

# COMMITTEE ON CAPITAL MARKETS REGULATION

October 4, 2011

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

Re: Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, 76 Fed. Reg. 47,948 (RIN 3235-AK37, SEC Release Nos. 33-9244; 34-64968; File No. S7-08-10)

Dear Ms. Murphy:

The Committee on Capital Markets Regulation (Committee) appreciates the opportunity to comment on the Re-Proposed Rules<sup>1</sup> of the Securities and Exchange Commission (SEC) regarding shelf eligibility conditions for asset-backed securities.

Since 2005, the Committee, composed of 32 members, has been dedicated to improving the regulation of U.S. capital markets. Our research has provided an independent and empirical foundation for public policy. In May 2009, the Committee released a comprehensive report entitled *The Global Financial Crisis: A Plan for Regulatory Reform* (May 2009 Report), which contains fifty-seven recommendations for making the U.S. financial regulatory structure more integrated, more effective, and more protective of investors in the wake of the financial crisis of 2008.<sup>2</sup> Since then, the Committee has continued to make recommendations for regulatory reform of major areas of the U.S. financial system.

As an initial matter, we caution that, particularly in light of the recent decision of the U.S. Court of Appeals for the D.C. Circuit striking down the SEC's proxy access rule,<sup>3</sup> adequate cost-benefit analysis will be critical if final rules are to withstand challenge in the courts.<sup>4</sup> We note that the SEC has requested comment on its Economic Analysis in the Re-Proposed Rules, and strongly encourage that final rulemaking include a thorough analysis, based on empirical evidence to the extent possible, of the Re-Proposed Rules' effects on efficiency, competition and capital formation.

<sup>1</sup> Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, 76 Fed. Reg. 47,948 (proposed Aug. 5, 2011) (hereinafter Re-Proposed Rules).

<sup>2</sup> COMM. ON CAPITAL MKTS. REG., *THE GLOBAL FINANCIAL CRISIS: A PLAN FOR REGULATORY REFORM* (May 2009), <http://www.capmksreg.org/research.html>.

<sup>3</sup> *Business Roundtable v. S.E.C.*, 647 F.3d 1144 (D.C. Cir. 2011).

<sup>4</sup> See Comm. on Capital Mkts. Reg., *Statement About a Decision by the U.S. Court of Appeals on Proxy Access* (July 27, 2011), <http://www.capmksreg.org/comments.html>.

We generally support the SEC's Re-Proposed Rules, and believe they make significant progress towards reform of the securitization markets. In our May 2009 Report, we provided a number of recommendations, including, among others, a recommendation for enhanced and standardized loan-level disclosures. We note that the SEC, in its April, 2010 proposed rules,<sup>5</sup> cited several of the observations and recommendations the Committee made in the May 2009 Report. We are very appreciative of the SEC's recognition and pleased to have been a resource to the SEC as it formulated its proposed rules.

With regard to the proposed asset-level disclosure requirements for residential mortgage-backed securities (RMBS), we agree with the SEC's approach of generally incorporating in its 2010 ABS Proposing Release the substance of the American Securitization Forum's (ASF) Project on Residential Securitization Transparency and Reporting (Project RESTART). As we stated in the May 2009 report, we believe the SEC's disclosure requirements should be based on investor demand and inputs,<sup>6</sup> which Project RESTART, a broad-based, industry-developed initiative, represents. However, we note that certain of the SEC's proposed disclosure requirements related to RMBS, as well as proposed disclosures for other asset classes, including credit and charge card asset-backed securities (ABS), have raised significant industry objection. The SEC acknowledged it has received many helpful and detailed suggestions regarding the proposed asset data requirements, and that it is considering all of these letters and has not yet made a determination regarding the final rules of any asset class.<sup>7</sup> We reiterate our recommendation that any final rulemaking should reflect investor input, and in particular, the recommendations of ASF.

We remain extremely concerned about the proposed requirement that issuers of privately-offered ABS make available to their investors the same level of disclosure as is proposed for registered ABS offerings. The SEC acknowledges that several commenters to its 2010 ABS Proposing Release expressed concern over the proposed disclosure requirements for private ABS.<sup>8</sup> We appreciate the SEC's goal of ensuring that sophisticated investors in offerings sold under Rule 144A and Regulation D under the Securities Act of 1933, as amended (Securities Act) receive adequate disclosure to make informed investment decisions. However, we believe the proposed private ABS disclosure requirement, even if limited to asset classes where asset-level disclosures are prescribed in Regulation AB, is both unnecessary and, more concerning, unduly burdensome on issuers of private ABS. As a result, this proposed requirement has the potential to severely limit the recovery and future growth of the private markets for ABS.

Requiring asset-level disclosure as prescribed in Regulation AB for privately offered ABS is unnecessary, as investors in these offerings meet statutory sophistication requirements and thus are able to participate in the Rule 144A and Regulation D markets. We agree with ASF's assessment that these investors:

<sup>5</sup> Asset-Backed Securities, SEC Release No. 33-9117, 75 Fed. Reg. 23,328 (proposed May 3, 2010) (hereinafter the 2010 ABS Proposing Release).

<sup>6</sup> COMM. ON CAPITAL MKTS. REGULATION, *supra* note 2, at 154.

<sup>7</sup> Re-Proposed Rules, 76 Fed. Reg. at 47,968.

<sup>8</sup> Re-Proposed Rules, 76 Fed. Reg. at 47,970.

... possess a level of knowledge and experience in the purchase and surveillance of structured finance products such that they are able to identify and request the information that they need to make informed investment decisions relating to those products without the protections mandated by the registration provisions of the Securities Act.<sup>9</sup>

We also note that offerings under Rule 144A and Regulation D remain subject to liability under Rule 10b-5. Potential liability serves to impose an adequate baseline of disclosure.

Furthermore, we believe compliance with the asset-level data requirements of Regulation AB will be extremely burdensome and time-consuming for issuers of private ABS. This is due not only to the nature of the assets underlying many private securitizations, but also to the structure of private offerings, which often involve multiple levels of securitization. We believe many issuers would find the burdens of disclosure so significant that they would look to other sources of capital outside the U.S. private securities markets.

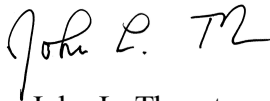
In the Re-Proposed Rules, the SEC has suggested limiting the application of the Regulation AB disclosure requirements to privately offered structured finance products only “if the particular asset class of the securities are of an asset class where asset-level disclosures are prescribed by Regulation AB (i.e., residential mortgage backed securities; commercial mortgage backed securities; automobile loans or leases; equipment loans or leases; student loans; floorplan financings; corporate debt; and resecuritizations)[.]”<sup>10</sup> We believe limiting the disclosure obligations to these asset classes is a step in the right direction, and if the SEC decides that asset-level data on private ABS offerings is necessary, we believe this limited approach would be in the best interests of promoting a viable private market. However, we reiterate that, for the reasons set forth above, this disclosure is needlessly burdensome even for these limited asset classes.

Thank you for considering our comments. Please do not hesitate to contact us at (617) 384-5364 if we can be of any further assistance.

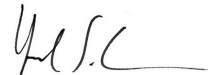
Respectfully submitted,



R. Glenn Hubbard  
Co-CHAIR



John L. Thornton  
Co-CHAIR



Hal S. Scott  
DIRECTOR

<sup>9</sup> Hearing on the State of the Securitization Markets Before the Subcomm. on Sec., Ins., and Inv. of the S. Comm. on Banking, Housing, and Urban Affairs, 112th Congress 46 (2011) (statement of Tom Deusch, Exec. Dir., Am. Securitization Forum).

<sup>10</sup> Re-Proposed Rules, 76 Fed. Reg. at 47,971.