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THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

By Electronic Mail
November 15, 2010

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

Re: File No. S7-24-10, Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Dear Ms. Murphy:

The Financial Services Roundtable[1] respectfully submits these comments in response to the request for comment by the Securities and Exchange Commission (the "Commission") with respect to its proposed rulemaking to implement Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Our comments have focused on the proposed rules to implement Section 943(2), which requires:

> [A]ny securitizer (as that term in defined in section 15G(a) of the Securities Exchange Act of 1934, as added by this subtitle) to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer, so that investors may identify asset originators with clear underwriting deficiencies.[2]

The Financial Services Roundtable appreciates the efforts the Commission has made to implement Section 943 within the 180-day implementation schedule mandated by Congress. We recognize, as well, that the Commission is constrained in its approach by the Congressional mandate, and we have limited our comments to those aspects of the

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

[2] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1897, § 943(2) (July 21, 2010). Section 941(b) ("Credit Risk Retention") of subtitle D ("Improvements to Asset-Backed Securitization") defines "securitizer" to mean "(A) an issuer of an asset-backed security; or (B) a 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 issuer."

proposed rules that we believe fall within the Commission's discretion. We thank the Commission for the opportunity to comment.

Our comments address seven primary aspects of the proposed rules that our members have identified as concerns. These are summarized as follows:

1. We believe proposed requirements to require securitizers to re-create data relating to demands and repurchases, where such data may not have been kept or subjected to controls, may not be possible in many circumstances and will likely not provide meaningful information to investors even where available. We ask that such data not be required. If the Commission nonetheless decides to require the re-creation of such data, we believe the data should be subject at most to antifraud liability under Rule 10b-5, and not to the strict liability standards of Section 11.

2. Transactions entered into prior to the adoption of final rules may not provide authority to the securitizer to gather or report the required data and may include confidentiality provisions that would be breached by the public reporting of such data. In particular, where a securitizer either does not have a continuing role with respect to a securitization or has a very limited role, the securitizer may not have access to the data and may have no means to compel its production. We are concerned that where securitizers do not have such access, they would be precluded from entering the securitization markets, given that the proposed rule does not relieve them of the obligation to report where the information is unknown and cannot be obtained without unreasonable effort or expense.

3. To ensure consistency of reporting by market participants and allow meaningful comparisons of data across issuers, we believe the Commission should provide a clear definition of "demand" that requires that the person bringing the demand has authority and standing to do so and articulates a specific claim under the transaction documents.

4. The Commission should strongly consider adding additional columns to Form ABS-15G to clarify the circumstances under which a demand has not led to a repurchase, including whether such demand is still within the applicable cure period, is under review, is subject to arbitration or litigation proceedings, has been rejected or has been withdrawn by the party bringing such demand. In addition, we note that the disclosure of the percentage of pool assets subject to demands and repurchases is not as straightforward as it appears, given that the pool size will vary over time and demands may be made with respect to different assets at different times. We suggest that the Commission clarify for amortizing pools that the calculation should be made using the initial principal balance of the loan and the initial aggregate principal balance of the pool.

5. To ensure that investors are able to easily identify the information most relevant to their investment decisions, separate Forms ABS-15G should be filed for each asset class securitized by a particular securitizer, rather than being aggregated in a

6. Form ABS-15G should be required to be filed no more frequently than quarterly, and should not have to be filed repeatedly by securitizers who have nothing to report.

7. Securitizers should be afforded a transition period of 6 months to allow them to develop systems and internal controls to capture the required data. If securitizers are required to re-create data that was not maintained, such transition period should be not less than 24 months.

A. The Commission Should Not Require Securitizers to Re-Create Data From Prior Periods.

The Commission proposes requiring all securitizers to file a new Form ABS-15G disclosing the securitizer's history with respect to demands for repurchase of assets for all prior securitizations, with the first Form ABS-15G to be filed before the first offer or sale of unregistered or registered asset-backed securities after adoption of the rule, and additional Forms ABS-15G to be published on a monthly basis thereafter. The proposed rule would require the initial Form ABS-15G to include a five-year history of all demands, repurchases, and replacements completed or pending, across all asset classes, for all securitizations (registered or unregistered) issued or organized and initiated by the securitizer. If a demand was made more than five years before the offering, but the resolution of the demand occurred within the five-year look back period, the securitizer would also be required to include the older demand in its reporting.[3]

The Commission acknowledges that the availability of data may be a problem for transaction parties other than the securitizer, stating:

> We are concerned that initially a securitizer may not be able to obtain complete information from a trustee because it may not have tracked investor demands. Because securitizers may not have access to historical information about investor demands made upon the trustee prior to the effective date of the proposed rules, we are proposing an instruction that a securitizer may disclose in a footnote, if true, that a securitizer requested and was able to obtain only partial information or unable to obtain any information with respect to investor demands to a trustee that occurred prior to the effective date of the proposed rules and state that the disclosures do not contain all demands made prior to the effective date.[4]

[3] Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 *Fed. Reg.* 62718, 62723, n. 37 (Oct. 13, 2010). The Release does not elaborate about what actions would trigger a resolution of a demand.

[4] *Id.* at 62722.

We are not sure why the Commission acknowledges and accommodates the unavailability of information from the trustee so explicitly but makes no effort to accommodate securitizers who may not have tracked investor demands. We note, in this regard, that depending on the documentation structure, demands for repurchases may not have been made to the securitizer. In some transactions, the securitizer does not make representations and warranties itself but instead assigns to the trustee the representations and warranties of the originator. Moreover, as we discuss below, the ability to re-create the history of demands is complicated by the fact that the Commission has indicated that a "demand" should be included even if not made in conformity with the terms of the transaction documents.

In addition, we believe the relevance of historical data from the years during and immediately preceding the crisis is very limited. Underwriting criteria; securitization practices; borrower, investor, trustee and securitizer behavior; and the banking industry as a whole have undergone striking changes during these years. Data from the previous five years will have no predictive value, as it will have no ability to identify originators who have reformed their practices and tightened their standards.

We do not believe that the proposed five-year look back for demands and repurchases will lead to the development of credible data that is comparable across securitizers or originators. Issuers may be excluded from the securitization markets entirely because they do not have and cannot obtain the information required by the proposed rule for pre-enactment periods. In addition, we believe that the look back will taint disclosures for years to come, undermining Congressional goals for these reports. We ask that the Commission reconsider the five-year look-back proposal.[5] In addition, to the extent the Commission determines to require a five-year look back even though the resulting data will not be reliable or verifiable in a manner consistent with the general standards for securities disclosures, we strongly urge the Commission to attach, at most, antifraud liability under a Rule 10b-5 standard to such reports.

B. The Commission Should Not Require Securitizers to Disclose Information as to Which They Do Not Have Legal or Contractual Rights or Reporting Authority.

The new statutory definition of "securitizer" includes a party who "organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer." In proposing the Section 943 implementing rules, the Commission has not discussed whether a person who falls within that definition will in fact have access to the demand and repurchase history for the transferred assets. We believe this is a significant issue for entities that are

[5] We note that the Commission has previously acknowledged the validity of diligence concerns of market participants with respect to new requirements to disclose old data, for instance providing in its adoption of Regulation AB that issuers would not have to include static pool data to the extent that it was unknown and could not be made available without undue effort and expense, and moreover, even where such data was available, data for periods before January 1, 2006 such data would not be treated as part of the prospectus or registration statement and would be subject only to general anti-fraud liability. Asset-Backed Securities, 70 *Fed. Reg*. 1506, 1543-1544 (Jan. 7, 2005) (the "Reg AB Release").

securitizers under pre-adoption transactions, as these entities may not have ensured that they have any rights to access the relevant information.

In "aggregator" transactions, where the securitizer acquires assets from multiple originators to form the securitization pool, practices have varied widely as to whether the aggregator or the special purpose vehicle it forms to act as depositor makes representations and warranties as to the assets, or whether the aggregator only transfers to the securitization trustee all of its rights with respect to the representations and warranties in the originator transfer documents. Similarly, in so-called "rent-a-shelf" transactions, the depositor may only make representations and warranties as to its title to the assets, while all loan-level representations are made by an originator who also acts as servicer. Because of the significant number of failures and near-failures of financial institutions that originated mortgage loans prior to the financial crisis, the relevant entities may no longer exist. Regardless, the depositor may have had a sufficiently limited role that it neither has access to the relevant information nor a means to compel its production. Even where it can acquire such information, the depositor may have no contractual right to report information with respect to the transaction and may be constrained by confidentiality agreements from doing so.

In our view, the best way to address these concerns is to make the reporting requirement prospective only—not merely by limiting the reporting to demands made after the date of adoption of the rule, but also by limiting it to transactions that were issued after the date of its adoption. Securitizers should have the opportunity to include in their transaction documents sufficient rights to allow them to fulfill this reporting obligation. Such an approach will have the further advantage of ensuring that reported information is comprehensive and does in fact cover all securitizations established by a particular securitizer, in keeping with Congressional intent.

C. The Commission Should Provide a Clear and Concise Definition of "Demands," Which We Believe Should Be Limited to Those Made in Conformity with the Transaction Documents.

The Commission in its proposal does not define "demands," which in the current environment have ranged from, on the one hand, methodical requests submitted by the trustee to repurchase specific loans with demonstrable problems, to, on the other hand, irate emails from investors demanding repurchase of entire portfolios. Our members report receiving repurchase demands from parties who do not own securities in the relevant transactions or otherwise do not have standing; demands to repurchase loans based on alleged breaches of representations and warranties where the representations and warranties were never made with respect to those loans; and demands made with no supporting information whatsoever. We do not believe that disclosure of such scattershot demands can provide investors with any meaningful information that would allow them to identify originators with clear underwriting deficiencies, and we are concerned that an approach that requires years' worth of such unreliable data will have a long-term adverse effect on the securitization markets, undercutting the goal of transparency that the Commission as well as Congress has articulated. Moreover, we are concerned that including blanket, unsupported demands in the reported data will have the

effect of creating so much "noise" in the data that it will be impossible for investors to identify those demands that reflect real issues in the portfolio and to evaluate the response to such demands.

The Financial Services Roundtable appreciates that repurchase and enforcement mechanisms in RMBS transactions often did not perform well in the current crisis, but we believe that market participants who are now keenly aware of the flaws in those mechanisms will create much more functional provisions going forward. Assuming that to be the case, we believe a demand should only be counted for reporting purposes to the extent it is validly made under the transaction documents. Any other approach to or definition of demands will create uncertainty about what communications are in fact demands, and may make it impossible to derive any meaningful information about how securitizers respond to demands and whether such demands reflect real issues in the portfolio. For the information to have value, it must be determined in a way that does not capture the subjective behavior of market participants, and the best objective measure of demands, free from that subjectivity, is a measurement of demands that meet the requirements of the transaction documents.[6] Efforts to recapture haphazard information from the past several years, as well as efforts to take a broadly inclusive approach to demands on a going forward basis, will prevent the development of meaningful reporting that will fulfill the Congressional purpose for this provision. We therefore believe that a clearly articulated, objective standard for determining demands, tied to the criteria in the transaction documents, should be the appropriate standard for the rule.[7]

D. The Commission Should Expand the Columns in the Proposed Table to Facilitate Better Reporting of the Status of Repurchase Demands.

We believe that, to more accurately reflect the resolution of repurchase demands, the Commission's proposed table should more clearly capture the various stages of a repurchase request between the time it has been made and its final resolution. As the Commission has noted, a loan may not be immediately repurchased because the related cure period has not expired. In addition, the person to whom the demand has been made, including a trustee, may need to conduct a review of the demand and whether it states a valid claim. If there is a dispute, the demand may be resolved through mandatory arbitration, litigation, or other dispute resolution mechanisms. The person making the demand may withdraw it after determining that it does not have a valid basis. The problem may be resolved without the repurchase or replacement of the loan, or the loan may in fact be repurchased or replaced. These are ordinary course paths that resolution of the demand may take, and we believe they should be reportable in the table itself,

[6] In this regard, we are not trying to create a mechanism under which minor technical flaws in a demand would allow the securitizer to exclude that demand from the report. Where there is a bona fide dispute between a trustee and a securitizer about whether a demand has been properly made, we believe the demand should be reported, with appropriate footnotes, until such dispute has been resolved.

[7] The establishment of criteria for demands would also help address the risk that originators or sponsors would buy back underperforming assets that were not in breach of underlying representations and warranties solely to avoid reputational damage, or that securitizers or other market participants would otherwise engage in behavior designed to manipulate the reported data.

rather than through footnote disclosures that will limit the comparability of disclosures across issuers.

In addition, we note that the computation of the percentage of pool assets subject to demands and repurchases is not straightforward, given that the pool size will vary over time due to payments, prepayments and defaults, and demands may be made with respect to different assets at different times. We suggest that the Commission clarify for amortizing pools that the calculation should be made using the initial principal balance of the loan and the initial aggregate principal balance of the pool. We believe that such an approach would ensure a consistent percentage calculation and provide better visibility into the issues with respect to the initial pool.

E. Securitizers Should Not Be Required to Aggregate Form ABS-15G Disclosures Across Asset Classes Where Such Aggregation Will Not Provide Meaningful Information to Investors

The Commission has previously acknowledged that asset classes in ABS may differ significantly from each other with respect to the information that is relevant. The Commission's recent Regulation AB proposals, for instance, proposed different disclosure requirements for each asset class.[8] In addition, in establishing the conditions for continued shelf eligibility under Form S-3, the Commission required that the issuer and its affiliates be in compliance with Exchange Act reporting requirements with respect to their other securitizations of the same asset class, but did not extend the condition to different asset classes.[9] Moreover, Congress itself has acknowledged that there are significant differences based on asset class, providing in Section 15G(c)(2) of the Exchange Act, which was added by Section 941 of the Dodd-Frank Act, that regulations under Section 15G "shall establish asset classes with separate rules for securitizers of different classes of assets, including residential mortgages, commercial mortgages, commercial loans, auto loans, and any other class of assets that the Federal banking agencies and the Commission deem appropriate."[10] In our view, differences among key performance statistics, asset characteristics, transaction structures, repurchase provisions, origination and underwriting standards and personnel all suggest that aggregating data for the Form ABS-15G will not be a meaningful way to present such data. In addition, the Commission has previously indicated a desire to separate disclosures so that investors

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[8] *See* Asset Backed Securities (the "Reg AB II Release"), 75 *Fed. Reg.* 23328, 23410 (May 3, 2010) (explaining that "[o]ur proposed asset-level information requirements, notably, are tailored by asset class. We have taken under consideration situations in which the amount of asset-level disclosure would be too voluminous, or investors are unlikely to find such disclosure meaningful. We have decided to modify these requirements or not impose them at all, if they do not appear to justify the compliance costs imposed on issuers.")

[9] *See* The Reg AB Release, 70 Fed. Reg. at 1525 ("In response to several commenter suggestions, we are revising the proposal to focus not on any transactions established directly or indirectly by a sponsor, but instead on transactions established by affiliated depositors involving the same asset class. We think this approach addresses many commenter concerns about the potential breadth of the proposed application across asset classes and tying the requirements to the sponsor definition.") (footnotes omitted).

[10] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1390-91, § 941 (July 21, 2010).

would not have to sift though irrelevant detail to find relevant material.[11] We therefore recommend that securitizers be allowed to report separately for each asset class rather than filing such reports on a combined basis.

F. Securitizers Should Not Be Required to Include Repurchase Demands from Section 4(2) Private Placements Where Assets and Representations Were SpecificallyTailored for the Investors in such Private Placements

Section 4(2) private placements in which a securitization is negotiated and purchased directly by one or a small number of institutional investors may involve assets chosen using atypical selection criteria and representations and warranties that are non-standard and reflect special concerns of the investors. For those transactions, demand and repurchase activity may not be reflective of asset quality or underwriting standards generally. In addition, in such transactions the investor may itself have selected and diligenced the securitized assets, which again would lead to skewed data that would not be reflective of origination or securitization practices of the originator or securitizer more generally. We believe that the Commission should permit securitizers to omit from their reporting this type of true private placement where the securitizer believes the reported information would not facilitate the goal of allowing investors to identify originators with clear underwriting deficiencies.

G. Form ABS-15G Should Be Filed No More Frequently Than Quarterly, and Should Not Be Filed Repeatedly By Securitizers with No Demand or Repurchase History

ABS issuers frequently report on and distribute collections of their assets on a monthly cycle because this has become the industry standard for balancing the reporting obligation against the negative carry and other costs associated with delaying the distribution of cash held in securitization accounts. The considerations relevant to establishing a monthly distribution date do not, however, apply to reporting demands and repurchases, where the cycle for processing, responding to and resolving demands typically occurs over a longer time period. We believe the reporting obligation for demands and repurchases should be treated consistently with more customary financial reporting cycles, including by having the relevant reporting period be a fiscal quarter and having a customary period after the end of such fiscal quarter, typically 45 days, to complete the report for that quarter.

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[11] See Reg AB II Release at 23353 ("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. 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.") (footnote omitted); Reg AB Release at 1563 (requiring separate Exchange Act reporting for each issuing entity created by a depositor, rather than having all reports filed under the depositor's name, and explaining that "there have been and continue to be inconsistencies by ABS issuers with respect to filing of registration statements and reports on EDGAR, thus making it difficult and time-consuming for investors and others to locate documents related to particular asset-backed securities.")

In addition, demands and repurchases are not generally made with respect to certain asset classes, most notably credit cards and autos. We see no value in having a regular reporting obligation for these entities if they have nothing to report. We suggest that securitizers who have nothing to report with respect to a particular asset class should be permitted to file a single report that so states, and should not have to file further reports unless and until they have something to report so that they are not generating uninformative filings and investors do not have to take the time to review reports that provide no new information.[12]

H. Securitizers Should Be Afforded an Extended Transition Period to Establish Necessary Systems and Procedures, and an Even Longer Period if They are Required to Re-Create Records of Historical Demands

The proposed rules will require that securitizers develop means to track demands for repurchases and fulfillment of such demands in careful detail, potentially across a wide range of securitization vehicles, and with sufficient granularity to allow the securitizers to identify the originator of the affected loan and the securitization vehicle. The information may exist in multiple systems, especially to the extent that securitizers have developed affiliations through merger and acquisition activity over time. Moreover, where securitizers track relevant data on a pool-by-pool basis, they may have no readily available means to correlate such data across different pools. We therefore believe that an adequate amount of time, which we estimate as at least 6 months, should be provided to allow the establishment of relevant systems and procedures.[13] In addition, if the Commission decided to proceed with any sort of look-back requirement, we believe securitizers and trustees would need at least 24 months to re-create and compile such data (to the extent available).

Conclusion

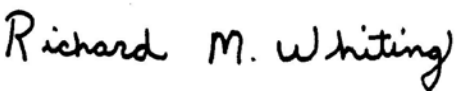
We believe that implementation of the Section 943(2) requirements should be done in such a way that the requirements to produce data are placed on parties that are able to fulfill them; the determination of demands is made subject to objective standards; the quality of the data presented is not compromised by efforts to reproduce potentially stale data that was not maintained for such purposes; and transaction parties are given a sufficient opportunity to develop systems to capture relevant data, to establish appropriate internal controls with respect to the reporting of such data, and to put in place contractual obligations that will allow them access to (and the authority to report) all relevant

[12] An alternative approach, for those securitizers who have publicly registered securitizations, would be to include a check box on Form 10-D that would allow such securitizers to confirm that they did not have new demand or repurchase activity to report, in lieu of ongoing Form ABS-15G filings.

[13] We note that if securitizers do not have adequate time to complete the transition, they will have to remain out of the securitization markets until they can complete the transition, with potential adverse effects on capital formation. If the Commission proceeds with requiring that reports be compiled for all asset classes, the effects of this may be amplified for securitizers who issue in multiple asset classes. For example, such an issuer may be able to easily establish an effective system with respect to its credit card securitization program, but may be precluded from issuing credit card transactions because of complications in establishing appropriate procedures for its mortgage securitization program. We do not believe that would be a desired or appropriate result.

information. Only in such circumstances will Section 943(2) provide the useful tool Congress intended to provide investors. Please feel to contact me at Rich@FSRound.org if you have any questions or concerns about this letter, or any other issue.

Best Regards,



Richard M . Whiting, Executive Director