November 15, 2010

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

***Re: Release Nos. 33-9148; 34-63029; File No. S7-24-10***

Dear Ms. Murphy:

This comment letter is submitted by the American Financial Services Association ("AFSA") in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding Release Nos. 33-9148; 34-63029; File No. S7-24-10 (the "Proposing Release")[1], relating to the implementation of Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). AFSA appreciates the opportunity to provide its comments on the Proposing Release.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers. Many of AFSA's members issue asset-backed securities ("ABS") as a primary source of funding. Securitizations have provided billions of dollars of revenue used to provide credit for consumers in the last two decades.

Securitization is important to many AFSA members. Actions by the Commission and other regulators that increase the cost of effecting securitizations unnecessarily will reduce, and even possibly eliminate, the incentive for our members to utilize securitizations. We understand that the performance of some securitized asset classes during the recent financial crisis was abysmal, and we know that some regulatory changes are appropriate as a response. We also understand that the Dodd-Frank Act mandates the Commission and other regulators to propose regulations in various areas, including the topics covered by the rules we discuss in this letter.

However, we ask the Commission to recognize that problems did not occur across the board in securitizations. As noted in the recent *Report to Congress on Risk Retention* (October 2010) from the Board of Governors of the Federal Reserve System (the "Fed Report"), many asset classes performed well during the financial crisis. For example, the Fed Report pointed out that "few, if any, triple-A tranches of auto ABS have experienced a principal write-down in the nearly 25 years of issuance"[2] and "[e]quipment loan and lease ABS in general, and the triple-A rated

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[1] 75 Fed. Reg. 62718 (October 13, 2010).
[2] Fed Report at 57.

securities, in particular, have displayed strong performance during the financial crisis."[3] The Fed Report contained statistics indicating that the prevalence of downgrades was far, far lower for asset classes such as credit cards, auto loans, equipment loans and leases and floorplan than it was for residential mortgage-backed securities ("RMBS").[4]

More specifically, we wish to point out to the Commission that the phenomenon of third parties making demands to securitizers to repurchase assets due to alleged breaches of representations and warranties is not commonplace in many sectors of the ABS markets. Indeed, each of the members of AFSA who participated actively in the process of preparing this comment letter reported that they had never received a third party demand to repurchase a securitized asset due to a breach of representation or warranty. We believe that the phenomenon of third party repurchase demands is limited almost entirely to the RMBS market.

Our view is that the Commission has proposed rules under section 943(2) of the Dodd-Frank Act that go well beyond the Congressional mandate. We believe the Commission is making a mistake in reading section 943(2) much more broadly than we think was intended. If the Commission overlearns the lessons of the financial crisis and imposes additional burdens on ABS sponsors whose securities have performed well, it risks making securitization a market of last resort, to be used only by ABS sponsors who cannot fund elsewhere. Such a result would be a failure of policy, and it would hurt investors and consumers as well as issuers.

**Summary of Section 943(2) Proposed Rulemaking**

Section 943(2) of the Dodd-Frank Act[5] requires the Commission to implement rules that require "securitizers"[6] 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."

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[3] *Id.* at 63.
[4] *Id.* at 52, 53, 57, 59, 65.
[5] **Section 943. Representations and Warranties in Asset-Backed Offerings.** Not later than 180 days after the date of enactment of this Act, the Securities and Exchange Commission shall prescribe regulations on the use of representations and warranties in the market for asset-backed securities (as that term is defined in section 3(a)(77) of the Securities Exchange Act of 1934, as added by this subtitle) that—

(1) require each national recognized statistical rating organization to include in any report accompanying a credit rating a description of—

(A) the representations, warranties, and enforcement mechanisms available to investors; and

(B) how they differ from the representations, warranties, and enforcement mechanisms in issuances of similar securities; and

(2) require any securitizer (as that term is 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.

[6] Section 15G(a)(3) of the Exchange Act defines "securitizer" as "(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…."

To implement Section 943(2) of the Dodd-Frank Act, the Commission has (i) proposed to add new Rule 15Ga-1 and (ii) re-proposed additional disclosures for prospectuses and periodic reports under Items 1104(e) and 1121(c), respectively, of Regulation AB.

Rule 15Ga-1 would require any securitizer of asset-backed securities (as defined in the Dodd-Frank Act, "Exchange Act ABS") to provide extensive information in respect of all assets originated or sold by the securitizer that were the subject of a demand for repurchase or replacement with respect to all outstanding Exchange Act ABS held by non-affiliates of the securitizer. This information would be required to be filed by the securitizer under the Securities Exchange Act of 1934 (the "Exchange Act") on Form ABS-15G, whether the securitizer was effecting a public offering or an unregistered offering. The filing on Form ABS-15G would need to be made initially at the time of the first offering made by the securitizer following the effective date of the rule, and that filing would cover the five-year period preceding the last day of the month preceding the date of such issuance. Periodic filing would then be required on a monthly basis by the securitizer, not later than the 15th day following the end of each month, apparently covering both the initial five-year "look-back" period and all subsequent months.

Reproposed Item 1104(e) would require inclusion in the prospectus of the information required by Rule 15Ga-1. However, the information in the prospectus would need to cover only the three most recent years and only repurchase demands made with respect to the asset class being securitized.

Reproposed Item 1121(c), which is applicable to periodic reports on Form 10-D, would require reporting of the information required by Rule 15Ga-1. However, the required information would relate only to the assets in a particular securitized pool, and not to other assets securitized by the sponsor. Set forth below are our comments relating to the proposed rules.

**1. Reporting Should Not Be Required For Securitizers with no Repurchase Demands**

As we note above, many AFSA members who are securitizers have never had a demand for repurchase of a securitized asset due to a breach of a representation or warranty. In a typical securitization, it is an obligation of the originator of an asset to repurchase the asset if it has breached a representation or warranty made with respect to the asset. These repurchases do occur from time to time, though they are quite infrequent. As a practical matter, in most non-RMBS securitizations, these repurchases are almost always initiated by the originator or its affiliated servicer upon a determination that a representation or warranty was breached, rather than in response to a demand for repurchase. We refer to these types of repurchases as "self-policed repurchases."

We interpret the Commission's proposals not to apply to self-policed repurchases, because they are not made as a result of a demand to repurchase. Therefore, we believe self-policed repurchases would not be reportable on Form ABS-15G or subject to disclosure under Items 1104(e) and 1121(c).

Moreover, we believe that the Commission should not require reporting by securitizers who have had no third party demands for repurchases. Such reporting would be burdensome for sponsors and would provide no benefit whatsoever to investors. If the Commission believed it was appropriate, we would be supportive of a requirement to include a statement in the disclosure document to the effect that the securitizer had not experienced any third party demands for repurchases within the relevant time period.

**2. The Disclosure Required by Section 943(2) Should Be Made Available to Investors in Offering Documents or in an Exchange Act Filing**

Rule 15Ga-1 would require securitizers of Exchange Act ABS to engage in Exchange Act reporting by filing a Form ABS-15G, both at the time of offering and on an ongoing basis. We strongly disagree with the approach of requiring securitizers to file reports under the Exchange Act.

First, the language of Section 943 simply does not require, nor does it create, an Exchange Act reporting obligation for securitizers. Section 943 only requires securitizers "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" (emphasis added). We believe that the common sense interpretation of this statutory language is that it applies to disclosure made at the time of the initial offering of an issue of Exchange Act ABS, not to ongoing reporting.

The purpose of the disclosure mandated by the Dodd-Frank Act is to allow "investors [to] identify asset originators with clear underwriting deficiencies." We think that investors will find the disclosure required by Section 943(2) to be most useful at the time they are making their investment decision with respect to a specific securities offering. Providing ongoing information regarding the repurchase activity with respect to a particular pool of assets will be of little benefit to investors who have already made the decision to purchase securities backed by such assets. Perhaps ongoing reporting would provide benefits to purchasers in the secondary market, albeit at the expense of the original purchaser. There would be no incremental deterrent effect on the securitizer, however, because the securitizer would already have sold the securities. We do not think these marginal benefits outweigh the significant burdens the proposed rules would place on securitizers.

Second, we do not agree with the "one size fits all" nature of the filing requirement. As proposed, Rule 15Ga-1 would require a first-time securitizer to file a Form ABS-15G, even though a first-time securitizer could not possibly have received any repurchase demands. This is clearly of no benefit to investors. Similarly, Rule 15Ga-1 would require a securitizer to file Form ABS-15G even if there is no new information to report since the last filing. Again, this would impose a cost on securitizers without supplying investors with any valuable information.

Third, because the Commission has taken the position that Section 943(2) applies to both registered and unregistered transactions, Rule 15Ga-1 would impose an Exchange Act reporting obligation on private securitizers who are not otherwise subject to Exchange Act filing

requirements. We simply cannot understand why the Commission would think it necessary or appropriate to force securitizers who are effecting a private offering to make a public filing. Such a filing will generate unneeded publicity about a transaction that the securitizer in many instances wishes to keep confidential. It will put into the public record completely non-contextual information about securities that cannot be purchased by most people who will see the information. And, notwithstanding the Commission's assurances, we think it jeopardizes the securitizer's exemption from the registration requirements.

Finally, we note that ABS issuers are facing an extraordinary increase in the reporting demands for registered ABS. New or expanded reporting obligations that have been proposed or enacted so far include:

- Ongoing periodic reporting on Form 10-D, as a result of many ABS now being excluded from the provisions under section 15(d) regarding suspension of the duty to file

- Ongoing periodic loan-level data reporting

- Additional reporting under Form 8-K regarding assets added to a pool and changes in the sponsor's ownership of securities

- Due diligence reporting obligations

- The reporting on demands for repurchase of assets under the Proposing Release

We ask the Commission to recognize that meeting these obligations will require significant additional resources and processes. It is likely that unintentional filing lapses will occur as issuers work to prepare the additional information that is ultimately required to be filed. In this light, we think the Commission should take care to provide that the consequences to issuers of missed filings are not severe. By way of example, we believe that the Commission should not condition an issuer's eligibility for shelf registrations on timely filing of incremental reports like Form ABS-15G during the preceding twelve months. At most, a requirement that such forms are current should be imposed.

We believe that securitizers should be given the choice of satisfying the disclosure obligations imposed by Rule 15Ga-1 either by making a filing using Form ABS-15G or by presenting the required disclosure in offering documents relating to the relevant Exchange Act ABS. Allowing disclosure via offering documents would accomplish the Dodd-Frank Act's goal of making such information available to investors, while being sensitive to cost and confidentiality concerns. However, we appreciate that frequent securitizers who sponsor multiple asset classes and who have reportable demands would find it easier to make a single filing of Form ABS-15G rather than present all of the information that would otherwise go on Form ABS-15G in a series of prospectuses, and those securitizers should be afforded that ability. As a general matter, we think that most non-RMBS securitizers would prefer to utilize a streamlined approach of reporting in an offering document that they had no third party demands for repurchases due to breaches of representations and warranties.

**3. If Ongoing Reporting is Required, It Should Be Less Frequent and Securitizers Should Have the Option of Satisfying Their Obligations By Reporting on Established Exchange Act Forms**

As we note above, we do not believe that ongoing reporting is necessary or appropriate. If, however, the Commission is determined to impose an ongoing reporting requirement, we have three requests.

Our first request is that ongoing reporting be limited to just the asset class that is being securitized. We believe that the statutory mandate for "combined reporting" by a securitizer is addressed by the disclosure to be made at the time an offering is initially made. Ongoing reporting should be limited just to the asset class of the securitized pool.

Our second request is that the ongoing reporting be required less frequently than monthly. We believe that a monthly requirement is onerous. Even for those securitizers who have received repurchase demands, we suspect that the relevant information typically does not change so significantly from month to month that reports of this frequency are required. We believe that a more appropriate frequency for reporting would be annually. There are going to be substantial costs involved in the preparation of the information required to be reported, and we believe that an annual update of this information would provide investors with plenty of relevant information.

For the vast majority of securitizers of non-mortgage Exchange Act ABS, repurchase requests are received rarely or not at all. Nonetheless, in order to comply with a reporting obligation, securitizers would be required to implement and maintain costly new systems; and those costs would increase along with the frequency of the reporting obligation. We think that these burdens significantly outweigh what little value such reports provide to investors.

Our third request in this area is that the reporting be permitted to be effected on an appropriate existing periodic report[7] (such as the Annual Report on Form 10-K) or on Form ABS-15G. For the same reasons we outlined above in respect of the initial report, we think that securitizers should have the choice of formats for reporting.

**4. The Required Look-Back Period is Inappropriate**

As proposed, Rule 15Ga-1 would require securitizers to look back five years when making the initial disclosures proposed to be made on Form ABS-15G and apparently for longer and longer periods thereafter. We disagree with the approach that the Commission has taken.

As previously discussed, the purpose of the disclosure mandated by the Dodd-Frank Act is to allow "investors [to] identify asset originators with clear underwriting deficiencies." In the residential mortgage area, we would expect that underwriting practices are likely much more stringent today than they were prior to the recession. A five-year look-back period would lead

[7] We also note that issuers of registered ABS already disclose repurchase activity as required under Item 1121(a)(14) of Regulation AB.

to the disclosure of stale information which would not be indicative of the current underwriting practices of originators. This would result in the imposition of a costly burden on securitizers and at the same time would not be likely to advance the principal purpose of Section 943(2).

We believe that the appropriate approach would be to impose this reporting requirement on a prospective basis only.

If the Commission nonetheless decides that a look-back period is necessary, we have several further comments. First, we note that the five-year look-back period proposed by Rule 15Ga-1 represents an expansion of, and is inconsistent with, the previously proposed (and now re-proposed) three-year look-back period required for disclosures of demands proposed to be made under Item 1104 of Regulation AB. Given that the Dodd-Frank Act does not mandate any look-back period, we are puzzled by and do not agree with the Commission's decision to impose a more extensive look-back period under Rule 15Ga-1.

Second, because the proposed disclosure requirements have not previously existed, securitizers may not have been tracking the required information, and obtaining it retroactively may be extremely costly or impossible. This is particularly the case with respect to assets acquired by a sponsor directly or indirectly from third party originators who may no longer exist or with whom the sponsor may no longer be in privity.

Third, due to the difficulty securitizers may have in obtaining and verifying the information required to be disclosed pursuant to Rule 15Ga-1 for periods prior to the date of enactment, we believe that it is vital that any disclosure made by securitizers pursuant to such rule relating to periods prior to the effective date of such rule should not subject to the same level of liability as other required disclosures. For a registered offering, it would be entirely unfair to hold a securitizer to a strict liability standard for information that is dated and that such securitizer did not previously know it would be required to disclose. We suggest that the Commission utilize the same approach it adopted for the provision of static pool data when Regulation AB first became effective, which would be to impose only an antifraud standard on information related to periods prior to the effective date of the new requirement.

Fourth, we believe that Rule 15Ga-1 does not provide securitizers with nearly enough time in which to compile and report the required information. As proposed, the rule would require securitizers who are subject to ongoing reporting requirements under the rule to be able to disclose information relating to the previous month end by the 15th day of each month. This timing is extremely tight. And with respect to securitizers who are obligated to file for the first time under the rule due to the commencement of an offering, such securitizer ostensibly must be able to report repurchase demands as of the previous day, in the case of a transaction which launches on the first day of the month. This timing is not reasonable. Given the difficulty and expense inherent in compiling the information required by Rule 15Ga-1, including the fact that the rule may require a securitizer to compile information from third party originators and to discuss the contents of the information with those originators prior to including it in a filing subject to Exchange Act liability, we request that the Commission specify that any required disclosure relate back to a period not later than the end of the third calendar

month preceding the due date of such disclosure, in order to allow the securitizer sufficient time in which to gather the required information and prepare such disclosure.

Finally, we note that we find it very difficult to understand what subparagraph (c)(2) of Rule 15Ga-1 is saying about the applicable time period for reporting on an ongoing basis. Subparagraph (c)(2) says "[i]nformation is not required for the time prior to that specified in subparagraph (c)(1)." But this cross-reference could have two very different meanings. On the one hand, it could mean that "information is not required for any time prior to five years before the date of the monthly report." That would be an acceptable meaning (although we continue to think that five years is too long). On the other hand, it could mean that "information is not required for any time prior to the first date as of which reporting was done under (c)(1)," which would mean that the "first date" would not change, so that each subsequent report would cover a longer and longer time period. We find the latter possible meaning to be very troubling. Therefore, if the Commission determines that ongoing reporting is required, we ask that the Commission clarify that such ongoing reporting will have a look-back period of no longer than five years (or such shorter look-back period as the Commission ultimately adopts).

**5. Securitizers Should Not Be Required to Disclose "Any and All" Repurchase Demands**

We disagree with the Commission's position that the rules enacted pursuant to Section 943(2) should require securitizers of Exchange Act ABS to disclose any and all demands for repurchase and replacement. The Commission goes so far as to require disclosure of "demands which do not ultimately result in repurchase or replacement pursuant to the terms of the transaction agreements, either because of withdrawn demands or incomplete demands that did not meet the requirements of a valid demand pursuant to the transaction agreements."[8]

Section 943(2) requires in part that a securitizer "disclose fulfilled and unfulfilled repurchase requests…, so that investors may identify asset originators with **clear** underwriting deficiencies." (emphasis added).

It is our strong belief that the inclusion of the word "clear" in the last clause of 943(2) reflects Congress' intent to qualify the language that appears before it. If, as the Commission suggests, Section 943 was intended to cover "any and all" requests, then Congress would not have included the limiting word "clear." We think that the word "clear," in essence, operates as a materiality qualifier.[9]

It is also our strong belief that Rule 15Ga-1 reporting of repurchase demands should only apply to legitimate demands for repurchase made in accordance with the transaction documents. The rule should not countenance specious or "shotgun" repurchase requests

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[8] 75 Fed. Reg. at 62712.

[9] On a related note, we disagree with the Commission's decision to remove the materiality qualifier in its reproposal of Item 1104 of Regulation AB. As we have noted, we believe that Section 943(2) contains the functional equivalent of a materiality qualifier, by limiting required disclosure to that which would indicate "**clear**" underwriting deficiencies. Therefore, the Commissions reasoning with respect to eliminating the materiality qualifier from Item 1104 is no longer valid.

that are rejected by the trustee or the issuer as not properly made or which are rescinded by the demanding party after consultation with the obligated party, presumably because the obligated party has provided satisfactory evidence that the asset is compliant.

Requiring the disclosure of any demand, whether valid or invalid, would not help investors "identify clear underwriting deficiencies;" instead, it would result in the disclosure of unhelpful and potentially misleading information.

One probable consequence of requiring invalid, incomplete or retracted demands to be disclosed would be to increase the litigation risks and associated costs of doing ABS transactions, resulting in higher borrowing costs for consumers.

**6. Other Comments and Requested Clarifications**

As currently proposed, Rule 15Ga-1 would apply to both registered and unregistered offerings of Exchange Act ABS. Transactions effected pursuant to Rule 144A, while unregistered, are frequently resold to a large number of qualified institutional buyers, and resemble registered offerings in various ways, such as making the sale primarily on the basis of a disclosure document and effecting the sale through one or more intermediary securities firms that purchase the securities from the issuer and resell them to investors. We can understand a desire to treat such offerings on the same basis as registered offerings for purposes such as disclosure of due diligence reports.

On the other hand, there are a great many transactions that are effected under other exemptions from the registration requirements, such as section 4(2), which do not bear any resemblance to registered offerings. In these other transactions, which we refer to as "truly private" transactions, there is no intermediary and no formal disclosure document. The hallmarks of truly private transactions include investors who are very sophisticated and who have significant bargaining power, direct negotiations between the issuer and the investors, and individually tailored documentation. These transactions can also involve assets that are not suitable for registered or Rule 144A offerings, and inclusion of reports on these assets would be confusing rather than illuminating for reviewers of filed reports.

We do not think that Congress intended Section 943 to cover truly private transactions. We note that Section 943(2) requires a securitizer "to disclose fulfilled and unfulfilled repurchase requests across all *trusts*..." (emphasis added). Trusts can be used in a variety of situations, but in the context of Exchange Act ABS, they are most commonly used in traditional amortizing term securitizations, where the trust holds pool assets for the benefit of the holders of notes issued by the trust, which notes are either registered and offered to the public or are sold in private transactions in reliance on Rule 144A or Regulation S. We believe that if Congress intended to cover any private transactions (which is not entirely clear), then Congress intended to only cover traditional term securitizations, and not truly private transactions. In such truly private transactions, investors are able to negotiate as to the appropriate level of disclosure regarding representations and warranties, and would not need the disclosure required by Rule 15Ga-1. Moreover, issuers enter into truly private transactions for a variety of reasons, and

they generally expect that no information about these transactions will become publicly available. We see no important policy reason why issuers should be required to report on truly private transactions, and we ask the Commission to exempt them from the scope of these rules.

As currently proposed, Rule 15Ga-1 would require disclosure of fulfilled and unfulfilled repurchase requests to be made on the basis of the "outstanding principal balance" of assets. We believe that this measurement standard may cause securitizers to have to re-establish, each time a required disclosure or filing is made, the value each loan for which a repurchase demand has been made. As an alternative, we suggest that securitizers be given the option to report repurchase demands using the cut-off date principal balance of an asset. We believe that using a constant date for value purposes would improve comparability for investors and would reduce the costs of compliance for securitizers. Neither approach offers perfect comparability, however, and securitizers will need to disclose the methodology that was used in calculating the reported values.

We note that in Release Nos. 33-9150; 34-63091; File No. S7-26-10, which relates to proposed rulemaking of the Commission pursuant to Section 945 of the Dodd-Frank Act (the "945 Rules"), the Commission also proposes to require the filing of a Form ABS-15G, but for a different purpose and subject to different timing requirements. As discussed in a separate letter submitted by AFSA with respect to the 945 Rules, we do not believe that the Form ABS-15G proposed under the 945 Rules is either necessary or appropriate. However, if the Commission determines that such filing is required, we request that the Commission either differentiate the two forms by using separate designations or reconcile the timing discrepancies between the various rules, so that issuers are not forced to make multiple filings of Form ABS-15G.

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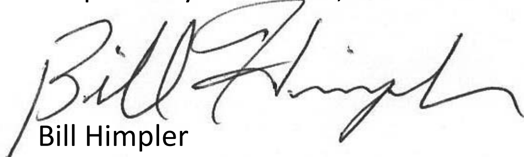
We very much appreciate the opportunity to provide the foregoing views in connection with the Commission's rulemaking process. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at 202-296-5544, ext. 616 or bhimpler@afsamail.org, or AFSA's outside counsel on this matter, Kenneth P. Morrison of Kirkland & Ellis LLP at 312.862.2347 or at kenneth.morrison@kirkland.com.

Respectfully submitted,



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