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Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
Attention: Jonathan G. Katz, Secretary

Re: Securities Offering Reform; Proposed Rule
(Release Nos. 33-8501; 34-50624; IC-26649; File No. S7-38-04)

Ladies and Gentlemen:

This letter is submitted on behalf of the Commercial Mortgage Securities Association (the "CMSA")[1] in response to the request of the Securities and Exchange Commission (the "Commission" or "SEC") for comments on the captioned Release Nos. 33-8501 and 34-50624, dated November 3, 2004 (the "Release") containing proposed rules and forms (the "Proposed Rules") relating to the registration, communications and offering processes under the Securities Act of 1933, as amended (the "Securities Act").

I. ENDORSEMENT OF ASF AND BMA LETTERS RELATING TO ABS

The CMSA is cognizant that other professional organizations are submitting detailed comment letters on behalf of the asset-backed securities ("ABS") market in general. Since many CMSA members are also members of the American Securitization Forum ("ASF"), we are familiar with the views and proposals contained in the comment letter to be submitted on behalf of the ABS industry by the ASF (the "ASF Letter") concerning the Proposed Rules. We are also familiar with the views and proposals contained in the comment letter to be submitted on behalf of the ABS[2] industry by The Bond Market Association ("BMA") concerning the Proposed

1 [The CMSA is an international trade organization whose mission is to improve the liquidity of commercial real estate debt securities through access to the capital markets. The CMSA represents 300 members, including investors in commercial mortgage-backed securities, issuers of CMBS and other organizations that provide services to the commercial mortgage origination and securitization industry. More information about the CMSA is available on the CMSA's Internet home page at http://www.cmbs.org.]

2 The Bond Market Association is similarly submitting a general response letter to the Release as it relates to non-ABS offerings in addition to a separate response letter providing comments on the ABS aspects of the Release, and the CMSA is hereby endorsing the ABS specific letter.

Rules (the "BMA Letter"). The CMSA concurs with the comments in those letters and endorses the positions taken, as to matters not addressed in this letter and, where specifically indicated, as to matters addressed in this letter. The CMSA is submitting this comment letter to reinforce and, in some cases, supplement the comments to be submitted by those other professional organizations with respect to provisions in the Proposed Rules that are of particular concern to the CMBS industry.

II. OVERVIEW

The CMSA has identified below some specific aspects of the Proposed Rules that it feels will have a material and far-reaching effect on participants in the CMBS market. The CMSA generally supports the Proposed Rules and the significant inroads they propose to make in the creation of new categories of permitted communications and a more liberal offering and communication process. The CMSA is concerned, however, that in some instances, the Proposed Rules (particularly those Proposed Rules that effect a change in potential liability) encompass basic concepts that are overly inclusive and subject to varying interpretations, thereby promoting increased litigation and potential liability for certain participants in the public offering process, without a justifiable benefit to investors. The inability of a CMBS participant to generate clear policies and procedures that facilitate compliance with the Proposed Rules decreases the utility and predictability of those new rules, particularly in the area of permitted communications. Further, the CMSA is requesting that (i) certain of the Proposed Rules be expanded to provide a greater and hopefully intended benefit to CMBS market participants and (ii) the benefits achieved through the codification in the Commission's recently published release[3] of final rules and forms (the "ABS Final Rules") of certain no-action letters relating to the use of "computational materials" in an ABS offering be similarly incorporated into the Proposed Rules as ultimately codified.

Attached as Annex A is an outline of the areas addressed by the CMSA in this comment letter and a summary of the CMSA's proposals in connection therewith.

III. DISCUSSION

A. COMMUNICATIONS PROPOSALS

1. Factual Business Information—*Proposed Rule 168*.

One of the proposed safe harbors from the gun-jumping provisions for continuing ongoing business communications is Proposed Rule 168, which would operate by excluding such communications from the definition of offer for purposes of Securities Act Sections 2(a)(10) and 5(c). Rule 168 would permit the regular release or dissemination by or on behalf of the issuer of factual business information and forward-looking information without such release being deemed to be an offer of a security. Factual business information includes, among other things, factual information about the issuer or some aspect of its business and factual information about business or financial developments with respect to the issuer.

3 SEC Release Nos. 33-33-8419; 34-49644; File No. S7-21-04 (May 3, 2004).

The provisions of Rule 168, however, are limited to issuers that are required to file Exchange Act reports, rendering the benefits of Proposed Rule 168 unavailable to ABS issuers eligible to use Form S-3. The ABS Final Rules have clarified that the "issuer" of each series of CMBS is the depositor, acting solely in its capacity as depositor to the issuing entity, for all purposes under the Securities Act and the Exchange Act. Accordingly, a CMBS issuer of any given trust is not required to file Exchange Act reports during the offering period for its securities, but only upon the creation of the related trust and until the suspension of the trust's Exchange Act reporting obligations. See our discussion below under "Free Writing Prospectuses—Proposed Rule 433" regarding a similar problem and recommendation with respect to Proposed Rule 433.

Conversely, the section of the Release regarding "Application of the Proposals to Asset-Backed Securities" indicates that the "proposals regarding regularly released information for reporting issuers could apply, depending on the facts and circumstances, to information conveyed to investors in outstanding ABS, such as static pool information provided with respect to pools underlying outstanding ABS, either in Exchange Act reports or other communications…". The Release expressly indicates in that section that the Commission "would anticipate that the communication proposals that we make today would, if adopted, apply to ABS offerings." It appears that the Commission was intending to apply the benefits of Proposed Rule 168, along with certain other gun-jumping safe harbors, to issuers of outstanding ABS, but perhaps viewing issuer for these purposes in a broader context, i.e. a depositor who at varying intervals has been required to file Exchange Act reports (despite the automatic suspension for each trust pursuant to Section 15(d)) and who will be required to do so again upon the creation of each new trust. The CMSA does not believe the suspension of Exchange Act reporting obligations with the passage of time for each trust was intended to function as a bar to the use of Proposed Rule 168 by ABS issuers eligible to use Form S-3 who had previously filed Exchange Act reports. The CMSA believes that it would be beneficial for an ABS issuer to have the ability to inform the market of the nature of its operations and, to the extent related thereto, those of its affiliates, including their origination, underwriting and securitization program in general, and of changes in their overall program from time to time.

In accordance with the foregoing, the CMSA requests that the Commission clarify in the Proposed Rules that the "continued regular release or dissemination by or on behalf of an issuer" pursuant to Proposed Rule 168 does not refer solely to the issuer with respect to a single series of CMBS (as information regarding the issuer would not be useful), but also to any sponsor or depositor and their affiliates that are regularly involved in the issuance of ABS of a particular asset class.

Summary: The CMSA requests clarification that the Proposed Rule 168 applies to issuers eligible to use Form S-3 who have previously filed Exchange Act reports and who periodically (upon the creation of each new trust) become issuers that are required to file Exchange Act reports, notwithstanding that they are not reporting issuers during the relevant offering period. The CMSA requests clarification that the Proposed Rule 168 applies to dissemination of factual business information by or on behalf of the sponsor or depositor and their affiliates with respect to a given asset class.

2. Tombstone Advertisements—*Proposed Rule 134*. The CMSA strongly supports the Commission's proposal to broaden the scope of the Rule 134 safe harbor to permit the dissemination of more information on the mechanics of an offering. Communications permitted pursuant to proposed Rule 134 may be published or transmitted to any person only after a prospectus satisfying the requirements of Section 10 (including a price range where required) has been filed.

We understand that the SEC intentionally did not include detailed term sheet items in the Proposed Rule 134 list and attempted to create a distinction between information that would be included in a free writing prospectus and information that would constitute a Rule 134 tombstone advertisement. However, we agree with and endorse the proposal set forth in the ASF Letter that certain additional limited summary items, mechanical and structural in nature, should be added to the list in Proposed Rule 134. Those limited items include, among others:

- limited structural information (principal window, weighted average life, interest accrual period, first and last payment date);
- other summary characteristics that are tabular in nature;
- other weighted average statistical information;
- anticipated timing of principal payments;
- specific class information;
- ERISA information; and
- certain pricing information.

Given the objective, factual, structural nature of the foregoing information, we believe the inclusion of such information satisfies the desire of the Commission to carefully circumscribe Rule 134 information and to limit such information to mechanics and structure. Additionally, given that this is one of the few types of information dissemination that can be provided by the issuer and/or an underwriter without the constraints of filing (to the extent it was provided by or on behalf of the issuer), we request that this Proposed Rule be expanded to provide the maximum possible benefit to the offering process, to infuse a uniform set of information into the market for each transaction, to promote investor understanding at the outset of the structural nature of each transaction in summary terms, and, to the maximum extent possible, to gauge investor interest.

The Release states that Rule 134 is available only after the issuer files a registration statement which includes a prospectus satisfying the requirements of Section 10 of the Act (including a price range where required). Footnote 142 of the Release states that base prospectuses that are permitted under the rules are statutory prospectuses that satisfy the requirements of Section 10 of the Securities Act. It follows that Rule 134 would not be available until a preliminary prospectus, or in the case of shelf registration, a base prospectus, is available. The CMSA requests that the Commission expressly provide, as was done in Rule 433(b)(2), for uniformity purposes, that a base prospectus in a shelf registration is a Section 10 prospectus for

purposes of Rule 134 tombstone communications, by adding the phrase "which could be a base prospectus satisfying the conditions of Rule 430B" to the first paragraph of Rule 134 (as well as to the other references in the Rule to Section 10 prospectus, including in Rule 134(d)). Further, to the extent that the Commission requires that a statutory prospectus precede or accompany a notice used to solicit indications of interest or offers to buy under Proposed Rule 134(d), we request that Commission provide that physical delivery in the case of Form S-3 eligible issuers is not required.

Summary: Expand Proposed Rule 134 to include items described above. Specify that a base prospectus satisfies the requirements of Rule 134 for a Section 10 prospectus. If a Section 10 prospectus is required under Proposed Rule 134(d), dispense with the delivery requirement.

3. Definition Of "Seasoned Issuer" (To Be Added to Rule 405) Should Include Any Issuers of ABS That Are Registered on Form S-3. The Release indicates in the section on "Application of the Proposals to Asset-Backed Securities" that ABS issuers offering securities registered on Form S-3 would be considered "seasoned issuers," and that ABS issuers offering securities registered on Form S-1 would be considered "non-reporting issuers." In contrast to this express statement regarding a fundamental premise of the Proposed Rules, several of those rules read technically are expressly inapplicable to ABS issuers. In order to correct this inconsistency, the CMSA requests that the Commission consider adding a new defined term "seasoned issuer" to proposed Rule 405, which would be defined to include, among other things, ABS issuers eligible to use Form S-3 pursuant to General Instruction I.B.5. This defined term could then be used in place of the seasoned issuer description that is currently utilized in several of the Proposed Rules. Alternatively, clarify that several of the Proposed Rules apply to ABS issuers eligible to use Form S-3 pursuant to General Instruction I.B.5. For example, the CMSA requests that the following Proposed Rules be made expressly applicable to ABS issuers:

a) ***Proposed Rule 433(b)(2).*** Proposed Rule 433(b)(2) should permit "seasoned issuers" (as defined above) eligible to use Form S-3 to use free writing prospectuses without delivery of a statutory prospectus, so long a base prospectus meeting the requirements of Proposed Rule 430B, on which ABS issuers using Form S-3 are entitled to rely, is on file. In connection therewith, the CMSA requests that the Commission clarify that Proposed Rule 433(b)(1) does not apply to "seasoned issuers" and that the Commission add General Instruction I.B.5 to the list of Form S-3 instructions set forth in Rule 433(b)(1)).

b) ***General Instructions II.F to Form S-3.*** Consistent with the request in paragraph (c) below, the CMSA requests that the Commission include reference to "Form S-3 General Instruction I.B.5" in General Instructions II.F to Form S-3, so that information would only be required to be furnished as of the date of initial effectiveness of the registration statement to the extent required by Rule 430A or Rule 430B.

c) ***Proposed Rule 430B.*** Consistent with the request in paragraph (b) above, the CMSA requests that the Commission clarify that Proposed Rule 430B, which provides that information that is unknown or is not reasonably available may be omitted from a base shelf prospectus and later included in a prospectus supplement, Exchange Act report incorporated by reference or a post-effective amendment, applies to delayed offerings under Rule 415(a)(1)(x)

made by issuers eligible to register primary offerings of securities in reliance on General Instruction 1.B.5. We see no policy reason for excluding ABS issuers from the benefits of Proposed Rule 430B or from being able to offer ABS promptly after effectiveness of a shelf registration statement.

Summary: The CMSA requests that the Commission add a new defined term "seasoned issuer" to proposed Rule 405, which would be defined to include, among other things, ABS issuers eligible to use Form S-3 pursuant to General Instruction I.B.5. Alternatively, the CMSA requests clarification that several of the Proposed Rules apply to ABS issuers eligible to use Form S-3 pursuant to General Instruction I.B.5, including Proposed Rule 433(b)(2), General Instructions II.F to Form S-3 and Proposed Rule 430B.

4. ***Free Writing Prospectuses***.

a) ***Proposed Rule 433***. The express language of Proposed Rule 433(b)(2) appears to preclude ABS issuers from using a free writing prospectus under that subsection. Proposed Rule 433(b)(2) permits seasoned issuers eligible to use Form S-3 to receive favorable treatment in that they are allowed to use free writing prospectuses without delivery of a statutory prospectus, so long a base prospectus meeting the requirements of Proposed Rule 430B (on which ABS issuers using Form S-3 are entitled to rely) is on file. Proposed Rule 433(b)(2) purports to apply only "if at the time of the filing of the registration statement and at the time of an amendment to the registration statement for purposes of complying with Section 10(a)(3), the issuer is a well known seasoned issuer, or if not a well known seasoned issuer, "is an issuer eligible to use Form S-3 … to register securities to be offered and sold by or on its behalf, on behalf of its subsidiary or on behalf of a person of which it is the subsidiary pursuant to General Instructions I.B.1, I.B.2, or I.C. of Form S-3 or General Instruction I.A.5, I.B.1 or I.B.2 of Form F-3. . . .". The omission of General Instructions I.B.5 of Form S-3 could serve as an ambiguous limitation on the treatment of asset-backed issuers as seasoned issuers and the benefits afforded thereto.

Conversely, the language of Proposed Rule 433(b)(1), which provides less favorable treatment in the use of free writing prospectuses in that it requires physical delivery of a statutory prospectus as a condition to the use of a free writing prospectus, states that it applies to issuers not subject to Exchange Act reporting requirements at the time of filing of the registrations statement and to issuers not eligible to use Form S-3 pursuant to several of the General Instructions (other than General Instruction I.B.5). This subsection therefore arguably applies to ABS shelf issuers, however, it does not appear to be the intent of the Commission that ABS issuers using Form S-3 not receive the favorable treatment of a "seasoned issuer" under Proposed Rule 433(b)(2).

Given that the issuer is a separate entity for each trust, that issuer is not subject to Exchange Act reporting requirements at the time of filing of the registration statement and does not become subject to Exchange Act reporting obligations until the creation of the related trust. (See Exchange Act Rule 15d-22(a), as added under Regulation AB). Further, those reporting obligations may be suspended after the first fiscal year of that trust in the event the securities of that trust are held by fewer than 300 record holders. See our discussion above under "Factual

Business Information—Proposed Rule 168" regarding a similar problem and recommendation with respect to Proposed Rule 168.

We therefore agree with the position taken in the ASF Letter that the fact that the technical language of Proposed Rule 433(b)(2), in that it omits reference to issuers using Form S-3 pursuant to General Instruction I.B.5, which is the only section ABS issuers are permitted to use, appears inconsistent with the intent of the Proposed Rules and was potentially an oversight.

Summary: We request that Proposed Rule 433(b)(2) be rendered expressly applicable to any issuer of ABS that are registered on Form S-3 by utilizing the revised definition of "seasoned issuer" (that can be added to Rule 405 and used throughout the new rules as described in the preceding section of this letter). Alternatively, the Commission could add General Instruction I.B.5 to the list of Form S-3 instructions set forth in Rule 433(b)(2) in order to effectuate the Commission's intent.

b) ***Rating Agency Pre-Sale Reports***. The ABS Final Rules provide that, in the case of rating agency pre-sale reports, whether an issuer or underwriter has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information will determine whether information prepared and distributed by such third parties is attributable to an issuer or an underwriter.[4]

Proposed Rule 433(f) provides that a media publication about an issuer or its securities for which an issuer or any person participating in the offering (or any person acting on their behalf) provided information that is published or disseminated by an unaffiliated media company would be considered a free writing prospectus prepared by or on behalf of the issuer or such offering participant. However, an issuer or other offering participant should not bear responsibility for the content of a pre-sale report prepared and distributed by an NRSRO, if the issuer's or other offering participant's involvement is limited to providing factual information about the offering and checking the report for factual errors. A rating agency pre-sale report is not a dissemination of information by the issuer or an attempt by the issuer to condition the market for the securities. Accordingly, the CMSA requests that the final rule clarify that a pre-sale report published by an NRSRO would not be considered a free writing prospectus under the provisions of Proposed Rule 433(f) and would not trigger a filing requirement by the issuer.

Further, in light of the Commission's Proposed Rule 159A, which would define the issuer as a "seller" for certain communications, the CMSA requests that the Commission clarify in that rule that rating agency pre-sale reports would never be considered "by or on behalf

4 Whether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or underwriter depends upon whether the issuer or underwriter has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. The courts and we have referred to the first line of inquiry as the "entanglement" theory and the second as the "adoption" theory. We think these theories are equally applicable with respect to ABS issuer or underwriter involvement regarding rating agency pre-sale reports. For example, if an issuer or underwriter distributed the pre-sale report in connection with an offering of the securities, it would be appropriate to conclude that such party has adopted that report and should be liable for its contents. Liability under the "entanglement" theory depends upon the level of pre-publication involvement in the preparation of the information.

of" the issuer or "issuer information." See our discussion under "'By or on Behalf of' the Issuer or the Registrant and 'Issuer Information'" below.

The information and analysis included in the pre-sale report, the assessment of risks and credit quality associated with the commercial mortgage collateral and the likelihood of timely and ultimate payment to investors is within the sole and exclusive control of the NRSRO. This is true despite that fact that the applicable NRSRO may request that the issuer review the report for inaccuracies and updates with respect to the collateral, especially since in a typical CMBS transactions, the commercial mortgage loans are closing and being documented as late as the cut-off date (and sometimes later) for the particular transaction and there is an ongoing flow of documentation to the rating agencies. The NRSRO would not be able to generate an accurate analysis and risk profile based on the most updated information if the issuer were not to some extent facilitating the delivery of information to the rating agencies and making sure accurate information is reflected. This does not, however, negate the fact that the conclusions and output are produced at the discretion of the NRSRO as an independent third party.

Further, the CMSA requests that the Commission provide clarification (despite the statement regarding the "adoption" theory in the Final ABS Rules that "if an issuer or underwriter distributed the pre-sale report in connection with an offering of the securities, it would be appropriate to conclude that such party has adopted that report and should be liable for its contents") that the mere forwarding of a rating agency pre-sale report without further evidence that the issuer has modified the report or otherwise adopted the report as its own would not constitute a distribution of that report by the issuer or the "adoption" of the report by the issuer or be inappropriate entanglement on the part of the issuer. In other words, forwarding a third-party report to a client for convenience purposes should not be considered a distribution of that report by the issuer.

Summary. The CMSA requests that the final rules clarify that a pre-sale report published by an NRSRO would not be considered a free writing prospectus under the provisions of Proposed Rule 433(f). Further, the CMSA requests that the Commission clarify in Proposed Rule 159A that rating agency pre-sale reports would never be considered "by or on behalf of" the issuer or "issuer information" for the purposes of Section 12(a)(2) liability. In addition, the CMSA requests express clarification in the final rules, despite the related statement regarding the "adoption" theory in the Final ABS Rules, that if an issuer is requested merely to forward a copy of a pre-sale report, then that issuer will not be considered to have distributed or adopted the information therein such that it would become "issuer information" or a free writing prospectus and, accordingly, the issuer would not be required to file that information.

c) ***Media Publications; Third Party Analytics.*** The Commission has stated in the Release that "if an issuer or any offering participant provided information about the issuer or the offering that constituted an offer, whether orally or in writing, to a member of the press or other media that was published (in any form), where dissemination in writing by the issuer or offering participant would constitute a free writing prospectus, we would consider the publication to be a free writing prospectus that would have been made by or on behalf of the issuer or offering participant."

Thus, where a free writing prospectus is prepared by persons in the media business or third-parties that are unaffiliated with the issuer and the publication is not paid for by the issuer or offering participants, the Proposed Rules would permit potentially unrestricted publication by the media of such free writing prospectus. To the extent any information included therein was deemed to be derived from a communication with the issuer or an offering participant during an offering, such free writing prospectus would be subject to filing by the issuer or offering participant involved within one business day after first publication or first broadcast. Under the Proposed Rules, an underwriter or issuer could invite the press to a live road show or an electronic road show, and the Commission would consider any article that includes information (or any portion thereof) obtained at that road show to be a free writing prospectus of the issuer or underwriter and subject to filing requirements and potential Section 12(a)(2) liability. Further, if anyone affiliated with or employed at the issuer gave an interview or provided any other statement to the media, the publication of the article after the filing of the registration statement would be a free writing prospectus of the issuer that would have to be filed by the issuer after publication and the issuer would bear liability therefor.

A similar problem exists with respect to information disseminated by third-party analytic services in ABS offerings, such as Bloomberg and Intex. In accordance with the Commissions position in ABS Final Rules, the CMSA requests confirmation that, such third-party analytic outputs are not free writing prospectuses, the issuer is therefore not required to file such outputs and is not subject to liability for such outputs.

The CMSA has the following concerns regarding the Commission's proposals for information provided to the media by or on behalf of the issuer or other offering participants:

- An issuer would not necessarily have knowledge in a timely fashion or have knowledge at all that a communication is or has been published that potentially contains issuer information that would require filing by the issuer.

- There may be issuer affiliates, unauthorized employees of the issuer or persons otherwise involved in the offering who have a questionable agency relationship with the issuer that have provided what may appear to constitute "issuer information" and responsible parties at the issuer are not made aware of the subject information dissemination at all or in a timely fashion.

- Information that is seemingly "issuer information" could be published or disseminated out of context or on a delayed basis, such that the ultimately disseminated information is misleading, outdated or omits certain significant information necessary to make the actual statements made not misleading.

Summary. The CMSA requests that communications or publications prepared by persons in the media business or other third-parties that are unaffiliated with the issuer (including, without limitation, media and third-party analytic publications), where the communication or publication is not prepared by or paid for by the issuer, would not be deemed to be "on behalf of" the issuer or "issuer information" and would not be considered a free writing prospectus subject to filing by or liability for the issuer, unless the issuer has expressly approved the ultimate use of the free writing prospectus on its behalf. The CMSA further requests that the

Commission clarify in Proposed Rule 159A that media and other third-party communications would never be considered "by or on behalf of" the issuer or "issuer information," unless it was determined that the issuer actually prepared the subject communication. See our discussion under "'By or on Behalf of' the Issuer or the Registrant and 'Issuer Information'" below.

d) ***Issuer Web Sites.*** In Proposed Rule 433(e), the Commission permits the publication of a free writing prospectus on an issuer's web site, but requires such free writing prospectus to be filed with the Commission. We agree with the position taken in the ASF Letter in this regard, that while such materials should have free writing prospectus status if published on an issuer's web site, the publication on the issuer's web site alone with a notice filing with the SEC is an efficient and effective way to disseminate the information to investors. Therefore, we concur with the ASF Letter and "….we therefore propose that the Commission revise Proposed Rule 433(e) to provide that in lieu of filing a free writing prospectus contained on an issuer's web site, an issuer shall instead be permitted to file with the Commission (either in its statutory prospectus or in a separate filing) a notice referring investors to such information and containing the URL for the specific portion of the issuer's web site that contains a free writing prospectus (such filing, a "Notice Filing"). The issuer would acknowledge in the Notice Filing that such information constitutes a "free writing prospectus" for purposes of Proposed Rule 433."

Summary: We propose that the Commission revise Proposed Rule 433(e) to provide that in lieu of filing a free writing prospectus contained on an issuer's web site, an issuer would instead be permitted to file with the Commission (either in its statutory prospectus or in a separate filing) a Notice Filing referring investors to such information and containing the URL for the specific portion of the issuer's web site that contains a free writing prospectus and, additionally, the issuer would acknowledge in the Notice Filing that such information constitutes a "free writing prospectus" for purposes of Proposed Rule 433.

e) ***Filing Issues.*** In the view of the CMSA, it is important that the Commission furnish more guidance regarding the circumstances in which an issuer would be held responsible, under Proposed Rule 433(d), for both the content and filing of a free writing prospectus that is unilaterally prepared and used by another offering participant or a third-party. The Commission's proposal to require that an issuer file a third-party written communication (of which it may or may not be aware given the broad range of possible third-party communications) on the date of first use whenever such a communication "contains material information about the issuer or its securities that has been provided by or on behalf of an issuer, known as 'issuer information,' that is not already contained in or incorporated in the registration statement or a filed free writing prospectus." In addition, the issuer would be required to file on the date of first use "any issuer information that is contained in a free writing prospectus prepared by any other person (but not information prepared by a person other than the issuer on the basis of that issuer information)." The foregoing standards are somewhat confusing and not useful where a communication is not shared with the issuer or is shared subsequent to the communication and, therefore, those standards will not facilitate compliance. With respect to the filing deadline, it would be difficult if not impossible for an issuer to determine whether another offering participant might be communicating information via e-mail or other means that contains information that may or may not have been "provided by or on behalf of the issuer." Further, even if information was at some time and in some format provided by or on behalf of the issuer, it may have been altered substantially in translation and then communicated to investors, making

it no longer be identifiable by the issuer and rendering it impossible for the issuer to file this communication on the date of its "first use" by that other participant.

Summary: The CMSA requests that the Commission clarify in Proposed Rule 433(d) with more concrete objective guidance when an issuer would be held responsible, under Proposed Rule 433(d), for both the content and filing of a free writing prospectus that is unilaterally prepared and used by another offering participant or a another third-party.

f) ***Conflict of Proposed Rules 164 and 433 with ABS Proposed Rules 167 and 426.*** The ABS Final Rules (Rule 167 and Rule 426) codified the series of no-action letters regarding the delivery of term sheets and computational materials to investors in ABS prior to the delivery of a Section 10(a) prospectus. Under the Proposed Rules, these materials would instead be considered free writing prospectuses, and their use would be conditioned on satisfying the conditions of Proposed Rule 164 and Proposed Rule 433.

However, ABS Final Rule 167 and 426 contained certain positive codifications for the ABS market relating to the timing of filing and eligibility to file the related materials. In the process of superseding the Rule 167 and Rule 426 regime and replacing those concepts with Proposed Rule 164 and 433, the CMSA requests that the Commission not retract certain of those benefits afforded through ABS Final Rules 167 and 426, and that the Commission accordingly incorporate those provisions into the Proposed Rules as ultimately codified.

In that regard, the CMSA endorses the analysis and positions set forth in the ASF Letter and the BMA Letter with respect to Proposed Rules 164 and 433, which provide, among other things, essentially that:

- The Proposed Rules should be revised to carry forward the filing deadlines currently provided in Rule 167.
- The Proposed Rules should be revised to carry forward the concept under Rule 167 that no filing is required for information relating to abandoned structures, or for materials that were used before the terms were finalized provided that no investor purchased based on those materials.
- ABS issuers should not become ineligible for use of free writing prospectuses due to Exchange Act reporting non-compliance.
- The Proposed Rules should provide that materials governed by Proposed Rule 164 and 433 should not be incorporated into the registration statement and subject to Section 11 liability, and potential liability would be limited to Section 12(a)(2) or Section 17(a) as provided under Rule 159.

Summary. The CMSA requests that, in the event ABS Final Rules 167 and 426 are superseded by Proposed Rules 164 and 433, such communications would be subject to the filing deadlines set forth in ABS Final Rule 167, no filing would be required for information relating to abandoned structures, or for materials that were used before the terms were finalized provided that no investor purchased based on those materials, ABS issuers would not become

ineligible for use of free writing prospectuses due to Exchange Act reporting non-compliance and such communications would not be subject to Section 11 liability.

g) ***Ineligible Issuer.*** Proposed Rule 405 defines "ineligible issuer" as any issuer that is required to file reports pursuant to Section 13, 14 or 15(d) of the Exchange Act that has not filed all materials required by such sections, including any certifications required by any reports, with no time limit set forth. An ineligible issuer under the Proposed Rules cannot use a free writing prospectus and cannot qualify as a well-known seasoned issuer. The CMSA requests that the Commission revise the definition of ineligible issuer for the reasons set forth below.

The ABS Final Rules provide that, for purposes of eligibility to use a Form S-3 registration statement, Exchange Act reporting compliance is determined at the time of filing of the registration statement. The continued use of an already effective Form S-3 registration statement and the offering of ABS issued thereunder were not made de facto contingent on compliance with Exchange Act reporting requirements. The effect of the eligibility condition to Rule 433 undermines this position, by precluding ABS issuers from offering through free writing prospectuses (which may become the predominant offering tool) if they failed to file any Exchange Act report. The CMSA suggests that this added sanction, which was likely considered and not deemed necessary in the consideration of the ABS Final Rules, is unnecessary and would only impede the communication process in the ABS market. Accordingly, the CMSA requests that the use of free writing prospectuses by ABS issuers, at a minimum to the extent that such free writing prospectuses would qualify as ABS informational and computational materials under ABS Final Rule 167, not be conditioned on Exchange Act reporting compliance.

Alternatively, if the Commission intends that "ineligible issuer" status be premised on the depositor's Exchange Act reporting compliance, such ineligible issuer status would apply solely in the context of free writing prospectuses that do not qualify as ABS informational and computational materials under ABS Final Rule 167. Under such circumstances, the CMSA supports the proposals set forth in the ASF Letter and similarly requests that the Exchange Act reporting requirement of the definition be modified to provide that: (i) a depositor be deemed an ineligible issuer only if it has failed to file the required Exchange Act reports during the most recent 12 month period, (ii) such reports need only be filed, and not necessarily timely filed, and (iii) the determination as to whether or not an issuer is an ineligible issuer be made at the time the free writing prospectus is used.

Summary. The CMSA requests that the use of free writing prospectuses by ABS issuers, at a minimum to the extent that such free writing prospectuses would qualify as ABS informational and computational materials under ABS Final Rule 167, not be conditioned on Exchange Act reporting compliance. Alternatively, to the extent Exchange Act reporting compliance remains a condition, the CMSA requests that (i) such ineligible issuer status would apply solely for free writing prospectuses that do not qualify as ABS informational and computational materials under ABS Final Rule 167, (ii) a depositor would be deemed an ineligible issuer only if it has failed to file the required Exchange Act reports during the most recent 12 month period, (ii) such reports need only be filed, and not necessarily timely filed, and (iii) the determination as to whether or not an issuer is an ineligible issuer be made at the time the free writing prospectus is used.

B. LIABILITY ISSUES

1. *Proposed Rule 159A and Proposed Rule 433*. *"By or on Behalf of" the Issuer or the Registrant and "Issuer Information".* Proposed Rule 159A provides that, for purposes of section 12(a)(2) of the Act only, the issuer will be (and, accordingly, have liability as) a "seller" with respect for the following types of communications:

- an issuer's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 424;

- any free writing prospectus as defined in Rule 405 prepared by or on behalf of the issuer;

- information about the issuer or its securities (1) provided by or on behalf of the issuer and (2) included in any other free writing prospectus; and

- any other communication made by or on behalf of the issuer.

The notes to Proposed Rule 159A provide that, for purposes of that section, information is provided or a communication is made by or on behalf of an issuer if the issuer or an agent or representative authorizes the information or communication and approves the information or communication before its provision or use. Elsewhere in the Release it states that "[a] communication by an underwriter or dealer participating in an offering would not be on behalf of the issuer solely by virtue of that participation. However, depending on the facts and circumstances, a communication by an underwriter or dealer could be a communication on behalf of an issuer to the extent it contained issuer information."

Further, under Proposed Rule 433, issuers and registrants would have the requirement to file certain information, including (i) any "issuer free writing prospectus" used by any person, (ii) any free writing prospectus of any person used by the issuer, and (iii) any "issuer information" contained in a free writing prospectus prepared by any other person (but not information prepared by a person other than the issuer on the basis of that issuer information). Proposed Rule 433(h) sets forth the following definitions:

- an *issuer free writing prospectus* means a free writing prospectus prepared by or on behalf of the issuer; and

- *issuer information* means material information about the issuer or its securities that has been provided by or on behalf of the issuer.

In accordance with Proposed Rule 159A, issuers and registrants would now have potential exposure under Section 12(a)(2) for free writing prospectuses distributed by themselves and third-parties, including underwriters and potentially the media, whether filed or unfiled, if they contained information provided "by or on behalf of the issuer" or "issuer information," and for "any other communication made by or on behalf of the issuer," since issuers would be

defined under the Proposed Rules as "sellers" for Section 12(a)(2) purposes with regard to any of those communications.[5]

The CMSA is concerned over the lack of certainty surrounding the meaning of the phrases "any other communication," "by or on behalf of" and "issuer information" and the consequent broad expansion of Section 12(a)(2) liability exposure imposed upon an issuer for the content of third-party communications, where such materials may have been used or disseminated without the knowledge, without the opportunity to correct or review or without the approval of the issuer. Further, the CMSA is concerned that the imposition of the filing requirement under Proposed Rule 433 based on the concepts "by or on behalf of" and "issuer information" will create a great deal of uncertainty during the offering process, thereby reducing the intended benefit of the new rules in promoting the free flow of certain information. The filing obligation of Proposed Rule 433 would apply to an uncertain subset of issuer offering information in connection with a particular ABS offering, while much of the other information delivered to investors in connection with that same ABS offering would not be filed. Further, given the potential lack of certainty as to what would constitute "any other communication," "by or on behalf of" or "issuer information," the CMSA believes that an issuer would find it difficult to effectively establish policies and procedures to assure compliance with certain of the Proposed Rules that incorporate this concept.

The CMSA is particularly unsure what the Commission means by "any other communication." Is this intended to capture oral communications by a third-party involving information that the issuer may have been unaware would be further disseminated? It is the CMSA's position that an issuer should only be liable for oral information disseminated "by the issuer." In addition, written or oral information could have been derived from some prospective or outdated source of issuer information, and, had a responsible agent of the issuer been asked whether such information was current or acceptable for publication or other investor communication, it may have indicated its disapproval or need to update or correct such information. Also, the issuer may not, in some cases, have intended that certain third-party disseminated information be used in a free writing prospectus or other communication. A great deal of information is discussed during the due diligence and offering process that could arguably be information provided by the issuer even though the issuer did not intend the information to be utilized in a free writing prospectus or further orally communicated. Further, the issuer may have approved the dissemination of certain information provided by it, however, such information is ultimately disseminated later than the issuer expected, or only a portion of the information is disseminated out of context, or the information is translated to create an inaccurate total picture, in each case rendering the communication potentially misleading.

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5 The Commission has stated in the Release at the text accompanying footnote 256 that: "We believe there currently is unwarranted uncertainty as to issuer liability under Section 12(a)(2) for issuer information in registered offerings using certain types of underwriting arrangements. As a result, there is a possibility that issuers may not be held liable under Section 12(a)(2) for information contained in the issuer's prospectus included in its registration statement. Therefore, as part of our proposals regarding Section 12(a)(2), we are proposing a rule providing that an issuer in a primary offering of securities, regardless of the form of the underwriting arrangement, be considered to offer or sell the securities to the purchaser, and therefore be a seller for purposes of Section 12(a)(2) as to any communications made by or on behalf of the issuer."

The CMSA has concerns regarding the application of the Commission's proposed use of "by or on behalf of" and "issuer information" in the following scenarios:

- An issuer affiliate, unauthorized employees of the issuer or persons otherwise involved in the offering with a questionable agency relationship with the issuer provides to a third-party what may appear to constitute "issuer information" and responsible parties at the issuer were not made aware of the subject information dissemination at all or in a timely fashion.

- Information that is seemingly "issuer information" is published or disseminated by a third-party out of context, or what once was arguably "issuer information" is altered, embellished or exaggerated, such that the ultimately disseminated information is misleading or omits certain significant information necessary to make the actual statements made not misleading, and responsible parties at the issuer were not given an opportunity to review the subject information dissemination.

- Information that is seemingly "issuer information" is published or disseminated by a third-party months after the information was derived from the issuer, and responsible parties at the issuer were not given an opportunity to update the subject information.

- During the offering and due diligence process (which may last several months), much information is communicated orally, by email or via working drafts, data sheets or other superseded information, which, despite policies and procedures to prevent such occurrence, falls into the hands of a third-party who repeats such information without the knowledge or approval of the issuer.

- Information that was initially derived from some issuer source passes through several parties and ultimately winds up communicated, and only the very first dissemination by the issuer was with the knowledge or approval of the issuer.

Among other things, the potential questions surrounding what parties might have authority to so authorize or approve the use of certain information and the circumstances that might constitute such authorization or approval are not further discussed or identified in the Release, leaving the door open for misinterpretation and overreaching by offering participants.

Furthermore, we are unclear as to when a piece of information is "issuer information" and when information is "by or on behalf of the issuer" in certain contexts. Clearly this distinction is material if Section 12(a)(2) liability were to attach for an issuer if the subject communication was "by or on behalf of the issuer" but would not attach if it constitutes "issuer information." For example, if an investor orally repeats certain information about an issuer's underwriting standards and the information was derived from a free writing prospectus previously filed by the issuer, is the communication "by or on behalf of" the issuer or "issuer information"?

The Commission has asked for comment as to whether the definition of "by or on behalf of an issuer" is clear; whether the Commission should provide more specificity limiting

the approval or authorization rights to specific persons acting for the issuer, whether as an employee, agent, or representative; whether the Commission should condition issuer liability for issuer information contained in a free writing prospectus or other communication on the issuer giving the information to the other party for use or on whether the issuer gave the user of the free writing prospectus permission to include the issuer information or issuer free writing prospectus; and whether the "by or on behalf of" condition should be included in a general definition of "by or on behalf of" in Securities Act Rule 405. In addition, the Commission has requested comment on whether it should define "issuer information" differently and, if so, how.

Given the serious liability implications under Section 12(a)(2) and the potential for confusion regarding how to assure compliance with the filing requirements of Proposed Rule 433, the CMSA requests that the Commission incorporate into Proposed Rule 405 a clear and objective definition of "by or on behalf of" and "issuer information" for the purposes of Proposed Rule 159A and Proposed Rule 433.

Failure to comply with a clear and objective definition of "by or on behalf of" or "issuer information" would not eliminate the potential Section 12(a)(2) liability for the subject information for the party actually disseminating the information to a purchaser or for any other seller with respect to such information, to the extent that such party would otherwise have been subject to Section 12(a)(2) liability prior to enactment of the Proposed Rule 159A. The application of a clear and objective definition of "by or on behalf of" and "issuer information" would ensure that care and proper procedures were undertaken by third-parties in the use of information derived from an issuer and would enable an issuer to establish policies and procedures to control the dissemination of such information.

Summary. As regards the foregoing, it is the CMSA's position that:

- the concept of "any other communication made by or on behalf of the issuer" in Proposed Rule 159A is overly expansive and unclear, rendering it extremely difficult for an issuer to prevent such communications or ensure that they are authorized, and, therefore, this category of communication should be eliminated from Proposed Rule 159A (note that we are unsure what other communications (other than free writing prospectuses) this is intended to capture; and, in the event the Commission determines to retain this provision and it is intended to cover oral communications or communications that are carved out of the definition of "free writing prospectuses", the rule should only cover such communications "by an issuer");

- the concepts of "by or on behalf of an issuer" and "issuer information" are not sufficiently defined in the Proposed Rules; therefore, a definition of "by or on behalf of" and "issuer information" containing objective criteria should be included in Securities Act Rule 405, at a minimum for the purposes of Proposed Rule 159A and Proposed Rule 433;

- the issuer should be permitted to designate those persons and agents that would be authorized to provide information and/or to authorize and approve information on its behalf in connection with an offering;

- issuer liability for issuer information contained in a free writing prospectus should be conditioned on whether an authorized person designated by the issuer gave the user of the free writing prospectus permission to include the issuer information and/or to use the free writing prospectus;

- with regard to the impact of a definition of "by or on behalf of" and "issuer information" on Proposed Rule 433, a free writing prospectus that did not fall within such definition should not be subject to the filing requirements of Proposed Rule 433; and

- the Commission should provide expressly in Proposed Rule 159A that certain communications are presumptively not "by or on behalf of" the issuer or registrant or "issuer information," including rating agency pre-sale reports, third party analytic reports, and other third party reports regarding the underlying assets, such as appraisals, environmental reports and property condition reports.

2. ***Timing of Contract of Sale.*** Proposed Rule 159 provides that for purposes of determining liability under Sections 12(a)(2) and 17(a)(2) of the Securities Act, any information conveyed to the investor after the time of the contract of sale will not be taken into account. In the event Proposed Rule 159 is enacted as set forth in the Release, there will greater opportunities for litigation over the adequacy of information conveyed to the investor at the time of his or her investment decision and over the question of whether there was an investment decision (which may be a subjective determination). Further, the enactment of Proposed Rule 159 would unnecessarily interject a major administrative and legal impediment into the ABS offering process for offering participants and potentially not remediate the true deficiency in the process. Proposed Rule 159 may effectively create an incentive for issuers and underwriters to avoid disseminating information until all information is in final form, in order to avoid a determination that an investor has made an investment decision based on incomplete information, thereby subjecting themselves to Section 12(a)(2) and Section 17(a)(2) liability.

Investors are fully aware that changes to a transaction occur subsequent to the preliminary prospectus and knowingly, based on such preliminary information, make a preliminary investment decision. Each party to the offering is aware that the final prospectus will reflect changes to the transaction and the underlying collateral, and oftentimes those changes are made with the consent and approval of, or at the request of, the affected investor. The ABS Final Rules that permit the delivery of ABS informational and computational materials prior to delivery of a final prospectus is additional recognition by the Commission that the process of an ABS offering involves the ongoing presentation of variety of preliminary information regarding the cash flow, structure and collateral, all leading up to the final structure and final collateral pool.

Investors and other offering participants are aware that a contract entered into at pricing is subject to the condition, which can be satisfied only after the final prospectus has been completed, that the information contained in the final prospectus does not contain a material change from the information conveyed at the time such contract is entered into and is otherwise reasonably consistent with market customs and standards and/or the practice of the related depositor and/or its affiliates. Accordingly, the final condition to the contract of sale entered into

at pricing for an ABS offering is only satisfied at the time of availability of the final prospectus. **The Securities Act requirement regarding delivery of a final prospectus that satisfies Section 10(a) of the Act prior to delivery of a confirmation is reflective of this process.**

Consequently, in the view of the CMSA (and as further evidenced in the positions taken in the ASF Letter and the BMA Letter), the time of availability of a final prospectus supplement should be the time of contract of sale for purposes of liability under Section 12(a)(2) or Section 17(a)(2). The concern should not be that an investor makes a preliminary investment decision that is knowingly based on preliminary information subject to certain conditions precedent, including that no material changes that are not anticipated market changes occur between the preliminary and the final prospectuses. Instead, the CMSA proposes, along with other market participants that have submitted comment letters to the Commission, that remediation is needed to ensure that investors are afforded a sufficient opportunity to review the final information prior to settlement and, if unacceptable material changes have occurred, to terminate the preliminary contract and refuse settlement.

We recognize, however, that for ABS issuances where the final prospectus is provided close in time to settlement, it is difficult for investors to review and digest revisions to the information previously delivered at the time of pricing. Investors need to be given sufficient time to review and digest the final information prior to settlement.

Accordingly, we agree with and endorse the analysis and recommendations set forth in the ASF Letter and request, as stated therein, that "the Commission reflect in the final version of Proposed Rule 159 that the timing of a contract of sale is a facts and circumstances analysis, and that a contract of sale with respect to a security may be entered into with an investor under which it is agreed, explicitly or implicitly, that the investor's obligation to purchase is subject to the condition that there are no material changes between the preliminary information and the final prospectus (it being understood that it will not constitute a material change if information is omitted from a term sheet or other preliminary disclosure but is provided in the final prospectus and is reasonably consistent with market customs and standards or prior issuances by the depositor or its affiliates). With such an agreement, liability under Section 12(a)(2) and Section 17(a)(2) would be based on the totality of the information conveyed to the investor, including the information set forth in the final prospectus, and not solely on the information provided at the time such contract was formed."

In addition, we endorse the ASF Letter's proposal for a safe harbor to Rule 159, permitting "any material misstatement or material omission in disclosure provided at the time of sale (including contract of sale) to be deemed to have been cured provided that any of the following events occurred:

- the issuer or underwriter specifically advised the investor about the material misstatement or material omission prior to settlement, and the settlement occurred; or

- the final prospectus or other disclosure document correcting such misstatement or omission was available at least 48 hours prior to settlement, and the settlement occurred; or

- the investor did not notify the underwriter of an objection based upon such misstatement or omission within 48 hours after availability of the final prospectus or other disclosure document correcting such misstatement or omission."

We further agree that the Commission should indicate that information would not constitute a material omission if it was omitted from a term sheet or other preliminary disclosure document but was provided in the final prospectus and was reasonably consistent with market customs and standards or prior issuances by the depositor or its affiliates.

In connection with proposed Rule 159, the CMSA requests that the Commission clarify what types of information dissemination would be deemed to be "conveyed" at the time of contract of sale. The CMSA requests that information conveyed to an investor for purposes of Section 12(a)(2) and Section 17(a)(2) of the Act and such Proposed Rule 159 include, at a minimum with respect to a "seasoned issuer", the following types of information: (i) the issuer's registration statement; (ii) any prospectus that the issuer files under Rule 424; (iii) any Exchange Act report filed by the issuer and incorporated by reference in the issuer's registration statement; (iv) any free writing prospectus of the issuer that has been filed under Rule 433 (or that, in accordance with the final rules, has otherwise been made available to investors); and (v)any information not covered under the foregoing bullets and filed on EDGAR, where the filing is specifically referred to the investor.

Summary. In the view of the CMSA, the time of availability of a final prospectus supplement should be the time of contract of sale for purposes of liability under Section 12(a)(2) or Section 17(a)(2). In addition, we endorse the ASF Letter's proposal for a safe harbor to Rule 159, permitting "any material misstatement or material omission in disclosure provided at the time of sale (including contract of sale) to be deemed to have been cured provided that any of the following events occurred: (i) the issuer or underwriter specifically advised the investor about the material misstatement or material omission prior to settlement, and the settlement occurred, or (ii) the final prospectus or other disclosure document correcting such misstatement or omission was available at least 48 hours prior to settlement, and the settlement occurred, or (iii) the investor did not notify the underwriter of an objection based upon such misstatement or omission within 48 hours after availability of the final prospectus or other disclosure document correcting such misstatement or omission." We further agree that the Commission should indicate that information would not constitute a material omission if it was omitted from a term sheet or other preliminary disclosure document but was provided in the final prospectus and was reasonably consistent with market customs and standards or prior issuances by the depositor or its affiliates. In connection with proposed Rule 159, the CMSA requests that the Commission clarify what types of information dissemination would be deemed to be "conveyed" at the time of contract of sale.

C. SECURITIES ACT REGISTRATION PROPOSALS

Three Year Shelf Renewal/ Automatic Shelf Registration / Pay-As-You-Go Registration Fees/Deletion of Rule 415(a)(1)(vii). We support the positions taken in the ASF Letter and the BMA Letter regarding the securities act registration proposals, specifically (but without limitation):

- Three Year Shelf Registration: We agree with the ASF's contention that the reasons stated by the Commission for requiring three-year shelf registration are more appropriate in the context of operating companies than ABS issuers. This is because every ABS issuance gives rise to a separate transaction-specific reporting obligation of generally limited duration thereby limiting or negating any benefits of "consolidation" of registration statements since each issuance (of a series of securities pursuant to a shelf takedown) triggers a separate reporting entity with no meaningful relationship to any other issuance under the same shelf registration. In the case of an operating company the Exchange Act reporting relates to the same entity as it experiences various reportable events and continues in operation. Therefore, the CMSA contends that the information in registration statements of ABS issuers tends to relate to structural and other features that do not change over time and that the time and expense of renewing an existing registration statement without fundamental changes is not warranted. The CMSA therefore urges the Commission to modify the proposed requirement in connection with ABS registration statements to require that such registration statements be updated only if fundamental changes have occurred that otherwise require such an update under existing Commission rules.

- Automatic Shelf Registration: We agree with the position taken in the ASF Letter and the BMA Letter that the benefits of automatic shelf registration should be extended to ABS issuers, particularly repeat issuers.

- Pay-As-You-Go Registration Fees: We do not believe that investors are disadvantaged by the Commission extending to ABS issuers the ability to pay registration fees on a pay-as-you-go basis.

With respect to the Commission's proposed deletion of Rule 415(a)(1)(vii) from Rule 415, the CMSA requests that the alternative of doing a delayed or continuous offering under Rule 415(a)(1)(vii) be retained. In that regard, we support the positions and comments of the ASF. A registered offering on Form S-1 pursuant to Rule 415(a)(1)(vii) would be the only alternative to Form S-3 for a delayed offering. Given the changes to eligibility for use of Form S-3 by ABS issuers, there may be an added incentive for an ABS issuer to do a delayed or continuous offering on Form S-1 under Rule 415(a)(1)(vii) in the future. Further, there is no policy reason not to permit mortgage related securities under SMMEA to be offered on a delayed or continuous basis as the rating requirement for a security to be a mortgage related security (i.e., top two rating categories) is considerably higher than the rating requirement for a security to be an asset-backed security eligible for registration on Form S-3 (i.e., top four rating categories) and, further, each offering on Form S-1 would be subject to review by the SEC.

Summary. The CMSA requests that (i) ABS issuers be required to undergo the time and expense of renewing their registration statements only if fundamental changes have occurred that otherwise require such an update under existing Commission rules, (ii) the benefits of automatic shelf registration be extended to ABS issuers, particularly seasoned and well known issuers and (iii) the ability to pay registration fees on a pay-as-you-go basis be extended to ABS issuers. Further, with respect to the Commission's proposed deletion of Rule 415(a)(1)(vii) from

Rule 415, the CMSA requests that the alternative of doing a delayed or continuous offering under Rule 415(a)(1)(vii) on Form S-1 be retained.

D. ADDITIONAL EXCHANGE ACT DISCLOSURE RULES

Risk Factor Disclosure Required in Form 10-K. The Proposed Rules provide in proposed Form 10-K that the following information be included: "Item 1A. Risk Factors Set forth, under the caption "Risk Factors," the risk factors described in Item 503(c) of Regulation S-K…applicable to the registrant, including the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. Provide the discussion of risk factors in plain English in accordance with Rule 421(d) of the Securities Act of 1933."

The CMSA agrees with the analysis and positions taken in the ASF Letter and the BMA Letter with regard to the inclusion of risk factors in the proposed Form-10K, in that we believe that it would not be appropriate to require each CMBS issuer to include in its Form 10-K the risk factors typically required in a registration statement for a corporate issuer. Given that a CMBS issuer would typically be required to file a 10-K with respect to only the first year of the related newly formed trust, such issuer would have recently distributed a prospectus identifying the material risks related to the assets of that trust. The Form 10-K for a CMBS securitization is an update as to the payments and collections during that first year. In addition, the Final ABS Rules already require the disclosure of certain adverse events occurring with respect to the related trust and trust assets, pursuant to Form 8-K and Form 10-K under the ABS Final Rules.

Since the risk factors proposed under new Form 10-K seemingly apply solely to the registrant and not to the assets of the subject trust, such risk disclosure would be of no use to CMBS investors who look solely to the assets of the subject trust, and requiring such disclosure would provide immaterial information to CMBS investors.

Summary: If Proposed Item 1A of proposed Form 10-K is adopted substantially as proposed, it should provide that CMBS issuers are not required to include risk factor disclosure.

ANNEX A

III. DISCUSSION

A. COMMUNICATIONS PROPOSALS

1. Factual Business Information—Proposed Rule 168.

Summary: The CMSA requests clarification that the Proposed Rule 168 applies to issuers eligible to use Form S-3 who have previously filed Exchange Act reports and who periodically (upon the creation of each new trust) become issuers that are required to file Exchange Act reports, notwithstanding that they are not reporting issuers during the relevant offering period. The CMSA requests clarification that the Proposed Rule 168 applies to dissemination of factual business information by or on behalf of the sponsor or depositor and their affiliates with respect to a given asset class.

2. Tombstone Advertisements—Proposed Rule 134

Summary: Expand Proposed Rule 134 to include items described above. Specify that a base prospectus satisfies the requirements of Rule 134 for a Section 10 prospectus. If a Section 10 prospectus is required under Proposed Rule 134(d), dispense with the delivery requirement.

3. Definition Of "Seasoned Issuer" (To Be Added to Rule 405) Should Include Any Issuer of ABS That Are Registered on Form S-3

a) ***Proposed Rule 433(b)(2)***

b) ***General Instructions II.F to Form S-3***

c) ***Proposed Rule 430B***

Summary: The CMSA requests that the Commission add a new defined term "seasoned issuer" to proposed Rule 405, which would be defined to include, among other things, ABS issuers eligible to use Form S-3 pursuant to General Instruction I.B.5. Alternatively, the CMSA requests clarification that several of the Proposed Rules apply to ABS issuers eligible to use Form S-3 pursuant to General Instruction I.B.5, including Proposed Rule 433(b)(2), General Instructions II.F to Form S-3 and Proposed Rule 430B.

4. <u>Free Writing Prospectuses</u>.

a) ***Proposed Rule 433***

<u>Summary</u>: We request that Proposed Rule 433(b)(2) be rendered expressly applicable to any issuer of ABS that are registered on Form S-3 by utilizing the revised definition of "seasoned issuer" (that can be added to Rule 405 and used throughout the new rules as described in the preceding section of this letter). Alternatively, the Commission could add General Instruction I.B.5 to the list of Form S-3 instructions set forth in Rule 433(b)(2) in order to effectuate the Commission's intent.

b) ***Rating Agency Pre-Sale Reports***

<u>Summary</u>. The CMSA requests that the final rules clarify that a pre-sale report published by an NRSRO would not be considered a free writing prospectus under the provisions of Proposed Rule 433(f). Further, the CMSA requests that the Commission clarify in Proposed Rule 159A that rating agency pre-sale reports would never be considered "by or on behalf of" the issuer or "issuer information" for the purposes of Section 12(a)(2) liability. In addition, the CMSA requests express clarification in the final rules, despite the related statement regarding the "adoption" theory in the Final ABS Rules, that if an issuer is requested merely to forward a copy of a pre-sale report, then that issuer will not be considered to have distributed or adopted the information therein such that it would become "issuer information" or a free writing prospectus and, accordingly, the issuer would not be required to file that information.

c) ***Media Publications; Third Party Analytics***

<u>Summary</u>. The CMSA requests that communications or publications prepared by persons in the media business or other third-parties that are unaffiliated with the issuer (including, without limitation, media and third-party analytic publications), where the communication or publication is not prepared by or paid for by the issuer, would not be deemed to be "on behalf of" the issuer or "issuer information" and would not be considered a free writing prospectus subject to filing by or liability for the issuer, unless the issuer has expressly approved the ultimate use of the free writing prospectus on its behalf. The CMSA further requests that the Commission clarify in Proposed Rule 159A that media and other third-party communications would never be considered "by or on behalf of" the issuer or "issuer information," unless it was determined that the issuer actually prepared the subject

communication. See our discussion under "'By or on Behalf of' the Issuer or the Registrant and 'Issuer Information'" below.

d) ***Issuer Web Sites***

Summary: We propose that the Commission revise Proposed Rule 433(e) to provide that in lieu of filing a free writing prospectus contained on an issuer's web site, an issuer would instead be permitted to file with the Commission (either in its statutory prospectus or in a separate filing) a Notice Filing referring investors to such information and containing the URL for the specific portion of the issuer's web site that contains a free writing prospectus and, additionally, the issuer would acknowledge in the Notice Filing that such information constitutes a "free writing prospectus" for purposes of Proposed Rule 433.

e) ***Filing Issues***

Summary: The CMSA requests that the Commission clarify in Proposed Rule 433(d) with more concrete objective guidance when an issuer would be held responsible, under Proposed Rule 433(d), for both the content and filing of a free writing prospectus that is unilaterally prepared and used by another offering participant or a another third-party.

f) ***Conflict of Proposed Rules 164 and 433 with ABS Proposed Rules 167 and 426***

Summary. The CMSA requests that, in the event ABS Final Rules 167 and 426 are superseded by Proposed Rules 164 and 433, such communications would be subject to the filing deadlines set forth in ABS Final Rule 167, no filing would be required for information relating to abandoned structures, or for materials that were used before the terms were finalized provided that no investor purchased based on those materials, ABS issuers would not become ineligible for use of free writing prospectuses due to Exchange Act reporting non-compliance and such communications would not be subject to Section 11 liability.

g) ***Ineligible Issuer***

Summary. The CMSA requests that the use of free writing prospectuses by ABS issuers, at a minimum to the extent that such free writing prospectuses would qualify as ABS informational and computational materials under ABS Final Rule 167, not be conditioned on Exchange Act reporting compliance. Alternatively, to the extent Exchange Act reporting compliance remains a condition, the CMSA requests that (i) such ineligible issuer status

would apply solely for free writing prospectuses that do not qualify as ABS informational and computational materials under ABS Final Rule 167, (ii) a depositor would be deemed an ineligible issuer only if it has failed to file the required Exchange Act reports during the most recent 12 month period, (ii) such reports need only be filed, and not necessarily timely filed, and (iii) the determination as to whether or not an issuer is an ineligible issuer be made at the time the free writing prospectus is used.

B. LIABILITY ISSUES

1. Proposed Rule 159A and Proposed Rule 433

Summary. As regards the foregoing, it is the CMSA's position that:

- the concept of "any other communication made by or on behalf of the issuer" in Proposed Rule 159A is overly expansive and unclear, rendering it extremely difficult for an issuer to prevent such communications or ensure that they are authorized, and, therefore, this category of communication should be eliminated from Proposed Rule 159A (note that we are unsure what other communications (other than free writing prospectuses) this is intended to capture; and, in the event the Commission determines to retain this provision and it is intended to cover oral communications or communications that are carved out of the definition of "free writing prospectuses", the rule should only cover such communications "by an issuer");

- the concepts of "by or on behalf of an issuer" and "issuer information" are not sufficiently defined in the Proposed Rules; therefore, a definition of "by or on behalf of" and "issuer information" containing objective criteria should be included in Securities Act Rule 405, at a minimum for the purposes of Proposed Rule 159A and Proposed Rule 433;

- the issuer should be permitted to designate those persons and agents that would be authorized to provide information and/or to authorize and approve information on its behalf in connection with an offering;

- issuer liability for issuer information contained in a free writing prospectus should be conditioned on whether an authorized person designated by the issuer gave the user of the free writing prospectus permission to include the issuer information and/or to use the free writing prospectus;

- with regard to the impact of a definition of "by or on behalf of" and "issuer information" on Proposed Rule 433, a free writing prospectus that did not fall within such definition should not be subject to the filing requirements of Proposed Rule 433; and

- the Commission should provide expressly in Proposed Rule 159A that certain communications are presumptively not "by or on behalf of" the issuer or registrant or "issuer information," including rating agency pre-sale reports, third party analytic reports, and other third party reports regarding the underlying assets, such as appraisals, environmental reports and property condition reports.

2. Timing of Contract of Sale

Summary. In the view of the CMSA, the time of availability of a final prospectus supplement should be the time of contract of sale for purposes of liability under Section 12(a)(2) or Section 17(a)(2). In addition, we endorse the ASF Letter's proposal for a safe harbor to Rule 159, permitting "any material misstatement or material omission in disclosure provided at the time of sale (including contract of sale) to be deemed to have been cured provided that any of the following events occurred: (i) the issuer or underwriter specifically advised the investor about the material misstatement or material omission prior to settlement, and the settlement occurred, or (ii) the final prospectus or other disclosure document correcting such misstatement or omission was available at least 48 hours prior to settlement, and the settlement occurred, or (iii) the investor did not notify the underwriter of an objection based upon such misstatement or omission within 48 hours after availability of the final prospectus or other disclosure document correcting such misstatement or omission." We further agree that the Commission should indicate that information would not constitute a material omission if it was omitted from a term sheet or other preliminary disclosure document but was provided in the final prospectus and was reasonably consistent with market customs and standards or prior issuances by the depositor or its affiliates. In connection with proposed Rule 159, the CMSA requests that the Commission clarify what types of information dissemination would be deemed to be "conveyed" at the time of contract of sale.

C. SECURITIES ACT REGISTRATION PROPOSALS

Three Year Shelf Renewal/ Automatic Shelf Registration / Pay-As-You-Go Registration Fees/Deletion of Rule 415(a)(1)(vii).

Summary. The CMSA requests that (i) ABS issuers be required to undergo the time and expense of renewing their registration statements only if fundamental changes have occurred that otherwise require such an update under existing Commission rules, (ii) the benefits of automatic shelf registration be extended to ABS issuers, particularly seasoned and well known issuers and (iii) the ability to pay registration fees on a pay-as-you-go basis be extended to ABS issuers. Further, with respect to the Commission's proposed deletion of Rule 415(a)(1)(vii) from Rule 415, the CMSA requests that the alternative of doing a delayed or continuous offering under Rule 415(a)(1)(vii) on Form S-1 be retained.

D. ADDITIONAL EXCHANGE ACT DISCLOSURE RULES

Risk Factor Disclosure Required in Form 10-K. 21

Summary: If Proposed Item 1A of proposed Form 10-K is adopted substantially as proposed, it should provide that CMBS issuers are not required to include risk factor disclosure.