at any time;

(iii) For which the terms are fully amortizing and which does not result in a balloon payment, where a 'balloon payment' is a scheduled payment that is more than twice as large as the average of earlier scheduled payments;

(iv) Which has an annual percentage rate that does not exceed the average prime offer rate for a comparable transaction, as of the date the interest rate is set—

(I) By 1.5 or more percentage points, in the case of a first lien residential mortgage loan having an original principal obligation amount that is equal to or less than the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2));

(II) By 2.5 or more percentage points, in the case of a first lien residential mortgage loan having an original principal obligation amount that is more than the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)); and

(III) By 3.5 or more percentage points, in the case of a subordinate lien residential mortgage loan;

(v) For which the income and financial resources relied upon to qualify the obligors on the loan are verified and documented

(vi) In the case of a fixed rate loan, for which the underwriting process is based on a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments;

(vii) In the case of an adjustable rate loan, for which the underwriting is based on the maximum rate permitted under the loan during the first seven years, and a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments;

(viii) That does not cause the consumer's total monthly debts, including amounts under the loan, to exceed a percentage established by regulation of the consumer's monthly gross income or such other maximum percentage of such income as may be prescribed by regulation under paragraph (4), and such rules shall also take into consideration the consumer's income available to pay regular expenses after payment of all installment and revolving debt;

(ix) For which the total points and fees payable in connection with the loan do not exceed 2 percent of the total loan amount, where 'points and fees' means points and fees as defined by Section 103(aa)(4) of the Truth in Lending Act (15 U.S.C. 1602(aa)(4)); and

(x) For which the term of the loan does not exceed 30 years, except as such term may be extended under paragraph (4).

documentation has been provided for the assets, the borrower meets a certain minimum credit score, or the terms of the loan do not involve balloon payments? Would such requirements for the mortgages in the pool be a better condition to shelf eligibility than the proposed risk retention shelf eligibility condition? Would such a shelf eligibility condition be difficult to implement? Should we instead condition shelf eligibility on risk retention for loans with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for loans secured by a first lien on a dwelling, or by 3.5 or more percentage points for loans secured by a subordinate lien on a dwelling?¹²⁸

How would we structure a condition that relates to specified characteristics of the assets for other asset classes that may not have those variables or those industry standards or have different underwriting standards? What would be the appropriate categories and thresholds? Do those appropriate categories and thresholds differ for different classes? If so, how? Are there securitized asset classes that have no clear or established standards that could demarcate assets meriting shelf eligibility and those that do not?

• The residual interest of a commercial mortgage securitization is typically sold to a third party purchaser, also known as the "B-piece buyer," before the issuance of the securities. In light of this practice, should we permit third party retention of a portion of the securitization to fulfill the shelf eligibility condition? How can we ensure that incentives between the sponsor and investors are aligned in a manner that results in higher quality if the sponsor is permitted to sell off its risk to a third party? For example, should such a shelf eligibility condition require that if a third party will retain the credit risk, the third party purchaser must retain a higher percentage (e.g., ten or 15%) of the risk, rather than five percent? If we allow this approach, should we condition shelf eligibility on a requirement that the third party separately examine the assets in the pool and/or not sell or hedge its holdings? Are there reasons we should, or should not, permit a third party to retain risk in order to satisfy the proposed risk retention condition?¹²⁹

¹²⁸ See definition of "higher-priced mortgage loans" in 12 CFR 226.35(a) and Truth in Lending, Federal Reserve System, 73 FR 44522 (July 30, 2008).

¹²⁹ In recent years, it was not uncommon for the securitization residual or equity interests to be

• Should any asset classes or types of securities be exempt from the proposed risk retention shelf eligibility condition or have different risk retention requirements apply? Because of the unique nature of residential mortgages in the financial markets, should risk retention apply to shelf offerings of residential mortgage-backed securities (RMBS) but not offerings of other ABS? If so, what would be an appropriate partial substitute for investment grade rating for shelf eligibility for those other asset classes?

• How would the proposed risk retention shelf eligibility condition impact how sellers account for the transfer of assets in a securitization transaction? Is it desirable to revise the proposal to lessen that impact and if so, how?

• Would the proposal have an impact on the true sale at law of the assets or on the rights of ABS investors as a result of conservatorship, receivership or bankruptcy of the originator or sponsor? If so, how can we revise the proposed risk retention condition to require risk retention without jeopardizing the transfer of assets as a true sale at law or the remoteness of those assets in the event of any bankruptcy, conservatorship, or receivership of the sponsor or originator?

• We note that FINRA Rule 5130 (Restrictions on the Purchase and Sale of IPOs of Equity Securities) generally prohibits FINRA members from selling initial public offerings to broker dealers and their affiliates. The rule is designed to protect the integrity of the public offering process by ensuring that: (1) Members make bona fide public offerings of securities at the offering price; (2) members do not withhold securities in a public offering for their own benefit or use securities to reward persons who can give them future business; and (3) industry insiders do not take advantage of their insider position to purchase IPOs for their own benefit at the expense of the public.¹³⁰ Under FINRA's rules, if an ABS is an equity security, it is excluded from the application of the rule if the security is sold pursuant to an exemption under the Securities Act or if it is an offering of investment grade rated ABS. Will this rule have any significant impact on the ability to retain risk as a requirement for shelf eligibility? While our rule changes would eliminate references to credit ratings, sponsors may still obtain ratings, which would potentially qualify

repackaged into CDOs and sold in the private markets.

¹³⁰ NASD notice to Members 03-79 (March 23, 2004) Initial Public Offerings.

the offering for this exemption. Alternatively, FINRA could change its rule to provide the exemption to shelf-eligible ABS rather than investment grade rated ABS. Are there any other regulations or rules that may impact the retention of risk?

(b) Third Party Review of Repurchase Obligations

In the underlying transaction agreements for an asset securitization, sponsors or originators typically make representations and warranties relating to the pool assets and their origination, including about the quality of the pool assets. For instance, in the case of residential mortgage-backed securities, one such representation and warranty is that each of the loans has complied with applicable federal, state and local laws, including truth-in-lending, consumer credit protection, predatory and abusive laws and disclosure laws. Another representation that may be included is that no fraud has taken place in connection with the origination of the assets on the part of the originator or any party involved in the origination of the assets. Upon discovery that a pool asset does not comply with the representation or warranty, under transaction covenants, an obligated party, typically the sponsor, must repurchase the asset or substitute the non-compliant asset with a different asset that complies with the representations and warranties.

The effectiveness of these contractual provisions has been questioned and lack of responsiveness by sponsors to potential breaches of the representations and warranties relating to the pool assets has been the subject of investor complaint.¹³¹ Transaction agreements typically have not included specific mechanisms to identify breaches of representations and warranties or to resolve a question as to whether a

¹³¹ See the Committee on Capital Markets Regulation Financial Crisis Report, at 135 (noting that contractual provisions have proven to be of little practical value to investors during the crisis); see also *Investors Proceeding with Countrywide Lawsuit*, Mortgage Servicing News, Feb. 1, 2009 (describing class action investor suit against Countrywide in which investors claim that language in the pooling and servicing agreements requires the seller/servicer to repurchase loans that were originated with "predatory" or abusive lending practices) and American Securitization Forum, *ASF Releases Model Representations and Warranties to Bolster Risk Retention and Transparency in Mortgage Securitizations*, (Dec. 15, 2009), available at <http://www.americansecuritization.com/>. Only large investors of ABS such as Fannie Mae and Freddie Mac have been able to exercise repurchase demands. See Aparajita Saha-Bubna, "Repurchased Loans Putting Banks in Hole," *Wall Street Journal* (Mar. 8, 2010) (noting that most mortgages bouncing back to lenders are coming from Fannie Mae and Freddie Mac).

breach of the representations and warranties has occurred.¹³² Thus, these contractual agreements have frequently been ineffective because without access to documents relating to each pool asset, it can be difficult for the trustee, which typically notifies the sponsor of an alleged breach, to determine whether or not a representation or warranty relating to a pool asset has been breached. Investors and trustees must rely on the sponsor to provide the necessary documentation about the assets in question. Without further safeguards, the protective quality of the representations and warranties can be compromised.

We are proposing to require as a condition to shelf eligibility, that the pooling and servicing agreement or other transaction agreement for the securitization, which is required to be filed with the Commission,¹³³ contain a specified provision to enhance the protective nature of the representations and warranties. The specified provision would require the obligated party (*i.e.* the representing and warranting party) to furnish a third party's opinion relating to any asset for which the trustee has asserted a breach of any representation or warranty and for which the asset was not repurchased or replaced by the obligated party on the basis of an assertion that the asset met the representations and warranties contained in the pooling and servicing agreement or other transaction agreement. Because we believe that annual review of the assets is not sufficient to address investors' concerns regarding the enforceability of these provisions in the underlying transaction documents, the opinion would be required to be furnished to the trustee at least quarterly.

To better ensure that the opinion is impartial, we are proposing to require that the third party providing the

¹³² See also Moody's Investors Service, Inc., *Special Report: Moody's Criteria for Evaluating Representations and Warranties in U.S. Residential Mortgage Backed Securitizations (RMBS)*, November 24, 2008 (noting that historically RMBS have not incorporated mechanisms and procedures to identify breaches of representations and warranties and recommending that post-securitization forensic reviews be conducted by an independent third party for delinquent loans).

¹³³ ABS issuers are currently required to file these agreements as an exhibit to the registration statement.

¹³⁴ See proposed General Instruction I.B.1(b) of proposed Form SF-3. Under existing rules, the transaction agreement is required to be filed as an exhibit to the registration statement. See Item 601 of Regulation S-K [17 CFR 229.601].

opinion not be an affiliate of the obligated party. This proposed third party loan review condition to shelf eligibility is designed to help ensure that representations and warranties about the assets provide meaningful protection to investors, which should encourage sponsors to include higher quality assets in the asset pool.¹³⁵ As a result, we believe that this proposed condition is an appropriate partial substitute for the investment grade ratings requirement.

Request for Comment

- Is this proposed condition an appropriate shelf eligibility condition for ABS offerings?
- Would this proposed condition, which would only require an undertaking from the issuer, have a measurable benefit to investors? Should we require more assurance that third party opinions have been provided to investors as a condition to shelf eligibility? For example, should we instead condition 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? Should we condition eligibility on a requirement that the trustee provide notice if required third party opinions are not obtained, along with an absence of a notice from the trustee to the effect that there was a failure to provide required opinions?
- Should we provide more guidelines in this shelf eligibility condition regarding the specifics of the provision that would be required to be included in the pooling and servicing or other agreement? If so, what should be detailed?
- Should the proposed condition provide any further specification of the terms of the third party opinion provision?
- Is it appropriate to require, as proposed, the third party to be non-affiliated with the obligated party? Should we specify further any requirements relating to providers of the third party opinion? Should we specify that the third party opinion provider must be an independent expert, similar to what is required in Section 314(d)(1)¹³⁶ of the Trust Indenture Act of 1939?¹³⁷

¹³⁵ As described below, we also propose to add a disclosure requirement to Exchange Act Form 10-D that would require disclosure of the number of loans that have been presented for repurchase to the party obligated to repurchase the assets under the transaction agreements and the number of those assets that have not been repurchased or replaced.

¹³⁶ 15 U.S.C. 77nnn(d)(1).

¹³⁷ 15 U.S.C. 77aaa *et seq.*

- Should we specify who should provide the third party opinion or who should not be permitted to provide the opinion? Should diligence firms that provide third party pre-securitization review of a random sample of assets be allowed to provide this opinion? Should we specify that it must be a legal opinion? Would attorneys or law firms be willing to provide this opinion? Why or why not? Would it be appropriate to allow a sponsor's in-house counsel to provide the opinion? If a law firm provides the opinion, should we prohibit the law firm that assisted in the offering from providing such an opinion?

- Based on existing attestation standards of either the PCAOB or AICPA, we do not believe that the proposed opinion could be provided by a public accountant. Would a public accountant be able to provide the proposed opinion under existing attestation standards? If so, which standard or standards should be applied, what level of assurance should be provided and how should the third party opinion be reported?

- Should we provide that the third party opinion must cover all of the representations and warranties in the agreement related to the assets, as proposed? Instead, are there certain representations and warranties that are the most significant that the opinion should cover? Are there types of representations and warranties that the third party opinion should not be required to opine on? For example, are there certain representations and warranties that an attorney or a law firm would not be able to opine on? If so, why?

- Are there any other types of limitations that a third party opinion provider would or should place on the required opinion? In general, what type of exam, assessment or evaluation would a third party opinion provider need to make in order to provide the required opinion?

- How costly or burdensome would it be for an issuer to be required to have a third party provide an opinion to satisfy the proposed shelf eligibility condition? Would this impose too much burden on ABS issuers? Are there ways to lessen the cost?

- Should the third party opinion be required to be furnished annually rather than quarterly, as proposed?

- Should we require that the third party opinion also be filed as an exhibit to an Exchange Act report?

- We are aware of some insurance providers that have offered to insure in the context of mergers and acquisitions any breach of the representations and

warranties in the transaction agreement. As an alternative to conditioning ABS shelf eligibility on an undertaking in the transaction agreement that the issuer furnish a third party opinion on assets not repurchased (or instead of the proposed condition), should we allow the issuer to purchase insurance to insure a minimum amount or percentage of the sponsor or originator's obligations under the transaction agreement? If so, what kind of disclosure should we require about the insurance provider? How can we ensure that this alternative method of meeting shelf eligibility adequately improves the incentive structure and therefore the quality of the securities?

(c) Certification of the Depositor's Chief Executive Officer

We also are proposing to establish a requirement that, as a condition to ABS shelf eligibility to replace investment grade ratings criteria, the issuer provide a certification signed by the chief executive officer of the depositor of the securitization regarding the assets underlying the securities for each offering.¹³⁸ The certification would require the depositor's chief executive officer to certify that to his or her knowledge, the assets have characteristics that provide a reasonable basis to believe they will produce, taking into account internal credit enhancements, cash flows at times and in amounts necessary to service payments on the securities as described in the prospectus. This officer would also certify that he or she has reviewed the prospectus and the necessary documents for this certification.¹³⁹

Because we would frame this ABS shelf eligibility condition as a certification requirement instead of a disclosure requirement, we are using slightly different language than a similar

¹³⁸ See proposed General Instruction I.B.1(c) to proposed Form SF-3.

¹³⁹ This condition is similar to the current disclosure requirements for asset-backed issuers in the European Union. Annex VIII, Disclosure Requirements for the Asset-Backed Securities Additional Building Block, Section 2.1 (European Commission Regulation (EC) No. 809/2004 (April 29, 2004). The EU requires asset-backed issuers to disclose in each prospectus that the securitized assets backing the issue have characteristics that demonstrate capacity to produce funds to service any payments due and payable on the securities. Similarly, under the North American Securities Administrator's Association (NASAA)'s guidelines for registration of asset-backed securities, sponsors are required to demonstrate that for securities without an investment grade rating, based on eligibility criteria or specifically identified assets, the eligible assets being pooled will generate sufficient cash flow to make all scheduled payments on the asset-backed securities after taking certain allowed expenses into consideration. The guidelines are available at www.nasaa.org.

EU disclosure requirement in order to more precisely outline what the officer is certifying to. We are proposing a certification rather than a disclosure requirement because we preliminarily believe the potential focus on the transaction and the disclosure that may result from an individual providing a certification should lead to enhanced quality of the securitization.¹⁴⁰ We believe, as we did when we proposed the certification for Exchange Act periodic reports, that a certification may cause these officials to review more carefully the disclosure, and in this case, the transaction, and to participate more extensively in the oversight of the transaction.¹⁴¹

We are proposing that the statements required in the certification would be made based on the knowledge of the certifying officer. As signatories to the registration statement, we would expect that chief executive officers of depositors would have reviewed the necessary documents regarding the assets, transactions and disclosures. Under current requirements, the registration statement for an ABS offering is required to include a description of the material characteristics of the asset pool,¹⁴² as well as information about the flow of funds for the transaction, including the payment allocations, rights and distribution priorities among all classes of the issuing entity's securities, and within each class, with respect to cash flows, credit enhancement and any other structural features in the transaction.¹⁴³ The proposed certification would be an explicit representation by the chief executive officer of the depositor of what is already implicit in this disclosure

¹⁴⁰ For instance, a depositor's chief executive officer may conclude that in order to provide the certification, he or she must analyze a structural review of the securitization. Rating agencies would also conduct a structural review of the securitization when issuing a rating on the securities.

¹⁴¹ See *Certification of Disclosure in Companies' Quarterly and Annual Reports*, Release No. 34-46079 June 14, 2002. See also Testimony Concerning Implementation of the Sarbanes-Oxley Act of 2002 by William H. Donaldson, Chairman U.S. Securities and Exchange Commission Before the Senate Committee on Banking, Housing and Urban Affairs (September 9, 2003) (noting that a consequence of "the combination of the certification requirements and the requirement to establish and maintain disclosure controls and procedures has been to focus appropriate increased senior executive attention on disclosure responsibilities and has had a very significant impact to date in improving financial reporting and other disclosure").

¹⁴² See Item 1111 of Regulation AB [17 CFR 229.1111].

¹⁴³ See Item 202 of Regulation S-K [17 CFR 229.202] and Item 1113 of Regulation AB [17 CFR 229.1113].

contained in the registration statement.¹⁴⁴ This is similar to the certifications of Exchange Act periodic reports required by Exchange Act Rules 13a-14 and 15d-14,¹⁴⁵ which also refer to the disclosure. As with the certifications required by these rules, the language of the proposed certification could not be altered. Instead, any issues in providing the certification would need to be addressed through disclosure in the prospectus.¹⁴⁶ For instance, if the prospectus describes the risk of non-payment, or probability of non-payment, or other risks that such cash flows will not be produced or such payments will not be made, then those disclosures would be taken into consideration in signing the certification.

The chief executive officer of the depositor is already responsible as signatory of the registration statement for the issuer's disclosure in the prospectus and can be liable for material misstatements or omissions under the federal securities laws.¹⁴⁷ An officer providing a false certification potentially could be subject to Commission action for violating Securities Act Section 17.¹⁴⁸ The certification would be a statement of what is known by the signatory at the time of the offering and would not serve as a guarantee of payment of the securities.

Under our proposal, this certification would be an additional exhibit requirement for the shelf registration statement that would not be applicable to the non-shelf registration statement, Form SF-1, and that would be required to be filed by the time the final prospectus is required to be filed under Rule 424.¹⁴⁹ We believe that requiring the chief executive officer of the depositor to sign the certification is consistent with other signature requirements for asset-backed securities.¹⁵⁰

¹⁴⁴ This approach is somewhat similar to the approach we took with Regulation AC, which requires certifications from analysts. We noted there that Regulation AC makes explicit the representations that are already implicit when an analyst publishes his or her views—that the analysis of a security published by the analyst reflects the analyst's honestly held views. Section II of *Regulation Analyst Certification*, Release No. 33-8193 (Feb. 23, 2003) [68 FR 9482].

¹⁴⁵ 17 CFR 240.13a-14 and 17 CFR 240.15d-14.

¹⁴⁶ See Section III.D.6 of the 2004 ABS Adopting Release.

¹⁴⁷ See Securities Act Section 11 (15 U.S.C. 77k(a)) and Exchange Act Section 10(b) (15 U.S.C. 78j(b)).

¹⁴⁸ 15 U.S.C. 77q(a).

¹⁴⁹ See proposed revision to Item 601(b) of Regulation S-K.

¹⁵⁰ See, e.g., Item 601(b)(31)(ii) of Regulation S-K (exhibit requirement for ABS regarding

Request for Comment

- Is our proposal to require certification appropriate as a condition to shelf eligibility? Would investors find the certification valuable?

- Is the proposed language for the certification requirement appropriate? Should we revise it in any way? Should we require that the officer certify that he has a reasonable basis to believe that the assets will produce cash flows at times and in amounts necessary to service payments on the securities as described in the prospectus (rather than certify that the assets have characteristics that provide a reasonable basis to believe that the assets will produce cash flows at times and amounts necessary to service payments as described)?

- Should we identify the level of inquiry required by the executive officer? Should we specify which documents (other than the prospectus) would need to be reviewed for purposes of the certification, and, if so, which ones should we specify?

- Under the proposal, the certifying officer could take into account internal credit enhancements for purposes of evaluating whether the assets have characteristics that provide a reasonable basis to believe they will produce cash flows at times and in amounts necessary to service payments on the securities as described in the prospectus. Should we also permit the certifying officer to also take into account external credit enhancements that may be utilized in the securitization?¹⁵¹

- Are there concerns that it is not possible for any individual to be in a position to certify that the assets in the pool have characteristics that provide a reasonable basis to believe they will produce, taking into account internal credit enhancements, cash flows at times and in amounts necessary to service payments on the securities as described in the prospectus? If so, how can we address those concerns or are there steps we should take to ensure that the level of uncertainty in the structure and assets is clear to investors?

- Instead of, or in addition to, requiring a certification, should we require the sponsor to disclose its estimates of default probability for all tranches in the transaction, default probability of loans in the pool, and/or the expected recovery rate on the loans conditional on default? Such estimates

certification required by Exchange Act Rules 13a-14(d) and 15d-14(d)).

¹⁵¹ Examples of external credit enhancement may include third party insurance to reimburse losses on the pool assets or the securities or an interest rate swap or similar swap transaction to provide incidental changes to cash-flow and return.

would be expected to be consistent with assumptions used in sponsors' internal modeling. Would this disclosure potentially provide investors useful insights into the sponsor's view of the creditworthiness of pool assets and the securitization overall? Would it convey information similar to that contained in credit ratings, which also have, historically, reflected beliefs about default probabilities and expected recovery rates? Do sponsors currently have internal models, or make internal assumptions for valuation purposes, that could be used to readily produce these numbers? If so, should we require that disclosed estimates be consistent with those used in sponsors' internal models? Should we indicate whether or not such disclosures constitute forward-looking statements?

- Should the chief executive officer of the depositor, as proposed, be required to sign the certification, or should an individual in a different position be required to certify? Which individual should be required to sign the certification? Should we instead require that the certification be signed by the senior officer of the depositor in charge of securitization, consistent with other signature requirements for ABS? Given that the depositor is often a special purpose subsidiary of the sponsor, would it be more appropriate to have an officer of the sponsor sign the certification? If so, should it be the senior officer in charge of securitization or some other officer of the sponsor?

- Is it appropriate to require the certification be filed as an exhibit to the registration statement at the time of the final prospectus by means of a Form 8-K?

(d) Undertaking To File Ongoing Reports

Our last proposed new shelf eligibility criterion replacing the investment grade ratings requirement is a requirement that the issuer provide an undertaking to file Exchange Act reports with the Commission on an ongoing basis. Exchange Act Section 15(d) requires an issuer with an effective Securities Act registration statement to file ongoing reports with the Commission. However, the statute also provides that for issuers that do not also have a class of securities registered under the Exchange Act the duty to file ongoing reports is automatically suspended after the first year if the securities of each class to which the registration statement relates are held of record by less than three hundred persons. As a result, typically the reporting obligations of all asset-

backed issuers,¹⁵² other than those with master trust structures,¹⁵³ are suspended after they have filed one annual report on Form 10-K because the number of record holders falls below, often significantly below, the 300 record holder threshold.¹⁵⁴

In the proposing release for Regulation AB, we requested comment on whether the ability to suspend reporting under Section 15(d) should be revisited.¹⁵⁵ One investor group recommended conditioning ABS shelf registration upon an issuer agreeing either to continue filing reports under Section 15(d) or to make publicly available on their Web sites copies of reports that contain the information required by Form 10-D.¹⁵⁶ While in 2004 we did not adopt rules that would create ongoing reporting obligations for asset-backed issuers, we did note that the concerns raised by investors confirm the importance to investors of post-issuance reporting of information regarding an ABS transaction in understanding transaction performance and in making ongoing investment decisions.¹⁵⁷

We are proposing to require as a condition to ABS shelf eligibility that the issuer undertake to file with the Commission reports to provide disclosure as would be required pursuant to Exchange Act Section 15(d) and the rules thereunder, if the issuer

were required to report under that section.¹⁵⁸ The issuer's reporting obligation under the undertaking would extend as long as non-affiliates of the depositor hold any of the issuer's securities that were sold in registered transactions.¹⁵⁹ We believe that ongoing reporting of an asset-backed issuer would provide investors and the markets with transparency regarding many aspects about the ongoing performance of the securities and servicer in its compliance with servicing criteria, among other things. We believe this transparency is important for investors and the market and that it is appropriate to encourage ABS issuers to provide ongoing reports by conditioning shelf eligibility on an undertaking to do so. Thus, we believe this requirement is a reasonable additional condition to shelf eligibility. In conjunction with our proposal to require asset-level information, it may prove even more useful to investors.¹⁶⁰

In connection with this shelf eligibility condition, we are proposing to require disclosure in the prospectus that is filed as part of the registration statement that the issuer has undertaken and will file with the Commission the reports as would be required pursuant to Exchange Act Section 15(d) and the rules thereunder if the issuer were required to report under that section. Such disclosure would be subject to the same liability as other disclosure in the prospectus.

Also, we are proposing to add a disclosure requirement to Item 1106 of Regulation AB¹⁶¹ that would require disclosure in a prospectus of any failure in the last year of an issuing entity established by the depositor or any affiliate of the depositor to file, or file in a timely manner, an Exchange Act report that was required either by rule or by virtue of an undertaking. We are proposing further changes to ABS shelf eligibility requirements in connection

with the proposed condition, as discussed in the following section.

Request for Comment

- We request comment on our proposal to require ABS issuers who wish to conduct delayed shelf offerings to undertake to file reports that would be required under Section 15(d) of the Exchange Act for as long as non-affiliates of the depositor hold any securities that were sold in registered transactions. Should we impose such a requirement? Should ABS issuers who use shelf registration be permitted to terminate their reporting obligations at an earlier period in time under shelf eligibility conditions? If so, when?

- Should we require, as proposed, the disclosure of any failure in the last year of an issuing entity established by the depositor or any affiliate of the depositor to file, or file in a timely manner, an Exchange Act report that was required either by rule or by virtue of the proposed undertaking?

- We request comment on all of the four new proposed shelf eligibility conditions in general. Are the proposed shelf eligibility conditions appropriate alternatives to the existing investment grade ratings requirement? If one or more of these proposed criteria are not adopted, should an investment grade rating continue to determine whether or not an ABS issuer is eligible for shelf registration? Or should we prohibit ABS issuers from using shelf registration altogether? What would the impact be if ABS issuers were prohibited from utilizing shelf registration? Do the proposed changes to the shelf registration procedures described above, coupled with the proposed shelf eligibility conditions, mitigate concerns about ABS issuers using shelf registration?

- Should our proposed shelf eligibility conditions (or some subset of them) be used in addition to the existing investment grade ratings requirement rather than replace it?

- What is the aggregate effect of the proposed revisions to shelf eligibility criteria and the shelf registration process for ABS offerings? If these revisions are adopted, would this make using non-shelf registration (Form SF-1) more attractive to an ABS issuer? How would this change the costs and benefits analysis for using shelf registration for ABS issuers? Would this change cause shelf registration to be less attractive or become uneconomic?

- If we continue to condition shelf eligibility, in part, on characteristics of the securities that relate to quality, should we establish shelf eligibility based on different criteria than the four

¹⁵² Under Rule 3b-19 under the Exchange Act [17 CFR 240.3b-19], an issuer is defined in relation to asset-backed securities in the following way:

(a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the "issuer" for purposes of the asset-backed securities of that issuing entity.

(b) The person acting in the capacity as the depositor specified in paragraph (a) is a different "issuer" from that same person acting as a depositor for another issuing entity or for purposes of that person's own securities.

¹⁵³ In a securitization using a master trust structure, the ABS transaction contemplates future issuances of asset-backed securities backed by the same, but expanded, asset pool that consists of revolving assets. Pre-existing securities also would therefore be backed by the same expanded asset pool.

¹⁵⁴ One source noted that in a survey of 100 randomly selected asset-backed transactions, the number of record holders provided in reports on Form 15 ranged from two to more than 70. The survey did not consider beneficial owner numbers. See Committee on Capital Markets Regulation Financial Crisis Report, at fn. 349.

¹⁵⁵ See Section III.D.2 of *Asset-Backed Securities*, Release No. 33-8419 (May 3, 2004) [69 FR 26650].

¹⁵⁶ See comment letter from Investment Company Institute (ICI).

¹⁵⁷ See Section III.A.3.d of the 2004 ABS Adopting Release. We noted that modifying the reporting obligation would raise broad issues about the treatment of other non-ABS issuers that do not have public common equity. We believe our ABS shelf eligibility proposal is sufficiently distinguishable from the treatment of non-ABS issuers.

¹⁵⁸ See proposed Item 512(a)(7)(ii) of Regulation S-K.

¹⁵⁹ We also are proposing to add a checkbox to the cover page of Forms 10-K, 10-D, and 8-K where the issuer would be required to indicate whether the report is being filed pursuant to the proposed undertaking.

¹⁶⁰ See the Committee on Capital Markets Regulation Financial Crisis Report, at 151-152 (noting that loan-level data is not useful if issuers can opt out of periodic reporting and recommending that the Commission consider whether Section 15(d) of the Exchange Act should apply to the typical RMBS issuance); Statement of Paul Schott Stevens President and CEO, ICI, for SEC Roundtable on Oversight of Credit Rating Agencies, April 15, 2009, available at <http://www.sec.gov/comments/4-579/4579-15.pdf> (recommending that the Commission require disclosure under Regulation AB be required to be made on an ongoing basis in spite of Section 15(d)).

¹⁶¹ 17 CFR 229.1106.

proposed criteria? Should shelf eligibility be conditioned on a limitation of the capital structure of ABS offerings? For instance, should shelf offerings not be allowed to include leveraged tranches or should we limit the number of tranches? If so, how many (e.g., five, six, or seven)? Should we put restrictions on the size of each tranche? If so, how should we do that? Should we limit ABS shelf eligibility to offerings backed by assets that are seasoned for some period of time? If so, how much time for each asset class (e.g., six months, one year, or two years)? Are there certain standardized structures that we should use as a requirement for shelf offering?

(e) Other Proposed Form SF-3 Requirements

We are proposing other amendments to Rule 401 and the instructions in proposed Form SF-3 relating to form eligibility. Currently, to be eligible to use Form S-3, the existing form for ABS shelf registration, an issuer must meet the form's registrant requirements, which generally pertain for ABS issuers to reporting history under the Exchange Act of the depositor and affiliates of the depositor with respect to the same asset class, and at least one of the form's transaction requirements. One of the current ABS transaction requirements for use of Form S-3 is that the securities are investment grade securities, and above we have described our proposals for four new transaction requirements for use of Form SF-3 that would replace the investment grade ratings requirement (*i.e.*, risk retention, third party opinion review of repurchase demands, certification, and the undertaking to file Exchange Act reports). We are proposing to add new registrant requirements that pertain to compliance with the four proposed transaction requirements. These registrant requirements would be new shelf eligibility conditions to registration on proposed Form SF-3, and would also serve as the new eligibility conditions to be evaluated prior to conducting an offering off an effective Form SF-3 shelf registration statement.

(i) Registrant Requirements To Be Met for Filing a Form SF-3

In order to be eligible to file a registration statement on proposed Form SF-3, we are proposing that the registrant meet the following new requirements. First, we are proposing to require that to the extent the sponsor or an affiliate of the sponsor of the ABS transaction being registered was required to retain risk with respect to a

previous ABS offering involving the same asset class, then, at the time of filing the registration statement, such sponsor or affiliate must be holding the required risk.

Second, we are proposing that to the extent the depositor or an issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor were at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement required to comply with the other transaction requirements of Form SF-3 ("twelve-month look-back period"), with respect to a previous offering of securities involving the same asset class, the following requirements would apply:

- Such depositor and each such issuing entity must have timely filed all the transaction agreements that contained the required provision relating to the third party opinion review of repurchase demands;¹⁶²
- Such depositor and each such issuing entity must have timely filed all the required certifications of the depositor's chief executive officer; and
- Such depositor and each such issuing entity must have filed all the reports that they had undertaken to file during the previous twelve months (or such shorter period during which the depositor or issuing entity had undertaken to file reports) as would be required under the Section 15(d) of Exchange Act if they were subject to the reporting requirements of that section.

Third, as proposed, there must be disclosure in the registration statement on Form SF-3 stating that these proposed registrant requirements have been complied with.

These proposed new registrant requirements are, in many respects, consistent with the existing Form S-3 registrant requirement relating to Exchange Act reporting.¹⁶³ As with the existing Form S-3 Exchange Act

¹⁶² Under our proposal discussed in Section III.F below, we are proposing to revise Item 1100(f) to require that exhibits be filed no later than the date of filing the final prospectus.

¹⁶³ Under existing Form S-3, prior to filing a registration statement, to the extent the depositor or any issuing entity previously established by the depositor or an affiliate of the depositor are or were at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the Form S-3 required to file Exchange Act reports, with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed during the twelve months (or shorter period that the entity was required to have filed such materials). Also, such material, other than certain specified reports on Form 8-K, must have been filed in a timely manner. See General Instruction I.A.4 to Form S-3.

reporting registrant requirement, which we are retaining for proposed Form SF-3, the proposed new registrant requirements would require specified compliance with respect to previous offerings of the depositor or its affiliates. The proposed twelve-month look-back period (except for the requirement relating to risk retention) is also consistent with the existing Form S-3 Exchange Act reporting registrant requirement. The proposed new registrant requirement relating to risk retention requires an issuer to measure its risk retention as of the date of filing the registration statement, which we believe is a reasonable requirement. As described in more detail below, we are not proposing to require the sponsor or an affiliate of the sponsor to ensure that all risk was retained at all times during the previous twelve calendar months, for purposes of shelf eligibility, out of a concern that it may be overly burdensome.

(ii) Evaluation of Form SF-3 Eligibility in Lieu of Section 10(a)(3) Update

Form S-3 eligibility under the current rules is determined at the time of filing the registration statement and at the time of updating that registration statement under Securities Act Section 10(a)(3)¹⁶⁴ by filing audited financial statements. Because ABS registration statements do not contain financial statements of the issuer, a periodic determination of whether the issuer can continue to use the shelf would be specified by rule.¹⁶⁵ Such an evaluation would also provide a means for the Commission and its staff to better oversee compliance with the proposed new Form SF-3 eligibility conditions that would replace the existing investment grade ratings requirement. Therefore, in lieu of Section 10(a)(3) updating, we are proposing to revise Rule 401 to require, as a condition to conducting an offering off an effective shelf registration statement, an annual evaluation of whether the Exchange Act reporting registrant requirements have been satisfied. Under the proposal, an ABS issuer wishing to conduct a takedown off an effective shelf registration statement must evaluate whether affiliated issuers that were required to report under Sections 13(a) or 15(d) of the Exchange Act during the previous twelve months, have filed such reports on a timely basis, as of ninety

¹⁶⁴ 15 U.S.C. 77j(a)(3).

¹⁶⁵ See Securities Act Rule 401(b) [17 CFR 230.401(b)].

days after the end of the depositor's fiscal year end.¹⁶⁶

(iii) Quarterly Evaluation of Eligibility To Use Effective Form SF-3 for Takedowns

We also are proposing to require a quarterly evaluation of whether the ABS issuer has satisfied the proposed new registrant requirements relating to risk retention, third party opinions, the depositor's chief executive officer certification, and the undertaking to file ongoing reports. Under our proposal, an ABS issuer wishing to conduct a takedown off an effective shelf registration statement must evaluate its compliance with the proposed new registrant requirements as of the last day of the most recent fiscal quarter.

(A) Risk Retention

Accordingly, if the interest that a sponsor was required under the proposed risk retention shelf eligibility condition to retain during the previous twelve months (or shorter period as applicable), with respect to a previous offering of securities off a Form SF-3 registration statement involving the same asset class, was sold off or hedged as of the last day of the most recent fiscal quarter, the related shelf registration statement could not be utilized for subsequent offerings until the fiscal quarter after the sponsor has re-acquired the risk that was required to be retained (e.g., by removing the disqualifying hedge or open market purchases of the securities) and such risk was on the sponsor's books as of the end of the fiscal quarter. We have provided for quarterly testing because we are concerned that more frequent testing could be unnecessarily costly. By requiring an evaluation of risk retention at the end of the quarter, we are not suggesting that a sponsor could permissibly sell or hedge the required risk. Such activities would be inconsistent with the risk retention shelf eligibility condition, with the disclosure relating to a sponsor's interest in the transaction that we are proposing to require in the registration statement, and would be subject to our proposed periodic reporting disclosure requirements related to the sponsor's interest described in Section III.C.3. below. At the same time, we are concerned that there may be circumstances where a sponsor or its affiliates undertake transactions that

inadvertently hedge a required risk retention interest, and discover this after a take-down off the shelf by an affiliated ABS issuer. We are not proposing that this would necessarily cause the new offering to be deemed not to have been registered on the appropriate form. However, we believe that it is important that our requirements take into consideration a practicable testing schedule that promotes compliance with the proposed shelf eligibility criteria without creating undue burdens or uncertainty for issuers, and we are proposing requirements that would require at least quarterly testing to achieve that goal. Similarly, with respect to our proposed registrant requirement relating to risk retention, we are proposing that an issuer evaluate whether the sponsor has retained required risk at the time of filing the registration statement.

(B) Transaction Agreements and Officer Certification

An ABS issuer must also evaluate whether, during the previous twelve months, the depositor or its affiliates had filed the transaction agreements required to contain the third party opinion provision and the depositor's chief executive officer certifications on a timely basis as of the end of the quarter. If they had not, then the depositor could not utilize the registration statement or file new registration statement on Form SF-3 until one year after the required filings were filed.

(C) Undertaking To File Exchange Act Reports

Finally, under this proposal, an issuer must evaluate whether Exchange Act reports, with respect to previous takedowns off an effective registration statement of the depositor or affiliate of the depositor, where the issuer had undertaken to file such reports during the prior twelve months had, in fact, been filed as of the last day of the most recent fiscal quarter. In this way, the reports required under Section 13(a) or 15(d) must continue to be timely for shelf eligibility but reports required pursuant to the undertaking must be current as of the end of the quarter. As such, the ABS issuer would need to confirm once a quarter that it continued to be eligible to use the effective registration statement for takedowns.

Request for Comment

• Should we add, as proposed, registrant requirements that would require, as a condition to form eligibility, affiliated issuers of the depositor that had offered securities of

the same asset class that were registered on Form SF-3 to have complied with the risk retention, third party opinion, certification and ongoing reporting shelf eligibility conditions that replace the investment grade ratings requirement? Will these requirements lead to better compliance by ABS issuers with the new shelf eligibility conditions that we are proposing?

• Should we require disclosure, as proposed, in the registration statement that the registrant requirements have been complied with? Should we specify a location in the registration statement for such disclosure?

• In our proposed registrant requirements for Form SF-3, we are proposing to require that sponsors of affiliated issuers have retained the required risk at the time of filing the registration statement. Is that appropriate? Should we require continued monitoring of risk retention compliance instead? Should we provide the loss of shelf eligibility if the sponsor of a previously established affiliated issuer has not retained at any time during the previous twelve months all of the risk that it was required to retain during that time? Or would such a requirement be overly burdensome?

• Is it appropriate to require, as proposed, that the certifications and the transaction agreement containing the required third party opinion provision that are required to be filed pursuant to our proposed shelf eligibility conditions be filed on a timely basis? Why or why not?

• We are proposing to require an affiliated issuer that has undertaken to file Exchange Act reports in the last twelve months to have filed such reports as required pursuant to the Exchange Act rules. Is this an appropriate additional registrant requirement for proposed Form SF-3? Should we also specify that such reports must have been filed on a timely basis?

• Should we revise Rule 401, as proposed, to require that as a condition to continued use of an existing shelf registration statement for takedowns, an issuer conduct a periodic evaluation of form eligibility? Why or why not? If not, how should we address the concern that ABS issuers do not file amendments for purposes of Section 10(a)(3)?

• Should we require, as proposed, that an issuer test for sponsor's compliance with risk retention requirements as of the end of the fiscal quarter? Could there be situations where a sponsor or its affiliates undertake transactions that inadvertently hedge a required risk retention interest? Alternatively, because the testing for compliance would occur at predictable

¹⁶⁶ Under this proposal, the related registration statement could not be utilized for subsequent offerings for at least one year from the date the issuer that had failed to file Exchange Act reports then became current in its Exchange Act reports (and the other requirements had been met).

intervals, are there concerns that the quarterly test for risk retention compliance could allow a sponsor to hold less than the required risk in between testing intervals? Should our requirements provide for testing that is made at different intervals (*e.g.*, once a month, once a distribution period, twice a quarter, at minimum number of random intervals)?

- Should we require that the evaluation of whether Exchange Act reports of affiliated issuers have been filed on a timely basis be made as of the 90 days after the depositor's fiscal year, as proposed? Should the evaluation be made on a different timeframe, such as the last day of the most recent fiscal quarter, consistent with our other proposals here?

- Should we require, as proposed, that the evaluation of whether the registrant requirements relating to risk retention, third party opinions, certification, and the issuer's undertaking to file ongoing reports be made as the last day of the most recent fiscal quarter? Should that evaluation be made at different periods, such as monthly or annually?

4. Continuous Offerings

We also are proposing to amend Rule 415 to limit the registration of continuous offerings for ABS offerings to "all or none" offerings. While we have not encountered particular problems with respect to continuous ABS offerings to date (and we believe that ABS offerings are not typically continuous), we believe that our proposal would help ensure that ABS investors receive sufficient information relating to the pool assets, if an issuer registered an ABS offering to be conducted as a continuous offering. We believe that this would close a potential gap in our regulations for ABS offerings.

In an all or none offering, the transaction is only completed if all of the securities are sold. However, in a best-efforts or "mini-max" offering, a variable amount of securities may be sold. In those latter cases, because the size of the offering would be unknown, investors would not have the transaction-specific information and, in particular, would not know the specific assets to be included in the transaction. Thus, Item 1111, either in its existing form or as proposed to be amended, could not be complied with.¹⁶⁷ Under our proposal, the continuous offering must be commenced promptly and must

¹⁶⁷ The staff has advised us that they believe that neither best efforts offerings nor any continuous offerings have been utilized in the past for public offerings of asset-backed securities.

be made on the condition that all of the consideration paid for such security will be promptly refunded to the purchaser unless (A) all of the securities being offered are sold at a specified price within a specified time, and (B) the total amount due to the seller is received by the seller by a specified date.¹⁶⁸

Request for Comment

- Is our proposed amendment to Rule 415 relating to continuous offerings of ABS appropriate?
- Should we restrict the duration of a continuous offering of ABS? If so, how long should the offering be permitted to continue?

5. Mortgage Related Securities

As noted above, mortgage related securities, as that term is defined in Section 3(a)(41) of the Exchange Act, currently are eligible for shelf registration regardless of form eligibility. This was a provision that was added to Rule 415 contemporaneous with the enactment of SMMEA.¹⁶⁹ As a result, an offering of mortgage related securities that does not meet the requirements of Form S-3 can be registered on a delayed basis on Form S-1.¹⁷⁰

We believe that mortgage related securities should meet all the requirements we are proposing for shelf eligibility in order to be eligible for registration on a delayed basis since these securities present the same complexities and concerns as other asset-backed securities. To achieve this goal and to better coordinate shelf registration for all types of asset-backed securities, we are proposing to amend Rule 415 to eliminate the provision for shelf eligibility for mortgage related securities regardless of the form that can be used for registration of the securities.¹⁷¹ Under the proposal, offerings of mortgage related securities will only be eligible for shelf registration on a delayed basis if, like other asset-backed securities, they meet the criteria for eligibility for shelf registration that we are proposing today. Thus, as proposed, delayed shelf offerings of mortgage related securities must be registered on new proposed Form SF-3, and accordingly, must meet

¹⁶⁸ All or none offerings are described in Exchange Act Rule 10b-9 [17 CFR 240.10b-9] in the same manner.

¹⁶⁹ See Section II.A. and fn. 61 above.

¹⁷⁰ See fn. 61 of 2004 ABS Adopting Release.

¹⁷¹ As proposed, Rule 415(a)(1)(vii) would enumerate the provision that permits delayed offerings for all asset-backed securities that are eligible to register on the proposed new Form SF-3. This provision would include offerings of eligible mortgage related securities.

the eligibility requirements of Form SF-3.

Request for Comment

- We request comment on the proposed amendment for mortgage related securities. Should we instead treat mortgage related securities differently from other asset-backed securities by continuing to condition the ability to conduct a delayed offering of mortgage related securities on their credit ratings by an NRSRO?

- We are proposing to require that delayed offerings of mortgage related securities be registered on proposed Form SF-3, the same registration form for delayed offerings of other asset-backed securities. Is there any reason to permit delayed offerings of mortgage related securities on either proposed Form SF-1 or proposed Form SF-3?

C. Exchange Act Rule 15c2-8(b)

Except for securities issued under master trust structures, shelf-eligible ABS issuers generally are not reporting issuers at the time of issuance. Under Exchange Act Rule 15c2-8(b),¹⁷² with respect to an issue of securities where the issuer has not been previously required to file reports pursuant to Sections 13(a) and 15(d) of the Exchange Act, unless the issuer has been exempted from the requirement to file reports thereunder pursuant to Section 12(h) of the Exchange Act, a broker or dealer is required to deliver a copy of the preliminary prospectus to any person who is expected to receive a confirmation of sale at least 48 hours prior to the sending of such confirmation ("48-hour preliminary prospectus delivery requirement"). The rule contains an exception to the 48-hour preliminary prospectus delivery requirement for offerings of asset-backed securities eligible for registration on Form S-3. An exception to the 48-hour preliminary prospectus delivery requirement was first provided in 1995 by staff no-action position.¹⁷³ This staff position was later codified in 2004.¹⁷⁴

In light of recent economic events and to make this rule consistent with our other proposed revisions, we are proposing to eliminate this exception so that a broker or dealer would be

¹⁷² 17 CFR 240.15c2-8(b).

¹⁷³ See fn. 163 of the 2004 ABS Adopting Release and accompanying text (discussing staff no-action letters providing relief to ABS issuers from Rule 15c2-8(b)).

¹⁷⁴ In the 2004 ABS Adopting Release, we noted some concerns that investors did not have sufficient time to consider ABS offering information. However, we determined to codify the staff position in light of other proposals that we were considering at the time that sought to address information disparity in the offering process.

required to deliver a preliminary prospectus at least 48 hours before sending a confirmation of sale for all offerings of asset-backed securities, including those involving master trusts. Because each pool of assets in an ABS offering is unique, we believe that an ABS offering is akin to an initial public offering, and therefore we believe the 48-hour preliminary prospectus delivery requirement in Rule 15c2-8(b) should apply. Even with subsequent offerings of a master trust, the offerings are more similar to an initial public offering given that the mix of assets changes and is different for each offering. Moreover, requiring that a broker or dealer provide an investor with a preliminary prospectus at least 48 hours before sending a confirmation of sale should be feasible and made easier to implement as a result of our proposal that a form of preliminary prospectus be filed with the Commission at least five business days in advance of the first sale in a shelf offering. We, therefore, are proposing to amend Rule 15c2-8(b) by repealing the exception for shelf-eligible asset-backed securities from the 48-hour preliminary prospectus delivery requirement.¹⁷⁵

Under the proposed amendment, a broker or dealer would be required to comply with the 48-hour preliminary prospectus delivery requirement with respect to the sale of securities by each ABS issuer, regardless of whether the issuer has previously been required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act.¹⁷⁶ In addition, the 48-hour preliminary prospectus delivery requirement would also apply to ABS issuers utilizing master trust structures that are exempt from the reporting requirements pursuant to Section 12(h) of the

Exchange Act. In a master trust securitization, assets may be added to the pool in connection with future issuances of the securities backed by the pool.¹⁷⁷ Although ABS issuers utilizing master trust structures may be reporting under the Exchange Act at the time of a “follow-on” or subsequent offering of securities, additional assets are added to the entire pool backing the trust in connection with a subsequent offering of securities. Additional assets are added to the pool also in connection with a subsequent offering by an issuer utilizing a master trust structure that is exempt from reporting under Section 12(h) or the rules thereunder. Requiring a broker-dealer to deliver a preliminary prospectus at least 48 hours before sending a confirmation of sale of ABS involving master trust structures issued by a reporting ABS issuer could afford investors more time to consider information about the assets that is not provided in Exchange Act reports.¹⁷⁸

We are also proposing a correcting amendment to Rule 15c2-8(j). Paragraph (j) states that the terms “preliminary prospectus” and “final prospectus” include terms that are defined in a Rule 434. In 1995, at the same time we adopted Rule 434, we added paragraph (j) to expand the use of the terms “preliminary prospectus” and “final prospectus” to reflect the terminology used in Rule 434.¹⁷⁹ Rule 434, however, was later repealed in 2005.¹⁸⁰ Accordingly, we are proposing to delete paragraph (j), which is no longer applicable.

Request for Comment

- Should we adopt a 48-hour preliminary prospectus delivery requirement for all ABS issuers, as proposed? Should we instead provide a different application of the 48-hour preliminary prospectus delivery requirement for ABS issuers? Should a broker or dealer be required to deliver a preliminary prospectus for an ABS offering at a different time from initial public offerings, such as 48 hours before the first sale in the offering (instead of 48 hours before confirmation)?

¹⁷⁷ The typical master trust securitization is backed by assets arising out of revolving accounts such as credit card receivables or dealer floorplan financings.

¹⁷⁸ We note that many such issuers currently often provide preliminary prospectuses to investors for each offering. Therefore, we do not believe our proposal would be overly burdensome on such issuers.

¹⁷⁹ See Section II.B.4.a of *Prospectus Delivery; Securities Transactions Settlement*, Release No. 33-7168 (May 11, 1995) [60 FR 26604].

¹⁸⁰ Rule 434 was repealed in the Offering Reform Release.

- Does our proposal to require filing of a preliminary prospectus pursuant to proposed Rule 424(h) at least five business days before the first sale in the offering make the proposed changes to Rule 15c2-8(b) unnecessary? Or is delivery of the preliminary prospectus, as contemplated by Rule 15c2-8(b), important? Would the proposed amendment to 15c2-8(b) provide a meaningful change in the information and time that investors are given to consider offering materials?¹⁸¹

- How should the prospectus delivery requirement apply to master trust structures? Is our proposal appropriate with respect to master trusts? Should we instead amend the rule to apply the 48-hour preliminary prospectus delivery requirement to master trusts only if the pool assets have changed by a specified level? If so, what should that level be (e.g., a change in five, ten, or 20% of pool assets, a change in a specified percentage such as five, ten, or 20% of the dollar value of the pool assets as measured by the principal balance, a significant change in the pool assets)? Are there other ways of measuring change in pool assets? Should this be determined by asset class, and if so, which asset classes should be subject to what standards? For example, should a change in pool assets for purposes of Rule 15c2-8 be measured differently for credit card ABS than for dealer floorplan ABS?

- As proposed, there are no specific disclosure requirements applicable to the 48-hour preliminary prospectus. Do we need to specify further how much asset or other information should be contained in the 48-hour preliminary prospectus? Or is that unnecessary in light of proposed Rule 430D and the proposed Rule 424(h) filing requirements?

D. Including Information in the Form of Prospectus in the Registration Statement

1. Presentation of Disclosure in Prospectuses

As currently permitted, asset-backed offerings registered on a shelf basis typically present disclosure through the use of two primary documents: the “base” or “core” prospectus and the

¹⁸¹ The 48-hour preliminary prospectus delivery requirement is triggered by when a broker-dealer sends a confirmation of sale. Under Exchange Act Rule 10b-10 [17 CFR 240.10b-10], the Commission’s confirmation rule, broker-dealers must send confirmations to their customers at or before completion of a securities transaction. Given the industry practice of a lengthy time to complete an ABS transaction, a customer may not receive a preliminary prospectus until well after he or she has made an investment decision. See also Exchange Act Rule 15c1-1 [17 CFR 240.15c1-1] (defining “completion of the transaction”).

¹⁷⁵ Because of the other changes we are proposing, we are also proposing to repeal Rule 190(b)(7). Rule 190(b)(7) provides that if securities in the underlying asset pool of asset-backed securities are being registered, and the offering of the asset-backed securities and the underlying securities is not made on a firm commitment basis, the issuing entity must distribute a preliminary prospectus for both the underlying securities and the expected amount of the issuer’s securities that is to be included in the asset pool to any person who is expected to receive a confirmation of sale of the asset-backed securities at least 48 hours prior to sending such confirmation. Rule 190(b)(7) effectively overrules the exclusion in Rule 15c2-8 for ABS issuers from the 48-hour preliminary prospectus delivery requirement for particular types of ABS offerings. Because we are proposing to repeal the Rule 15c2-8 exclusion for ABS issuers, and because our proposed disclosure requirements regarding the underlying securities for resecuritizations would require significantly more information than what is required in Rule 190(b)(7) to be provided in the preliminary prospectus, we are proposing to delete Rule 190(b)(7).

¹⁷⁶ See definition of issuer in relation to asset-backed securities in Exchange Act Rule 3b-19.

prospectus supplement.¹⁸² The base prospectus filed prior to effectiveness of the registration statement outlines the parameters of the various types of ABS offerings that may be conducted in the future, including asset types that may be securitized, the types of security structures that may be used and possible credit enhancements or other forms of support. The registration statement at the time of effectiveness also contains one or more forms of prospectus supplement, which outline the format of transaction-specific information that will be disclosed at the time of each takedown.¹⁸³ At the time of a takedown, a final prospectus supplement is used which describes the specific terms of the securities being offered.¹⁸⁴ The base prospectus and the final prospectus supplement together form the final prospectus which is filed with the Commission pursuant to Securities Act Rule 424(b).¹⁸⁵

This practice has also been utilized by non-ABS issuers. However, for typical corporate issuers, their base prospectus is substantially shorter than in an ABS offering as the bulk of the information is incorporated by reference into the prospectus from the issuer's Exchange Act reports.

In the 2004 ABS Adopting Release, we explained that when presenting disclosure in base prospectuses and prospectus supplements, the base prospectus must describe the types of offerings contemplated by the registration statement.¹⁸⁶ We also noted that a takedown off of a shelf that involves assets, structural features, credit enhancement or other features that were not described as contemplated in the base prospectus will usually require either a new registration statement (*e.g.*, to include additional

assets) or a post-effective amendment (*e.g.*, to include new structural features or credit enhancement) rather than simply describing them in the final prospectus filed with the Commission pursuant to Securities Act Rule 424. However, we admonished registrants to exercise discretion and describe only those material asset types and features reasonably contemplated to be included in an actual takedown in order to make the information easily accessible to investors.¹⁸⁷

Today, we also remind issuers of the importance of providing disclosure in compliance with our plain English rules. Under Securities Act Rule 421,¹⁸⁸ information in a prospectus must be presented in a clear, concise and understandable manner. The note to Rule 421(b) states that issuers should avoid copying complex information directly from legal documents without any clear and concise explanation of the provisions. The rule also cautions against using boilerplate disclosure and repeating disclosure in different sections of the document because it increases the size of the document and it does not enhance the quality of information.¹⁸⁹

Notwithstanding the discussion in the 2004 ABS Adopting Release and the provisions of Rule 421, we are concerned that the base and supplement format has resulted in unwieldy documents with excessive and inapplicable disclosure that is not useful to investors. Many ABS prospectuses in this format often include boilerplate disclosure and complex information that appears to be imported directly from forms of transaction agreements. Some issuers file a base prospectus that contemplates multiple asset types, security structures and possible types of enhancement and support that are never actually utilized in a takedown. Moreover, the length of a disclosure document for an ABS offering, as a result of the base and prospectus supplement format, is often overwhelming and is burdensome for investors to navigate.

Another problem that has arisen under current practices is that in some instances, issuers have filed with the Commission at the time of takedown only the prospectus supplement and not the base prospectus that was included in the registration statement. Since the base and the prospectus supplement

together form the final prospectus, when an ABS issuer excludes the base prospectus from the EDGAR filing at the time of takedown, an investor needs to locate the base prospectus filed with the initial effective registration statement on Form S-3 on EDGAR. Given that a shelf registration statement is available for three years,¹⁹⁰ it can be unclear what information from the base prospectus is applicable to the current offering or is superseded by the supplement.

The current format has the unintended effect of encouraging a drafting approach that builds in the largest possible flexibility for as many differing transactions as possible, although with the negative effect that an investor bears the burden of determining which disclosures are relevant to a particular transaction. The current rule benefits issuers but may not be as useful for investors, when the registration statement is primarily for the benefit of investors. We believe we should facilitate investor understanding and access to prospectuses for ABS and eliminate unnecessary disclosures given to investors. Investors must be able to readily access and understand the information for a specific offering. Consequently, we are proposing to eliminate the practice of providing a base prospectus and a prospectus supplement for ABS issuers. To accomplish this, we are proposing to add a provision in new Rule 430D and an instruction to proposed Form SF-3 that would require ABS issuers to file a form of prospectus at the time of effectiveness of the proposed Form SF-3 and to file a single prospectus for each takedown, which would require that all of the information required by Regulation AB be included in the prospectus.¹⁹¹ We believe our proposal will help issuers comply with our plain English requirements, help reduce the size of the offering documents, and eliminate the need to review inapplicable disclosure.

Other than the proposed limitation of one depositor and asset class per registration statement discussed below,

¹⁸² The Form S-3 requirements adopted in 2004 incorporated the existing practice of using a base and supplement format. In Section III.A.3.b. of the 2004 ABS Adopting Release, we noted that we did not intend to change existing practices of asset-backed issuers.

¹⁸³ Rule 430B describes the type of information that primary shelf eligible issuers and automatic shelf issuers may omit from a base prospectus in a Rule 415 offering and include instead in a prospectus supplement. Exchange Act report incorporated by reference, or a post-effective amendment. Under Rule 430B a base prospectus in a shelf registration statement must comply with the applicable form requirements, but can omit information that is unknown or not reasonably available to the registrant pursuant to Rule 409. See Section V.B.1.b.i.(A) of the Offering Reform Release.

¹⁸⁴ We note that currently stand alone trust issuers do not usually provide preliminary prospectuses to investors.

¹⁸⁵ See Section III.A.3.b of the 2004 ABS Adopting Release and Section V.B.1.b.i.(A) of the Offering Reform Release.

¹⁸⁶ See Securities Act Rule 409 [17 CFR 230.409] and Section III.A.3.b. of the 2004 ABS Adopting Release.

¹⁸⁷ See Section III.A.3.b of the 2004 ABS Adopting Release.

¹⁸⁸ 17 CFR 230.421. See also *A Plain English Handbook: How to Create Clear SEC Disclosure Documents*, available at <http://www.sec.gov/pdf/handbook.pdf>.

¹⁸⁹ See 17 CFR 230.421(b).

¹⁹⁰ See Securities Act Rule 415(a)(5).

¹⁹¹ Disclosure may still be incorporated by reference as allowed by proposed Rule 430D and the applicable Form requirements. Proposed Rule 430D(c) would provide that information omitted from a form of prospectus that is part of an effective registration statement in reliance on Rule 430D(a) that is subsequently included in the prospectus that is part of a registration statement must contain all of the information that is required to be included in the prospectus pursuant to the requirements of the registration statement with respect to the offering. Under this proposed requirement, an ABS issuer would not be permitted to include information on the offering in a prospectus base and supplement format. We discuss this proposal in more depth in Section II.B.1.b.

we believe requiring only one form of prospectus with the registration statement would not limit the flexibility of the issuer to vary its structural features from takedown to takedown. As is the case today, assets, structuring and other features may be presented in brackets in the form of prospectus filed with the registration statement. Under the proposal, issuers could include the same bracketed information in the form of prospectus filed with the registration statement. At the time of the offering, only the disclosure applicable to the transaction at hand would be included in the prospectus provided to investors and filed with the Commission.

Currently, some sponsors create a separate depositor for each of its various loan programs, and each depositor files its own shelf registration statement. Other issuers have included multiple depositors,¹⁹² multiple base prospectuses and multiple prospectus supplements all in one registration statement.¹⁹³ Under our proposal, each depositor would be required to file a separate registration statement for each form of prospectus. Each registration statement would cover offerings by one depositor securitizing only one asset class.¹⁹⁴ Although this would change current practice for asset-backed issuers, we believe such a change would make disclosure for investors much more accessible and useful.

Request for Comment

- Is the proposed change to presentation of disclosure in the prospectus appropriate? Would investors benefit from the proposed

¹⁹² With respect to registration statements with multiple depositors, each depositor is an issuer of each takedown of securities off of a shelf. See Securities Act Rule 191 [17 CFR 230.191].

¹⁹³ Also, the current instructions to Form S-3 state that a registration statement may not merely identify several alternative types of assets that may be securitized. Under current requirements, a separate base prospectus and form of prospectus supplement must be presented for each asset class that may be securitized in a discrete pool in a takedown under that registration statement. See General Instruction V.A.2 of Form S-3 and Section III.A.3.b. of the 2004 ABS Adopting Release.

¹⁹⁴ For instance, resecuritization transactions of mortgage-backed securities would be considered a separate asset class from mortgage-backed securities and, thus, require a separate registration statement, even if the depositor would be the same. As we currently require for offerings registered on Form S-3, a separate registration statement would be required for takedowns involving pools of foreign assets where the assets originate in separate countries or the property securing the pool assets is located in separate countries. In cases where an underlying security such as a special unit of beneficial interest (SUBI) or collateral certificate is also registered, the depositor of the underlying SUBI or collateral certificate would also be included in the same registration statement. Collateral certificates and SUBIs are discussed further in Section VII.A. below.

change? Would it be unduly burdensome for issuers to prepare the disclosure in a single document? If so, how can we better mandate clear and concise documents so that investors are able and encouraged to analyze the investment?

- Is our proposal to require a depositor to file a separate registration statement for each form of prospectus appropriate?
- Are there any particular asset classes that should retain the base and form of prospectus supplement format? If so, why?

- Should issuers be able to file more than one form of prospectus with a registration statement? If so, why? If issuers were permitted to do so, what other steps could be taken to help market participants understand the transaction?

- Are there other changes we should make to the format and form of the prospectus to assist investors in analyzing the potential investment?

2. Adding New Structural Features or Credit Enhancements

We are also proposing to restrict the ability of ABS issuers to file a prospectus under Rule 424(b) for the purpose of adding certain types of information to the form of prospectus. Under the existing Rule 430B, ABS issuers and other issuers are permitted to provide the information omitted from the prospectus that is part of a registration statement at the time of the offering as a prospectus supplement, a post-effective amendment, or where permitted as described below, through its Exchange Act filings that are incorporated by reference into the registration statement and prospectus that is part of the registration statement and identified in a prospectus supplement.¹⁹⁵ In the 2004 ABS Adopting Release, we stated our longstanding position that the type or category of asset to be securitized must be fully described in the registration statement at the time of effectiveness.¹⁹⁶ We further explained the structural features contemplated also should be disclosed, as well as identification of the types or categories of securities that may be offered, such as interest-weighted or principal-weighted classes (including IO or PO securities), planned amortization or companion classes or residual or subordinated interests.¹⁹⁷ We stated that a takedown off of a shelf

¹⁹⁵ See Securities Act Rule 430B(d) and Offering Reform Release Section V.B.1.b.i.(B).

¹⁹⁶ See Section III.A.3.b. of the 2004 ABS Adopting Release.

¹⁹⁷ See *id.*

that involves assets, structural features, credit enhancements or other features that were not described as contemplated in the base prospectus will usually require either a new registration statement (*e.g.*, to include additional assets) or a post-effective amendment (*e.g.*, to include new structural features or credit enhancement) rather than simply describing them in the final prospectus filed with the Commission pursuant to Securities Act Rule 424.¹⁹⁸ Although, with Offering Reform, we adopted Rule 430B,¹⁹⁹ which provides all issuers on Form S-3 with the alternative to include information previously omitted in a prospectus filed pursuant to 424(b) or by incorporating periodic and current Exchange Act reports and the staff has continued to apply our position articulated in the 2004 ABS Adopting Release. We confirm that position by proposing to codify our statement regarding when a post-effective amendment would be required in Rule 430D.²⁰⁰

We are proposing to require that when the issuer desires to add information that relates to new structural features or credit enhancement, the issuer must file that information by post-effective amendment. As a result of this proposal, the staff would have the opportunity to review new structural features or credit enhancements that would be contemplated for future offerings. With respect to new assets, we believe that if the issuer intends to offer securities that are backed by assets that are not contemplated in the form of prospectus that is filed as part of the registration statement, a new registration statement should be filed.²⁰¹

Request for Comment

- Is our proposal to require issuers to file a post-effective amendment to reflect new structural features or credit enhancements and provide a related undertaking appropriate?

E. Pay-as-You-Go Registration Fees

In 2005, we first adopted pay-as-you-go rules²⁰² to allow well-known seasoned issuers using automatic shelf registration statements to pay filing fees at the time of a securities offering.²⁰³ To

¹⁹⁸ See *id.*

¹⁹⁹ See Securities Act Rule 430B(d) and Section V.B.1.b.i.(B) of the Offering Reform Release.

²⁰⁰ See proposed Securities Act Rule 430D(d)(2).

²⁰¹ If the asset pool includes securities, registration would be required under Securities Act Rule 190.

²⁰² See Securities Act Rules 456(b) [17 CFR 230.456(b)] and 457(r) [17 CFR 230.457(r)].

²⁰³ See Section V.B.2.b.(D) of the Offering Reform Release. Under the current pay-as-you-go procedure for WKSIs, an issuer can pay any filing fee, in whole

alleviate some of the burden of managing multiple registration statements among ABS issuers, we are proposing to allow, but not require, asset-backed issuers eligible to use Form SF-3 to pay filing fees as securities are offered off of a shelf registration statement. If this approach, commonly known as “pay-as-you-go,” is adopted for ABS issuers, no filing fees would need to be paid at the time of filing a registration statement on Form SF-3. A dollar amount or a specific number of securities would not be required to be included in the calculation of the registration fee table in the registration statement, unless a fee based on an amount of securities is paid at the time of filing.²⁰⁴ However, under our proposal the fee table on the cover of the registration statement must list the securities or class of securities registered and must indicate if the filing fee will be paid on a pay-as-you-go basis.²⁰⁵

Under our proposal, the triggering event for a fee payment would be the filing of a preliminary prospectus under proposed Rule 424(h).²⁰⁶ At the time of filing a Rule 424(h) prospectus,²⁰⁷ the

or in part, in advance of takedown or at the time of takedown providing flexibility in the timing of the fee payment. Issuers using pay-as-you-go can still deposit monies in an account for payment of filing fees when due. The fee rules applicable to the use of such account, also referred to as the “lockbox account,” apply. The amount of the fee is calculated based on the fee schedule in effect when the money is withdrawn from the lockbox account. This flexibility had been provided so issuers may determine the fee payment approach most appropriate for them. See fn. 529 of the Offering Reform Release.

²⁰⁴ See proposed Securities Act Rule 457(s).

²⁰⁵ In the case of ABS, the fee table on the registration statement would typically list the offering of certificates and notes as separate classes of securities. Each class (or tranche) of those certificates and notes offered would not need to be separately listed on the fee table. However, if the ABS is a resale, where registration of the underlying securities would be required under Rule 190 and the underlying security was not listed on the fee table of the Form SF-3 registration statement, the offering would require a new registration statement. Likewise, if a servicer or trustee invests cash collections in other instruments which may be securities under the Securities Act, such as guarantees or debt instruments of an affiliate, under Rule 190 those underlying securities would also need to be registered concurrently with the asset-backed offering. If those underlying securities were not listed on the fee table of the registration statement, a new registration statement would be required.

²⁰⁶ See proposed Securities Act Rule 456(c). Unlike the pay-as-you-go rules for WKSIs, we do not believe that a cure period is necessary for ABS issuers because we are proposing to require ABS issuers to pay the required fee at the time the preliminary prospectus is filed under Rule 424(h). The timing of the fee payment for ABS would not give rise to the same effective date and registration concerns that arise with WKSIs. Section V.B.2.b.(D) of the Offering Reform Release.

²⁰⁷ If an issuer is filing a Rule 424(h) filing solely in order to update the fee table and pay additional

asset-backed issuer would include a calculation of registration fee table on the cover page of the prospectus and would be required to pay the appropriate fee calculated in accordance with Securities Act Rule 457.²⁰⁸

Request for Comment

- Is our proposal for a pay-as-you go fee alternative for ABS issuers appropriate? Should ABS issuers be able to register offerings of an unspecified amount of securities on Form SF-3?

- Would this help with the management of multiple shelves for asset-backed issuers? Are there other steps we could take to help sponsors and depositors manage shelves for ABS?

- Should we revise Rule 457(p), as proposed, to clarify that if an ABS offering is not completed after the fee is paid, the fee could be applied to future registration statements by the same depositor or affiliates of the depositor across asset classes?

F. Signature Pages

We also are proposing to revise the signature pages for registration statements of asset-backed issuers. Securities Act Section 6²⁰⁹ requires that the registration statement be signed by the issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions. In 2004, we clarified that the depositor is the issuer for purposes of ABS.²¹⁰ We codified in the general instructions to Forms S-1 and S-3 that the registration statement must be signed by the depositor, the depositor's

fees, the 424(h) filing would not trigger a new five business day waiting period.

²⁰⁸ The amount of the filing fee is calculated based on the fee schedule in effect at the time of payment (upon filing in advance, or at the time of an offering) in accordance with the provisions of Rule 457. Thus the fee amount may be different depending on the time of payment. Also, as provided in Rule 457(p), if all or a portion of the securities offered under a registration statement remain unsold after the offering's completion or termination, or withdrawal of the registration statement, the aggregate total dollar amount of the filing fee associated with those unsold securities may be offset against the total filing fee due for a subsequent registration statement. Currently, if an ABS offering is not completed after the fee is paid, the fee could be applied to future registration statements by the same depositor or affiliates of the depositor.

²⁰⁹ 15 U.S.C. 77f(a).

²¹⁰ Securities Act Rule 191 and Exchange Act Rule 3b-19 state that the depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the “issuer” for purposes of the asset-backed securities of that issuing entity. These rules also provide that the person acting in the capacity as such depositor is a different “issuer” from that same person acting as a depositor for another issuing entity or for purposes of that person's own securities.

principal executive officer or officers, principal financial officer and controller or principal accounting officer, and by at least a majority of the depositor's board of directors or persons performing similar functions.²¹¹

Asset-backed issuers are not required to file financial statements of the issuer under our rules or pursuant to their governing documents, and these issuers do not employ a principal accounting officer or controller. Thus, because such signatures appear to serve no purpose, we are proposing to exempt asset-backed issuers from the requirement that the depositor's principal accounting officer or controller sign the registration statement.

The Form 10-K report for ABS issuers must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor, or on behalf of the issuing entity by the senior officer in charge of the servicing. In addition, the certifications for ABS issuers that are required under Section 302 of the Sarbanes-Oxley Act²¹² must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor if the depositor is signing the Form 10-K report, or on behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer if the servicer is signing the Form 10-K report. We are now proposing to require that the senior officer in charge of securitization of the depositor sign the registration statement (either on Form SF-1 or Form SF-3) for ABS issuers. We believe that requiring such individual to sign the registration statement is more meaningful in the context of ABS offerings because it is more consistent with our other signature requirements for ABS issuers.

Request for Comment

- Is our proposed amendment to the registration statement signature requirements appropriate? Is there any reason we should not exempt, as we are proposing to do, ABS issuers from the requirement that the depositor's principal accounting officer or comptroller sign the registration statement?

- Is our proposal to require the senior officer in charge of securitization of the depositor to sign the registration statement for ABS issuers appropriate?

III. Disclosure Requirements

In addition to reformatting how prospectuses are presented in ABS

²¹¹ See General Instruction VI.C of Form S-1 and General Instruction V.B. of Form S-3.

²¹² 15 U.S.C. 7241.

offerings, we are proposing several changes to the disclosure requirements in Regulation AB for asset-backed securities. Three of our proposals involve significant changes from our current requirements. First, subject to certain exceptions, we are proposing to require asset-level information regarding each asset in the pool backing the securities. Second, we are proposing that issuers of ABS backed by credit card pools provide standardized grouped account data regarding the underlying asset pool. Third, we are proposing to require that most issuers provide the flow of funds, or waterfall, in a waterfall computer program. In addition, we are proposing changes that refine other disclosure requirements, including those relating to pool-level disclosure, the prospectus summary, transaction parties, and static pool information.

A. Pool Assets

We are proposing to increase the required disclosure regarding the assets underlying the ABS. We are proposing that in most ABS offerings asset-level data be required in the prospectus at the time of offering and in Exchange Act reports. For credit card ABS issuers, we are proposing that issuers provide grouped account data. In order to facilitate investors' use of asset data files, we are proposing that the data be filed on EDGAR in Extensible Mark-Up Language (XML). We also are proposing revisions to our pool-level disclosure requirements designed to enhance the information available to analyze the pool.

While Regulation AB does not restrict the type or quality of assets that may be included in the asset pool, our rules under the Securities Act are designed to assure that a prospectus contains disclosure regarding the assets that facilitates informed investment decisions.²¹³ We believe access to robust information concerning the pool assets is important to investors' ability to make informed investment decisions about asset-backed securities.²¹⁴ We also believe disclosure about the pool should be as multi-faceted as necessary to provide a full picture of the composition and characteristics of the pool assets. In addition, it is critical that the pool asset information be presented

²¹³ Item 1111 of Regulation AB contains our disclosure requirements regarding the pool assets. Item 1111 requires disclosure of the material aspects of the composition of the asset pool, sources of pool cash flow, changes to the asset pool, and rights and claims regarding the pool assets. See Section III.B.5. of the 2004 ABS Adopting Release.

²¹⁴ See also Section III.B.5 of the 2004 ABS Adopting Release.

in a comprehensible and clear fashion.²¹⁵

1. Asset-Level Information in Prospectus

To augment our current principles-based pool-level disclosure requirements, we are proposing a new requirement to disclose asset-level information. Investors, market participants, policy makers and others have increasingly noted that asset-level information is essential to evaluating an asset-backed security.²¹⁶ Some have said that there is a need and investor appetite for increased asset-level disclosures.²¹⁷ We have heard that understanding a borrower's ability to repay may be more important than the features of the underlying loan, or even the collateral, on an asset-level basis.²¹⁸ Others have stated that having access only to pool data (and not asset-level data) has made it difficult to discern whether the riskiest loans were to the most creditworthy borrowers or to the least creditworthy borrowers in the asset pool.²¹⁹

The public availability of asset-level information has been limited. In the past, some transaction agreements for securitizations required issuers to provide investors with asset-level information, or information on each asset in the pool backing the securities.²²⁰ Such loan schedules provided to an investor are sometimes filed as part of the pooling and servicing agreement or as a free writing prospectus. We believe that all investors and market participants should have access to the information necessary to

²¹⁵ See *id.*

²¹⁶ See, e.g., "Restoring Confidence in the Securitization Markets," *Global Joint Initiative Report*, Dec. 3, 2008, at 11.

²¹⁷ See Committee on Capital Markets Regulation Financial Crisis Report, at 147 (noting that a survey of data fields provided to investors did not include 21 data fields considered essential by all investors surveyed). See also Joshua Rosner, *Securitization: Taming the Wild West*, Roosevelt Institute Project on Global Finance, *Make Markets Be Markets* (Mar. 2010) at 75 (noting investors need for timely loan-level performance data in order to accurately price securities).

²¹⁸ See Committee on Capital Markets Regulation Financial Crisis Report, at 151 (recommending that standard, granular, loan-level data be provided sufficient to allow investors to complete their own credit analysis). See also Rosner, at 77 (noting that the lack of clear definitions interferes with investors' ability to compare performance of various deals, issuers, and underlying collateral).

²¹⁹ Testimony of Patricia A. McCoy, Hearing on "Securitization of Assets: Problems and Solutions" before the U.S. Senate Banking Housing and Urban Affairs Subcommittee on Securities, Insurance and Investment, Oct. 7, 2009.

²²⁰ This usually includes information such as the principal balance at the time of origination, the date of origination, the original interest rate, the type of loan (e.g., fixed, ARM, hybrid), the borrower's debt to income ratio, the documentation level for origination of the loan, and the loan-to-value ratio.

assess the credit quality of the assets underlying a securitization transaction at inception and over the life of the transaction.²²¹

For most investors, the usefulness of asset-level data is generally limited unless the individual data points are standardized. Standardizing the information facilitates the ability to compare and analyze the underlying asset-level data of a particular asset pool as well as compare them with other pools.²²² Standardized and easily accessible data points also may facilitate stronger independent evaluations of ABS by market participants.

Prior to today, the Commission had not proposed to require asset-level data or proposed standards for such information. We are aware that some standards have already been developed for registered and unregistered offerings of commercial mortgage-backed securities and residential mortgage-backed securities.²²³ The CRE Finance Council (formerly Commercial Mortgage Securities Association)'s²²⁴ Investor Reporting Package includes data fields on loan, property and bond-level information for commercial mortgage-backed securities at issuance and while the securities are outstanding.²²⁵ The American Securitization Forum (ASF)²²⁶ recently published disclosure

²²¹ Others have noted the importance of loan-level data to investors. See U.S. Department of Treasury, *A New Foundation: Rebuilding Financial Supervision and Regulation*, June 17, 2009; (noting in particular, that issuers of ABS should be required to disclose loan-level data); Federal Deposit Insurance Corporation, *Supervisory Insights: Enhancing Transparency in the Structured Finance Market*, available at http://www.fdic.gov/regulations/examinations/supervisory/insights/sisum08/article01_transparency.html (stating that a lack of complete and public dissemination of a securitization's loan-level data reduces transparency and hampers the investor's ability to fully assess risk and assign value).

²²² See Statement of Former Federal Reserve Governor Randall S. Kroszner at the Federal Reserve System Conference on Housing and Mortgage Markets, Washington, DC, Dec. 4, 2008 (stating that a necessary condition for the potential of private-label MBS to be realized going forward is for comprehensive and standardized loan-level data covering the entire pool of loans backing MBS be made available and easily accessible so that the underlying credit quality can be rigorously analyzed by market participants).

²²³ The collection of standardized disclosure given to investors is generally called a reporting package.

²²⁴ The CRE Finance Council (formerly Commercial Mortgage Securities Association) is a trade organization for the commercial real estate finance industry.

²²⁵ Materials related to the CRE Finance Council Investor Reporting Package are available at: <http://www.crefc.org/>.

²²⁶ ASF is a securitization industry group that represents issuers, investors, financial intermediaries, rating agencies, legal and accounting firms, trustees, servicers, guarantors, and other market participants.

and reporting packages for residential mortgage-backed securities that included standardized definitions for loan or asset-level information.²²⁷ The package is part of the group's Project on Residential Securitization Transparency and Reporting ("Project RESTART"). The ASF has proposed implementation dates involving new issuance loans under the Disclosure Package of February 1, 2010.²²⁸ Other organizations, such as Mortgage Electronic Registration Systems, Inc. (MERS),²²⁹ have developed reporting packages to capture and report data at different times during the life of the underlying residential or commercial loan. Sellers of mortgage loans to Fannie Mae and Freddie Mac²³⁰ are required to deliver loan-level data in a standardized electronic form.²³¹ Other federal agencies, such as the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS) also collect certain loan-level data on mortgages. The OCC and the OTS gather mortgage performance data from national banks and thrifts.²³² We are unaware of any publicly available data standards for other asset classes and currently there is no mandatory

²²⁷ See American Securitization Forum RMBS Disclosure and Reporting Package Final Release (July 15, 2009), available at <http://www.americansecuritization.com/>.

²²⁸ Implementation dates for ongoing monthly reporting under the Reporting Package are set for August 1, 2010 on a trial basis and November 1, 2010 on a permanent basis.

²²⁹ MERS is affiliated with the Mortgage Industry Standards Maintenance Organization (MISMO), a not-for profit subsidiary of the Mortgage Bankers Association.

²³⁰ Fannie Mae and Freddie Mac are government sponsored enterprises (GSE's) that purchase mortgage loans and issue or guarantee mortgage-backed securities (MBS). MBS issued or guaranteed by these GSEs have been and continue to be exempt from registration under the Securities Act and reporting under the Securities Exchange Act. As a result, only non-GSE ABS, or so called "private label" ABS, will be required to comply with the new rules. For more information regarding the GSEs, see Task Force on Mortgage-Backed Securities Disclosure, "Staff Report: Enhancing Disclosure in the Mortgage-Backed Securities Markets" (Jan. 2003) available on our Web site at <http://www.sec.gov/news/studies/mortgagebacked.htm>.

²³¹ See Fannie Mae Loan Delivery Data requirements at <https://www.efanniemae.com/sf/refmaterials/prodmortcodes/index.jsp>. See also Freddie Mac Product Delivery requirements at <http://www.freddiemac.com/singlefamily/sell/delivery/>.

²³² The results are collected and published in a quarterly Mortgage Metrics Report. The reports are available at http://www.occ.gov/mortgage_report/MortgageMetrics.htm or at <http://www.ots.treas.gov/?p=Mortgage%20Metrics%20Report>. See Joint Press Release of the Office of the Comptroller of the Currency and the Office of Thrift Supervision, "OCC and OTS Expand Data Collection on Mortgage Performance," February 13, 2009, available at <http://www.occ.treas.gov/ftp/release/2009-9.htm> (attaching Web site link to the data dictionary).

requirement that issuers follow any of these standards for reporting to investors in asset-backed securities.

Because we believe that issuers should provide transparent and comparable data, we are proposing to require asset-level information in a standardized format to be included in the prospectus and periodic reports and filed on EDGAR. Our proposal specifies and defines each item that must be disclosed for each asset in the pool. In our discussion below, we refer to each individual item requirement as an asset-level data point. Some of the asset-level data points that we are proposing are indicator fields. Indicator fields will require an answer of "yes" or "no," and are designed to facilitate investor review of the data.²³³ We are also proposing an instruction to Schedule L that will contain definitions for some of the terms that we use throughout the schedule. Because we believe that asset-level data should be provided to investors and all market participants in a form that facilitates data analysis, we are also proposing to require that asset-level data be filed on EDGAR in XML format. These proposals would be in addition to the disclosure currently required about the composition and characteristics of the pool of assets taken as a whole. We believe the pool-level disclosure currently required by Regulation AB is still important to investment decisions and can facilitate an investor's understanding of the overall investment opportunity.

Request for Comment

- Is our proposal to require asset-level disclosure with data points identified in our rules appropriate?
- Is a different approach to asset-level disclosure preferable, such as requiring it generally, but relying on industry to set standards or requirements? If so, how would data be disclosed for all the asset classes for which no industry standard exists or for which multiple standards may exist? To the extent multiple standards exist, how would investors be able to compare pools? Please be detailed in your response.
- We note that there are several different standards under which asset-level data is already required. Would our requirements impose undue burdens on ABS issuers?
- Should we instead amend our current requirements regarding pool-

²³³ For example, we are proposing an asset-level data point to disclose whether the asset has been modified. The response would be either yes or no. If the answer is no, a preparer or user of the data would then know that asset-level data points related to modifications would not be applicable to that particular asset.

level disclosure by requiring issuers to present certain pool-level tables in a standardized manner? For instance, should we specify how statistical data should be presented by defining the groups or incremental ranges that must be presented? What would those appropriate groups or incremental ranges be for an individual table? For instance, what would be the appropriate range for obligor income and why? Please be specific in your response.

- Are the definitions of terms in the proposed instruction to Schedule L appropriate? Are there any other terms that should be included in the instruction?

(a) When Asset-Level Data Would Be Required in the Prospectus

Today we are proposing new Item 1111(h) and Schedule L of Regulation AB which enumerate all of the data points that must be provided for each asset in the asset pool at the time of the offering. Schedule L data would be an integral part of the prospectus, and in order to facilitate investor analysis prior to the time of sale, we are proposing to require issuers to provide Schedule L data as of a recent practicable date that we define as the "measurement date" at the time of a Rule 424(h) prospectus. So that investors receive a data file with final pool information at the time of the offering, we also are proposing that an updated Schedule L, as of the cut-off date for the securitization, be provided with the final prospectus under Rule 424(b).²³⁴ Likewise, if issuers are required to report changes to the pool under Item 6.05 of Form 8-K, updated Schedule L data would be required.²³⁵ As we discuss in Section III.A.3, we are proposing a new Item 6.06 to Form 8-K for issuers to file the XML data file.

Request for Comment

- Is the proposed requirement to provide Schedule L data with the proposed Rule 424(h) prospectus, the final prospectus under 424(b) and for changes under Item 6.05 of Form 8-K appropriate? Should Schedule L data be required at any other time? If so, please tell us when and why.
- Are the proposed measurement dates appropriate? Are there any data fields that would be inappropriate or too

²³⁴ The cut-off date would be the date specified in the instruments governing the transaction (i.e., the date on and after which collections on the pool assets accrue for the benefit of the asset-backed security holders).

²³⁵ If a new asset is added to the pool during the reporting period, an issuer would be required to provide the asset-level information for each additional asset as required by our proposed revisions to Item 1111 and Item 6.05 on Form 8-K.

burdensome to supply as of two different measurement dates (i.e., the measurement date and the cut-off date)? If so, please specify the data field and provide a detailed explanation.

- Should we provide further guidance about what would be a recent practicable date for purposes of determining the measurement date?

(b) Proposed Disclosure Requirements and Exemptions

We are proposing that issuers of ABS of most asset classes must provide the standardized data points enumerated in Schedule L. The proposed standardized data points would serve to indicate the payment stream related to a particular asset, such as the terms, expected payment amounts, indices and whether and how payment terms change over time. Such data points would be important in order to analyze the future payments on the asset-backed securities. To perform better prepayment analysis or credit analysis, we are proposing data points that indicate the quality of the obligor or the asset origination process. For instance, in the case of residential mortgages, data points we are proposing to require, among others, are credit score of the obligors, employment status, income, and how that information was verified. To perform analysis of the collateral related to the asset in the pool, we are proposing data points related to each property. For instance, in the case of loans or leases secured by automobiles, issuers would need to provide data points related to the type and model of car and the value of the car.

Except with respect to certain asset classes (as described below), we are proposing that every issuer must provide the data points listed under Item 1. General described below. We are proposing to subdivide Schedule L based on the asset class. We believe the general data points are consistent with the principles-based definition of an asset-backed security and apply to almost every asset class underlying a transaction that has been registered in the past, and should also apply to any new asset classes that may be included in a registered offering in the future. We also propose asset class specific data point requirements for eleven specific asset classes: Residential mortgages, commercial mortgages, auto loans, auto leases, equipment loans, equipment leases, student loans, floorplan financings, corporate debt and securitizations. We are proposing item requirements for these asset classes because, based on our experience with registered offerings for these types of asset classes, we believe these data

points are among those that represent the more useful information for investors.

(i) Proposed Coded Responses

Consistent with our efforts to standardize asset-level disclosure, we are proposing that issuers provide responses to the asset-level disclosure requirements as a date, a number, text or a coded response. The required coded responses will be contained in the EDGAR Technical Specifications. Attached at the end of this release we provide an appendix which contains a table for the proposed general item requirements as well as asset class specific item requirements. Each table lists the proposed item number, the title of the proposed data field, the proposed definition, the proposed response type and codes, if applicable, and proposed category of information. The proposed category of information designates the type of information we are proposing so that users will know when the data point is applicable.

We are sensitive to the possibility that certain asset-level disclosure may raise concerns about the personal privacy of the underlying obligors. In particular, we are aware that data points requiring disclosure about the geographic location of the obligor or the collateralized property, credit scores, income and debt may raise privacy concerns. As we stated in the 2004 ABS Adopting Release, issuers and underwriters should be mindful of any privacy, consumer protection or other regulatory requirements when providing loan-level information, especially given that in most cases, the information would be publicly filed on EDGAR.²³⁶ However, as we noted above, information about credit scores, employment status and income would permit investors to perform better credit analysis of the underlying assets. In light of privacy concerns, instead of requiring issuers to disclose a specific location, credit score, or exact income and debt amounts, we are proposing ranges, or categories of coded responses.

For instance, to designate geographic location of an obligor who is a person, instead of requiring, city, state or zip code of the property, we are proposing that issuers provide the broader geographic delineations of Metropolitan or Micropolitan Statistical Areas.²³⁷ Metropolitan and Micropolitan Statistical Areas are geographic areas,

²³⁶ See Section III.C.1.c. of the 2004 ABS Adopting Release.

²³⁷ Current lists and definitions of Metropolitan and Micropolitan Statistical Areas are available at <http://www.census.gov/population/www/metroareas/metrodef.html>.

designated by a five-digit number, defined by the U.S. Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics.²³⁸ A Metropolitan Statistical Area may also contain a subdivision, called a Metropolitan Division.²³⁹ As an example, if the underlying property that serves as collateral to a mortgage is located in Alexandria, Virginia, the issuer would need to designate the geographic location as 47894—Washington-Arlington-Alexandria, DC-VA-MD-WV, the appropriate Metropolitan Division.

For asset-level disclosure data points that require disclosure of obligor credit scores, we are proposing coded responses that represent ranges of credit scores. The ranges are based on the ranges that some issuers already provide in pool-level disclosure. For monthly income and debt ranges, we developed the ranges based on a review of statistical reporting by other governmental agencies.

We also realize that a situation may arise where an appropriate code for disclosure may not be currently available in the technical specifications. To accommodate those situations, our proposals provide a coded response for “not applicable,” “unknown” or “other.” However, “not applicable,” “unknown” or “other” would not be appropriate responses to a significant number of data points and registrants should be mindful of their responsibilities to

²³⁸ A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Area contains an urban core of at least 10,000 (but less than 50,000) population. Each Metro or Micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core. The OMB also further subdivides and designates New England City and Town Areas. The OMB may also combine two or more of the above designations and identify it as a Combined Statistical Area.

²³⁹ For example, 47900 designates the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Statistical Area. 47900 contains two subdivisions. One is 13644 Bethesda-Frederick-Rockville, MD Metropolitan Division which includes Frederick County and Montgomery County. The other is 47894 Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division which contains the District of Columbia, DC; Calvert County, MD; Charles County, MD; Prince George's County, MD; Arlington County, VA; Clarke County, VA; Fairfax County, VA; Fauquier County, VA; Loudoun County, VA; Prince William County, VA; Spotsylvania County, VA; Stafford County, VA; Warren County, VA; Alexandria City, VA; Fairfax City, VA; Falls Church City, VA; Fredericksburg City, VA; Manassas City, VA; Manassas Park City, VA; and Jefferson County, WV. See OMB Bulletin No. 09-01, “Update of Statistical Area Definitions and Guidance on Their Uses,” List 3, November 2008.

provide all of the disclosures required in the prospectus and other reports.²⁴⁰ Additionally, a situation may arise where an issuer would like to disclose other data not already defined in our proposed disclosure requirements.²⁴¹ In these cases, registrants should provide appropriate explanatory disclosure. As we discuss in more detail below, we are proposing that issuers file explanatory disclosure and or definitions of additional data points as another exhibit to Form 8-K at the same time the asset-level data file is required to be filed on Form 8-K. The Form 8-K and each of these exhibits would be incorporated by reference into the prospectus.²⁴²

Request for Comment

- Are the proposed coded responses contained in the attached tables appropriate? Please be specific in your responses by commenting on specific proposed line items and codes.

- The combination of certain asset-level data disclosures may raise privacy concerns. Are there particular asset-level data points that give rise to privacy concerns, in addition to the ones noted above and why? Are there other ways we could provide investors with similar information and lessen privacy concerns? Which information raises the most significant privacy concerns?

- Which data points, or combination of data points would be the most important to an investor's analysis? For instance, if we do not adopt any requirement to disclose geographic location, would the coded range of FICO score, coded range of income, and sales price still be useful to investors? If we do not adopt a requirement to disclose geographic location, a coded range of FICO score and coded range of income, would the sales price alone still be useful to investors? Please be specific in your response.

- Is our approach to geographic location appropriate? Does the use of the Metropolitan or Micropolitan Statistical Area, or Metropolitan Division provide investors with meaningful disclosure? Should we require only Metropolitan and Micropolitan Statistical Area which would be a broader description? For example, for a property in Alexandria, Virginia, 47900-Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Statistical Area would be

the appropriate designation that would be a larger geographic area than Metropolitan Division. Would disclosure by state or zip code be appropriate? If a particular geographic area is experiencing a low volume of real estate transactions, would the low volume of transactions make it easier to identify the underlying obligor using other publicly available resources? Are there other ways to designate geographic location that would provide investors meaningful disclosure while also addressing privacy concerns? For instance, instead of requiring geographic location at the asset-level, should we proscribe requirements for a pool-level table that presents the geographic concentration of the pool subdivided by state, size of loan and number of loans? In using such a pool-level disclosure approach would it also be necessary to subdivide by income, credit score and sales price?

- Is our approach to credit scores, income and debt appropriate? Does our approach appropriately balance investor need for the information while addressing privacy concerns? Do the categories provide meaningful ranges for investor analysis? If not, please be specific in your response. Should we instead require asset-level disclosure of the specific credit score, amount of income and amount of debt of an obligor?

- Are there other privacy issues that arise for issuers of ABS backed by foreign assets? How do the privacy laws of foreign jurisdictions differ from U.S. privacy laws? If the privacy laws of foreign jurisdictions are more restrictive regarding the disclosure of information, how should we accommodate issuers of ABS backed by foreign assets? Is there substitute information that could be provided to investors? Please be specific in your response.

(ii) Proposed General Disclosure Requirements

With respect to each asset in the pool, the issuer would be required to provide the disclosure described below. A description of the 28 proposed data points is provided in Table 1 of the Appendix. We believe the proposed general item requirements are basic characteristics of assets that would be useful to investors in ABS across asset classes.

1. A unique asset number applicable only to that asset and the source of the number. We are aware that identifiers for each asset may be generated in many ways. These identification numbers may have been generated at origination or at different times through the securitization process. An asset number

is necessary so that investors and other market participants may follow the performance of a loan through ongoing periodic reporting. We do not propose a specific naming or numbering convention; however, we are proposing an instruction to clarify what type of asset numbers would satisfy this requirement and an instruction to clarify that the same asset number should be used to identify the asset for all reports required of an issuer under Section 13(a) or 15(d) of the Exchange Act. For instance, asset number types that would satisfy the requirements could be generated by CUSIP Global Services (CUSIP);²⁴³ the American Securitization Forum (ASF Universal Link); MERS (Mortgage Identification Number); by the registrant;²⁴⁴ or by using the convention "[CIK-number]-[Sequential asset number]";²⁴⁵

2. Whether the asset is designated to a particular collateral group. Some asset pools designate assets to particular groups in order to determine how cash flows will be passed on to investors;

3. Information regarding origination, such as origination date, original amount of the loan or contract, original term of the asset in number of months;

4. The asset maturity date, which is the month the final payment on the asset is scheduled to be made;

5. The original amortization term, which is the number of months in which the asset would be retired if the amortizing principal and interest were to be paid each month;

6. Information regarding interest rate, such as the original interest rate, amortization type which means whether the interest rate is fixed or adjustable;

7. If the asset has an interest only term, the number of months in which the obligor is permitted to pay only interest on the asset;

8. Whether the interest calculation is simple or actuarial. A simple interest calculation is always based on the original principal, thus interest on interest is not included. An actuarial calculation is based on principal plus accrued interest;

9. The identity of the primary servicer that has the right to service the asset, either by name or by the MERS organization number (in the case of RMBS);

²⁴³ A CUSIP number would be appropriate if the asset being securitized itself is a security.

²⁴⁴ For instance, if a registrant uses its own unique numbering to track the asset throughout its life, disclosure of that number would satisfy this proposed item requirement.

²⁴⁵ For instance, if a registrant used the "[CIK-number]-[Sequential asset number]" format, the number would first list the 10-digit CIK of the issuing entity and the second half would be a number for the pool, e.g., "0000350001-000001."

²⁴⁰ See Securities Act Rule 409 [17 CFR 230.409] and Exchange Act Rule 12b-21 [17 CFR 240.12b-21].

²⁴¹ See our discussion regarding adding tags to our XML schema in Section III.A.4. below.

²⁴² See Section III.A.4. below, proposed Item 6.06 to Form 8-K and proposed Item 601(b)(103) of Regulation S-K.

10. The servicing fees, either expressed as a percentage of the asset amount or as a flat-dollar amount, as applicable;

11. The servicing advance methodology by indicating the code that best describes the manner in which principal and/or interest are to be advanced by the servicer;

12. Whether the loan or asset was an exception to defined or standardized underwriting criteria; and

13. The measurement date, which would be the date the asset-level data is provided in accordance with proposed Item 1111(h)(1).²⁴⁶

As discussed above, proposed Item 1111(h)(2) would also require issuers to provide Schedule L data as part of a final prospectus filed in accordance with Rule 424(b), as of the cut-off date for the securitization.²⁴⁷ The cut-off date would be the date specified in the instruments governing the transaction (*i.e.*, the date on and after which collections on the pool assets accrue for the benefit of the asset-backed security holders). In addition, we are proposing the following data points to update for activity that could occur during the period between the time the asset-level data would have been previously provided in the proposed Rule 424(h) prospectus and the cut-off date.

1. The current asset balance, current interest rate, and current payment amount due.

2. The number of days the obligor is delinquent and the number of payments the obligor is past due as of the cut-off date.

3. If the obligor has not made the full scheduled payment, the number of days between the scheduled payment date and the cut-off date.²⁴⁸ We are proposing this item requirement so that investors will receive comparable data about the payment performance of an asset.²⁴⁹ We note that the disclosure

²⁴⁶ As discussed above, proposed Item 1111(h)(1) would require issuers provide Schedule L data at the time of a Rule 424(h) prospectus as of a recent practicable date.

²⁴⁷ We note that the proposed requirement to file Schedule L data with the final prospectus does not address the timing and adequacy of information available to the investor at the time the investment decision is made. Under Securities Act Rule 159, information conveyed after the time of the contract of sale (*e.g.*, a final prospectus) is not taken into account in evaluating the adequacy of information available to the investor at the time the investment decision was made.

²⁴⁸ For example, if the scheduled payment date is December 25, and the full payment due is not received by the cut-off date for the report, December 31, the appropriate response to this item would be 6 days. We note that some delinquency recognition policies may not consider the payment delinquent at the same point in time.

²⁴⁹ We are also proposing that issuers be required to report the number of days a full scheduled

payment is past due in each Form 10-D. *See* discussion in Section III.A.2.a.

provided in response to this proposed requirement may differ from other asset-level or pool-level delinquency disclosure due to the various delinquency recognition policies across issuers and asset classes.²⁵⁰

4. Remaining term to maturity, which would be the number of months between the cut-off date and asset maturity date.

Request for Comment

- Are the general data points that would apply to all securitizations (other than credit cards, charge cards and stranded costs) appropriate? Should any be deleted or made applicable only to certain asset classes? If so, what data points? Are there any other data points that should apply to all asset classes? Please provide a detailed explanation of the reasons why or why not.

- Is the approach to asset number identifier workable? Should we only require or permit one type of asset number for all asset classes? If so, which one would be most useful? It appears that our proposed naming convention of “[CIK-number]-[Sequential asset number]” would be applicable to all asset classes. Does the use of an asset number alleviate potential privacy issues for the underlying obligor? Why or why not? What issues arise if the asset number is determined by the registrant? Would there be any issues with investors being able to specifically identify each asset and follow its performance through periodic reporting?

payment is past due in each Form 10-D. *See* discussion in Section III.A.2.a.

²⁵⁰ We are proposing this item instead of proposing to define delinquency for all issuers. In the 2004 ABS Adopting Release we stated that delinquency should be determined in accordance with any of the following: The transaction agreements for the asset-backed securities; the delinquency recognition policies of the sponsor, any affiliate of the sponsor that originated the pool asset or the servicer of the pool asset; or the delinquency recognition policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed above or the program or regulatory entity that oversees the program under which the pool asset was originated. We adopted that definition because commenters requested flexibility since policies relating to delinquency vary somewhat across asset types and sponsors. The approach we adopted gave consideration to a party's delinquency recognition policies and we emphasized robust disclosure about those policies. For instance, some sponsors do not consider an obligor delinquent when any portion of a contractually required payment is late, but instead only when less than some percentage or amount of a payment is received. *See* Section III.A.d.iii. of the 2004 ABS Adopting Release. In the context of standardized asset-level data, we believe the disclosure of the number of days from the scheduled payment due date and the cut-off date allows flexibility for the definition of delinquent while allowing for analysis and comparability of asset-level data.

- Should we require a data point to disclose the CIK number of the sponsor? Would all sponsors have a CIK number? If not, in what other ways could we require standardized disclosure of the identity of sponsors?

- Should we define delinquency in order to provide comparable delinquency disclosure across issuers and asset classes? If so, how should it be defined and why? Would market participants be able to make changes to their current systems to capture information to satisfy a standardized delinquency disclosure requirement? Would such a requirement be burdensome? Is there another way to provide comparable delinquency disclosure across issuers and asset classes? Please be detailed in your response.

- The response to some data points requires the identification of a party (*e.g.*, originator or servicer) or the MERS generated number of the organization. Is this approach to identification workable? Do any issues arise with allowing a text response to these types of data points? What alternatives would alleviate such issues? What if the organization does not have a MERS number?

(iii) Asset Specific Data Points

As discussed in detail below, we are proposing to further subdivide the Schedule L data points so that issuers can determine whether or not the data field applies to their transaction. For instance, if the asset pool contains only residential mortgages, then issuers would only need to provide those data points designated under proposed Items 1 and 2 of Schedule L. Similarly, if the asset pool contains only student loans, the issuer would only need to provide those data points designated under proposed Items 1 and 8. If the asset pool contains assets for which we have not proposed asset class specific data points, the issuer would only need to provide those general data points designated under proposed Item 1. Further, if the asset pool of residential mortgages consists only of fixed-rate mortgages, all of the data points related to adjustable rate mortgages²⁵¹ need not be included in the data file. Likewise, in a pool of student loans, if the asset pool comprised only loans issued under a federal student loan program, such as the Federal Family Education Loan Program (FFELP),²⁵² information related

²⁵¹ Item 2(a)(16) of proposed Schedule L.

²⁵² FFELP loans are generally based on need, instead of credit quality of the underlying obligor. For more information, see the U.S. Department of

to private label student loan programs need not be included in the data file.²⁵³ The issuer, however, may need to provide data in the appropriate indicator field, which is a “yes” or “no” answer to whether the characteristic is present. This approach is designed to facilitate investor review of the asset-level data.

Request for Comment

- Is the proposed subdivision of Schedule L appropriate? Would this approach facilitate investor review of the asset-level data?

(iv) Proposed Exemptions

We are proposing to exclude ABS backed by credit cards, charge cards, and stranded costs from the requirement to provide asset-level data. Based on staff reviews of credit card and charge card asset pools, it appears that some may contain as many as 20 to 45 million accounts. Based on the overwhelming volume of data in these types of asset classes, we do not believe that granular asset-level information would be as useful for investors and the provision of asset-level data may be cost-prohibitive for issuers. We have also heard anecdotally that investors in credit card or charge card ABS do not have a desire for asset-level data. For these asset classes, we are proposing that credit card ABS issuers provide grouped account data that we discuss below.²⁵⁴

For ABS backed by stranded costs, the underlying asset is transition property or system restoration property. Stranded costs are the costs associated with a decline in the value of electricity-generating assets due to restructuring of the industry, and the underlying property is called transition property.²⁵⁵ System restoration property is a similar underlying asset, but provides for recovery of system restoration costs incurred by electric utilities as a result of hurricanes, tropical storms, ice or snow storms, floods and other weather-related events and natural disasters. These types of property are usually created by the action of a state legislature or other designated

authority.²⁵⁶ The property generally includes a right and interest to impose, collect and receive charges payable by electric customers in a particular territory. Also, this right usually provides that the designated state authority may periodically adjust the charges billed to customers in order to recover the stranded costs in the event all collections are not made. Because transition property is not originated on a customer-by-customer basis, and is instead the right to impose charges on customers based on electrical usage, we preliminarily do not believe it is appropriate to require asset-level data be provided for stranded cost ABS.

Request for Comment

- Should asset-level data be provided by credit card, charge card or stranded cost issuers? If so, please explain why and what asset-level data should be provided.

- Would requiring asset-level data for these asset classes, rather than grouped asset data, as proposed below, be useful for investors? Is the volume of data in these types of asset classes a concern to investors? If so, are there ways to address this, for example, by facilitating the presentation of the data, to make it more useful to investors?

- Are there any other asset classes that should be exempt from the requirement to provide asset-level data and why?

- In light of the proposal not to set forth asset-level data for these assets, is there any pool-level data that should be provided by credit card, charge card, or stranded cost issuers? If so, please identify the pool-level data that we should require and explain why.

- Should we specify standardized definitions for pool-level data? For instance, for credit cards or charge cards, should we define terms such as modification, excess spread and charge-off? How are issuers currently defining these various terms?

- Should pool-level data for credit cards and charge cards be provided at the same time that we propose for other issuers to provide Schedule L data (i.e., with the proposed Rule 424(h) prospectus, the final prospectus under 424(b) and for changes under Item 6.05 of Form 8-K)? Should it also be provided at any other time, such as in periodic reports? If so, please tell us when and why.

- Should we revise Item 1111 to require pool-level disclosure in a standardized format for ABS backed by credit cards or charge cards? Current

Item 1111 requires issuers to present pool-level statistical information in appropriate distributional groups or incremental ranges in addition to presenting appropriate overall pool totals, averages and weighted averages, if such presentation will aid in the understanding of the data. In the case of credit cards and charge cards, should we proscribe the distributional groups or incremental ranges for material pool characteristics such as credit scores, credit limit, account balance, account age, geographic location or annual percentage rate (APR)?²⁵⁷ For instance, in the case of FICO credit scores, should the distributional groups be similar to the coded response ranges for asset-level data in proposed Item 2(c)(3) of Schedule L?²⁵⁸ What other types of credit scores are used by credit card issuers, if any? Are any proprietary? What distributional groups would be useful for disclosure of other types of credit scores?

- In the case of credit limit and account balance, should we proscribe the following distributional groups for disclosure with respect to credit card and charge card pools: (1) <\$1,000; (2) \$1,000–\$5,000; (3) \$5,000–\$10,000; (4) \$10,000–\$20,000; (5) \$20,000–\$30,000; (6) \$30,000–\$40,000; (7) \$40,000–\$50,000; and (8) greater than \$50,000? Would using these distribution groups lead to useful disclosure?

- In the case of account age, should we proscribe the following distributional groups for disclosure with respect to credit card and charge card pools: (1) 12 months or less; (2) 12–24 months; (3) 24–36 months; (4) 36–48 months; (5) 48–60 months; (6) 60–84 months; (7) 84–120 months; and (8) over 120 months? Would using these distribution groups lead to useful disclosure?

- In the case of geographic location, should we require disclosure by state or by Metropolitan Statistical Area for credit card and charge card pools?²⁵⁹ Which would be more useful? Should issuers be required to disclose all states or Metropolitan Statistical Areas for the entire pool, or only the top 10, 20 or some other number?

- In the case of interest rate or APR, what would be the appropriate

Education Web site at <http://www2.ed.gov/programs/jfel/index.html>.

²⁵³ Item 8(c) of proposed Schedule L.

²⁵⁴ See Section III.A.3.

²⁵⁵ When the electricity industry deregulated, prices for electricity were expected to decline as competition was introduced into the market. With prices projected to fall more than production costs, utilities would earn less and the value of their assets would shrink. Thus, with falling prices eroding the value of the utilities' assets, some of their costs would be unrecoverable, or stranded. See *Electric Utilities: Deregulation and Stranded Costs*, Congressional Budget Office, October 1998.

²⁵⁶ See, e.g., Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 39.001–463.

²⁵⁷ In the FDIC Securitization Proposal, the FDIC also solicited comments on specific questions of disclosure related to securitizations. We note the suggestions of one commenter regarding the disclosure that should be provided by issuers of ABS backed by credit cards. See comment letter from MetLife on the FDIC Securitization Proposal (“MetLife FDIC Letter”), available at <http://www.fdic.gov/regulations/laws/federal/2010/10comAD55.html>.

²⁵⁸ See Table 2 of the Appendix to this release.

²⁵⁹ See discussion in Section III. A.1.b.i. above.

distributional groups? For example, would the following distributional groups be appropriate: (1) 0 to 1.99%; (2) 2.00% to 4.99%; (3) 5.00% to 9.99%; (4) 10.00% to 14.99%; (5) 15.00% to 19.99%; (6) 20.00% to 24.99%; (7) 25.00% to 29.99%; (8) 30.00% to 34.99%; (9) 35.00% to 39.99%; and (10) over 40.00%? Are there other characteristics that should be included in the same statistical table of information, such as how many accounts are currently deferring interest, deferring interest/principal, or other types of promotions?

○ Should we require issuers of ABS backed by credit cards and charge cards to provide statistical tables to disclose the amount of credit that is available for purchases? If so, should we proscribe the following distributional groups: (1) <\$1,000; (2) \$1,000–\$5,000; (3) \$5,000–\$10,000; (4) \$10,000–\$20,000; (5) \$20,000–\$30,000; (6) \$30,000–\$40,000; (7) \$40,000–\$50,000; and (8) greater than \$50,000? Would using these distribution groups lead to useful disclosure? Would this information be useful to investors and why?

○ Should we require issuers of ABS backed by credit cards and charge cards to provide statistical tables to disclose the type of products in the pool? For instance, credit card products could include affinity,²⁶⁰ co-branded cards,²⁶¹ merchant cards, partner cards, and reward cards. Would this information be useful to investors and why?

○ Should we require issuers of ABS backed by credit cards and charge cards to provide statistical tables to disclose whether there are any accounts in the pool are under a debt management program, have redefaulted, are diluted or whether the account has been closed? Would this information be useful to investors and why?

○ Should we require issuers of ABS backed by credit cards and charge cards to provide statistical tables to disclose payment habits of the obligors, such as the number of accounts, or percentage of the pool that make minimum payments, pays balances in full, or other payment types? Are there any other categories of payment behavior that would be useful to investors?

○ Should we require issuers of ABS backed by credit cards and charge cards to provide statistical tables to disclose whether the obligors are homeowners, mortgage holders or renters? Would this

information be useful to investors and why? Do issuers have this information? Because credit card securitizations are usually structured as master trusts, how would issuers be able to provide updated information at the time of each takedown?

○ Should we require issuers of ABS backed by credit cards and charge cards to provide statistical tables to disclose whether the obligors are employed and if so, the type of employment? Should we specify the categories for this type of information, such as: (1) Professional; (2) technical; (3) managerial; (4) clerical; (5) sales; (6) service; (7) agricultural; (8) laborers; (9) military; (10) student; (11) retired; (12) unemployed; and (13) unknown? Would this information be useful to investors and why?

○ Should we require issuers of ABS backed by credit cards and charge cards to provide statistical tables to disclose the level of education of the obligors? Should we specify the categories for this type of information such as: (1) Graduate; (2) college-4 year; (3) college-2 year; (4) high school or (5) unknown? Would this information be useful to investors and why?

○ Should we require issuers of ABS backed by credit cards and charge cards to provide statistical tables to disclose the debt-to-income ratio of the obligors? Would this information be useful to investors and why? Should the debt-to-income ratio be defined and calculated in the same manner as required in Schedule L?²⁶² What would the appropriate distributional categories be? For example, would the following distributional groups be appropriate: (1) 0 to 4.99%; (2) 5.00% to 9.99%; (3) 10.00% to 14.99%; (4) 15.00% to 19.99%; (5) 20.00% to 24.99%; (6) 25.00% to 29.99%; (7) 30.00% to 34.99%; (8) 35.00% to 39.99%; (9) 40.00% to 44.99%; (10) 45.00% to 49.99%; (11) 50.00% to 54.99%; (12) 55.00% to 59.99%; (13) 60.00% to 64.99%; (14) 65.00 to 69.99%; (15) 70.00% to 74.99%; (16) over 75.00%?

○ Because credit card securitizations are usually structured as master trusts, how would issuers be able to provide updated information described in the previous four bullet points at the time of each takedown?

○ Should we specify the data that should be presented for each distributional group in the above requests for comment? For instance, for each distributional group of credit scores, issuers typically provide a table detailing the number of accounts, dollar amount and percentage of the pool.

Should we also require that issuers provide the following information for each credit score distributional group in the same table: (1) Weighted average credit limit; (2) weighted average utilization rate; (3) weighted average account age; (4) percentage of obligors that pay in full; (5) percentage of obligors that make minimum payments; (6) weighted average credit score; (7) weighted average APR; (8) portfolio yield; (9) amount of interchange; (10) amount of fees; (11) amount of gross charge-offs; (12) amount of recoveries; (13) amount of prepayments; (14) dollar amount of accounts that are over 30 days delinquent; (15) number of accounts that are over 30 days delinquent; and (16) weighted average excess spread?²⁶³ Is there any other information that would be useful for investors in this format?

• Should we require aggregated asset-level data in a machine-readable form for issuers of ABS backed by stranded costs so that investors may download the data and input it into a waterfall computer program? If so, please specify the characteristics, the appropriate distributional groups and related definitions and formulas, if applicable.

(c) Residential Mortgage-Backed Securities

We are proposing 137 data points for ABS backed by residential mortgages. The staff has surveyed the data and definitions provided by the organizations mentioned above, as well as other industry sources. We are proposing to require additional data fields that relate to residential mortgages that are based mainly on information already typically provided by sellers to Fannie Mae and Freddie Mac or likely to be collected by participants in Project RESTART.

Some of the Fannie Mae, Freddie Mac and Project RESTART data points appear in the general section (Item 1), because we believe those data points would apply to all types of asset-backed securities. We did not, however, include every data point included in those loan-level packages. We believe that there are numerous ways to capture the same data, and after reviewing other loan-level data dictionaries, our definitions may have minor differences from those in Fannie Mae, Freddie Mac and Project RESTART because we wanted to make sure that we captured disclosure that may be provided to other organizations. For instance, we believe that many of the points are also consistent with the data dictionary developed by

²⁶⁰ Affinity card programs are offered by organizations such as universities, alumni associations, sports teams, professional associations and others.

²⁶¹ A co-branded credit card generally is a credit card jointly sponsored by a bank and retail merchant, such as a department store.

²⁶² See proposed Items 2(a)(21)(iv) and 2(a)(20)(v) of Schedule L.

²⁶³ See, e.g., Appendix A, Attachment I of the MetLife FDIC Letter.

MISMO.²⁶⁴ We also reviewed other data definitions currently used by banks for reporting to the OCC and OTS.²⁶⁵ As noted above, we also are proposing several indicator fields that usually require a “yes” or “no” answer in order to facilitate investor review of the data.

With respect to each mortgage in the pool, the issuer would be required to disclose the information described below. A complete description of each proposed data point is provided in Table 2 of the Appendix to this release.

1. A code that describes the loan purpose.
2. The lien position of the loan.
3. Whether the obligor is subject to any prepayment penalties, a code that describes the type of penalty, the term of penalty and a code that describes how the penalty is calculated.
4. The origination channel and whether a broker took the application.
5. The Nationwide Mortgage Licensing System (NMLS) loan originator number and loan origination company number.²⁶⁶
6. Whether the loan allows for negative amortization and information

²⁶⁴ As noted above, MISMO is an affiliate of MERS. The MISMO data dictionary is available at <http://www.mismo.org/pages/Residential%20Specifications.aspx>.

²⁶⁵ See “OCC/OTS Mortgage Metrics—Loan Level Data Collection: Field Definitions,” January 7, 2009, available at <http://www.occ.treas.gov/ftp/release/2009-9a.pdf>.

²⁶⁶ In 2008, Congress passed The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act) which required the creation of a Nationwide Mortgage Licensing System and Registry. The SAFE Act is designed to enhance consumer protection and reduce fraud by encouraging states to establish minimum standards for the licensing and registration of state-licensed mortgage loan originators and for the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish and maintain a nationwide mortgage licensing system and registry for the residential mortgage industry. The SAFE Act was enacted as part of the Housing and Economic Recovery Act of 2008, Public Law 110-289, Division A, Title V, sections 1501–1517, 122 Stat. 2654, 2810–2824 (July 30, 2008), codified at 12 U.S.C. 5101–5116. The Federal Housing Finance Agency will require that mortgages purchased by Freddie Mac and Fannie Mae include loan-level identifiers of the loan originator and loan origination company for mortgage applications taken on or after July 1, 2010. The original date of compliance was January 1, 2010; however, this has been extended to July 1, 2010. See Federal Housing Finance Agency News Release, “FHFA Announces New Mortgage Data Requirements,” January 15, 2009, available at <http://www.fhfa.gov/webfiles/400/LoanOrigDS11509.pdf>. See also Freddie Mac Bulletin 2009-27, December 4, 2009, available at <http://www.freddiemac.com/sell/guide/bulletins/pdf/bll0927.pdf> and Fannie Mae Selling Notice “Mortgage Loan Data Requirements—Update,” October 6, 2009, available at <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/nlce100609.pdf>. The NMLS maintains the following Web site: <http://mortgage.nationwidelicencingsystem.org/Pages/default.aspx>.

regarding the negative amortization terms which would include:

- a. The maximum dollar amount and the number of months negative amortization amount allowed;
- b. The initial and subsequent number of months an obligor can initially pay the minimum payment before a new payment is determined;
- c. The current negative amortization amount that has accumulated;
- d. The number of months the payment is fixed and the initial and subsequent limits on payment increases and decreases;
- e. The length of the initial and any subsequent recast periods in number of months; and
- f. The current minimum payment amount.
7. Whether the loan has been modified. If so:
 - a. The number of modifications;
 - b. A code that describes the reason for modification;
 - c. The effective date of the modification;
 - d. Updated debt-to-income ratios of the obligor;
 - e. The total amount added to the principal balance of the loan due to the modification or capitalized amount;
 - f. Any deferred amount that is non-interest bearing; and
 - g. The pre-modification interest rate, the pre-modification payment amount, and the forgiven principal and interest amounts.
8. Whether the loan documents require a lump-sum payment of principal at maturity, otherwise known as a balloon loan.
9. In the case of a refinance transaction, the amount of cash the obligor received.
10. The number of months a buydown period would be in effect. A buydown period is when a lump sum payment is made to the creditor by the obligor or by a third party to reduce the amount of some or all of the obligor’s periodic payments.
11. The date through which interest is paid with the current payment, which is the date from which interest will be calculated for the application of the next payment.
12. The number of days after which a servicer can stop advancing funds on a delinquent loan.
13. Amount of any junior mortgages on the property and if the loan in the pool is a junior loan, information on the senior loan such as origination date, amount, loan type, hybrid period, and negative amortization limit.
14. If the loan is an adjustable rate mortgage:
 - a. The index on which the adjustable rate is based;

b. The margin, which is the number of percentage points added to the index to establish the new rate;

c. The fully indexed rate, which is the index rate plus the margin;

d. If the interest rate is initially fixed for a period of time, the number of months between the first payment date and the first interest adjustment date;

e. The maximum percentage by which a mortgage rate may increase or decrease, initially, at subsequent points in time, and over the lifetime of the loan;

f. The number of months between interest rate reset periods;

g. The number of days prior to an interest rate effective date which is used to determine the appropriate index rate or lookback;

h. The date of the next interest rate adjustment;

i. The method of rounding and the rounding percentage;

j. Whether the loan is an option ARM, that is whether the obligor can choose payment options;

k. A code that describes the means of computing the lowest monthly payment available to the obligor after recast.

When the loan is recast, a new minimum payment is calculated to fully amortize the loan over the remaining term of the loan;

l. The initial minimum payment an obligor is required to make; and

m. Whether the loan is convertible to a fixed interest rate.

15. Whether the loan is a home equity line of credit, or HELOC, and the related period in which the obligor may draw funds against the HELOC account.

With respect to each mortgage loan in the pool, the issuer would be required to disclose the information on the property securing the loan described below.

1. Geographic location of the property, designated by Metropolitan Statistical Area, Micropolitan Statistical Area, or Metropolitan Division, as applicable.

2. A code that describes the property type and occupancy status of the property.

3. Sales price.

4. The appraised value used to approve the loan and most recent appraised value, the property valuation method, date of valuation, valuation scores and types of scores.

5. Combined and original loan-to-value ratios and the calculation date.

6. If the obligor pledged financial assets to the lender instead of making a down payment, the total value of assets pledged as collateral for the loan at the time of origination.

If the loans in the pool relate to manufactured housing, the issuer would

be required to disclose the information described below.

1. A code that describes the interest of others in the real estate.
2. A code that describes the community ownership structure.
3. The name of manufacturer and model name, the year the home was manufactured and whether it was constructed in accordance with the 1976 HUD Code.
4. Gross and net invoice price of the home.
5. Loan to invoice ratios, whether the loan was made by a lender related to the community, and whether the securitized property is considered chattel or real estate.

6. The source of the obligor's down payment.

With respect to each mortgage in the pool, the issuer would be required to disclose the information on the obligor described below.

1. Obligor and co-obligor's credit scores and types of scores.
2. Obligor and co-obligor's wage and other income and a code that describes the level of verification.
3. A code that describes the level of verification of assets of the obligor and co-obligor.
4. Obligor and co-obligor's length of employment, whether they are self-employed and a code that describes the level of verification.
5. The dollar amount of verified liquid/cash reserves after the closing of the mortgage loan.
6. The total number of properties owned by the obligor that currently secure mortgages.
7. The amount of the obligor's other monthly debt.
8. The obligor's debt to income ratio used by the originator to qualify the loan.
9. A code that describes the type of payment used to qualify the obligor for the loan, such as the payment under the starting interest rate, the first year cap rate, the interest only amount, the fully indexed rate or the minimum payment.
10. The percentage of down payment from obligor's own funds other than any gift or borrowed funds.

11. The number of obligors on the loan.
12. Any other monthly payment due on the property other than principal and interest.
13. The number of months since any obligor bankruptcy or foreclosure.

14. The obligor and co-obligor's wage income, other income and all income.

With regard to mortgage insurance, the issuer would be required to disclose the information below.

1. Whether mortgage insurance is required.

2. The name of the mortgage insurance company, coverage plan type, certificate number, and insurance coverage percentage.

3. Whether the insurance is lender or borrower paid.

4. If there is pool insurance, the name of pool insurance provider and pool insurance stop loss percentage.

Request for Comment

- Are all of the RMBS data points appropriate? Are there other data points that should be required for all RMBS issuers? Are any data points not necessary or overly burdensome to obtain? Please specify the proposed data points and provide a detailed explanation of the reasons why or why not.
- Some data points request the results of calculations, such as debt-to-income ratios. Can these ratios otherwise be calculated from data provided by the other asset-level data points? If so, can users of the information independently calculate these data points? And should we not require these data points to be included in the asset-level data file?

- Should we include a data point to require what effort an originator or sponsor made to see if there are other loans secured by the same property? If we were to code the response, what code descriptions should we provide?
- Are the proposed type of responses and coded responses appropriate? Are there additional codes that should be included? Please provide a detailed explanation of the reasons why or why not.

- What privacy concerns arise if we require issuers to disclose the sales price of the property, if any? Would rounding the sales price to the nearest thousandth alleviate privacy concerns? If not, what would be the appropriate rounding method? If we instead required the disclosure of sales price be provided by a coded range of dollar amounts, would that alleviate privacy concerns? What would be the appropriate ranges of dollar amounts? Would the above mentioned options have an effect on an investor's ability to analyze the asset-level data or use the waterfall computer program? If so, please be specific in your response. In what other ways could we require the disclosure of sales price so that investors receive useful information and also address any privacy concerns?

(d) Commercial Mortgage-Backed Securities

We are proposing 61 data points for ABS backed by commercial mortgages. The data points we are proposing to require are primarily based on the

definitions included in the CRE Finance Council Investor Reporting Package, current Regulation AB requirements and staff review of current disclosure. The CRE Finance Council disclosure package standardizes bond, loan and property level information for commercial mortgage-backed securities.²⁶⁷ We are not proposing, however, to include every data point included in the CRE Finance Council reporting package. Some of the data points already appear in the general section (Item 1), because we believe those data points would apply to all types of asset-backed securities. We did not include others because we did not believe the level of detail was necessary for investor analysis as we believe that the most important data points for CMBS are those that relate to the loan term and the property. With respect to each commercial mortgage loan in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point and related response is provided in Table 3 to the Appendix to this release.

1. A code that describes the loan structure, including the seniority of participated mortgage loan components.

2. The current remaining term of the loan.

3. A code that describes the payment method, the amount of the periodic principal and interest payment, and frequency of payment for the loan, frequency that the payment will be adjusted, and grace days allowed.

4. The number of properties that serve as mortgage collateral for the loan;

5. The hyper-amortizing date, which is the current anticipated repayment date after which principal and interest may amortize at an accelerated rate, and/or interest to the mortgagor increases substantially.

6. Whether the loan is interest only or requires a balloon payment.

7. Whether the obligor is subject to prepayment penalties, the effective date after which the lender allows prepayment of a loan, the date after which yield maintenance prepayment penalties are no longer effective and the date after which prepayment premiums are no longer effective.

8. If the loan permits negative amortization, the maximum percentage and amount of the original loan balance that can be added to the original loan balance as a result of negative amortization.

9. If the loan is an adjustable rate mortgage:

²⁶⁷ According to the CRE Finance Council, transaction disclosure should be updated and provided monthly. See <http://www.crefc.org/>.

- a. The index on which the adjustable rate is based;
- b. The first rate adjustment date;
- c. The first payment adjustment date;
- d. The number of percentage points that are added to the current index rate to establish the new note rate each interest adjustment date;
- e. The maximum percentage by which a mortgage rate may increase or decrease, initially, at subsequent points in time, and over the lifetime of the loan;
- f. A code describing the frequency with which the periodic mortgage rate is reset and a code describing the frequency with which the periodic mortgage payment will be adjusted; and
- g. The number of days prior to an interest rate effective date which is used to determine the appropriate index rate or lookback.

10. Whether the loan had been modified from its terms at the time of origination.

The issuer also would be required to provide information on each of the properties collateralizing the loan. This would include:

1. The property name, geographic location, designated by zip code, as applicable, and the year that the property was built;
2. A code describing the current use of the property, including net rentable square feet of a property, number of units/beds/rooms, and percentage of rentable space occupied by tenants;
3. The valuation amount of the property as of a valuation date and source of valuation;
4. The total underwritten revenues from all sources for a property and total underwritten operating expenses (including real estate taxes, insurance, management fees, utilities, and repairs and maintenance);²⁶⁸
5. The date when the defeasance option becomes available. A defeasance option is when an obligor may substitute other income-producing property for the real property without pre-paying the existing loan;²⁶⁹

6. Net operating income and net cash flow, including a code describing how operating income and net cash flow were calculated (*i.e.*, using the CMSA standard, using a definition in the pooling and servicing agreement, or using the underwriting method);

²⁶⁸ For this purpose “underwritten” means the amount of revenues or expenses adjusted based on a number of assumptions made by the mortgage originator or seller. We believe issuers should include narrative disclosure about the assumptions used in the prospectus.

²⁶⁹ See Mary Stuart Freyberg and Mary MacNeill, “*Defeasance by Design: Frequently Asked Questions*,” CMBS World, March 1999, available at http://www.cmsglobal.org/cmsworld/cmsworld_toc.aspx?folderid=31374.

7. The ratio of underwritten net operating income to debt service, the ratio of underwritten net cash flow to debt service, and an indicator showing how the debt service coverage ratio was calculated;²⁷⁰ and

8. The three largest tenants (based on square feet), including square feet leased by the tenant and lease expiration dates of the tenant.

We note that some of the data points that we are proposing to include in Schedule L are currently required on a loan-level basis under existing Item 1111(b)(9)(i) of Regulation AB.²⁷¹ Such items are described in the list above and relate to: the location and use of each property; net operating income and net cash flow information, as well as the components of net operating income and net cash flow, for each mortgaged property; current occupancy rates for each mortgaged property and the identity, square feet occupied by and lease expiration dates for the three largest tenants at each mortgaged property. Issuers of ABS backed by CMBS would be required to continue to provide the information required by Item 1111(b)(9)(i) in the prospectus in a narrative form.

Request for Comment

- Are all of the CMBS data points appropriate? Is there any reason not to incorporate any of the requirements for commercial mortgage-backed securities into Schedule L? Are there any additional fields we should include? Are there any changes we should make for specific types of commercial properties?
- Should we include the current Item 1111(b)(9)(i) asset-level disclosure requirement for CMBS in Schedule L, as proposed? Should we eliminate the requirement to provide the asset-level information in narrative form? If so, would any material information relating to a commercial mortgage be lost?

²⁷⁰ For this purpose, “underwritten” means that the amount disclosed is adjusted based on a number of assumptions made by the mortgage originator or seller. We believe issuers should include narrative disclosure about the assumptions used in the prospectus. Such an indicator would consider whether the servicer allocates debt service only to properties where financial statements are received, whether all properties are reported on one rolled up financial statement from the borrower, whether all financial statements were collected for all properties, whether no financial statements were received, whether not all properties received financial statements and the servicer leaves empty, or whether or not all properties received financial statements and the servicer allocates 100% of debt service to all properties where financial statements are received.

²⁷¹ Specifically, we are proposing to include the requirements of Item 1111(b)(9)(i)(A), (B), (C), and (D) in Schedule L.

- We are proposing to require an indicator that shows how net operating income and net cash flow were calculated for commercial mortgages. The code options for this indicator would show whether these items were calculated using a CMSA standard, using a definition in the pooling and servicing agreement, or using an underwriting method. Are these appropriate codes? Are there any additional codes that should be included?

- We are proposing to require an indicator that shows how the debt service coverage ratio was calculated for commercial mortgages. The code options for this indicator would be: (1) Average—not all properties received financial statements, and the servicer allocates debt service only to properties where financial statements are received; (2) Consolidated—all properties reported on one “rolled up” financial statement from the borrower, (3) Full—all financial statements collected for all properties, (4) None Collected—no financial statements were received; (5) Partial—not all properties received financial statements and servicer to leave empty; and (6) “Worst Case”—not all properties received financial statements, and servicer allocates 100% of debt service to all properties where financial statements are received. Are these codes appropriate? Are there additional codes that should be included?

- We currently require disclosure of the three largest tenants that occupy the underlying property in the prospectus. Should we also require issuers to disclose whether the named tenants are affiliated with the obligor as a data point in Schedule L and in narrative form in the prospectus? Should we require a description of the relation in narrative form?

- Should we continue to require Item 1111(b)(9)(i) data in the prospectus, as proposed, or is the proposed asset-level data sufficient?

(e) Other Asset Classes

We are unaware of any other organization that has standardized data points for asset classes other than mortgages for investor reporting.²⁷² As we explain above, standardized data points provide disclosure to investors about the payment stream and amount of payments related to individual assets;

²⁷² We note that the ASF contemplates expanding Project RESTART to other major asset classes, such as student loans, credit cards and automobile securitizations. See American Securitization Forum RMBS Disclosure and Reporting Package Final Release (July 15, 2009) at 29, available at <http://www.americansecuritization.com/>.

make it possible for users to perform prepayment and credit analysis on an individual asset, and evaluate the collateral, if any, that secures the individual asset.²⁷³ Consequently, in order to make the asset-level information useful to investors, we are proposing data points derived from the aggregate pool-level disclosure that is commonly provided in prospectuses for the following asset classes: Automobile loans and leases; equipment loans and leases; student loans; floorplan financing; repackagings of corporate debt and securitizations. We are also proposing to add several data points related to obligor and co-obligor income, assets, employment, and credit scoring. These data points mirror the definitions proposed for RMBS in an effort to provide more robust disclosure about obligor credit quality. We solicit comment on all of our proposed asset specific data points and have specific questions on certain asset classes.

Request for Comment

- Are there any organizations that have produced standardized data definitions for other asset classes? If so, would these definitions be appropriate for the proposed asset specific data points?
- Are the asset specific data points appropriate? What other data points should be required by all issuers of that asset class? Please provide a detailed explanation of the reasons why or why not.

(i) Automobiles

Asset-backed securities may be backed by a pool of automobile loans or automobile leases. We are proposing to require 31 additional data fields that relate to ABS backed by loans for the purchase of automobiles and 33 data fields that relate to ABS backed by automobile leases. With respect to each loan or lease in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in the Appendix to the release in Table 4 for automobile loans and Table 5 for automobile leases.

1. Whether payments are required monthly or a balloon payment is due;
2. Whether a form of subsidy was received by the borrower, such as an incentive or rebate;
3. Geographic location of the dealer by zip code;
4. The vehicle manufacturer, model, model year, vehicle type and whether it is new or used;

5. The vehicle value and source of vehicle value at the time of origination;

6. For leases, base residual value and source of residual value;

7. The obligor and co-obligor's credit scores and credit score type;

8. The obligor and co-obligor's wage and other income and a code that describes the level of verification;

9. A code that describes the level of verification of assets of the obligor and co-obligor;

10. The obligor and co-obligor's length of employment and a code that describes the level of verification; and

11. The geographic location of the obligor by Metropolitan Statistical Area, Micropolitan Statistical Area, or Metropolitan Division, as applicable.

Request for Comment

- Are all of the automobile data points appropriate? What other data points should be required by all issuers of ABS backed by automobile loans or leases? Please provide a detailed explanation of the reasons why or why not.
- For ABS backed by automobile leases, should we require a field indicating whether the lessor or lessee is responsible for selling the vehicle at the end of the lease? If so, please explain why.
- We are proposing to require an indicator for the source of the vehicle value. The code options for this indicator would be: (1) Invoice price; (2) Sales Price; (3) Kelly Blue Book; and (98) Other. Are these codes appropriate? Are there additional codes that should be included?
- We are proposing to require an indicator for the source of a vehicle's residual value. The code options for this indicator would be: (1) Black Book; (2) Automotive Lease Guide; and (98) Other. Are these codes appropriate? Are there additional codes that should be included?

(ii) Equipment

We are proposing to require five additional data fields that relate to ABS backed by equipment loans and eight that relate to equipment leases. With respect to each equipment loan or lease in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in the Appendix to the release in Table 6 for equipment loans and Table 7 for equipment leases.

1. The frequency of payments, such as whether payments are due monthly, quarterly, semiannually, or annually.
2. The type of equipment financed and whether it is new or used.

3. The obligor industry and geographic location as indicated by zip code.

4. For leases, whether the lease type is a true lease or a finance lease.

5. For leases, the residual value of the equipment and source of residual value.

Request for Comment

- Are all of the equipment data points appropriate? What other data points should be required by all issuers of ABS backed by equipment loans or leases? Please provide a detailed explanation of the reasons why or why not.
- Should we require data points on the obligor's ability to pay the equipment loan or lease? If so, please provide a detailed explanation of the types of data points and what code descriptions should be provided.
- Should we require a data point to disclose whether the equipment that serves as collateral is the subject of certain provisions of the U.S. Bankruptcy Code? For instance, section 1110 of the Bankruptcy Code²⁷⁴ applies to financiers of aircraft, aircraft engines, and other defined equipment. If so, please provide a detailed explanation of what the data point should be and what code descriptions should be provided.
- We are proposing to require an indicator for equipment type. The code options for this indicator would be: (1) Construction; (2) Furniture and Fixtures; (3) General Office Equipment/Copiers; (4) Industrial; (5) Maritime; (6) Printing Presses; (7) Technology; (8) Telecommunications; (9) Transportation; and (98) Other. Are these codes appropriate? Are there additional codes that should be included?
- We are proposing to require an indicator for the obligor industry. The code options for this indicator would be: (1) Agriculture and Resources; (2) Communications and Utilities; (3) Construction; (4) Distribution/Wholesale; (5) Electronics; (6) Financial Services; (7) Forestry and Fishing; (8) Healthcare; (9) Manufacturing; (10) Mining; (11) Printing and Publishing; (12) Public Administration; (13) Retail; (14) Services; (15) Transportation; and (98) Other. Are these codes appropriate? Is code "(15) Transportation" too broad? If so, what codes would be more useful? Are there additional codes that should be included?
- We are proposing to require an indicator for the source of the equipment residual value. The code options for this indicator would be: (1) Internal; (2) External Consultant; and (3) Other. Are these codes appropriate? Are

²⁷³ See Section III.A.1.b.

²⁷⁴ 11 U.S.C. 1110.

there additional codes that should be included? Are there any published guides to equipment residual values?

(iii) Student Loans

We are proposing to require 28 additional data fields that relate to ABS backed by student loans. With respect to each loan in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in the Appendix to the release in Table 8.

1. Whether payments on the loan are subsidized through a federal program.
2. A code describing the repayment terms and the current number of years in repayment.
3. The name of any guarantee agency.
4. The date the loan was disbursed to the obligor.
5. Whether the obligor payment status is in-school, grace period, deferral, forbearance or repayment.
6. Geographic location of the obligor by Metropolitan Statistical Area, Micropolitan Statistical Area, or Metropolitan Division, as applicable.
7. A code describing the type of school or program. Code options for this data point would be continuing education, graduate, K-12, medical, or undergraduate.
8. If the loan was not issued under a federally funded program, the following additional disclosure would be required:
 - a. The obligor and co-obligor's credit scores and credit score type;
 - b. The obligor and co-obligor's wage and other income and a code that describes the level of verification;
 - c. A code that describes the level of verification of assets of the obligor and co-obligor; and
 - d. The obligor and co-obligor's length of employment and a code that describes the level of verification.

Request for Comment

- Are all of the student loan data points appropriate? What other data points should be required by all issuers of ABS backed by student loans? Please provide a detailed explanation of the reasons why or why not.
- We are proposing to require an indicator for repayment type. The code options for this indicator would be: (1) Level; (2) Graduated Repayment; (3) Income-sensitive or (4) Interest Only Period. Are these codes appropriate? Are there additional codes that should be included?
- We are proposing to require an indicator for school type. The code options for this indicator would be: (1) Continuing Education; (2) Graduate; (3) K-12; (4) Medical; or (5) Undergraduate.

Are these codes appropriate? Are there additional codes that should be included?

(iv) Floorplan Financings

Asset-backed securities may be backed by a pool of floorplan receivables. Floorplan receivables are used by wholesalers and retailers to finance purchases of inventory, for instance, an automobile dealership will finance purchases of the vehicles available for sale in its inventory. Floorplan receivables are usually revolving in nature and are commonly structured as revolving asset master trusts. Payment terms may vary, but usually payment is due when the underlying collateral is sold. Generally, when new inventory is purchased, a new receivable is created; therefore, we are proposing that the asset-level data be provided for each receivable, instead of each account.

We are proposing to require six additional data fields that relate to ABS backed by floorplan financings. With respect to each receivable in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in the Appendix to the release in Table 9.

1. The account origination date.
2. The type of inventory product line.
3. Whether the property financed is new or used.
4. Information related to the obligor such as geographic location by zip code, and credit score and type.
5. If the issuing entity is structured as a master trust that has previously issued securities, the information required by Items 1 and 9 of Schedule L-D for assets that were part of the asset pool prior to the current offering.²⁷⁵

Request for Comment

- Since floorplan financings are usually structured as master trusts, we are proposing to require asset-level data based on each receivable in the pool. Should the data be provided by account? Which is more appropriate and why?
- Are all of the proposed floorplan financing data points appropriate? What other data points should be required by all issuers of ABS backed by floorplan financings? Please provide a detailed explanation of the reasons why or why not.

²⁷⁵ We believe prior performance information of pre-existing assets would be useful for investor analysis of the asset pool. If the information was previously reported, issuers would be able to incorporate by reference the previously filed Form 10-D.

- We are proposing to require an indicator for product line type. The code options for this indicator would be: (1) Accounts Receivable;²⁷⁶ (2) Consumer Electronics and Appliances; (3) Industrial; (4) Lawn and Garden; (5) Manufactured Housing; (6) Marine; (7) Motorcycles; (8) Musical Instruments; (9) Power Sports; (10) Recreational Vehicles; (11) Technology; (12) Transportation and (98) Other. Are these codes appropriate? Are there additional codes that should be included?

- Is our proposal to require the information in Item 1 and Item 9 of Schedule L-D for pre-existing assets in master trusts appropriate?

(v) Corporate Debt

Asset-backed securities may be backed by corporate debt securities. Asset-backed securities backed by corporate debt securities are typically issued in smaller denominations than the underlying security and the ABS are registered under Section 12(b) of the Exchange Act for trading on an exchange. Additionally, a pooling and servicing agreement may also permit a servicer or trustee to invest cash collections in corporate debt instruments which may be securities under the Securities Act.²⁷⁷ We are proposing nine additional data fields for ABS backed by corporate debt. We believe the data points in Item 1. General are appropriate because items such as origination date, maturity date, amortization term, etc. would also apply to corporate debt. A description of each proposed data point is provided in the Appendix to this release in Table 10.

1. Title of the underlying security or agreement, denomination, and currency.
2. The payment frequency of the security or agreement.
3. Whether the security or agreement is callable.

²⁷⁶ With respect to accounts receivable, an originator generally makes loans that are secured by accounts receivable owed to the dealer, manufacturer, distributor or other commercial customer against which an extension of credit was made and, in limited cases, by other personal property, mortgages on real estate, assignments of certificates of deposit or letters of credit. The accounts receivable which are pledged to an originator as collateral may or may not be secured by collateral. In the case of a loan facility secured by accounts receivable, the lender usually has discretion as to whether to make advances to the borrower under that facility.

²⁷⁷ An asset pool of an issuing entity includes all other instruments provided as credit enhancement or which support the underlying assets of the pool. If those instruments are securities under the Securities Act, they must be registered or exempt from registration if included in the asset pool as provided in Securities Act Rule 190, regardless of their concentration in the pool. See Securities Act Rule 190(a) and (b). See also Section III.A.6.a. of the 2004 ABS Adopting Release.

4. Name of trustee.
5. Underlying SEC file number and CIK number.
6. Whether the security is a zero-coupon, that is whether it bears interest by means of periodic payments or by means of purchase at a discount and full price repayment at maturity.

Request for Comment

- Should asset-level disclosure be required for ABS backed by corporate debt? Are all of the corporate debt data points appropriate? What other data points should be required by all issuers of ABS backed by corporate debt? Please provide a detailed explanation of the reasons why or why not.
- Should we require asset-level disclosure of credit enhancements related to the underlying security? If so, how would we define the data point(s) and the related responses?

(vi) Resecuritizations

In a resecuritization ABS, the asset pool is comprised of one or more asset-backed securities. We are proposing that issuers provide the same Schedule L data as required for corporate debt-backed securities, for each asset-backed security in the asset pool because the same information about the underlying asset-backed security, such as the title of the security, payment frequency, whether it is callable, the name of trustee and the underlying SEC file number and CIK number would be useful to an investor. In addition, we are proposing that issuers provide Schedule L data for assets underlying those securities.²⁷⁸ For instance, in an offering where the asset pool is comprised of several RMBS, then the data points in Item 1 and Item 10 of Schedule L would be required for every RMBS security in the asset pool, as well as the data points in Item 1 and Item 2 for each loan underlying each RMBS security. Also, under current rules, if the assets that will be securitized are themselves securities under the Securities Act, the offering of those securities must be registered or exempt from registration under the Securities Act, and all disclosures for a registered offering is required.²⁷⁹

²⁷⁸ The waterfall computer program would also be required for each underlying security. See our proposed changes to Item 1113 (h) of Regulation AB discussed in Section III.B.1 below.

²⁷⁹ Due to the exposure created in the underlying instrument through the asset-backed offering, under current rules, information related to any underlying instrument is required to be disclosed in accordance with offering disclosure requirements of current Forms S-1 and S-3. For example, updated and current information includes updated pool data, static pool, risk factors, performance information, how the underlying securities were

Request for Comment

- Is our proposal for resecuritizations appropriate? What other data points should be required by all issuers of that asset class? Please provide a detailed explanation of the reasons why or why not.
- Should we require disclosure of the ratings of the resecuritized securities in Schedule L?
- Should we require Schedule L data for the asset pool only, i.e. only the data points in Item 1 and Item 9 of Schedule L?
- Would issuers of the resecuritization ABS be able to obtain the asset-level data for the pool of assets underlying the resecuritized ABS? Should we phase in the requirement? We note that Project RESTART recommends that issuers provide the loan-level reporting package for outstanding RMBS,²⁸⁰ although we note that the ASF recommendation may only serve to provide information similar to our proposed requirements for periodic reports, and may not include all the information required at the time of an offering.

2. Asset-Level Ongoing Reporting Requirements

In addition to asset-level information at the time of the offering, we are proposing to require asset-level performance information in a standardized format filed on EDGAR in periodic reports required under Sections 13 and 15(d) of the Exchange Act, including those required pursuant to the new undertaking to continue reporting described above. The proposed asset-level performance data in periodic reports would differ from information that would be required at the time of the offering. We believe that in periodic reports, some of the most important information focuses on whether an obligor is making payments as scheduled, the efforts by the servicer to collect amounts past due, and the losses that may pass on to the investors.

Currently, issuers report performance information in periodic reports on an aggregate basis; however, we believe

acquired, and whether and when the underlying securities experienced any trigger events or rating downgrades. As we stated in the 2004 ABS Adopting Release, not all items of disclosure required at the time of offering the resecuritization ABS are available through incorporation by reference of Exchange Act reports. See Section III.A.7. and footnote 193 of the 2004 ABS Adopting Release. Furthermore, under our proposal requiring one prospectus for each ABS offering, all of the information must be contained in the prospectus.

²⁸⁰ See American Securitization Forum RMBS Disclosure and Reporting Package Final Release (July 15, 2009) at 21, available at <http://www.americansecuritization.com/>.

that it would be most useful for investors to receive information regarding whether an individual obligor is making payments as scheduled, the efforts by the servicer to collect amounts past due, and the loss that may pass on to the investors on an asset-level basis. That way, an investor may use the asset-level information to conduct his or her own valuation of the credit quality of a particular asset and its effect on the pool throughout the life of the investment. We also believe that regulators could find this information useful. Like asset-level data at the time of the offering, we are proposing to require asset-level performance data to be filed on EDGAR in XML in order to facilitate data analysis. The proposed disclosure requirements are contained in proposed Item 1121(d) and Schedule L-D.

As we discussed earlier, in to order facilitate comparison of information across securities, we believe that asset-level data should be standardized, and some organizations have already developed data points for ongoing reporting of information for registered and unregistered commercial mortgage-backed securities and residential mortgage-backed securities.²⁸¹ In our proposed periodic reporting requirements, we have utilized such standardization where feasible. Like our proposal for asset-level data at the time of the offering, our proposed periodic reporting requirements specify and define each item that must be disclosed for each asset in the pool. We are also proposing an instruction to Schedule L-D that will contain definitions for some of the terms that we use throughout the schedule. Attached at the end of this release we provide an appendix which contains a table of the proposed general item requirements as well as asset class specific item requirements. Each table lists the proposed item number, the title of the proposed data field, the proposed definition, the proposed response type and codes, if applicable, and proposed category of information. The proposed category of information designates the type of information we are proposing so that users will know when the data point is applicable.

Proposed Item 1121(d) and Schedule L-D disclosure would be required at the time of each Form 10-D. Periodic

²⁸¹ Materials related to the CRE Finance Council Investor Reporting Package are available at: http://www.crefc.org/Industry_Standards/CMSA-Investor_Reporting_Package/ CRE Finance Council IRP/. See American Securitization Forum RMBS Disclosure and Reporting Package Final Release (July 15, 2009), available at <http://www.americansecuritization.com/>.

reports on Form 10–D are required to be filed within 15 days after each required distribution date on the asset-backed securities, as specified in the governing documents for such securities.²⁸² If assets are added to the pool during the reporting period, either through prefunding periods, revolving periods or substitution, disclosure would be required under our proposed revisions to Item 6.05 on Form 8–K discussed in Section V.C.1. Similarly, the Schedule L data contained in proposed Item 1111A would need to be provided.

Request for Comment

- Are the definitions of terms in the proposed instruction to Schedule L appropriate? Are there any other terms that should be included in the instruction?
- Are the proposed coded responses contained in the attached tables appropriate? Does our approach to responses provide investors with meaningful disclosure while also addressing any privacy concerns? Please be specific in your response by commenting on specific proposed line items and codes.
- Is the proposed requirement to provide Schedule L–D data with Form 10–D appropriate? Should Schedule L–D data be required at any other time, such as daily or monthly for all asset classes? Please tell us why.

(a) Proposed Disclosure Requirements

We are proposing that the same asset classes, subject to the requirement to provide asset-level data at the time of the offering, would also be required to provide the standardized data points enumerated in Schedule L–D. Like the proposed asset-level information at the time of the offering, we are proposing that most issuers must provide the 46 data points listed under Item 1. General of Schedule L–D. We believe these data points are generic and consistent across asset classes, and should also apply to any new asset classes that may be included in a registered offering. In addition, we also propose asset class specific data points that will be discussed further below.

With respect to each asset in the pool, we are proposing to require the following disclosure with each Form 10–D. A description of the 46 data points is provided in Table 11 of the Appendix.

1. The unique asset number and a description of the type of number. The asset number and type of asset number should be the same values assigned at

the time of the offering that would appear in Schedule L.

2. Whether the asset is designated to a particular collateral group.

3. The beginning and ending dates of the reporting period.

4. The actual total amount paid during the reporting period, the amount of interest collected, the amount of principal collected and other amounts collected.

5. Any other principal and interest adjustments.

6. The current asset balance and scheduled asset balance.

7. Amounts that were scheduled to be collected during the reporting period, which would be the scheduled payment amount, scheduled interest payment amount, and scheduled principal amount.

8. A code that describes the current delinquency status and current payment status.

9. A code that describes the payment history over the most recent 12 months.

10. The next due date, next interest rate and remaining term to maturity.

11. Information related to servicing which would be:

a. The current servicer and the dollar amount of the fee earned by the current servicer for administering the loan for the reporting period;

b. If the loan's servicing has been transferred, the effective date of the servicing transfer;

c. Any amounts advanced by the servicer during the reporting period, and the cumulative outstanding amount;

d. A code that describes the manner in which principal and/or interest are advanced by the servicer;

e. The date a servicer stopped advancing payment; and

f. Other fees earned by the servicer and other fees assessed by the servicer related to the asset.

12. Whether the asset terms have been modified.

13. Whether a notice to repurchase the asset has been received, whether the asset has been repurchased, the repurchase date, name of the repurchaser, and the reason for repurchase.

14. Whether the asset has been liquidated.

15. Whether the asset has been charged-off and the charged-off principal and interest amounts.

16. Whether the asset has been paid-off, and if so, whether any prepayment penalties were paid or waived. If waived, a code indicating the reason why.

Request for Comment

- Are the general data points appropriate for Form 10–D? What other

data points would apply to all asset classes? Please provide a detailed explanation of the reasons why or why not.

(b) Proposed Exemptions

We are proposing to exclude ABS backed by credit cards, charge cards and stranded costs from the requirement to provide ongoing asset-level data in periodic reports. Like the proposed asset-level data at the time of the offering, because of the volume of accounts in a credit card or charge card securitization we believe that granular asset-level information would not be as useful to investors and would be very costly for issuers, depending on the level of automation of the issuer's information processing and delivery system. For these asset classes, we are proposing that issuers provide grouped account data that we discuss in Section III.A.3. below. As explained earlier, because transition property is not a receivable, nor a pool of receivables, we do not propose asset-level data be provided for stranded cost ABS for periodic reports.

Request for Comment

- Is there any asset-level data that should be provided in periodic reports by credit card, charge card or stranded cost issuers? If so, please explain why.
- Is there any pool-level data that should be provided in periodic reports by credit card, charge card, or stranded cost issuers? Should any pool-level data be standardized for these asset classes? If so, please explain why. For instance, we request comment above about whether we should require issuers of ABS backed by credit cards and charge cards to provide specific types of pool-level disclosure in a standardized manner at the time of an offering.²⁸³ Should any of that pool-level information be required with each periodic report on Form 10–D? For instance, should we use the same distributional groups for account balance, account age, APR, credit available for purchase, types of products, and accounts under a debt management program?
- Are there any other asset classes that should be exempt from the asset-level disclosure requirement in periodic reports and why?

(c) Residential Mortgage-Backed Securities

We are proposing 151 data points for periodic reports for ABS backed by residential mortgages. Similar to the RMBS data points we are proposing for

²⁸² See General Instruction A.2 to Form 10–D.

²⁸³ See Section III. A.1.b.iv. above.

Schedule L, much of the proposed data and definitions are based on fields developed by organizations doing work in the area of RMBS, as well as government agencies.²⁸⁴ Many of the data points we are proposing relate to loan modifications and loss mitigation activities by the servicer. We describe the additional proposed data points below. A description of each proposed data point and related response is provided in Table 12 of the Appendix to this release.

1. Information related to delinquent loans, such as a code describing the reason for non-payment and codes describing the status of the non-payment;
2. If the loan is an adjustable rate mortgage, the rate at the next reset date, the next interest reset date, the payment at the next reset date, the next payment reset date, whether the loan is an option ARM, and whether the borrower exercised an option to convert an ARM loan to a fixed loan;
3. If the obligor has filed for bankruptcy:
 - a. The date of filing and case number;
 - b. The date on which the next payment is due under the terms of the bankruptcy plan;
 - c. If the bankruptcy has been released, the code that describes the reason for the release and the date of the release;
 - d. The actual due date of the loan had the bankruptcy not been filed; and
 - e. Whether the debt was reaffirmed and whether the trustee handles post-petition payments.
4. With respect to delinquent loans, whether the servicer is pursuing loss mitigation and the type of loss mitigation with the loan, borrower or property;
5. Information related to loan modifications:
 - a. The date of first payment due post modification;
 - b. The loan balance as of the modification effective payment date;
 - c. The amount added to the principal balance of the loan;
 - d. Pre- and post-modification interest rates;
 - e. Post-modification margin, which is the number of percentage points added to the index to establish the new rate;
 - f. Pre- and post-modification principal and interest scheduled payment amount;
 - g. Post-modification interest rate ceilings and floors;
 - h. Pre- and post-modification initial and subsequent limitations on interest rate increases and decreases;

- i. Pre- and post-modification limitations on payment amount increases and decreases;
 - j. Pre- and post-modification maturity dates;
 - k. The number of months of the interest reset period, pre- and post-modification;
 - l. Updated debt-to-income ratios used to qualify the modification;
 - m. Pre- and post-modification interest only period;
 - n. Cumulative and current forgiven interest and principal amounts;
 - o. The due date on which the next payment adjustment is scheduled to occur for an ARM loan;
 - p. Whether the loan remains an ARM loan post-modification;
 - q. Whether the terms of the modification agreement call for the interest rate to step up over time, the maximum interest rate to which the loan may step up and the date the maximum interest rate will be reached;
 - r. Cumulative and current principal amount deferred by the modification that are not subject to interest accrual as well as any amounts collected from the obligor during the current period;
 - s. Cumulative and current interest and fees deferred by the modification that are not subject to interest accrual as well as any amounts collected from the obligor during the current period;
 - t. The total amount of expenses that have been waived or forgiven and reimbursable to the servicer;
 - u. The total amount of escrow and corporate advances made by the servicer at the time of the modification. Corporate advances are amounts paid by the servicer which may include foreclosure expenses, attorney fees, bankruptcy fees, and insurance, among others;
 - v. The total amount of servicing fees for delinquent payments that has been advanced by the servicer at the time of the modification;
 - w. Whether the loan has been modified under the terms of the Home-Affordable Modification Plan (HAMP).²⁸⁵ If so, information regarding participation end dates, amounts paid and payable under the program, whether the mortgage holder has or will receive the incentive amount under the program, and actual and scheduled balance of the loan plus any deferred amounts.
6. If a forbearance plan is in effect, the start date and end date of the plan. A forbearance plan is a period during

which no payment or a payment amount less than the contractual obligation is required by the obligor;

7. If a repayment plan is in effect, the start and end date of the plan, and the date the obligor ceased complying with the terms of the plan. A repayment plan refers to a period during which an obligor has agreed to make monthly mortgage payments greater than the contractual installment in an effort to bring a delinquent loan current;
8. If the type of loss mitigation is Deed-In-Lieu, the date on which a title was transferred to the servicer pursuant to a deed-in-lieu-of-foreclosure arrangement. Deed-In-Lieu refers to the transfer of title from an obligor to the lender to satisfy the mortgage debt and avoid foreclosure;
9. If the type of loss mitigation is a short sale, the amount accepted for a short sale. Short sale refers to the process in which a servicer works with a delinquent obligor to sell the property prior to the foreclosure sale;
10. If the loan has exited loss mitigation efforts, whether the plan was completed or satisfied, cancelled or failed, or denied and the date of exit;
11. If the loan is in the foreclosure process:
 - a. The date the loan was referred to a foreclosure attorney and the date on which foreclosure action was taken;
 - b. The expected date of the foreclosure sale, the date set for the foreclosure sale by the court or the trustee, and the actual date it occurs;
 - c. A code that describes the reason for delay in the foreclosure process;
 - d. If state law provides for a period for confirmation, ratification, redemption or upset period, the date of the end of the period;
 - e. The amount bid by the servicer at the foreclosure sale;²⁸⁶
 - f. If the loan exited foreclosure, the date and the code that describes the reason the proceedings ended;
 - g. If the property was sold to a third-party, the sale amount of the property;
 - h. In a judicial foreclosure state, if a judgment on the foreclosure has occurred, the date on which a court granted the judgment in favor of the creditor;
 - i. The date on which the publication of the trustee's sale information is published in the appropriate venue; and

²⁸⁵ HAMP is a federal loan modification program. Further details are available at <http://makinghomeaffordable.gov/> and <https://www.hmpadmin.com/portal/index.html>.

²⁸⁶ The servicer will usually place an opening bid, on behalf of the issuing entity, at the foreclosure auction that is usually equal to the outstanding loan balance, interest accrued, and any additional fees and attorney fees associated with the trustee sale. If there are no bids higher than the opening bid, the property will be owned by the issuing entity and be considered real estate owned (REO). This typically would occur because the market value of the property is less than the total amount owed on the loan.

²⁸⁴ See Section III.A.1.c. above.

j. The date on which the servicer sent a notice of intent to the obligor informing the obligor of the acceleration of the loan and pending initiation of foreclosure action.

12. If the property is now owned by the issuing entity due to an unsuccessful sale at the foreclosure auction, the asset is considered real estate owned (REO).²⁸⁷ Information should be provided on the following:

- a. The most recent listing date and price;
- b. If an offer has been accepted, the amount and the date of acceptance;
- c. The original list date and list price for the property;
- d. If an REO sale has closed, the closing date, the gross proceeds, and the net proceeds;
- e. The cumulative monthly and total loss amount passed on to the issuing entity;
- f. Any amount recovered during the current period;
- g. The start and end date of an eviction process, if applicable; and
- h. If the loan exited REO during the current period, provide the date and a code describing the reason.

13. Information related to loss claims:

- a. The unpaid principal balance at the time of liquidation;
- b. Amounts advanced by the servicer and to be reimbursed such as interest, servicing fees, attorney fees, attorney costs, property taxes, property maintenance, insurance premiums, utility expenses, appraisal expenses, property inspections, any pre-securitization advances and other miscellaneous expenses;
- c. If the loan is in REO, the amount of REO management fees;
- d. The amount of the payment to the obligor or tenants in exchange for vacating the property; and
- e. Any incentive payment to servicer for carrying out a deed-in-lieu or short sale.

14. Information related to loss recoveries:

- a. The escrow balance and the suspense balance;
- b. Proceeds collected from hazard claims, pool insurance, mortgage insurance, property tax refunds, and insurance premium refunds; and
- c. The amount of any realized loss resulting from bankruptcy or special hazard.

15. If a mortgage insurance claim has been submitted to the primary mortgage insurance company for reimbursement, the following information would be required:

- a. The date the claim was filed and the date it was paid;
- b. The amount claimed and the amount paid;
- c. The date the claim was denied or rescinded; and
- d. If the property was conveyed to the insurance company, the date of conveyance.

Request for Comment

• Are all of the RMBS data points appropriate for periodic reports? What other data points should be required by all RMBS issuers? Are any data points not necessary or overly burdensome to obtain? Please provide a detailed explanation of the reasons why or why not. Some data points request the results of calculations, such as debt-to-income ratios. Can those data points be calculated from information already provided by the other asset-level data points? If so, can users of the information independently calculate these data points? Should we not require these data points to be included in the asset-level data file for periodic reports?

• Should we add a data point to require the amount of any loss as a result of intentional misstatement, misrepresentation, or omission by an applicant or other interested parties, relied on by a lender or underwriter to provide funding for, to purchase, or to insure a mortgage loan? If so, how would the issuer be able to verify the information? Is this information currently disclosed?

• Should we require updated information about the obligor, such as updated credit scoring information? If so, why? Would issuers be able to obtain updated credit scores?

• We are proposing several data points to capture activity specifically related to the HAMP program. Are more generic data points appropriate that would capture activity if other types of government programs are or become available? If so, please provide us with the data points that would be more appropriate and the related definition.

• We are proposing, in the case of a foreclosure, that registrants provide the expected date of the foreclosure sale, the date on which the foreclosure sale has been set by the court or the trustee, and the date on which the foreclosure sale occurs. Are all three data points necessary?

• We are proposing, in the case of a delayed foreclosure, that registrants provide a code describing the reason for the delay. Should we specify the number of days that would constitute a delay for this item requirement? If so,

what would be the appropriate number of days and why?

(d) Commercial Mortgage-Backed Securities

We are proposing to require 47 additional data points for periodic reports that relate to commercial mortgages. Similar to the proposed Schedule L data points for commercial mortgage-backed securities, the data points we are proposing to require below are primarily based on the definitions provided by the CMSA. With respect to each commercial mortgage loan in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in Table 13 to the Appendix to this release.

1. The remaining term, number of properties that collateralize the loan and the current hyper-amortizing date. The hyper-amortizing date is the current anticipated repayment date, after which principal and interest may amortize at an accelerated rate, and/or interest to the mortgagor increases substantially.

2. If the loan is an adjustable rate mortgage, the rate at the next reset date, the next date the rate is scheduled to change, the amount of the payment at next reset, and next payment change date.

3. If the loan permits negative amortization, the cumulative deferred interest, and deferred interest collected.

4. A code describing any workout strategy.

5. Information related to modifications, such as the date of the last modification, a code that describes the type of loan modification, the new modified note rate, payment amount, maturity date and amortization period.

6. Information related to each property such as property name, geographic location, as represented by zip code, property type, net rentable square footage, number of units, year built, valuation amounts, physical occupancy, property status and a code that describes the defeasance status. A defeasance option is when an obligor may substitute other income-producing property for the real property without pre-paying the existing loan.

7. Financial information related to the properties including:

- a. Financial reporting beginning and end dates;
- b. Revenues, operating expenses, net operating income, and net cash flow;
- c. A code describing how net operating income and net cash flow were calculated; and
- d. The ratio of underwritten net operating income to debt service, the ratio of underwritten net cash flow to

²⁸⁷ Servicing agreements will usually require the servicer to promptly sell the property.

debt service and a code describing how the ratio was calculated.²⁸⁸

Request for Comment

- Are all of the CMBS data points for periodic reports appropriate? What other data points should be required by all CMBS issuers? Please provide a detailed explanation of the reasons why or why not.
- Should we require more data points relating to foreclosure in CMBS, like we propose for RMBS? If so, please be specific as to which data points should be required and why.
- We are proposing data points for information related to the properties collateralizing each asset in Item 3(d) of Schedule L–D because we note that issuers that currently provide the disclosure in accordance with the CMSA Investor Reporting Package provide property information on a periodic basis. Some of this information is the same disclosure that would have been provided at the time of the offering by proposed Schedule L. Is it appropriate to include all of the data points in proposed Item 3(d) with each Form 10–D filing? In particular, is it useful for investors to receive the Item 3(d)(1) Property name, Item 3(d)(2) Property geographic location, Item 3(d)(3) Property type and Item 3(d)(6) Year built with each Form 10–D filing? Please tell us why or why not.

(e) Other Asset Classes

As discussed above, because we are unaware of any other organizations attempting to standardize data points for asset classes other than mortgages, we are proposing data points for periodic reports derived from the aggregate pool-level disclosure that is already provided in periodic reports for the following asset classes: Automobile loans and leases; equipment loans and leases; student loans; and securitizations. We do not propose any asset specific data points related to repackagings of corporate debt for periodic reports. We believe the data points required under proposed Item 1. General of Schedule L–D will provide the appropriate asset-level performance disclosure for those assets to investors.

Request for Comment

- Should we propose asset specific data points related to repackaging of corporate debt for periodic reports? If so, what would those be and what

would be the appropriate form of disclosure?

(i) Automobiles

We are proposing to require five additional data fields for periodic reports that relate to ABS backed by automobiles loans and nine for ABS backed by automobile leases. With respect to each loan or lease in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in the Appendix to the release in Table 14 for automobile loans and Table 15 for automobile leases.

1. Whether a form of subsidy is received on the loan, such as an incentive or rebate.
2. Any recovery of amounts previously charged-off.
3. Whether the vehicle was repossessed and related proceeds and fees.
4. For automobile leases, the updated residual value, source of residual value, whether the lease has been terminated and the reason why, any excess wear and tear or mileage charges, sales proceeds of the vehicle, or extension of lease term.

Request for Comment

- Are all of the automobile data points appropriate for periodic reports? What other data points should be required by all issuers of ABS backed by automobile loans or leases? Please provide a detailed explanation of the reasons why or why not.
- We are proposing to require an indicator for the reason for automobile lease termination. The code options for this indicator would be: (1) Scheduled termination; (2) Early termination due to bankruptcy; (3) Involuntary repossession; (4) Voluntary repossession; (5) Insurance payoff; (6) Customer payoff; (7) Dealer purchase; and (8) Other. Are these codes appropriate? Are there additional codes that should be included?

(ii) Equipment

We are proposing to require two additional data fields for periodic reports that relate to ABS backed by equipment loans and five that relate to equipment leases. With respect to each loan or lease in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in the Appendix to the release in Table 16 for equipment loans and Table 17 for equipment leases.

1. Liquidation proceeds and any recovery of amounts previously charged-off; and

2. For equipment leases, the updated residual value, source of residual value, and whether the lease has been terminated and the reason why.

Request for Comment

- Are all of the equipment data points appropriate for periodic reports? What other data points should be required by all issuers of ABS backed by equipment loans or leases? Please provide a detailed explanation of the reasons why or why not.
- We are proposing to require an indicator for the reason for equipment lease termination. The code options for this indicator would be: (1) Scheduled termination; (2) Early termination due to bankruptcy; (3) Involuntary repossession; (4) Voluntary repossession; (5) Insurance payoff; (6) Customer payoff; (7) Dealer purchase and (98) Other. Are these codes appropriate? Are there additional codes that should be included?

(iii) Student Loans

We are proposing to require six additional data fields for periodic reports that relate to ABS backed by student loans. With respect to each loan in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in the Appendix to the release in Table 18.

1. A code that describes the current obligor payment status.
2. The amount of capitalized interest during the reporting period.
3. If there is activity related to any guarantor during the reporting period, principal and interest received from the guarantor, whether a claim is in process and the outcome of the claim.

Request for Comment

- Are all of the student loan data points appropriate for periodic reports? What other data points should be required by all issuers of ABS backed by student loans? Please provide a detailed explanation of the reasons why or why not.

(iv) Floorplan Financings

We are proposing to require five additional data fields for periodic reports that relate to ABS backed by floorplan financings. With respect to each loan in the pool, the issuer would be required to disclose the information described below. A description of each proposed data point is provided in the Appendix to the release in Table 19.

1. The liquidation proceeds and any recovery of amounts previously charged-off.
2. Updated credit score and type.

²⁸⁸ For this purpose, “underwritten” means the adjusted amount based on a number of assumptions made by the mortgage originator or seller. We believe issuers will have had to include narrative disclosure about the assumptions used in the prospectus for the transaction.

Request for Comment

- Are all of the proposed floorplan financing data points appropriate for periodic reports? What other data points should be required by all issuers of ABS backed by floorplan financings? Please provide a detailed explanation of the reasons why or why not.

(v) Resecuritizations

As discussed earlier, at the time of the offering, we are proposing to require underlying asset-level data disclosure for securitization ABS.²⁸⁹ Therefore, for periodic reporting, in addition to the asset-level data that would be required of the underlying securities as outlined in Item 1. General of Schedule L–D, we also propose that issuers of securitization ABS provide Schedule L–D data for the asset pool of the underlying securities. For example, if the ABS is comprised of several RMBS, then the data points in Item 1 of Schedule L–D would be required with respect to each RMBS security in the asset pool. In addition, the data points in Items 1 and 2 of Schedule L–D would be required for each loan underlying each RMBS security.²⁹⁰ If the issuer of the underlying security suspends its reporting obligation and stops reporting, the issuer of the securitization ABS would still have to provide the required Schedule L–D data for each loan underlying each RMBS security because we believe that investors in the securitization ABS would need the underlying asset-level information to evaluate the performance of the securitization ABS.

Request for Comment

- Is our proposal for asset-level reporting for securitizations appropriate?
- Would issuers of the securitization ABS be able to obtain the asset-level data for the pool of assets underlying the securitized ABS? Should we phase in the requirement? We note that Project RESTART recommends that issuers provide the loan-level reporting package for outstanding RMBS.²⁹¹

²⁸⁹ Where the underlying securities were required to be registered pursuant to Rule 190 [17 CFR 230.190], the issuer of those underlying securities is subject to the requirements of Section 13(a) or 15(d) of the Exchange Act, as applicable.

²⁹⁰ However, asset-level data would not be required if the asset class is exempt from the requirements of Item 1121(d) of Regulation AB. For instance, if the asset pool is comprised of stranded cost ABS, then Schedule L–D for the underlying pool would not be required because they are exempt from the requirements of Item 1121(d).

²⁹¹ See American Securitization Forum RMBS Disclosure and Reporting Package Final Release (July 15, 2009) at 21, available at <http://www.americansecuritization.com/>.

3. Grouped Account Data for Credit Card Pools

As we discussed above, we are proposing to exclude ABS backed by credit cards²⁹² from the requirement to provide asset-level data because we believe that level of information would result in an overwhelming volume of data that may not be useful to investors and providing the data may be cost-prohibitive for issuers. However, as we also noted above, we believe that investors and market participants should have access to the information necessary to assess the credit quality of the assets underlying a securitization transaction at inception and over the life of the transaction. Instead of providing asset-level data, we are proposing that issuers of ABS backed by credit cards provide disclosure more granular than pool-level disclosure by creating “grouped account data.” As we explain in more detail below, grouped account data would be created by compressing the underlying asset-level data into combinations of standardized distributional groups using asset-level characteristics and providing specified data about these groups. Like our proposals for other asset classes discussed above, we are proposing to require the grouped account data be provided in XML and filed as an Asset Data File in order to facilitate data analysis.²⁹³ Our proposal for grouped account data would be in addition to the disclosure currently required about the composition and characteristics of the pool of assets taken as a whole.

Request for Comment

- Is our proposal to require grouped account data disclosure with standardized groupings appropriate?
- Do investors in ABS backed by credit cards need enhanced information about assets, or are our current disclosure requirements sufficient?
- Is our proposal to require grouped account data in XML appropriate? Why or why not?

(a) When Credit Card Pool Information Would Be Required

Today we are proposing new Item 1111(i) and Schedule CC of Regulation AB that describe the standardized distributional groups and the information that would be provided for each group. Consistent with the proposed asset-level disclosure requirements for other asset classes, Schedule CC data would be an integral part of the prospectus, and in order to

²⁹² For purposes of this discussion, we refer to both credit card and charge cards as “credit cards.”

²⁹³ See Section III.A.4.

facilitate investor analysis prior to the time of sale, we are proposing to require issuers to provide Schedule CC data as of a recent practicable date that we define as the “measurement date” at the time of a Rule 424(h) prospectus and at the time of the final prospectus under Rule 424(b). Likewise, if issuers are required to report changes to the pool under Item 6.05 of Form 8–K, updated Schedule CC data would be required.²⁹⁴ Updated Schedule CC would also be required if an issuer is required to report changes to the waterfall under proposed Item 6.07 to Form 8–K.²⁹⁵ As we discuss in Section III.A.4, we are proposing a new Item 6.06 to Form 8–K for issuers to file the XML data file.

In addition, because credit card ABS are typically structured as master trusts, accounts may be added or withdrawn.²⁹⁶ Unlike amortizing asset pools, the composition of the underlying asset pool varies over time and we believe investors and market participants would benefit from receiving information about the underlying asset pool as the pool evolves. Therefore, we are proposing that an updated Schedule CC be filed with each periodic report on Form 10–D.

Request for Comment

- Is the proposed requirement to provide Schedule CC data with the proposed Rule 424(h) prospectus, the final prospectus under 424(b) and for changes under Item 6.05 of Form 8–K appropriate?
- Is the proposed measurement date appropriate? Should we provide further guidance about what would be a recent practicable date for purposes of determining the measurement date? For example, should we specify that it be prepared as of a date that is five business days prior to filing?
- Would the proposed Schedule CC contained in the most recent Form 10–D provide investors with sufficiently current information at the time of making an investment decision? In this regard, we note the result could be that the most recent Schedule CC data could be as old as 45 days.
- Is our proposal to require that updated Schedule CC data be provided with Form 10–D appropriate? Should Schedule CC data be required at any other time, such as daily, weekly or

²⁹⁴ Under our proposed revisions to Item 6.05 of Form 8–K, a narrative description of the changes that were made to the asset pool, including the number of assets substituted or added to the asset pool, would be included in the body of the report.

²⁹⁵ See Section III.B. below.

²⁹⁶ See fn. 177 above and accompanying text.

monthly? If so, please tell us when and why.

- Is our proposal to require that updated Schedule CC data be provided when changes to the waterfall are reported under proposed Item 6.07 appropriate? Please tell us why or why not.

(b) Proposed Disclosure Requirements

We are proposing that issuers group the underlying pool into grouped account data lines. Proposed Schedule CC sets forth the standardized groups and the information requirements that would be required for credit card pools. Grouped account data lines are created by grouping the underlying accounts by several characteristics. We further designate the groupings for each characteristic. This way, investors may receive more granular information about the underlying asset pool in order to perform better analysis of future payments on the asset-backed securities.²⁹⁷

We are proposing that data be grouped by a combination of the following characteristics:

1. Credit score. If the credit score used is FICO, the proposed groupings would be: (1) Less than 500; (2) 500–549; (3) 550–599; (4) 600–649; (5) 650–699; (6) 700–749; (7) 750–799; (8) 800 and over; and (9) unknown. We are

proposing that issuers provide the most recent credit score available and accompanying disclosure would be required to explain the age of the credit score or the policy for updating the credit score from the time of account origination.²⁹⁸ If the credit score used is not FICO, an issuer would designate similar groupings and provide explanatory disclosure. We are proposing a group of “unknown;” however, as we discuss above, registrants should be mindful of their responsibilities to provide all of the disclosures required in the prospectus and other reports.²⁹⁹

2. Number of Days Past Due. The proposed groupings would be accounts that are: (1) Current; (2) less than 30 days; (3) 30–59 days; (4) 60–89 days; (5) 90–119 days; (6) 120–149 days; (7) 150–179 days; and (8) 180 days and over.³⁰⁰

3. Account age. The proposed groupings would be accounts that are: (1) Less than 12 months; (2) 12 to 24 months; (3) 24 to 36 months; (4) 36 to 48 months; (5) 48 to 60 months; and (6) over 60 months.

4. State. The proposed groupings would be the top 10 states for aggregate account balance. The remaining accounts would be grouped into the category “other.”

5. Adjustable rate index. The proposed groupings for the adjustable rate indexes would be: (1) Fixed; (2) prime; and (3) other.

In order to create a grouped account data line, each group based on each of these characteristics should be combined with all groups for all other characteristics. All possible combinations would result in 14,256 grouped account data lines. The table below illustrates how the distributional groups and the information requirements relate to each other. For example, grouped account data line 2 in the table below presents the information required by columns (b)(1) through (b)(5) by combining all the credit card accounts in the underlying pool that fall within the 500–549 credit score group (column (a)(1)), payments are less than 30 days past due (column (a)(2)), account age of 12 to 24 months (column (a)(3)), with obligors located in the state of Alabama (column (a)(4)), where the adjustable rate index is based on a floating percentage (column (a)(5)). For each grouped account data line, we are proposing that issuers provide the following information: The aggregate credit limit; aggregate account balance; number of accounts; weighted average annual percentage rate; and weighted average net annual percentage rate.³⁰¹

| Grouped account data line number | Credit score | Days payment is past due | Account age | Top 10 State | Adjustable rate index | Aggregate credit limit (\$) | Aggregate account balance (\$) | Number of accounts (#) | Weighted average APR (%) | Weighted average net APR (%) |
|----------------------------------|---------------|--------------------------|----------------------|--------------|-----------------------|-----------------------------|--------------------------------|------------------------|--------------------------|------------------------------|
| | (a)(1) | (a)(2) | (a)(3) | (a)(4) | (a)(5) | (b)(1) | (b)(2) | (b)(3) | (b)(4) | (b)(5) |
| 1 | less than 500 | Current | Less than 12 months. | AK | Fixed. | | | | | |
| 2 | 500–549 | < 30 days | 12–24 months | AL | Prime. | | | | | |
| 3 | 550–599 | 30–59 days | 24–36 months | AR | Other. | | | | | |
| 4 | 600–649 | 60–89 days | 36–48 months | AZ | Fixed. | | | | | |
| 5 | 650–699 | 90–119 days | 48–60 months | CA | Prime. | | | | | |
| 6 | 700–749 | 120–149 days | Over 60 months | CO | Other. | | | | | |
| 7 | 750–799 | 150–179 days | Less than 12 months. | CT | Fixed. | | | | | |
| 8 | 800 and over | 180+ days | 12–24 months | DE | Prime. | | | | | |
| 9 | less than 500 | < 30 days | 24–36 months | DC | Other. | | | | | |
| 10 | 500–549 | 30–59 days | 36–48 months | FL | Fixed. | | | | | |
| 11 | 550–599 | 60–89 days | 48–60 months | Other | Prime. | | | | | |
| 12 | 600–649 | 90–119 days | Over 60 months | AK | Other. | | | | | |
| 13 | 650–699 | 120–149 days | Less than 12 months. | AL | Fixed. | | | | | |
| 14 | 700–749 | 150–179 days | 12–24 months | AR | Prime. | | | | | |
| 15 | 750–799 | 180+ days | 24–36 months | AZ | Other. | | | | | |
| 16 | 800 and over | Current | 36–48 months | CA | Fixed. | | | | | |

Request for Comment

- Are the proposed standardized distributional groups appropriate? Are

there any other distributional groups that we should specify? Are there any that should not be required?

- Would credit card ABS issuers be able to provide this information in this

²⁹⁷ We base our groupings on a comment letter received from an investor in response to the FDIC Securitization Proposal. See fn. 257 above.

²⁹⁸ See further discussion regarding explanatory disclosure for asset data files in Section III.A.4. and proposed Item 6.06(b) to Form 8–K.

²⁹⁹ See Securities Act Rule 409 [17 CFR 230.409] and Exchange Act Rule 12b–21 [17 CFR 240.12b–21].

³⁰⁰ See fn. 260 above. As we discuss above, our rules do not currently provide a definition of delinquent because of various delinquency policies across issuers. Instead of proposing to define

delinquency, we believe disclosure of the number of days past due allows for analysis and comparability of the data.

³⁰¹ The weighted average net annual percentage rate would be the weighted average of the annual percentage rate less any servicing fees related to the account.

format on a cost-effective basis? Would it raise competitive concerns?

- We understand that most credit card ABS issuers currently provide disclosure about the FICO credit score distribution of the underlying pool. Rather than allowing the issuer to use a credit score that is not FICO, should we require that all issuers provide disclosure of FICO credit scores by distributional groups? Are there other types of credit scores with respect to which we should require disclosure by distributional group? If so, what would be the appropriate distributional groups?

- Should we provide a definition for delinquency? If so, how should it be defined?

- Are the distributional groups for adjustable rate index appropriate? Are there any other commonly used indexes that we should specify?

- Would issuers already have information about all of the states in order to prepare the groupings for the top 10 states by aggregate account balance and other? If so, should we require that issuers provide groupings by every state? Please tell us why or why not.

- Are the proposed informational requirements appropriate for the grouped account data (*i.e.*, aggregate credit limit, aggregate account balance, number of accounts, weighted average APR and weighted average net APR)? What other types of information should issuers provide about their accounts in the grouped account data format?

- Are credit cards ever securitized using structures that are not master trusts? If so, should we require asset-level disclosure for non-master trust credit card ABS issuers because the pool would be fixed and contain a smaller number of accounts?

4. Asset Data File and XML

We are proposing to require asset-level information³⁰² and grouped account data (with respect to credit cards) related to an offering and ongoing periodic reporting be filed on EDGAR in XML (extensible Markup Language) as an asset data file. By proposing to require the asset-level data file in XML, a machine-readable language, we anticipate that users of the data will be able to download the disclosure directly into spreadsheets and databases, analyze it using commercial off-the-shelf software, or use it within their own models in other software formats.

Asset-backed filers currently are required to file their registration

statements, current and periodic reports in ASCII (American Standard Code for Information Interchange) or HTML (HyperText Markup Language).³⁰³ Our electronic filing system also uses other formats for reporting related to corporate issuers, such as XML, to process reports of beneficial ownership of equity securities on Forms 3, 4, and 5 under Section 16(a) of the Exchange Act,³⁰⁴ and a form of XML known as XBRL to provide financial statement data.³⁰⁵ As we explained in the XBRL Adopting Release, electronic formats such as HTML and XML are open standards³⁰⁶ that define or “tag” data using standard definitions. The tags establish a consistent structure of identity and context. This consistent structure can be recognized and processed by a variety of different software applications. In the case of HTML, the standardized tags enable Web browsers to present Web sites’ embedded text and information in a predictable format so that they are human readable. In the case of XML and XBRL, software applications, such as databases, financial reporting systems, and spreadsheets recognize and process tagged information. For asset-backed issuers, we believe that XML is the appropriate format to provide standardized asset data disclosure. As we discuss earlier, some issuers already file loan schedules on EDGAR as part of the pooling and servicing exhibit or a free writing prospectus. However, the data is currently filed on EDGAR in ASCII or HTML, both of which do not facilitate data analysis. XBRL allows issuers to capture the rich complexity of financial information presented in accordance with U.S. GAAP.³⁰⁷ In

³⁰³ Rule 301 under Regulation S–T [17 CFR 232.301] requires electronic filings to comply with the EDGAR Filer Manual, and Section 5.1 of the Filer Manual requires that electronic filings be in ASCII or HTML format. Rule 104 under Regulation S–T [17 CFR 232.104] permits filers to submit voluntarily as an adjunct to their official filings in ASCII or HTML unofficial PDF copies of filed documents.

³⁰⁴ 15 U.S.C. 78p(a).

³⁰⁵ See *Interactive Data to Improve Financial Reporting*, Release No. 33–9002 (Feb. 10, 2009) (“the XBRL Adopting Release”).

³⁰⁶ The term “open standard” is generally applied to technological specifications that are widely available to the public, royalty-free, at minimal or no cost.

³⁰⁷ As part of its process of developing proposed Accounting Standards Updates, the FASB identifies and seeks comment on proposed changes to tags in the U.S. GAAP XBRL Taxonomy. When the FASB publishes final Accounting Standards Updates, it includes in the final document proposed changes to the U.S. GAAP XBRL taxonomy as a result of the amendments in the Accounting Standards Update being issued. FASB Accounting Standards Updates, which include proposed updates to the U.S. GAAP XBRL taxonomy and are used to update the FASB Accounting Standards Codification. The FASB

contrast, the proposed asset data file will present relatively simpler characteristics of the underlying loan, obligor, underwriting criteria and collateral among other items that are well suited for XML. We are proposing XML, rather than XBRL, because there are many commercial products that can be used with XML including parsers that would allow investors to insert data into a relational database for analysis, data extensions available in XBRL are not applicable to this data set, the nature of the repetitive data lends itself to an XML format and the schema could be easily updated.

We understand that most of this information is data collected at the time of origination and ongoing performance information is maintained on servicing systems. The CRE Finance Council (formerly CMSA) is already moving towards requiring issuers to provide its Investor Reporting Package in XML.³⁰⁸ The use of XML will enable investors to use standard commercial off-the-shelf software for analysis of underlying loan-level data.³⁰⁹ This software may also permit investors to insert the data into a database to identify individual data points. Then the data can be aggregated, compared and analyzed. Data can also be subjected to further waterfall analysis. Since XML data can be visualized in internet browsers, investors can develop a style sheet if viewing data is important in their analysis.³¹⁰

Prior to requiring the asset data file in XML, technical specifications that describe the schema, which would include each data point described in Schedules L, L–D, and CC are necessary.³¹¹ Also, extension data would not be permitted in the asset-level data file because we believe it would defeat the purpose of standardizing the data elements.³¹² Instead, we are proposing to include a limited number of “blank” data tags in

Accounting Standards Codification is available at www.fasb.org.

³⁰⁸ See CRE Finance Council Investor Reporting Package X Version 6.0 Working Exposure Draft #1” available at http://www.crefc.org/Industry_Standards/CMSA-Investor_Reporting_Package/CRE_Finance_Council_IRP/.

³⁰⁹ Off-the-shelf software includes computer products that are ready-made and available for sale, lease, or license to the general public.

³¹⁰ A style sheet is a text file that provides instructions for formatting and displaying the information in XML documents in a human-readable format.

³¹¹ A schema is a set of custom tags and attributes that defines the tagging structure for an XML document.

³¹² Extension data would allow issuers to add their own data elements to our defined data elements.

³⁰² As defined in proposed Schedule L [17 CFR 229.1111A] and Schedule L–D [17 CFR 229.1121A].

our XML schema. In order to reduce complexity for users we are proposing to limit the number to ten blank data tags. These blank data tags would give issuers the ability to present additional asset-level data not required by proposed Schedule L or L-D. For example, if servicers were required to comply with a new modification program, and related tagged information would be material to investors, it may be appropriate to use a blank data tag. Additionally, if an issuer registers ABS backed by an asset class that has not been previously registered, so that no asset class specific schema exists at the time, that issuer could use the available blank data tags. Issuers, however, would need to provide a narrative explanation of the definitions or formulas for the additional tagged data and file it as another exhibit on Form 8-K or Form 10-D.³¹³ Issuers could also file other explanatory disclosure regarding the asset-level data in an exhibit, if necessary.³¹⁴

(a) Filing the Asset Data File and EDGAR

We are proposing that the new asset data file in XML be filed as an exhibit to the filings. Therefore, we are proposing changes to Item 601 of Regulation S-K, Rules 11, 201, and 202 of Regulation S-T and Form 8-K to accommodate the filing of asset data files. We are proposing to define the XML file required by proposed Schedules L, L-D, and CC as an "Asset Data File" in Regulation S-T and make corresponding changes to Rule 101 of Regulation S-T mandating electronic submission.³¹⁵ As we discuss above, we are proposing that the asset data be filed as an exhibit to the appropriate Form 8-K (in the case of an offering) or to the appropriate Form 10-D (in the case of a periodic distribution report).³¹⁶ As we note above, we realize that registrants may want to provide investors with additional asset information not defined in Schedule L or L-D, or that issuers of new asset classes may want to provide investors with other data points. As such, we also propose an additional exhibit, an asset related document, for registrants to disclose the definitions or formulas for the additional data points or to provide further explanatory

disclosure regarding the asset data file.³¹⁷

We also propose to add Item 6.06 to Form 8-K. Regardless of whether the issuer is registering the offering on Form SF-1 or SF-3, we are proposing to require all asset data files to be filed on Form 8-K so that investors may easily locate asset-level data disclosure on EDGAR. The proposed item explains that the asset data file must be filed with the Form 8-K on the same date of the filing of a prospectus filed in accordance with proposed Rule 424(h), a final prospectus meeting the requirements of section 10(a) of the Securities Act filed in accordance with Rule 424(b), and a report filed in accordance with Item 6.05 of Form 8-K (Securities Act Updating Disclosure). The proposed item also requires that any asset data related document³¹⁸ be filed at the same time the asset data file is filed on EDGAR. We have also included proposed instructions to Item 6.06 to refer to the proposed exhibit requirements in Item 601 of Regulation S-K and to the incorporation by reference item requirements on proposed Forms SF-1 and SF-3.

(b) Hardship Exemptions

We are proposing a self-executing temporary hardship exemption for filing the asset data file; however, we are proposing to exclude the asset data file from the continuing hardship exemption. Rule 201 under Regulation S-T generally provides for a temporary hardship exemption from electronic submission of information, without staff or Commission action, when a filer experiences unanticipated technical difficulties that prevent timely preparation and submission of an electronic filing. The temporary hardship exemption permits the filer to initially submit the information in paper, but requires the filer to submit a confirming electronic copy of the information within six business days of filing the information in paper.³¹⁹ Failure to file the confirming electronic copy by the end of that period results in short form ineligibility. Because the disclosure requirement for an asset data file is inherently electronic, and the information would not be useful if provided in paper, we are proposing an alternative approach to the temporary hardship exemption. Under our proposal, if the registrant experiences unanticipated technical difficulties

preventing the timely preparation and submission of an asset data file, a registrant will still be considered timely if the asset data is posted on a Web site on the same day it was due to be filed on EDGAR, the Web site address is specified in the required exhibit, a legend is provided in the appropriate exhibit claiming the hardship exemption, and the asset data file is filed on EDGAR within six business days. We believe that posting the asset data on a Web site is preferable to a paper filing in this circumstance. By requiring the asset data file posting on a Web site, investors would have access to the disclosures and would not experience any delay in accessing the asset data in XML format. Consistent with our current temporary accommodation rules, under our proposed accommodation, the asset data file must be filed on EDGAR within six business days and failure to file the asset data file within that period will result in the loss of Form SF-3 eligibility. We believe it is important that the disclosure be filed with the Commission on EDGAR to preserve continuous access to the information. As we discuss below, our experience with the temporary accommodation for static pool disclosure raises concern that access to the information on Web sites may be lost due to the distress in the market or the fact that certain sponsors may cease operations.³²⁰

We are proposing to exclude asset data files from the continuing hardship exemption under Rule 202 of Regulation S-T. Rule 202 generally allows a registrant to apply for a continuing hardship if it cannot file all or part of a filing without undue burden or expense. In contrast to the self-executing temporary hardship exemption process, a filer may obtain a continuing hardship exemption only by submitting a written application, upon which the Commission staff must then act under delegated authority.

We do not believe a continuing hardship exemption is appropriate with respect to an asset data file because we believe the proposed asset data file would be an integral part of the prospectus and periodic performance reporting. We believe that, for ABS issuers, the information in machine readable format is generally already collected and stored on a servicer's systems. Therefore, we do not believe it would be appropriate for issuers to receive a continuing hardship exemption for the asset data file. We believe investors should receive all of the disclosures specified in Schedules L

³¹³ See proposed Item 601(b)(103)(i) of Regulation S-K.

³¹⁴ See proposed Item 601(b)(103)(ii) of Regulation S-K.

³¹⁵ See proposed definition to Rule 11 of Regulation S-T.

³¹⁶ See proposed exhibit table in Item 601(a) of Regulation S-K.

³¹⁷ See proposed Item 601(b)(103) of Regulation S-K.

³¹⁸ *Id.*

³¹⁹ See Rule 201 of Regulation S-T [17 CFR 232.201].

³²⁰ See Section III.E.4.

and L–D and in a format that will allow them to effectively utilize the information.³²¹

(c) Technical Specifications

We are proposing to add detailed information on submitting an asset data file to the EDGAR Technical Specification. As discussed above and as specified in the Appendix to this release, there are several data points contained in Schedule L and Schedule L–D that require issuers to provide a coded response. These codes would be enumerated in the EDGAR Technical Specification. We expect that the technical specifications would be available as early as possible prior to any required compliance date. The manual would be published on the SEC's Web site on the "Information for EDGAR Filers" webpage.³²²

Request for Comment

- Is it appropriate to require the asset data file in XML format? Does XML format most easily facilitate the analysis of the securities and their underlying assets for all market participants?
- In what format do issuers currently provide asset data information to investors (as may be required, for example, under transaction agreements)? Do any market participants currently provide asset data in accordance with a technical specification or schema commonly used across a particular asset class? If so, would our data points cause divergence from current practice? Please tell us which specific proposed data points would be of concern and why. How can we address those concerns? Is another format preferable, such as XBRL?
- Should we adopt the proposed changes to Item 601 of Regulation S–K, Regulation S–T and Form 8–K?
- We are not proposing changes to Rule 305 of Regulation S–T to exempt the asset data file from the restrictions on the number of characters per line that may be filed on EDGAR in order to prevent issuers from filing the tagged data in one continuous string. We believe the restriction on the number of characters per line will help preparers and validators with their review of the asset data file. Should we exempt the asset data file from Rule 305 of Regulation S–T? If so, why?

³²¹ We recognize that our rules provide for a continuing hardship for registrants required to file Interactive Data Files in XBRL. Interactive Data Files in XBRL contain data that is already disclosed in the prospectus. In contrast, asset data files will contain disclosure that is not otherwise provided in the related prospectus or report. See the XBRL Adopting Release.

³²² The Web site address is <http://www.sec.gov/info/edgar.shtml>.

- Are the proposed blank data tags appropriate? Is ten blank data tags the appropriate number? Should the number be more or less? Would more blank data tags create undue complexity for investors? Are there other ways we could provide for additional disclosure and have that disclosure be standardized?

- Is the proposed temporary hardship exemption, including the required Web site posting, appropriate? Should we allow a continuing hardship exemption for filing the asset data file on EDGAR?

- We propose to use existing submission types in order to enable filers to attach the asset data file as an exhibit. Tagging specifications that explain the requirements of the XML schema would be included in the proposed technical specifications. Are there other specifications that would be helpful that should be provided in the EDGAR Filer Manual for asset data files that are not currently included in other Technical Specifications? Please be specific in your response.

- Should we provide a transition period prior to the required compliance date that would allow filers to submit only test filings? Please be specific in your response.

- The technical specification will outline in detail the required format of each data point. Are there other validation checks that need to be in place to check compliance? Please be specific in your response.

4. Pool-Level Information

By at least 2006, an increasing number of residential mortgages were generated in the United States through loosened underwriting standards.³²³ In addition, originators engaged in practices such as the bundling of non-traditional features into a single loan product, known as "risk-layering."³²⁴

³²³ The PWG March 2008 Report states that there was a dramatic weakening of underwriting standards for U.S. subprime mortgages, beginning in late 2004 and extending into early 2007.

³²⁴ For a discussion of the increase in looser underwriting standards and risk layering practices, see, e.g., Speech by Federal Reserve Chairman Ben S. Bernanke At the Federal Reserve Bank of Chicago's 43rd Annual Conference on Bank Structure and Competition, Chicago, Illinois, available at <http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm>; Report by the Global Joint Initiative of Securities Industry and Financial Markets Association, the American Securitization Forum, the European Securitisation Forum, and the Australian Securitisation Forum, "Restoring Confidence in the Securitization Markets," (Global Joint Initiative Report) Dec. 3, 2008, at 4; and United States Government Accountability Report to Congressional Requesters: Home Mortgages: Provisions in a 2007 Mortgage Reform Bill (H.R. 3915) Would Strengthen Borrower's Protections But Views on Their Long Term Impact Differ (July 2009) at 19, available at <http://www.gao.gov/new.items/d09741.pdf>.

The loosening of underwriting standards for subprime mortgages has been cited as one of the principal causes of the recent turmoil in the financial markets.³²⁵ In addition, compliance with the disclosure guidelines set forth in our rules by some ABS issuers was not consistent.

Item 1111 of Regulation AB³²⁶ outlines several aspects of the pool that the prospectus disclosure should cover.³²⁷ Item 1111 explicitly provides that exceptions to origination criteria must be disclosed.³²⁸ We are proposing revisions to the pool-level disclosure requirements in Item 1111 to further detail and clarify the type of disclosure that is required to be provided for ABS offerings with respect to deviations from disclosed underwriting standards. We also are proposing revisions related to the originator's diligence with respect to the information used to underwrite the assets, and the remedies related to the pool assets that are available to investors that are provided in underlying transaction agreements.

First, we are proposing to amend Item 1111 to specify that disclosure regarding the underwriting of assets that deviate from the disclosed origination standards must be accompanied by specific data about the amount and characteristics of those assets that did not meet the disclosed standards. To the extent that disclosure is provided regarding compensating or other factors, if any, that were used to determine that the assets should be included in the pool, despite not having met the disclosed underwriting standards, the issuer would be required to specify the factors that were used and provide data on the amount of assets in the pool that are represented as meeting those factors. Thus, data would be required on the number of assets not meeting the underwriting criteria, the number of such assets meeting particular compensating factors (if those factors are disclosed), and the number of such assets not meeting such factors.

³²⁵ See The PWG March 2008 Report and The President's Working Group, *Progress Update on March Policy Statement on Financial Market Developments*, October 2008 (both reports noting that the breakdown in underwriting standards for subprime mortgages as one of a list of principal causes of the turmoil in the financial markets).

³²⁶ 17 CFR 229.1111.

³²⁷ Item 1111 requires this disclosure on the assets, as material, whether or not the sponsor is also the originator of the assets or the sponsor acts as an aggregator or consolidator of loans.

³²⁸ Item 1111(a)(3) requires a description of the solicitation, credit-granting or underwriting criteria used to originate or purchase the pool assets, including, to the extent known, any changes in such criteria and the extent to which policies and criteria are or could be overridden.