November 15, 2010

VIA E-MAIL: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy, Secretary

Re: Release Nos. 33-9148; 34-63029; 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 of 2010

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this letter 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, dated October 4, 2010 (the "Proposing Release")[2] relating to the implementation of Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). ASF supports appropriate reforms within the asset-backed securities ("ABS") market and we commend the Commission for seeking industry input regarding its proposed rules on this critically important issue. Over the past decade, ASF has become the preeminent forum for securitization market participants to express their views and ideas. ASF was founded as a means to provide industry consensus on market and regulatory issues, and we have established an extensive track record of providing meaningful comment to the Commission and other agencies on issues affecting our market. Our views as expressed in this letter are based on feedback received from our broad membership, including our issuer, investor, ABCP conduit sponsor, rating agency, trustee and financial intermediary members.

[1] The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

[2] *See* http://sec.gov/rules/proposed/2010/33-9148.pdf.

Section 943 of Dodd-Frank ("Section 943")[3] requires the Commission to implement rules relating to disclosure of representations, warranties and enforcement mechanisms as well as repurchase information in asset-backed securities offerings. Dodd-Frank amends the Securities Exchange Act of 1934 (the "Exchange Act") to include an alternative definition of "asset-backed security" (an "Exchange Act ABS") that is broader than the existing definition set forth in Regulation AB[4] of the Securities Act of 1933 (the "Securities Act"). In the Proposing Release, the Commission indicates its belief that the definition of Exchange Act ABS includes securities that are typically sold in transactions exempt from registration under the Securities Act including collateralized debt obligations and securities issued or guaranteed by government sponsored enterprises ("GSEs"), such as the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Section 943(1) requires each nationally recognized statistical rating organization ("NRSRO") to describe the representations, warranties and enforcement mechanisms available to investors in a particular issuance and how they differ from the representations, warranties and enforcement mechanisms contained in issuances of similar securities. Section 943(2) requires any securitizer 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.

ASF supports targeted reform in the securitization market and has introduced numerous initiatives through ASF Project RESTART[5], a broad-based industry effort to develop commonly accepted and detailed standards for transparency, disclosure and diligence on a prospective basis. Particularly relevant in this context is our development of the ASF Model RMBS Representations and Warranties (the "ASF Model Reps"), which provide a baseline set of representations and warranties for residential mortgage-backed securities ("RMBS") transactions, and our discussions to create the ASF Model RMBS Repurchase Provisions, a uniform set of procedures that delineate the roles and responsibilities of transaction parties in the repurchase process. Given these efforts, we are uniquely positioned to offer comment on the Proposing Release and to apprise the Commission of issues relevant to enacting appropriate rules. Set forth below are our members' comments and concerns relating to the proposed rules.

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[3] **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.

[4] 17 CFR 229.1100 through 17 CFR 229.1123.

[5] *See* www.americansecuritization.com/restart.

I. Section 943(1) Proposed Rulemaking

To implement Section 943(1) of Dodd-Frank, the Commission has proposed Rule 17g-7 under the Exchange Act requiring that each NRSRO include in any report accompanying a credit rating with respect to an Exchange Act ABS 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. The Commission notes that a "credit rating" for purposes of this requirement includes any expected or preliminary credit rating issued by an NRSRO, including, for example, in connection with a pre-sale report. By its terms, Rule 17g-7 does not specify the extent of the description required nor does it set forth what is meant by "similar securities" or the required level of comparison. Our members believe that this lack of clarity will result in confusion on how to comply with the rule.

The first requirement of Rule 17g-7 is a description of the representations, warranties and enforcement mechanisms included in a particular transaction. We request that this requirement be further clarified, so that NRSROs are able to provide useful disclosure to investors. Without a qualifying standard or specified means of disclosure, NRSROs may be forced to restate, in their entirety, the relevant provisions contained in the prospectus or offering memorandum or in the applicable transaction document to ensure compliance. We question the utility of this outcome, as investors may already have this information available to them in the offering materials. Instead, we suggest limiting the description requirement to a summary of the provisions or allow the NRSROs to reference the provisions in the applicable transaction or offering document.

The second requirement of Rule 17g-7 is a description of how the representations, warranties and enforcement mechanisms in a particular transaction differ from the representations, warranties and enforcement mechanisms contained in issuances of similar securities. This comparison requirement creates further compliance challenges and raises a number of issues for the Commission to consider. First, through our work on the ASF Model Reps, we can attest to the fact that a comparison of representations, warranties and enforcement mechanisms across various transactions is a time consuming process that involves substantial analysis. An effective comparison for investors must entail more than simply identifying whether or not particular representations and warranties exist, as the substance of each may vary widely. Instead, the comparing party would have to analyze all differences in language, including phraseology and the use of knowledge qualifiers, to evaluate whether various actions and requirements are included within the representations and warranties.

Second, the term "similar securities" should be defined or otherwise qualified to limit the universe within which transactions should be compared. The representations, warranties and enforcement mechanisms within different transactions may vary greatly across different types of issuers and assets. For example, a transaction involving newly originated loans may not have the same risk profile as a transaction involving seasoned loans or a transaction involving prime auto loans may not have the same risk profile as a transaction involving subprime auto loans. Furthermore, "aggregator" securitization transactions, in which an issuer purchases loans from several different, usually unaffiliated, originators, may have unique characteristics such as the capacity of the issuer to monitor and verify certain information held by third party originators. We recommend that the Commission expressly define "similar securities" to mean "those types

of issuances, if any, that the NRSRO making the comparison would deem relevant for rating a particular transaction."

Third, Rule 17g-7 should explicitly set forth standards by which an NRSRO can satisfy the requirement to compare representations, warranties and enforcement mechanisms across transactions. In the commentary contained in the Proposing Release, the Commission notes that an NRSRO may fulfill the comparison requirement by reviewing previous issuances both on an initial and an ongoing basis in order to establish "benchmarks" for various types of securities and to revise them as appropriate.[6] Our NRSRO members have indicated that most NRSROs have broad-based internal measures for representations and warranties in ABS transactions, and believe that these measures could act as benchmarks, or as a starting point for developing benchmarks, to meet the required comparison. Furthermore, our investor members believe that industry standards, such as the ASF Model Reps, should also be included as an appropriate benchmark. We believe that the current language of Rule 17g-7, which references a comparison against "issuances of similar securities," is not, on its face, broad enough to include a comparison benchmark as mentioned by the Commission in the Proposing Release. We request confirmation, by way of explicit inclusion in Rule 17g-7, that an NRSRO's internal measures for representations, warranties and enforcement mechanisms, or any applicable industry standards, such as the ASF Model Reps, would meet the comparison requirement.[7]

Fourth, we note that the driving principle behind Section 943 of Dodd-Frank is to increase transparency around representations and warranties, and the enforcement thereof, in securitizations in order to help bring to light underwriting deficiencies. This is made expressly clear in Section 943(2), which mandates disclosure of fulfilled and unfulfilled repurchase requests "so that investors may identify asset originators with clear underwriting deficiencies." In crafting that section, Congress understood that repurchases are a standard remedy for representations and warranties regarding the assets in a pool underlying Exchange Act ABS. Therefore, demand and repurchase activity may be indicative of assets that fail to meet the quality standards represented to by the originator. However, securitization transaction agreements also customarily contain other representations and warranties of the transaction parties that are unrelated to the pool assets and asset quality. Such "corporate" representations, that are common to securitization and non-securitization transactions alike, may cover due organization of the transaction parties, due authorization, execution and delivery of the transaction agreements, absence of conflicts with other agreements binding the transaction parties and like matters. Breach of those representations and warranties do not generally result in an obligation to repurchase loans on the part of the representing party, but rather in ordinary contractual damages. Therefore, we believe that it would add nothing to the process of rooting our underwriting deficiencies to require the NRSROs to compare corporate representations and warranties in their reports, and request that the Commission revise proposed Rule 17g-7 to refer expressly to representations and warranties ***regarding the pool assets***.

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[6] *See* Footnote 63 of the Proposing Release.

[7] We also note that certain asset classes, such as RMBS, have not issued securities backed by newly originated collateral since the financial crisis, which could create problems for NRSROs trying to compare representations, warranties and enforcement mechanisms to "issuances of similar securities" without further guidance.

Finally, we ask the Commission to consider the process by which NRSROs will obtain the information necessary to comply with their Rule 17g-7 obligations. Because the reports containing the required comparison will frequently be published prior to the date on which the transaction documents containing the representations and warranties are filed by the issuer on EDGAR, the information will need to be obtained directly from the issuer or, in the case of non-hired NRSROs, from the issuer's website maintained pursuant to Rule 17g-5, at the same time it is supplied to the hired NRSROs. Currently, information of a non-public nature supplied by an issuer to an NRSRO is required to be kept confidential, even though it is used in the ratings process. Rule 17g-7 effectively requires public disclosure of such information or, potentially even more troubling, in the case of NRSROs that operate on an "investor pay" basis, allows such information to be made available to only select investors who are customers of the NRSRO. We ask that the Commission clarify that an issuer who provides transaction documents containing representations, warranties and enforcement mechanisms to an NRSRO will be deemed not to have violated Section 5(b)(1) of the Securities Act, in the case of a public offering, or to have engaged in a general solicitation, in the case of a private offering, by virtue of the publication by the NRSRO of a report containing the information required by Rule 17g-7.

II. Section 943(2) Proposed Rulemaking

To implement Section 943(2) of Dodd-Frank, the Commission proposes to add new Rule 15Ga-1 that would require any securitizer of Exchange Act ABS to provide certain demand and repurchase information for 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. Dodd-Frank establishes a definition for the term "securitizer" which is, generally, an issuer of Exchange Act ABS or a person who organizes and initiates an Exchange Act ABS transaction by transferring assets to the issuer.[8] In the Proposing Release, the Commission indicates its belief that the definition of securitizer would include the GSEs and municipal entities, and that the provisions of Section 943(2) would apply to registered or unregistered transactions.[9] The disclosure requirement for a particular Exchange Act ABS transaction would be conditioned upon the underlying transaction agreements providing a covenant to repurchase or replace an underlying asset for breach of a representation or warranty. Any securitizer that issues an Exchange Act ABS, or organizes and initiates an asset-backed securities transaction by selling or transferring an asset, either directly or indirectly, including through an affiliate, to the issuer would meet the requirements of Rule 15Ga-1 by filing new proposed Form ABS-15G, at the time the securitizer or an affiliate commences its first offering of Exchange Act ABS and a monthly basis thereafter.

As acknowledged by the Commission in the Proposing Release, Section 943(2) establishes requirements as to demand and repurchase activity for asset-backed securities transactions that are similar to those proposed by the Commission in its release relating to proposed revisions to the offering, disclosure and reporting requirements for asset-backed securities (the "2010 ABS

[8] 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…."
[9] *See* page 10 of the Proposing Release.

Proposing Release").[10] In the 2010 ABS Proposing Release, the Commission proposed to revise (i) Items 1104 and 1110 of Regulation AB to require disclosure on a pool by pool basis of the amount, if material, of the publicly securitized assets originated or sold by the sponsor and certain originators that were the subject, during the prior three years, of a demand to repurchase or replace for breach of a representation or warranty regarding the pool assets and (ii) Item 1121 of Regulation AB to require reporting on Form 10-D of repurchase demands and unfulfilled repurchases (collectively, the "Regulation AB Repurchase Proposals"). ASF commented on those proposals in our broad response letter to the 2010 ABS Proposing Release that was filed on August 2, 2010[11] and we appreciate the Commission's consideration of those comments as noted in the recent Proposing Release. In the Proposing Release, the Commission has re-proposed the Regulation AB Repurchase Proposals relating to Items 1104 and 1121 to, among other things, align the required disclosure with that prescribed by Rule 15Ga-1. While we realize that the proposals relating to repurchase disclosure contained in the Proposing Release and the 2010 ABS Proposing Release have different features and requirements, most notably the coverage in the Proposing Release of multiple asset classes, we believe that the purpose of the disclosure is similar enough to warrant changes in scope to avoid duplicative requirements and unnecessary burdens on the market.

It is important to note that the language of Section 943 does not require, nor does it create, a reporting obligation for securitizers. Instead, Section 943 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 this disclosure can be accomplished, and would be more effective, within an offering document for consideration by investors interested in purchasing particular Exchange Act ABS. There is little need for an additional filing requirement, especially one that is required when the securitizer "commences its first offering of the asset-backed securities,"[12] at which time the securitizer would also be required to include substantially similar information pursuant to Item 1104 as per the Regulation AB Repurchase Proposals. If a Form ABS-15G is required to be filed at the time of issuance of every new deal and periodically thereafter (even if new deals occur within those subsequent months), under normal market conditions the market will be flooded with data about frequent securitizers that is largely duplicative and of questionable incremental value.

a. Form ABS-15G Should be Filed Quarterly

If the Commission decides to implement the requirements of Rule 15Ga-1, in addition to revised Item 1104, we suggest that the Form ABS-15G be filed on a quarterly basis, instead of at issuance and on monthly basis thereafter. The requirement to prepare and file Form ABS-15G places an additional administrative burden and expense on securitizers, who are already struggling to cope with the enhanced compliance requirements imposed by the Commission's

[10] Release Nos. 33-9117; 34-61858; File No. S7-08-10, dated April 7, 2010.
[11] Please refer to pages 67-68 and 77-78 in our comment letter on the 2010 ABS Proposing Release (the "ASF Regulation AB Comment Letter"), which can be found at http://www.americansecuritization.com/uploadedFiles/ASFRegABIICommentLetter8.2.10.pdf.
[12] *See* Proposed Rule 15Ga-1.

recently enacted rules, such as Rule 17g-5, the proposed expansion of disclosure under the proposed revisions to Regulation AB and other legislative and regulatory initiatives. In the event that the Commission does not see fit to implement the requirements of Section 943(2) solely through offering document disclosure, as suggested above, our issuer members believe that the filing of the required repurchase information, after the initial filing, on a quarterly basis is sufficiently frequent to provide a useful insight into repurchase activity and to alleviate the burden of filing often redundant information on a monthly basis. In that regard, they point out that the repurchase cycle for assets is rarely tied to the monthly distribution cycle for ABS transactions. Our investor members concur that quarterly filings would represent an appropriate balance between providing timely repurchase activity information to the market and avoiding information overload, and accordingly, are supportive of quarterly reporting.

Pooling and servicing agreements or other securitization transaction agreements typically provide a period of 60 to 90 days following a demand for repurchase for breach of representation or warranty in which the representing party is entitled to cure the breach. For this reason, it is generally not practical to report the disposition of the repurchase demand in the same monthly reporting cycle in which it is made and the reporting party will not be in a position to know what percentage of demands made in the period did not result in repurchase. While we acknowledge that the Commission has attempted to remedy this situation by including a column for repurchases "pending," we note that such disclosure, which will already be provided in any prospectus pursuant to revised Item 1104, will not provide an investor any useful information until after the cure period has expired. In our comment letter on Item 1121 of Regulation AB, as proposed to be amended in the 2010 ABS Proposing Release, we suggested that reporting of repurchases be made quarterly, with respect to properly authorized and unrescinded demands made in the second preceding quarter, so that the report would reflect the disposition of any previously made demands. In our view, such a quarterly reporting cycle would allow any transactional cure period to expire, even if a repurchase demand was made on the final day of the preceding calendar quarter, resulting in more meaningful disclosure to investors regarding non-repurchases than to simply list any unresolved demands as "pending."

In any event, whether or not the Commission decides to retain the "pending category," given that Rule 15Ga-1 may require the 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 the report cover properly authorized demands made through a period not later than the end of the fourth calendar month preceding the due date of the report, in order to allow the securitizer sufficient time in which to gather the required information and prepare the report.

b. Rule 15Ga-1 Should be Implemented on a Prospective Basis

We request that the requirement to report the information set forth in Rule 15Ga-1 be implemented on a prospective basis (i.e., that the disclosure relate to demands made during the prior five years or the period since the implementation date of Rule 15Ga-1, whichever is less). Although under proposed Rule 15Ga-1 sponsors and originators would need to track and report repurchase demands received, repurchases made and not made, and repurchases pending, and to report these activities to other market participants who may need to provide the relevant disclosure, these requirements did not previously exist, and it is likely that the required

information will often be unavailable with respect to transactions entered into prior to the implementation date of Rule 15Ga-1. That is particularly the case with respect to assets acquired by a sponsor directly or indirectly from third-party originators who may no longer exist[13] or with whom the sponsor may not be in privity. We appreciate that the Commission has attempted to address this issue by providing in the instructions to the proposed rule that if a securitizer requested and was unable to obtain all information with respect to investor demands upon a trustee that occurred prior to the effective date of the rule, it could note that in its disclosure and state that the disclosure does not contain investor demands made on a trustee prior to the effective date. However, we think that the necessarily widespread exclusion of information for periods prior to the effective date of Rule 15Ga-1 would render the information that is made available less comparable, and therefore less useful and potentially even misleading to investors. Further, we find nothing in the language of Section 943(2) that requires information to be disclosed for Exchange Act ABS issued prior to its enactment (or the effective date of any rules implemented by the Commission), and that language certainly does not prohibit the Commission from balancing the policy of Dodd-Frank with the practicality of obtaining historical information by applying its rules prospectively.[14]

c. Rule 15Ga-1 Should be Limited to "Properly Authorized" Demands

We believe that Rule 15Ga-1 reporting of repurchase demands should only apply to demands for repurchase made by the party or parties authorized to make demand under the transaction documents. This would exclude, for example, repurchase requests that are rejected by the trustee as not properly made or which are rescinded by the demanding party after consultation with the obligated party.

Applying Rule 15Ga-1 only to demands properly made by the authorized parties would alleviate the very real concern that information disclosed pursuant to the rule could be misleading. The Commission indicates that disclosure would be required for assets subject to "any and all demands" for repurchase even though it acknowledges that a demand may not result in a repurchase because it is withdrawn or "did not meet the requirements of a valid demand pursuant to the transaction agreements."[15] We disagree with this approach. Because Rule 15Ga-1 requires securitizers to disclose repurchase information upon the occurrence of a demand, we believe a minimum requirement should be that such demand have been made in accordance with any express procedure set forth in the transaction documents. Under many past transaction agreements, repurchase demands were largely permitted in the first instance only to be made by trustees, who almost always had limited access to the information upon which a demand could be asserted and no obligation to affirmatively evaluate compliance with representations and warranties. When many of those transactions experienced high levels of loan defaults, particularly in the RMBS market, a large number of demands were made by investors directly to representing parties to repurchase loans in contravention of those trustee presentation

[13] Many originators no longer exist after the events of the financial crisis.
[14] Should the Commission not choose to apply Rule 15Ga-1 only prospectively, we request, at a minimum, that it broaden the exception in the instruction to paragraph (a)(1)(v) of the rule to permit the securitizer to omit information about demands made prior to the effective date of the rule that the securitizer cannot obtain without unreasonable effort or expense.
[15] *See* page 13 of the Proposing Release.

requirements. The requirement to report all past demands for repurchase under the proposed rule means that facially inadequate demands would need to be reported, leading investors to make inaccurate determinations as to underwriting quality. While we agree with the Commission's observation in the Proposing Release that requiring securitizers to report no demands for transactions that do not contain a covenant to repurchase "might give an incorrect impression of sound underwriting,"[16] we equally believe that requiring securitizers to report facially invalid demands for transactions that do contain a covenant to repurchase may create an unwarranted impression of poor underwriting for those transactions. Given that a purpose of the report on Form ABS-15G is to allow investors to assess the representing party's compliance with its obligations under the transaction agreements, we also think it important that the report of non-repurchases correlate to legitimate demands for repurchase that have been made pursuant to any express procedural requirement under the transaction agreements. Otherwise, investors may be unable to differentiate between demands that may be associated with underwriting deficiencies, on the one hand, and those associated with poor pool performance resulting from changed economic conditions, on the other. We note that if the applicability of Rule 15Ga-1 is made prospective, concerns about demand legitimacy should fade, as it is the belief of our members that, on a going forward basis, transaction agreements will require much more detailed remedial provisions, including robust third party involvement in the evaluation of representation and warranty breaches and clearly defined responsibilities of transaction parties, so that representation and warranty claims are more likely to be vetted and pursued in accordance with the transaction documents than in past transactions.[17]

d. Form ABS-15G Filing Should Apply to a Single Asset Class

We request that the obligation to disclose repurchase demands extend only to securitized assets of a single asset class. We see nothing in the language of Section 943(2) to require aggregation of multiple asset classes in a single filing. Differences in the nature of assets of different classes are sufficiently great that the reasons for repurchase, or the bases for failure to repurchase an asset of one class may yield little insight into the thought processes or intentions of the repurchasing party when evaluating a transaction backed by assets of a different asset class. For example, our investor members do not believe that repurchase information for a securitizer of auto loans or credit card receivables is sufficiently relevant to an analysis of the underwriting of a securitizer's residential mortgage loans to warrant an all-encompassing disclosure requirement. In addition, sponsors that are large, diversified financial institutions engaging in securitization and sales of multiple asset classes often do so, for business reasons unrelated to the securitization process, through separately managed business units. Consequently, because the definition of securitizer is limited to an issuer or 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," one financial institution's corporate structure may require that it disclose repurchase information for multiple asset classes in one filing while another financial institution's corporate structure may permit it to do so in separate filings by asset class. This

[16] *See* page 13 of the Proposing Release.
[17] For a proposed framework of these remedial provisions, please refer to pages 24-25 in our comment letter to the 2010 ABS Proposing Release, which can be found at http://www.americansecuritization.com/uploadedFiles/ASFRegABIICommentLetter8.2.10.pdf.

anomalous result would be avoided by revising proposed Rule 15Ga-1 to accommodate our issuer and investor members' shared view that the material information to be provided in each report is the demand and repurchase activity across all assets of the same asset class securitized by the securitizer. While this may lead some securitizers to have to file more than one report, we believe the result will be clearer and more consistent reports that can be more easily reviewed and digested by investors. In the event that the Commission is amenable to this request, we suggest adding a line to the cover page of Form ABS-15G to require the securitizer to indicate the asset class to which the report relates.

e. Subsequent Filings Should Not Be Required Where No Demands Exist

In the Proposing Release, the Commission indicates that the "initial filing would be required to include all of the information in proposed Rule 15Ga-1, even if there had been no demands to repurchase or replace assets to report with respect to any issuing entity of an Exchange-Act ABS securitized by a securitizer."[18] It is unclear whether the Commission intended that this requirement also extend to the periodic filings. In any event, for certain asset classes, such as credit card, student loan and auto ABS, demands to repurchase or replace for breaches of representations and warranties concerning the assets rarely, if ever, occur. Our members who issue and invest in these asset classes agree that filing the tabular information required by Rule 15Ga-1 is of little utility if no demands have ever occurred. Accordingly, we propose that a securitizer of assets that has not received any demands to repurchase or replace for breach of the representations and warranties concerning any assets in the last year file a single Form ABS-15G including the information required by Rule 15Ga-1 after the effective date of the final rules implemented by the Commission. Thereafter, if no demands are received, the securitizer would be obligated annually, no later than March 30 of each calendar year, to file a Form ABS-15G indicating that no demands to repurchase or replace for breach of the representations and warranties concerning the assets have occurred since the filing of the previous Form ABS-15G. We propose that a securitizer meeting this requirement have no other periodic filing obligation under Rule 15Ga-1 unless a demand occurs, in which case the securitizer would be required to file an updated Form ABS-15G including the updated information for the applicable period.[19]

In a similar vein, we request that, if the Commission retains the requirement to periodically file Form ABS-15G, in addition to the obligation expressly mandated in Section 943(2) to "disclose" demand and repurchase activity, it reinsert the materiality threshold into the proposed revision to Items 1104 and 1121 of Regulation AB. Should the Commission conclude that the Congressional intent in adopting Section 943(2) requires periodic reporting of such activity, without regard to materiality, that information will be available in the public domain for the review of investors, and under the Commission's proposal will also be expressly required to be referred to in the issuer's prospectus and periodic reports. We do not think that it is an unreasonable exercise of the Commission's rulemaking discretion to permit an issuer that has *de*

[18] *See* page 19 of the Proposing Release.

[19] We propose that, after filing the updated Form ABS-15G, securitizers would then be able to indicate in an annual Form ABS-15G filing that no demands to repurchase or replace for breach of the representations and warranties concerning the assets have occurred since the filing of the last Form ABS-15G.

minimis demand or repurchase activity to conclude, at the peril of Securities Act liability, that disclosure of that activity in the offering document is not material to investors.

f. A "Safe Harbor" Should be Established for Filing Information Relating to Unregistered Offerings

The Commission has proposed that a securitizer be required to publicly file Form ABS-15G at the time it commences its first offering, or organizes and initiates an offering, even if the offering is unregistered. In addition, the filing is required to include information from outstanding unregistered transactions. Our issuer members are concerned that these requirements may subject them to liability under the federal securities laws or result in a springing registration requirement. Indeed, the Commission notes in the Proposing Release that the inclusion of information beyond that required in proposed Rule 15Ga-1 may jeopardize an issuer's reliance on the private offering exemption in the Securities Act and the safe harbor for offshore transactions from the Securities Act registration provisions by constituting a public offering or conditioning the market for an offering of Exchange Act ABS.[20]

Determining whether an issuer has conditioned the market is not a bright-line analysis and issuers are wary of statements in the Proposing Release that they may rely on an exemption or safe harbor if the information made public is limited to that required by Rule 15Ga-1. Instead, we suggest including a safe harbor provision in the actual rule stating that disclosing information required by Rule 15Ga-1 will not be considered a public offering or conditioning the market and would not jeopardize an issuer's reliance on an exemption from registration. Such a provision would permit an issuer to continue relying on a particular exemption or safe harbor from registration if the issuer included only the information required by the filing. To provide certainty, Rule 15Ga-1 would need to set forth that all information, including both the information required to be disclosed in the table and the information required pursuant to the rule's two instructions, would be included in the safe harbor, along with any additional information necessary to make the information contained in or omitted from the table not misleading. This is of particular importance with respect to the instruction relating to providing narrative disclosure of the reasons why any repurchase or replacement is pending, as such disclosure may reveal additional information about the securitizer and its securitization program.[21] To limit the types of narratives made pursuant to such instruction, the Commission could provide examples of appropriate responses.

g. Rule 15Ga-1 Should Not Apply to Resecuritizations

We request that the Commission clarify that Rule 15Ga-1 is not intended to apply to resecuritizations. As the Commission is aware, the underlying assets in a resecuritization are ABS and the representations and warranties contained in those transactions typically relate only to ownership of such ABS by the trust. The purpose of Section 943(2), and thus Rule 15Ga-1,

[20] *See* Footnote 34 in the Proposing Release.

[21] Please note that we also suggest in this letter including within the table a column for repurchase requests that are in litigation or dispute. Due to confidentiality concerns, we recommend that the Commission not include any instruction requiring narrative disclosure with respect to this disclosure, but in the event the Commission does, it would also have to be covered by the safe harbor.

which is to enable investors to identify asset originators with clear underwriting deficiencies, is not achieved through compliance with representations and warranties contained in resecuritizations relating to ownership of the underlying securities. Furthermore, because the underlying ABS in a resecuritization were issued out of trusts that are covered by Rule 15Ga-1, the information targeted by the rule will already be required to be disclosed by the underlying securitizer, to the extent available, after the effective date of Rule 15Ga-1. Adding another layer of disclosure for resecuritizations, the underlying assets of which are ultimately backed by loans that are already subject to Rule 15Ga-1, would be duplicative and unduly onerous.

h. Rule 15Ga-1 Should Not Apply to Traditional Private Placements

We request that the Commission specify that Rule 15Ga-1 not require the reporting of demand and repurchase activity with respect to securitizations effected solely in reliance on the exemption in Section 4(2) of the Securities Act for transactions by an issuer not involving any public offering. Traditional institutional private placements involve direct negotiation of transaction agreements, including representations and warranties, between issuers and institutional investors. Accordingly, these transactions often feature additional, non-standard representations and warranties tailored to the needs of the particular investor, which may be designed to assure that loans, even those of relatively high credit quality, meet the particular investor's investment criteria. Our issuer members therefore believe that demand and repurchase activity in "true" private placements is often likely to not be as probative of underwriting issues as comparable activity in non-negotiated transactions, such as public offerings or offerings made to qualified institutional buyers in reliance on Rule 144A under the Securities Act.

i. Rule 15Ga-1 Should Not Apply to Asset-Backed Commercial Paper Conduit Transactions

We also request that the Commission specify that Rule 15Ga-1 not require the reporting of demand and repurchase activity with respect to assets financed by asset-backed commercial paper conduits ("ABCP conduits") that meet the definition of Exchange Act ABS. As is the case with traditional institutional private placements, sponsors of ABCP conduits generally directly negotiate representations by the originator, independently review the underlying assets, and establish remedies for misrepresentations by the originator or failures by the originator in servicing the assets. Those provisions are similar to the procedures these financial institutions follow in making secured loans. These criteria are different from the capital market conventions used by underwriters and investors in securities markets. Sponsors of ABCP conduits rely heavily on their knowledge of and experience with their customer, a type of knowledge and experience generally not available to securities market investors. As a result of these features, in the view of our conduit sponsor members, demand and repurchase activity in Exchange Act ABS purchased by ABCP conduits is not likely to be as probative of underwriting issues as comparable activity in non-negotiated transactions and is not relevant to investors in ABCP, which rely upon the creditworthiness of support providers with respect to these issues.

j. Other Clarifications

We request clarification that the five years of demand and repurchase activity required to be reported on an ongoing basis is required to be reported on a rolling basis, so that no more than

five years of information would be contained in the report. We believe that five years worth of demand and repurchase activity is sufficient to provide insight into the underwriting quality of the respective originators, and that an unlimited "look-back" would only swamp investors with stale data of limited value.

We request that the Commission revise the proposed rule to require disclosure of fulfilled and unfulfilled repurchase requests concerning assets ***"securitized"*** by the securitizer, rather than assets "***originated and sold***" by the securitizer. We believe the requested change would clarify the intent of Section 943(2) and the Commission to place responsibility on securitizers to disclose demand and repurchase activity with respect to assets securitized by them directly, or through an affiliated depositor, in the case of two-step transactions. Read literally, the language of proposed Rule 15Ga-1, as currently drafted, could be construed to require the securitizer to report demand and repurchase activity on loans originated and sold by it but securitized by other securitizers. In addition to contradicting the disclosure structure contemplated by Section 934(2) and the Proposing Release, we think such a construction would lead to inconsistent and duplicative reporting.

We note that the Commission has proposed to require disclosure regarding the assets that are pending repurchase and has included an instruction within the rule to provide, in a footnote to the table, narrative disclosure of the reasons why repurchase is pending. We agree with the Commission that including repurchase requests that are within a cure period as assets that were not repurchased would provide "inaccurate disclosure about the current pending status of those repurchase requests."[22] However, whether or not the Commission decided to retain the "pending" category, we believe that an additional column should be added for repurchase requests that are in litigation or dispute, as inclusion of such requests in the assets pending repurchase column would not be appropriate and may mislead investors. We request that the Commission not include any instruction requiring narrative disclosure with respect to why a repurchase request for an asset is in litigation or dispute, as such information can be highly sensitive.

We also note that, in re-proposing Sections 1104 and 1121 of Regulation AB, the Commission has proposed to require issuers to include in their prospectuses "a reference to the most recent Form ABS-15G filed by the securitizer." We request that the Commission clarify that it does not intend that the issuer incorporate the securitizer's most recent filing on Form ABS-15G into the registration statement, with attendant liability under Section 11 of the Securities Act. Such liability would, of course, attach to the three years of historical demand and repurchase information required to be provided under re-proposed Item 1104, which would be rendered superfluous if the more expansive report required by Rule 15Ga-1 was incorporated by reference.

Finally, we ask the Commission to revise and clarify a statement made in the narrative portion of the Proposing Release, which appears to us to inadvertently misstate the actual operation of the proposed rule. On page 20 of the Proposing Release, the Commission states that "Under the proposal, securitizers would be required to continue periodic reporting through and until the last payment on the last Exchange Act-ABS outstanding held by a non-affiliate that was issued by

[22] *See* page 18 of the Proposing Release.

the securitizer ***or an affiliate*** (emphasis added)." While we acknowledge that the proposed rule requires reporting by sponsors of repurchase and demand activity in trusts they securitize in two-step transactions through affiliated depositors, and that such reporting is required for so long as any securities of the sponsor are held by non-affiliates, neither Section 943(2) nor proposed Rule 15Ga-1 requires the securitizer to report on securities of affiliated securitizers, who will have their own reporting requirements with respect to the securities they sponsor. Therefore, the fact that an affiliated securitizer (other than a depositor with respect to the same assets) still has securities outstanding, should logically be irrelevant to the duty of the securitizer to continue to file reports once its securities are no longer held by non-affiliates. Subsection (c)(3) of proposed Rule 15Ga-1, which governs suspension of the duty to file Form ABS-15G, is consistent with that understanding. Therefore, we believe the above-referenced language represents a drafting error and ask, in order to eliminate any possible confusion, that the Commission remove the phrase "or an affiliate" from the narrative in the final release.

k. Transition

The data gathering and procedure changes required to be implemented by securitizers and others in order to comply with Rule 15-Ga1 will be substantial and we request an appropriate period of time following finalization of the rule for our members to prepare for their disclosure obligations. Accordingly, consistent with our comments relating to transition included in the ASF Regulation AB Comment Letter, we request compliance with the requirement of Rule 15-Ga1 be made applicable to transactions issued no earlier than the later of one year following the date of publication of the final rule in the Federal Register and January 1, 2012.

* * * *

ASF very much appreciates 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 212.412.7107 or at tdeutsch@americansecuritization.com, Evan Siegert, ASF Associate Director, at 212.412.7109 or at esiegert@americansecuritization.com, or ASF's outside counsel on this matter, Jordan Schwartz of Cadwalader, Wickersham & Taft LLP at 212.504.6136 or at jordan.schwartz@cwt.com.

Sincerely,

Tom Deutsch
Executive Director
American Securitization Forum