SUMMARY OF COMMENTS
Concerning the Commission's Proposed Rules Regarding

Asset-Backed Securities

Securities Act Release No. 8419
Exchange Act Release No. 49644

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I. List of Commenters

a) Accounting Firms, Accountants and Auditors

1. Ernst & Young LLP ("E&Y")
2. KPMG LLP ("KPMG")
3. PricewaterhouseCoopers LLP ("PWC")
4. Steve Walls ("Walls")

b) Trade Associations

5. American Bankers Association ("Am. Bankers")
6. American Bar Association ("ABA")
7. American Financial Services Association ("AFSA")
8. American Institute of Certified Public Accountants ("AICPA")
9. American Society of Corporate Secretaries ("ASCS")
10. American Securitization Forum ("ASF")
    a. Letter dated July 12, 2004
    b. Letter dated July 30, 2004
11. Association of the Bar of the City of New York ("NYCBA")
12. Association of Financial Guaranty Insurers ("AFGI")
13. Australian Securitisation Forum ("Aus. SF")
14. Bond Market Association ("BMA")
15. Commercial Mortgage Securities Association ("CMSA")
16. European Securitisation Forum ("ESF")
17. Financial Services Roundtable ("FSR")
18. Mortgage Bankers Association ("MBA")
19. Mortgage Insurance Companies of America ("MICA")

c) Corporations and Corporate Executives

20. AIG Credit Corp. ("AIG")
21. American Honda Finance Corporation ("AHFC")
22. Bank of America Corporation ("BOA")
23. Capital One Financial Corporation ("Capital One")
24. Citigroup Global Markets, Inc. ("CGMI")
25. Citigroup Inc. ("Citigroup")
26. First Marblehead Corporation ("First Marblehead")
27. Group of five automotive finance companies ("Auto Group")
    a. American Honda Finance Corporation
    b. DaimlerChrysler Services North America LLC
    c. Ford Motor Credit Company
    d. General Motors Acceptance Corporation
    e. Navistar Financial Corporation
28. JPMorganChase & Co. ("JPMorganChase")
29. Lewtan Technologies ("Lewtan")
30. MBNA Corporation ("MBNA")

31. Sallie Mae., Inc. and Nelnet, Inc.	("Sallie Mae")
32. Toyota Motor Credit Corporation	("TMCC")
33. UBS Securities LLC	("UBS")
34. U.S. Bank National Association	("US Bank")
35. Wells Fargo Bank, National Association	("Wells")

d) Law Firms and Attorneys

36. Allen & Overy LLP	("A&O")
37. Dewey Ballantine LLP	("Dewey")
38. Foley & Lardner LLP	("Foley")
39. Jones Day	("Jones Day")
40. Kutak Rock LLP	("Kutak")
41. Mitchell Silberberg & Knupp LLP	("MS&K")
42. Ruth A. Strauss	("Strauss")
43. Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A.	("Trenam")

e) Investors and Investor Associations

44. CFA Institute (formerly AIMR)	("CFAI")
45. Fidelity Management & Research Company	("FMR")
46. Investment Company Institute	("ICI")
47. Metropolitan Life Insurance Company	("MetLife")
48. State Street Global Advisors	("State Street")

f) Rating Agencies

49. Moody's Investors Service	("Moody's")

II. Overview

On May 3, 2004, the Commission issued proposals to address comprehensively the registration, disclosure and reporting requirements for asset-backed securities (ABS) under the Securities Act of 1933 and the Securities Exchange Act of 1934. Responses were received from 49 commenters.

Commenters expressed general overall support for the Commission's proposal to establish a separate framework for the registration and reporting of ABS due to differences between ABS and other securities. These commenters generally praised the proposing release as reflective of tremendous effort and a thorough understanding of the ABS markets.

Investors in particular endorsed the proposals, though not all believed the Commission's proposals went far enough. Several investors believed the Commission should be more specific in required disclosures and some suggested additional disclosures. Some investors also expressed concern about the availability of information to make informed investment decisions.

At the same time, most commenters representing issuers, lawyers and industry trade associations, while expressing general overall support for the proposals, raised specific concerns about certain aspects of the proposals, generally arguing that they may cause unwarranted burdens for issuers or may have unintended consequences. Many of these commenters suggested modifications to the proposals to alleviate their concerns. All of these commenters believed that if their concerns were addressed, the proposals would represent a valuable improvement to the current informal system.

In addition, while commenting on several proposals that were incremental to the current system, many of these commenters also suggested revisiting and relaxing existing requirements. These included not only positions that have developed over the years through no-action letters and staff practice that were proposed to be codified, but also changes to several existing Commission rules that were not covered by the proposal.

These commenters also generally preferred less specificity and more flexibility in the proposals. For example, several of these commenters urged expanding access to the proposed regulatory regime beyond the proposed limits for ABS, including revisiting several existing staff and Commission positions on what is considered an asset-backed security. Several of these commenters also were particularly concerned with illustrative lists included in the proposed disclosure items, fearing that such lists may result in "presumptive materiality" that such information must be disclosed, even if irrelevant or unavailable. Several of these commenters also generally objected to providing disclosure they do not already provide, such as information on unaffiliated servicers or certain pool characteristics, and many provided detailed comments on particular aspects of the disclosure items.

The proposals relating to Exchange Act reporting compliance for Form S-3 eligibility attracted considerable opposition from many issuers and their representatives. Many thought the risk of disqualification for late filing was too high and would carry unintended and unjust consequences, particularly given the amount of filings required for ABS and the number of unrelated parties involved. Many of these commenters, while recognizing there have been

compliance problems with Exchange Act reporting, nevertheless requested flexibility and less restrictive alternatives.

Another proposal that attracted considerable opposition from issuers and their representatives was the method of determining disclosure for providers of enhancement and other support for the ABS, particularly for counterparties of interest rate and currency swaps. Many objected to the proposed test based on whether the counterparty is liable or contingently liable for payments supporting the ABS as potentially unworkable and against market practice. Several of the commenters suggested alternatives, such as measuring against the maximum probable exposure of the counterparty or requiring more limited disclosure based on counterparty ratings.

The proposed requirement for static pool data attracted considerable comment. Investors supported disclosure. Issuers and their representatives, however, were concerned with the scope of the requirement given that not all issuers make such data available today. Many commenters suggested alternatives and guidance for the scope, content and method of delivery of the disclosure, with several commenters requesting the ability to provide the data through alternative means, such as websites.

Most commenters supported codifying the no-action letters permitting use of informational and computational material in the offering process apart from the registration statement prospectus. Several issuers and their representatives urged expanding the proposals beyond the no-action letters in several ways, such as including ABS registered on Form S-1 and excluding underwriter-prepared material from filing and Securities Act liability requirements.

Many commenters representing issuers, their representatives and accounting firms commented on the proposed report of compliance with servicing criteria and the related accountant's attestation. All commenters believed such an approach was more appropriate for ABS than requiring financial statements. However, these commenters generally believed that instead of requiring a single "responsible party" to perform an overall assessment over the entire servicing and administrative function, which the commenters viewed as generally unworkable and inappropriate, there should be separate assessments of compliance, and related accountant attestations, by each party responsible for the particular criteria. Various alternatives were suggested for such an approach. Several commenters also commented on the proposed servicing criteria.

Finally, almost all issuers and their representatives advocated a longer transition period than that proposed given the nature and scope of the proposals.

The responses are discussed in more detail below.

III. General Observations

- Thirty-seven commenters supported a separate framework for the registration and reporting of ABS due to growth of the market and differences between ABS and other securities.[1] The current system of informal guidance diminishes transparency and efficiency.

- Sixteen commenters generally endorsed the comments of the ASF,[2] twelve commenters generally endorsed the comments of the ABA,[3] five commenters generally endorsed the comments of the BMA,[4] four commenters generally endorsed the comments of the CMSA,[5] two commenters generally endorsed the comments of the MBA,[6] and one commenter generally endorsed the comments of the American Bankers Association.[7]

- One commenter believed the proposals cover most, if not all, of the information investors need during the life of an ABS issuer, in particular:[8]
    - Pre-offering information investors need to analyze the securities, including deal structure, supporting entities and arrangements and pool assets;
    - Ongoing information about the performance of the underlying assets and ABS;
    - Information investors need to understand the risks associated with the termination or early amortization of ABS, as well as terms relevant to a bankruptcy of a sponsor, servicer or other entity critical to payment on the transaction.

- One commenter questioned increased disclosure for ABS targeted to institutional investors, as it believed such investors do not need the benefits of increased disclosure.[9]

- One commenter commended the Commission for focusing on matters of clear relevance to investors in fashioning proposed rules on disclosure and looking to current industry

[1] A&O; ABA; AFSA; AICPA; AIG; Am. Bankers; ASCS; ASF; Aus. SF; Auto Group; BMA; BOA; Capital One; CFAI; CGMI; E&Y; ESF; First Marblehead; Foley; FMR; FSR; ICI; Jones Day; JPMorganChase; KPMG; Kutak; MBA; MBNA; MetLife; Moody's; PWC; Sallie Mae; State Street; TMCC; UBS; US Bank; Wells.

[2] AFSA; Aus. SF; Auto Group; BMA; BOA; Capital One; CGMI; Citigroup; CMSA; First Marblehead; FSR; JPMorganChase; MBA; MBNA; Sallie Mae; UBS.

[3] AFSA; Auto Group; BMA; BOA; Capital One; CGMI; Citigroup; CMSA; FSR; JPMorganChase; Sallie Mae; UBS.

[4] BOA; First Marblehead; FSR; JPMorganChase; UBS.

[5] BMA; BOA; JPMorganChase; UBS.

[6] BMA; JPMorganChase.

[7] JPMorganChase.

[8] CFAI.

[9] Kutak.

practice as a guide.[10] The commenter also supported the proposed approach to fashion "principles-based" disclosure rules. The commenter believed the proposal will benefit issuers and investors alike and will lead to a more efficient ABS market.

- One commenter believed the final rules should be primarily a codification of existing staff and market practices, with incremental requirements only where evidence conclusively indicates that changes are necessary and practical.[11] However, the commenter also suggested revisiting and relaxing many requirements, including not only positions that have developed over the years through no-action letters and staff practice that were proposed to be codified, but also several Commission rules that were not covered by the proposal.

- Three commenters believed repackaging transactions differ from other ABS and special accommodations should be made for them.[12] Two of these commenters suggested the SEC provide an express statement of those provisions that would apply to repackagings (or, alternatively, a list of the provisions that would not apply) to avoid uncertainty.[13]

IV. Securities Act Registration

A. Definition of Asset-Backed Security

1. Basic Definition

- Six commenters urged a different principles-based definition of "asset-backed security" to ensure flexibility.[14] Three commenters recommended eliminating all bright-line tests from the exceptions to the proposed definition, preferring instead a definition without limits.[15] Commenters were concerned that because the basic definition would now encompass Form S-1 registration as well, securities outside the definition, which are still structured securities, would be subject to all the requirements of corporate securities or at best, relegated to the "twilight regime" currently occupied by ABS. This could force some of those securities to the private market. The commenters generally argued bright-line tests from the exceptions could be arbitrary, would restrict innovation and investors can take care of themselves as most are institutions. Instead, the principles themselves should be relaxed. Two commenters believed several of the proposed limitations would disqualify several public ABS offerings they have conducted in recent years.[16]

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[10] ASCS.

[11] ASF.

[12] ASF; BMA; CGMI.

[13] BMA; CGMI.

[14] ABA; ASF; Auto Group; ESF; FSR; JPMorganChase.

[15] ABA; ASF; Auto Group.

[16] Auto Group; ESF.

As an example of the commenters' arguments, the fact that as the concentration of delinquent assets increases, payments on the related structured securities become more dependent on the entity providing collection services should not foreclose the security from the basic ABS definition. The increased dependence may result in increased disclosure, but should not alter the nature of the transaction as ABS because many of the material disclosures would be the same as ABS and application of the corporate disclosure regime would not be useful. Further, such an offering would be on Form S-1 and subject to staff review. The commenters generally believed this approach also applies to the other bright-line tests, such as for non-performing assets, lease ABS and ABS employing master trusts, prefunding accounts and revolving periods.

- One commenter suggested the following alternate definition in lieu of Item 1101(c) and the exceptions from the proposed definition:[17]

(c)(1) Asset-backed security means a security that entitles its holders to receive payments that depend primarily on the cash flows of identifiable financial assets (including any proceeds from the disposition of any such assets or property related to such assets), plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders.

(2) The following additional conditions apply in order to be considered an asset-backed security:

(i) Neither the depositor nor the issuing entity is an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or will become an investment company as a result of the asset-backed securities transaction.

(ii) The activities of the issuing entity are limited to acquiring, holding, collecting and disposing of such identifiable financial and other assets referenced in paragraph (c)(1) of this Section, issuing the asset-backed securities supported or serviced by such assets, and other activities reasonably incidental thereto.

Instruction to clause (c) of item 1101: For purposes of the definition of "asset-backed security" set forth in clause (c) of item 1101, a lease shall constitute a "financial asset."

- One commenter suggested the following alternate definition in lieu of Item 1101(c)(1) and eliminating all tests except for the restrictions on the issuing entity:[18]

"Asset-backed security" means a security that is primarily serviced by the cash flows of, or by cash flows that correspond to cash flows of a fixed or revolving pool of (i) receivables or other financial assets, that by their terms convert into cash (without

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[17] ASF.

[18] ABA.

regard to actual performance), or (ii) leases and equivalent receivables, including the proceeds from the disposition of any such assets or property related to such assets, in each case together with any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.

- One commenter suggested two alternative forms of the definition of "asset-backed security."[19] As with the two alternatives above, both suggestions eliminated the term "discrete" and included no limitations on the amount of securities that could be backed by lease residual values. The first suggestion included a clarification for foreign ABS. The second suggestion included a reference to and definition of "special purpose entity" for use with foreign ABS.

- Two commenters thought it was unclear whether the following were included in the basic definition and thought each should be included:[20]

    - "balloon" loans, such as automobile balloon loans, that are used in jurisdictions where unfavorable tax treatment or laws apply to auto leases. The loans are similar to leases and permit the obligor to satisfy the balloon payment by returning the vehicle (an additional commenter raised this concern).[21]

    - insurance premium finance loans, which are short-term loans often securitized with a multi-year revolving period. One commenter indicated it has registered ABS backed by revolving insurance premium finance loans on Form S-3.[22]

    - revolving credit lines with no term limits but can be terminated at any time.

    - dealer floorplan loans that are payable on demand.

- One commenter requested clarification that equity securities with a finite term and a mandatory redemption, such as preferred securities (e.g., preferred stock and trust preferred securities), are within the definition of ABS.[23] Similarly, equity securities subject to a liquidity, repurchase or other arrangement that will convert the security into cash in an amount specified at the time of issuance of the ABS should qualify as a financial asset within the ABS definition.

- One commenter requested including in the basic definition, or by separate rule, delegated authority to the staff to permit any issuer or class of issuers, upon such terms and

[19] Aus. SF (alternative definitions provided in Annex A of the comment letter).

[20] ASF; FSR.

[21] ABA (suggested making clear that a "functional equivalent" of an auto lease should be treated as a lease).

[22] AIG.

[23] ABA.

conditions and for such period as it deems necessary or appropriate, to treat any security issued by such issuer or class of issuers as ABS.[24]

- One commenter believed it is unclear whether the pool asset must include a specific minimum payment obligation within a finite time period, or merely that the asset may require some cash payment within a time period.[25] For example, a license agreement for trademark use may not necessarily require a fixed minimum monthly or annual payment, but only an obligation to make royalty payments if use of the licensed right generates revenue. The individual license may not generate any cash flow within a finite period, but a pool of such licenses may generate enough cash flows during the lives of the various licenses to justify securitization. The commenter believed adding the words "are reasonably anticipated to" between the words "terms" and "convert" in the definition would resolve the issue. The commenter did not believe the change would create investor risk as the ABS would still need to be investment grade for Form S-3 and the ABS regime would be more apt for these securities than corporate rules.

- One commenter requested the adopting release state that the starting point for disclosure for securities that technically fail the ABS definition is Regulation AB, registrants should seek pre-filing conferences with the staff in such instances as to what disclosure is required and the staff has authority to apply the Regulation AB to "near" ABS.[26]

- One commenter thought a definition of "pool assets" would be helpful.[27]

- One commenter believed that in defining ABS, attention should be paid to separation of the assets from the credit risk of an issuing entity, servicer or sponsor as abuse occurs where it is lacking.[28] For example, direct limited recourse is inconsistent with securitization. Some of Regulation AB may still be relevant for these securities, but more conventional disclosures also should be required. How the link is set up with the sponsor or servicer also may affect the analysis. Similarly, as the proposal points out, as discretion or business judgment is necessary to maximize recovery (e.g., due to the level of defaulted or non-financial assets) a point is reached that converts the structure from ABS into a business. Where that line is crossed depends on both the nature of the assets and the passivity of the ABS entity.

- Four commenters believed the basic definition should include synthetic securitizations.[29] Synthetic securities may raise special disclosure issues concerning the reference asset or

[24] ASF.

[25] MS&K.

[26] ABA.

[27] A&O.

[28] Foley.

[29] ASF; BMA; CGMI; Jones Day (particularly credit default swaps).

index, but these securities continue to have characteristics of ABS. In most synthetic securitizations, the pool assets include the swap or other derivative instruments comprising the asset pool, such pool assets are self-liquidating and at all times operate as the source of payment on the ABS. One commenter believed Form S-1 is not feasible for these transactions given the need to act on issuances quickly.[30] The commenter believed an ABS transaction should be allowed to substantially replicate any investment through the use of synthetics or derivatives. One commenter requested at a minimum permitting "hybrid" securitizations that involve both cash and synthetic assets in the pool.[31]

- One commenter believed there are synthetic securitizations in which the payments on the synthetic ABS are based on the actual cash payments on the reference assets (including repossession proceeds) and put investors in the same position as if the reference assets had been transferred to the issuer.[32] These synthetic securities should be allowed.

- One commenter believed footnote 62 regarding synthetic securitizations does not provide enough clarify as to which transactions are permissible, which will require participants to continue to seek staff guidance and will "chill" development of products.[33] For example, the commenter asked if a transaction in which a bond is securitized with a swap tied to CPI would be ABS. The commenter did not see a difference between this structure and a fixed-to-floating rate swap, arguing both "reduce or alter" risk, and thought the same analogy applied to other indices, including currency, commodity and equity indices.

  The commenter also did not see a difference between an asset pool that holds a corporate bond and an asset pool that contains Treasury securities and a credit default swap that references a single named obligor, arguing that the latter still includes financial assets that convert into cash (even if the swap counterparty has the right to deliver the reference obligation to the trust in exchange for the liquidation proceeds of the Treasury securities if the issuer of the reference obligation enters bankruptcy or defaults) and the derivative is not being used to bring in a non-eligible financial asset (e.g., perpetual equity).

2. Nature of the Issuing Entity

- One commenter agreed with the principle that the activities of the issuing entity should be restricted to ABS transactions.[34]

- One commenter expressed support for the non-investment company restriction.[35]

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[30] BMA.

[31] Jones Day.

[32] ABA.

[33] BMA.

[34] ABA.

[35] Aus. SF.

- Three commenters suggested eliminating or clarifying the word "passive" in the phrase "passively owning or holding the pool of assets."[36] Two commenters thought the meaning was unclear and thought the non-investment company condition is sufficient.[37] One commenter thought that in some transactions, the issuer, servicer or other entities must be allowed to permit certain changes to the assets, such as the assumption by new entities of leases (e.g., CMBS).[38]

- One commenter believed the passive limitation is not suitable for Australian ABS.[39] The commenter explained that trusts are not recognized as having a legal existence, and thus, a fiduciary trust company is appointed to act on behalf of the trust. The fiduciary trust company may perform the role of trustee for a variety of trusts in various ABS transactions and is thus not limited to passively owning or holding a pool for one particular ABS transaction. The trustee is the entity which holds title to the assets on behalf of the trust, as well as the entity in whose name the ABS are issued. The commenter suggested eliminating the passive limitation and revisions to the ABS definition to reflect such structures (suggested language). The commenter also suggested adding a condition to the "issuing entity" definition for foreign ABS to clarify the issuing entity may be the trust and not the trustee (suggested language).

- Two commenters believed the passive limitation could preclude actions historically taken to ensure that an ABS transaction will be accounted for under GAAP as an on-balance sheet financing rather than an off-balance sheet sale.[40] As explained by one commenter, a way to ensure consolidation is to allow the issuing entity the limited authority to actively invest some minimum amount in Treasury securities (or other narrowly defined securities) for profit.[41] The commenter requested adding to the permitted activities the authority to invest for profit a minimal amount of available cash in investment grade assets. Alternatively, qualify that issuing entities activities can be "predominantly" those proposed. The other commenter suggested deleting the "passive" requirement.[42]

- Five commenters believed series trusts should be included.[43] The issuance by one entity of separate series, one or more of which are backed by one pool while others are backed

[36] ABA; ASF; MBA.

[37] ASF; MBA.

[38] MBA.

[39] Aus. SF.

[40] MBNA; MS&K.

[41] MS&K.

[42] MBNA.

[43] ABA; ASF; BMA; Capital One; Kutak.

by other pools, seems consistent with the principles underlying the basic definition, including the restriction on the general character of the issuing entity's activities. Each outstanding series of securities would be backed by a discrete, self-liquidating asset pool, without management or business activities. Two of the commenters also thought that series trusts are more efficient because a sponsor can conduct multiple issuances from a single platform, thereby enhancing market recognition and branding under a single name and eliminating redundant fixed costs.[44] One commenter did not believe there was a distinction between a series trust and a master trust since each series has no rights with respect to assets backing other series.[45] The commenter indicated that rating agencies are already required to reconfirm the ratings assigned to the securities issued previously by the issuing entity once a new series is formed. In the alternative, the commenter suggested that if any restriction is retained, it should not restrict the use of subsequent trusts having the same asset class as earlier trusts.

- Six commenters were concerned footnote 63 could be read to preclude certain structures, some of which are used currently, and requested clarification.[46] Examples cited included:

    - *Stacked Transactions:* Used in CMBS and RMBS, a single issuing entity issues securities backed by a pool of two or more discrete loan groups. It may be that: (a) excess cash flows from each group cross-collateralize other groups, (b) credit enhancement is in the form of subordinated securities that represent interests in all groups, (c) there is limited cross-collateralization for specified types of losses or other shortfalls, or (d) there is no cross-collateralization. One commenter also believed it commonplace in RMBS to structure a deal to include "directed classes" that draw cash flows from underlying pieces of other deals.[47]

    - *Multi-Tiered REMICs:* Used in CMBS and RMBS, multiple REMIC elections are made for a single issuing entity to structure desired tranches to comply with REMIC rules. In multiple REMICs, for tax purposes, the pool will be designated as a REMIC, which REMIC may form interests that in turn comprise another pool designated as another REMIC, which in turn may form interests that are structured in the desired manner for the public offering (a double REMIC) or may comprise another pool that forms interests structured in the desired manner for the public offering (a triple REMIC), and so on. The interests formed by one REMIC are rarely certificated and have no force or effect other than for tax purposes.

    - *Origination or Titling Trusts:* Used in auto lease ABS, leases and titles often are originated in the name of a separate entity to avoid expenses in re-titling vehicles underlying the leases. The titling trust issues a "special unit of beneficial interest," or SUBI, representing a beneficial interest in a discrete pool of leases

[44] ABA; ASF.

[45] Kutak.

[46] ABA; ASF; BMA; JPMorganChase; MBA; Sallie Mae.

[47] MBA.

and autos held by the titling trust to constitute the pool for the ABS. The same titling trust will be comprised of multiple pools and will issue multiple SUBIs.

- *Issuance Trusts:* Used for credit cards and dealer floorplan, an existing master trust issues to an "issuance trust" an interest often referred to as a "collateral certificate" representing a beneficial interest in the master trust's asset pool. The issuance trust issues its own ABS backed by the collateral certificate and, therefore, indirectly by the master trust pool. Most issuance trusts are structured to allow it to create additional asset pools and issue multiple series of ABS, each backed by a discrete asset pool, or where one or more of such series are linked by means of some form of cross-collateralization among pools. While the pool initially created for the issuance trust consisted of a collateral certificate representing a beneficial interest in a particular master trust, asset pools subsequently created for the issuance trust may consist of receivables or other "whole" assets, a collateral certificate representing a beneficial interest in another trust or a combination of the two. An additional commenter raised a concern about the continued availability of this structure.[48]

- One commenter requested making clear (e.g., an instruction) that certain existing UK mortgage master trusts meet the ABS definition and therefore are eligible for Form S-3.[49] In a typical transaction, the originator transfers a pool to a "mortgages trustee" which issues two interests: one back to the originator and one to a special purpose entity ("funding entity"). A new issuing entity is formed for each issuance and lends the RMBS proceeds to the funding entity. The funding entity transfers the proceeds of the loan to the originator for an increase in the funding entity's share in the trust property. The cashflow from the trust pool of mortgages is distributed to the funding entity and originator in accordance with their interests and the funding entity uses the funds to repay the inter-company loans from the various issuing entities, which use the payments to pay the ABS. Accordingly, each issuing entity is a different entity, even though the ABS of each issuing entity are supported by the cashflow of a single pool. Today, the particular issuing entity, funding entity and mortgages trustee are all registrants, registering the ABS, the relevant inter-company loan and the interests in the mortgages trust.

  In addition, the commenter believed the issuing entity definition should be revised to contemplate such structures where the issuing entity does not hold the pool assets directly, but instead holds an instrument (e.g., a trust interest, a loan or a swap) representing the interest in the cashflow from the pool assets. The commenter suggested language for Item 1101(c)(2)(ii) such that the activities of the issuing entity are limited to "passively owning or holding the pool of assets or an economic interest therein, issuing the asset-backed securities supported or serviced directly or indirectly by those assets, and other activities reasonably incidental thereto." Item 1101(f) could be revised such that the issuing entity is the "trust or other entity ... that owns or hold the pool assets or an

[48] Capital One.

[49] A&O.

economic interest therein and in whose name the asset-backed securities supported or serviced directly or indirectly by the pool assets are issued."

3. Delinquent and Non-Performing Pool Assets

a. General Comments

- Two commenters noted that policies relating to "non-performing" or "delinquent," as well as policies for grace periods, re-aging and restructuring, vary across asset types and sponsors.[50] Banks and thrifts must follow FFIEC Guidelines, but others do not. It would be impracticable and burdensome to impose, and for sponsors to track, a single definition. Disclosure of such methodologies and policies, and material modifications, extensions or waivers thereof, should be sufficient instead of bright-line tests.

- Two commenters requested, if bright line tests are retained, deleting the word "original" from the reference to the asset pool for the delinquency and non-performing loan tests as it is unnecessary and unclear how it would relate to master trusts, where additional assets may be assigned from time to time, independent of the issuance of any ABS.[51]

- One commenter noted footnote 66 specifies that the "cut-off" date "may" be used for the tests and requested whether other dates may be used.[52] An additional commenter requested that the determination date be set as of the cut-off date and not at the time of the offering, which would be impossible to determine.[53] The commenter alternatively suggested that the calculations be as of the cut-off date and that the cut-off date be as of a date that is no more than 60 days prior to the time of the offering. A third commenter suggested that Item 1101(c)(2) use the phrase "at the cut-off date for the transaction, if applicable, or any subsequent date prior to or at the issuance of the ABS" instead of "at the time of issuance of the asset-backed securities" to avoid confusion.[54]

- Two commenters requested clarifying that for master trusts, the proper measuring date for non-performance and delinquency should not be a "cut-off date," which is not used for most master trusts.[55] Instead, the date should be the date as of which delinquency and loss information is given in the prospectus (one commenter[56] also added "or, if

[50] ASF; MBNA.

[51] ASF; MBNA.

[52] ASF.

[53] Kutak.

[54] ABA.

[55] ABA; ASF.

[56] ASF.

applicable, the date such information is disclosed in the most recent distribution report relating to the asset pool delivered to security holders, whichever is later").

b. Non-Performing Assets and Charge-Offs

- Two commenters supported disclosure of charge-off policies as critical to investors.[57] One of the commenters also requested:[58]

    - Disclosure of the number and amount of non-performing loans which qualified for charge-off but were then waived to provide insight into delinquency policies.

    - That a 120-day delinquent loan should qualify as non-performing. If this is not feasible due to different asset classes, the commenter nevertheless recommended a consistent and objective standard.

- Three commenters objected to creating a bright-line test for non-performing in lieu of the proposed definition because asset types and sponsors vary.[59] However, one commenter suggested clarifying what the Commission meant by "charge-off" (example given).[60]

- One commenter believed a minor level of non-performing loans should be ok as it does not change the fundamental character of the ABS and can be addressed by disclosure.[61]

- Four commenters requested an exception for master trusts because the same asset pool supports different series of ABS over time and the pool will almost certainly contain some amount of non-performing assets (e.g., were performing at the time of a prior issuance but have deteriorated).[62] One commenter suggested measuring the test as of the date of conveyance of each new group of assets in connection with an issuance and only against that new group of assets.[63] Another commenter suggested alternatively allowing master trusts to use Form S-3 for subsequent takedowns as long as non-performing loans do not represent more than 5% of the asset pool.[64]

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[57] MetLife; State Street.

[58] MetLife.

[59] ABA; Auto Group; MBA.

[60] ABA.

[61] ABA.

[62] A&O; ABA; JPMorganChase; Kutak.

[63] A&O.

[64] Kutak.

- One commenter noted transaction documents often do not contain charge-off policies but rather incorporate charge-off standards in defining terms.[65] The commenter thought the first clause of the "non-performing" definition was therefore of limited utility and the definition worked because of the second clause.

- One commenter believed the phrase "or the pool asset meets the charge-off policies of the sponsor" in the definition of "non-performing" should be revised to read "or the pool asset would be treated as wholly or partially charged-off under the charge-off policies of the sponsor, the affiliate of the sponsor that originates or services such pool asset or the third-party servicer that services such asset pool."[66]

- Four commenters were concerned with the portion of the non-performing definition that a pool asset that is more than one payment past due cannot be characterized as not non-performing if only partial payment had been made, arguing generally that this could cause any delinquent asset to potentially meet the definition.[67] Two would delete it.[68] Two suggested revised language.[69]

- Three commenters noted some transactions involving revolving assets as well as master trusts contemplate that a pool asset may remain designated to the pool even after being charged off to avoid the expense of "re-flagging" it and to aid in the allocation of any recoveries.[70] The assets are assigned a zero balance and are not considered in cash flow calculations. The commenters believed the staff has allowed this and requested confirmation that it would continue to be allowed. One of the commenters also believed the staff has allowed a higher percentage of delinquent assets where no receivables in excess of the percentage threshold were funded through the issuance of the registered ABS and requested confirmation that this may continue.[71]

- Two commenters did not believe the concept of "charged-off" was clear for some asset classes, such as loans secured by real property or other tangible property, where remedies such as foreclosure or repossession exist and the asset is not written off until the underlying collateral is liquidated.[72] One of the commenters believed the definition should be revised to clarify that, in the context of pool assets secured by underlying

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[65] ABA.

[66] ABA.

[67] A&O; ABA; ASF; MBA.

[68] ASF; MBA.

[69] A&O; ABA.

[70] ASF; Capital One; MBNA.

[71] ASF.

[72] ABA; ASF.

collateral, "non-performing" means a pool asset where there has been a disposition or other liquidation of the underlying collateral following a foreclosure, repossession or other similar proceeding or action."[73]

- One commenter requested amending the definition of "non-performing" to reflect that when student loans are in non-payment periods (e.g., in-school, grace, deferment and forbearance), they are not considered "non-performing."[74] The commenter believed that only when a FFELP student loan is submitted to a guarantor for payment of a claim, or when a private student loan reaches its charge-off date, should the loan be considered non-performing. Further, a loan can enter and exit these periods without contractual modification to the loan but instead by the terms of the loan or industry practice, and this practice should not count as impermissible "re-aging." An additional commenter raised similar concerns for FFELP loans in forbearance status.[75]

- One commenter requested a specific carve-out for the non-performing limitation for transactions in which the sponsor transfers its entire portfolio of a particular type of asset as such a pool will inevitably contain some non-performing assets.[76] Transaction mechanics could be structured to neutralize the effects (e.g., losses on the assets will not be charged to investors). Certain foreign transactions require such a structure. Concerns could be addressed through disclosure.

- One commenter believed foreign securitizations of non-performing assets are expected to increase and non-performing assets should be allowed.[77] The fact that obligors are unable or unwilling to pay does not change the fact that the written terms of the assets provide for conversion into cash within a specified time. Plus, the existing ABS definition already is qualified by "primarily" and includes the ability to include other rights or other assets designed to assure timely distribution. An absolute ban ignores other such structural features that could make some tranches investment-grade. Including non-performing assets would also be consistent with the proposed proviso regarding leases because in each instance a third party is expected to convert the asset into cash. The proviso should be expanded to include any financial asset that, when considered in conjunction with the value of any secured collateral, can reasonably be expected to convert into cash. Not accommodating these transactions could force them to the private market, cause the exclusion of or higher pricing to U.S. investors and, if they are registered, cause them to be subject to the current informal disclosure regime.

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[73] ASF.

[74] Sallie Mae.

[75] Kutak.

[76] ABA.

[77] Jones Day.

c. Delinquencies

- Two commenters believed delinquency limits should be eliminated or at a minimum increased as disclosure is sufficient.[78] The commenters argued variously that delinquency is just one performance variable, corporate debt issuers do not have similar financial tests, an investment grade rating should be enough for Form S-3 and the 20% level from the 1997 no-action letter is not a meaningful cut-off. One commenter suggested alternatively no limit for the basic definition and 60% for Form S-3.[79]

- Six commenters noted some sponsors consider an obligor delinquent only when less than some percentage (e.g., 90%) or amount of a payment is received.[80] The proposal of requiring delinquency if "any portion of a contractually required payment" is 30 days or more past due would require a burdensome change to systems and could affect relationships with obligors. The commenters suggested flexibility. For example, one commenter suggested modifying the definition to permit "common industry and country standards."[81] Other commenters suggested an approach similar to the definition of "non-performing" that an asset is delinquent if it meets either the requirements in the relevant transactions agreements or the policies of the sponsor, and the applicable terms and policies should be disclosed in the prospectus. Some suggested alternatively creating a "de minimis" exception. For example, two commenters urged a 90% collection threshold.[82] If no alternative is used, some requested clarifying that historical delinquency information for periods prior to the final rules may be presented as currently computed, footnoting the applicable delinquency policy.

- One commenter requested an exception for master trusts because the same asset pool supports different series of ABS over time and the existing asset pool will almost certainly contain some amount of delinquent assets.[83] The commenter suggested measuring the test as of the date of the conveyance of each new group of assets in connection with an issuance and only against that new group of assets.

- One commenter indicated that the definition of a delinquent loan as 30 days or more past due would be a problem for FFELP student loans because servicing tapes are currently run monthly and a borrower who is one day late or who is delinquent because of a check-writing error will show up as delinquent although they quickly go back into compliance.[84]

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[78] ABA; ASF.

[79] ABA.

[80] ABA; AFSA; Auto Group; Citigroup; MBA; TMCC.

[81] ABA.

[82] AFSA; TMCC.

[83] A&O.

[84] Kutak.

- One commenter suggested amending the "delinquency" definition to reflect that student loans routinely go through non-payment periods (e.g., in-school, grace, deferment and forbearance), which are granted without separate contractual modification, either by the loan terms or industry practice, and therefore should not be considered delinquent.[85] Further, such status changes that do not have an adverse impact on the ultimate repayment of the asset should not be considered impermissible "re-aging." If a loan is considered "current" consistent with industry practice or the Higher Education Act, it should be considered "current" for Regulation AB. An additional commenter, raising the same concern with respect to student loans in forbearance, alternatively suggested extending the delinquency definition to 90 days, but not less than 60 days.[86]

- Four commenters noted that under most programs, the servicer is allowed to grant obligors certain extensions and typically the underlying documents are not contractually amended.[87] Both suggested eliminating the requirement in lieu of disclosure. One commenter suggested alternative language if the requirement is retained.[88]

- One commenter supported requiring a contractual modification in order to classify a pool asset on which only partial payments have been made as non-delinquent, because it would provide discipline and objectivity.[89] The commenter also supported proposed disclosure of the sponsor's criteria for granting modifications, the effect of any grace period, re-aging, restructuring or other practice on delinquency experience, and when assets could be removed or substituted. The commenter also suggested requiring disclosure of the aggregate number and dollar amount of accounts that have been modified, extended or repurchased from the pool, broken out to identify the basis for the modification, extension or removal. The commenter provided examples of how activities in this area could be used by a sponsor to distort pool performance.

- One commenter believed the rules should state that the definition of delinquency, in particular the portion of the definition relating to "partial payments" in the re-aging proviso, refers only to payments of contractually required principal and interest and not to servicer-related fees, such as late fees.[90] An investor is only interested (and entitled to) the principal and interest, and a loan that is otherwise considered current in the payment of principal or interest should not be considered delinquent if fees remain outstanding.

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[85] Sallie Mae.

[86] Kutak.

[87] ABA; AFSA; ASF; TMCC.

[88] ABA ("Past due payments in respect of a pool asset that have not been paid in full will still be considered past due except to the extent that such pool asset has been contractually restructured such that those past due payments are no longer due on dates that are prior to the date of such contractual restructuring").

[89] State Street.

[90] MBA.

Other regulators, such as the FTC, are also encouraging lenders not to consider borrowers delinquent if the only amount unpaid is attributable to fees.

- One commenter noted that servicers use different day count conventions (e.g., the Mortgage Bankers Association (MBA) method and the Office of Thrift Supervision (OTS) method) to determine when a loan is delinquent, and depositary institutions are subject to regulatory guidelines on this subject.[91] The commenter requested clarification that the rules will not affect the method of counting delinquencies.

- One commenter requested clarification that the OTS method of calculating delinquency for purposes of the concentration thresholds and disclosure requirements can be used as opposed to the MBA method.[92] The commenter believed the final rules should clarify this point as the different methods will result in different results.

- One commenter encouraged the MBA method of defining delinquency as opposed to the OTS method, which is the current practice of many issuers.[93] The commenter believed it is a more accurate method and most consistent with the SEC proposal of defining delinquency as a contractually required payment being 30 days or more past due.

4. Lease-Backed Securitizations and Residual Values

- One commenter expressed support for permitting lease-backed ABS on Form S-3.[94]

- Five commenters believed the proposed residual value percentage tests are too stringent to encompass all current lease-backed ABS and do not allow flexibility for further changes.[95] For example, commercial vehicle "fleet" lease securitizations may exceed 80%. Shorter-term auto leases (which are less likely to default), unseasoned leases and leases with vehicles likely to retain their value also have higher residual percentages. Residual percentages differ widely by lease type and separate tests are arbitrary. Such tests also discriminate against smaller issuers who may not have a portfolio large enough to form a pool meeting the tests. Even for larger issuers, the percentage limitation could become the main selection criteria, rather than a random selection resulting in a representative portfolio, making public securitization less attractive. For these and the other reasons summarized below, the commenters recommended abandoning any specific percentage tests and require appropriate disclosure instead. Ratings agencies and the market will act as a limiter on percentages.

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[91] ABA.

[92] MBA.

[93] MetLife.

[94] Auto Group.

[95] ABA; AHFC; ASF; Auto Group; TMCC.

- If a percentage test is used, one commenter suggested a single test for all leases measured at not more than 85% (determined by the method used in the securitization transaction) of aggregate original lease balances.[96] Another suggested an alternative for vehicles that the aggregate contractual residual value (or if not available, book value) is not greater than 80% of the aggregate of MSRP or other recognized standard of value for all leased vehicles in the pool.[97]

- Four commenters believed the rule is not clear enough on how to make the necessary calculations.[98] The commenters generally argued that the present formulation creates uncertainties and could result in calculations that are too complex. One commenter believed its suggested alternative (discussed in the prior bullet) would solve the issues with the present formulation for vehicle leases.[99]

- Two commenters believed any test should use the residual value of the leased asset at the inception of the lease and not at the time of ABS issuance.[100] This is easier to calculate and would not bias against older, seasoned leases (which may have more established payment records) because those leases would increase the total portion of cash flows from residual values.

- Two commenters noted that many existing transactions, when calculating the amount of securities that may be issued against the lease balance of a pool, limit the residual value of the leased asset to the lesser of the residual value as set forth in the lease contract and the residual value for that vehicle as determined by an independent third party (e.g., The Automotive Lease Guide).[101] The commenters thought any bright-line test should give effect to the same limitations as are used in the ABS transaction.

- Three commenters believed that if a bright-line test is used, leases that have residual value insurance or guarantees and leases where the lessee is obligated at lease termination to pay any shortfall between vehicle sale proceeds and contract residual should be excluded.[102] In both instances, the ABS holders look to the credit risk of the obligated party instead of the residual value risk of the assets themselves.

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[96] ASF.

[97] Auto Group.

[98] ABA; ASF (particular examples given); Auto Group; TMCC.

[99] Auto Group.

[100] ABA; ASF.

[101] ABA; ASF.

[102] ABA; ASF; Auto Group.

- Three commenters suggested clarifying "automobile" if tests are retained.[103] One suggested clarifying that auto leases include SUV, van, truck, motorcycle and other motor vehicle leases.[104] Another requested replacing "automobile" with "motor vehicle" or "automobile or truck."[105] Another suggested replacing "automobile" with "vehicle" with the latter defined as automobiles (including, without limitation, light duty trucks, SUVs and vans), motorcycles, trucks, buses, trailers or other commercial vehicles."[106]

- One commenter thought the reference to leases in the basic definition creates the unintended implication that some leases might not be financial assets.[107] An additional commenter thought the phrase "financial assets that are leases" in the definition raised confusion as to whether a difference was intended between finance leases and operating leases.[108] While relevant in accounting, the difference is irrelevant in ABS and requested clarification that any type of lease that provides cash payments is ok.

5. Exceptions to the "Discrete" Requirement

- Three commenters believed restrictions on prefunding and revolving periods should not apply to "homogenous" asset types that can be defined by uniform eligibility criteria that can be disclosed (e.g., residential mortgage loans, auto receivables and FFELP student loans).[109] In addition, one of these commenter advocated no such restrictions for master trusts.[110] The market and rating agencies should decide acceptable limits based on disclosure. Alternatively, two commenters suggested excluding issuers that undertake to report the then current pool composition on a quarterly basis for the life of the prefunding period or revolving period.[111] As a further alternative, one commenter recommended extending prefunding and revolving periods to 5 years for homogenous assets.[112] An

[103] ABA; ASF; Auto Group.

[104] ASF.

[105] ABA.

[106] Auto Group.

[107] ASF.

[108] ABA.

[109] ABA; Sallie Mae (in particular for FFELP student loans because all are issued under the Higher Education Act); TMCC.

[110] ABA.

[111] Sallie Mae; TMCC.

[112] Sallie Mae.

additional commenter suggested allowing the revolving periods over which the rating agency will allow the investment grade rating of the securities to exist.[113]

- One commenter requested clarifying that each test is evaluated independently (e.g., an offering of non-revolving assets can have a prefunding account of 25% of total proceeds and a revolving period of 25% of total proceeds).[114]

a. Master Trusts

- Three commenters expressed specific support for master trusts.[115]

- Eight commenters noted that most master trusts permit, and in some instances require, the depositor to add pool assets from time to time regardless of when ABS are issued (e.g., additions that maintain the depositor's interest in the trust, which may be a form of enhancement, additions because of the short maturities of the underlying receivables, additions to remove excess interest or additions "simply at the option of the depositor").[116] Many suggested revising Item 1101(c)(3)(i) to eliminate a link between the addition of pool assets and future issuance.[117] Concerns about new additions are mitigated by proposed disclosure about acquisition criteria.

- One commenter requested clarifying General Instruction I.B.5 of Form S-3 that ABS offered under master trusts are Form S-3 eligible, regardless of whether the underlying assets are fixed or revolving.[118] Otherwise, the application of General Instruction I.B.5.(e), which limits the addition of non-revolving financial assets, would limit master trust structures involving these types of assets to a one-year revolving period.

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[113] Kutak (indicated that rating agencies tend to allow an indeterminate revolving period for student loan securitizations and three to five years for insurance premium loan securitizations, both subject to no trigger events occurring).

[114] ASF.

[115] ABA; MBNA; State Street.

[116] ABA; AFSA; AIG; ASF; Capital One; Citigroup; JPMorganChase; MBNA.

[117] ABA (alternative formulation given generally "allow[ing] for the addition or removal of assets"); AFSA (alternative formulation given adding the ability to add assets "in connection with maintaining minimum pool balances"); ASF (alternative formulation given allowing changes "otherwise from time to time ... in the ordinary course of administering the pool"); Capital One (same alternative formulation as AFSA given); Citigroup ("or as otherwise contemplated by the operative documents"); JPMorganChase; MBNA ("allow periodic asset additions as part of normal master trust administration provided under the securitization documents").

[118] ASF.

b. Prefunding Periods

- One commenter supported the proposed limits on prefunding periods.[119] In addition, the commenter suggested limiting prefunding to financially secure sponsors with a track record of the same ABS asset type (e.g., rating of senior unsecured debt of sponsor for financial strength and Exchange Act reporting history requirement for the asset type). The commenter believed there is increased risk that financially weak sponsors would divert prefunding proceeds inconsistently from the transaction agreements, and prefunding increases the probability that the final pool will be different from the pool described to investors.

- Seven commenters noted that although the proposed tests are consistent with existing no-action letters, they believed the staff has permitted or the market has used higher limits and for longer periods and requested eliminating or expanding the tests.[120] The commenters supplied various arguments, including that that increased prefunding is mitigated by disclosure of acquisition criteria and the Form S-3 investment grade requirement, increased prefunding increases issuer funding flexibility, and there is no compelling reason to distinguish between Form S-1 and S-3 because investors are not likely to receive more information in a Form S-1 offering. As alternatives, one commenter requested eliminating any limitation on prefunding for Form S-1[121] and five commenters requested allowing periods of up to 50% for Form S-3.[122] One commenter also advocated a graduated scale for Form S-3 of amounts not in excess of 50% up to a year, not in excess of 75% up to nine months, and not in excess of 100% up to six months.[123] One commenter would support the one-year limitation if the percentage limitation was abandoned, believing 100% prefunding should be allowed.[124]

- One commenter requested an exclusion for fully disclosed pools of subsequent student loans that are described in the prospectus to the same extent as the initial pool, but for some reason will not be added until up to six months following closing.[125]

- One commenter recommended the following for prefunding in master trusts:[126]

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[119] State Street.

[120] AFSA; ASF; Auto Group; BMA; Capital One; FSR; TMCC.

[121] ASF.

[122] AFSA; ASF; BMA; Capital One; FSR.

[123] ASF.

[124] Auto Group.

[125] Sallie Mae.

[126] ASF.

- Any prefunding test in connection with a particular issuance of ABS should be determined in relation to the aggregate size of the then-existing pool, rather than by reference to the offering proceeds of the specific issuance.

- No limits are imposed where such prefunding operates to "refund" the balance of revolving assets already in the pool (e.g., issuing new ABS the proceeds of which are held to defease or retire an existing series of ABS backed by the same pool).

c. Revolving Periods

- Six commenters urged eliminating any restrictions on revolving periods, including for Form S-3.[127] Revolving periods allow issuers flexibility to create ABS with longer or different maturities and weighted average lives. Restrictions for fixed, non-revolving assets limit flexibility for registered ABS backed by such assets, which is arbitrary compared to revolving assets, substantially disadvantages some issuers and may impair investors who desire a certain maturity. One commenter noted issuers have been using revolving periods for periods longer than proposed.[128] Two commenters explained that issuers add assets in master trusts in two ways (1) through creation of new assets in revolving accounts (e.g., credit card receivables); and (2) the addition of new accounts (premium finance loans and auto loans).[129] The proposal would allow the first without limitation but inappropriately limit the second. The proposal also would bias against shorter-term assets because it would be impossible to create ABS with meaningful terms without revolving. Revolving concerns are mitigated by proposed disclosure regarding acquisition criteria. Two commenters noted that the marketplace and rating agencies currently require disclosure about limitations on future asset additions and the types of assets that may be added, the origination standards employed by the sponsor and any contractual provisions limiting any change in such standards.[130]

- One of the commenters advocated that, if tests are maintained, no limitations for Form S-1 and periods of up to three years for Form S-3 on a graduated scale: not in excess of 100% during the first year, an additional 75% in the second year, and an additional 50% in the third year, with any unused capacity from a year eligible to be carried forward into subsequent years provided the aggregate amount is not exceeded.[131] Another commenter advocated allowing revolving periods for non-revolving assets for up to 36 months.[132]

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[127] ABA; AIG; ASF; Auto Group; ESF; TMCC.

[128] Auto Group (examples given).

[129] ABA; AIG.

[130] AIG; Auto Group.

[131] ASF.

[132] Auto Group.

- One commenter suggested clarifying "revolving" and "non-revolving" assets if a distinction is retained.[133] Most asset classes do not have revolving *receivables*, they have revolving *accounts* under which specific (arguably "fixed") receivables are generated. The commenter suggested replacing the phrase "fixed receivables or other financial assets that do not revolve" with "asset pools consisting directly or indirectly of receivables which do not arise under revolving accounts" and defining "revolving account" as "the relationship between a credit provider and an obligor that permits multiple repayments and reborrowings."

- One commenter suggested, if thresholds are retained, changing the restriction to read "the duration of the revolving period does not extend for more than one year (plus any additional days until the related final reinvestment date)" because the original language would not allow reinvestment of a full year's worth of collections because collections for the 12th month need several additional days to be determined and reinvested.[134]

B. Securities Act Registration Statements

1. Form Types

- One commenter supported limiting ABS registration to either Form S-1 or Form S-3.[135] The commenter, requested clarification, however, that "mortgage-related" securities, as defined in Exchange Act Section 3(a)(41) may continue to be registered under Form S-3 pursuant to Rule 415(a)(vii), even if they do not meet the ABS definition (e.g., backed by non-performing assets) and allowing the registration statement to be prepared in accordance with the instructions for ABS (e.g., application of disclosure items).

- One commenter suggested clarifying that Form S-1 is available for all offerings, including those that do not meet the ABS definition, even though Regulation AB may not be available for such offerings.[136]

- One commenter requested incorporation by reference for Form S-1 in order to include exhibits after effectiveness.[137]

- One commenter objected to including reference to Item 304 of Regulation S-K in the proposed Form S-1 disclosure menu, arguing it is overly broad for ABS where accountant

[133] Auto Group.

[134] Auto Group.

[135] ABA.

[136] Kutak.

[137] ASF.

involvement is limited to the attestation.[138] Disclosure about changes in or disagreements with accountants should be required only to the extent related to that report.

2. Presentation of Disclosure in Base Prospectuses and Prospectus Supplements

- One commenter believed limiting the base to only the asset types and structural features reasonably contemplated diverges from current practice and should be dropped.[139]

- Two commenters believed a separate base for each asset class would not be unduly burdensome if "asset class" was interpreted reasonably to include similar assets (e.g., first and second mortgages and home equity loans are all residential mortgage loans).[140]

- Two commenters noted that, although the proposal is consistent with practice, believed the staff has given additional interpretations that should be codified, such as:[141]

    - Use of a single base and form of supplement for all loans secured by residential real estate, regardless of composition of any particular pool. "Asset class" should be clarified so that it applies at the general level and does not apply at a sub-type level (e.g., prime and sub-prime). An additional commenter also raised this concern.[142]

    - Use of a single base and form of supplement relating principally to a particular asset class, but which also describes one or more additional asset classes, as long as the additional class is below a specified portion (10% and 20% suggested) of the pool. This interpretation should be extended to assets of additional jurisdictions. One commenter believed no disclosure should be required in the base prospectus for such additional assets (whether by type or country), with disclosure in the supplement being sufficient.[143]

    - Use of a single base and form of supplement that describes multiple asset classes, provided the descriptions of each class are presented in the alternative and designated as such (e.g., through brackets or alternate pages).

    - If assets are to be pooled together in a takedown, they constitute a single "class" and separate base and form of supplements should not be required.

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[138] ABA.

[139] ABA.

[140] ABA; Aus. SF.

[141] ASF; NYCBA.

[142] MBA.

[143] NYCBA.

- Where assets will not necessarily be pooled together in a takedown, taking into consideration whether if separate prospectuses were prepared, the disclosure would remain the same and hence the assets will be deemed a single class.

- One commenter requested that, if the proposal is adopted, encouraging and accommodating pre-filing conferences with the staff to discuss factors the Commission may not have addressed in the final rule or to address new developments.[144]

- Two commenters supported the approach of being able to describe structural features generally in the base prospectus with specific terms being provided in prospectus supplements, with the requirement that a prospectus supplement may only contain asset types and structural features described in the base.[145] One of the commenters requested clarifying, however, that the language "except as otherwise permitted in the prospectus supplement" is acceptable because it is used to clarify that the supplement may refine, supplement or modify general concepts set forth in the base without adding new asset types or structural features.[146] The commenter believes the release confirms this usage.

- Six commenters objected to requiring a separate base and form of supplement for each country.[147] These commenters argued it discourages cross-border integration of capital markets and is an unnecessary artificial barrier on registered ABS with assets from multiple countries. Multi-country transactions have occurred without such a requirement with sufficient disclosure. EU ABS often involve multiple jurisdictions. Disclosure can be just as adequate in a single base or in the final prospectus supplement as it would be if it was required in separate documents at registration. One commenter believed the main differences will relate to the legal aspects of the asset class and taxation, all of which can be addressed through disclosure similar to that provided for multiple U.S. states.[148] As an alternative, one commenter requested clarifying that US territories are considered part of the US and an exception be made where less than 10% of the pool is secured by properties in a particular foreign jurisdiction.[149]

- Three commenters requested that a single base and form of supplement may be used for all assets originated in, or secured by property located in, jurisdictions sharing similar legal systems (e.g., Australia and UK) due to the amount of overlap.[150]

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[144] NYCBA.

[145] ABA; NYCBA.

[146] ABA.

[147] A&O; ABA; Aus. SF; CMSA; ESF; NYCBA.

[148] ABA.

[149] CMSA.

[150] ASF; Aus. SF; NYCBA.

- One commenter believed repackaging transactions should be excluded from the separate base for each country requirement as they typically do not provide extensive information on the underlying securities and the relevant disclosures will instead be in the filings for the underlying security.[151]

- One commenter suggested confirmation that footnote 83 does not create a presumptive rule, analogous to the concept of a "convenience shelf," that an offering within a specified time period after effectiveness *per se* will be required to include a completed prospectus supplement in the effective registration statement.[152]

- One commenter suggested reconsideration of footnote 83 because unless the entire amount registered is taken down immediately after effectiveness, the commenter did not see why the immediate takedown should be treated differently from a later takedown and why the information should be required in the registration statement at effectiveness.[153] If the position is retained, the commenter urged establishing a safe harbor that an offering will not be viewed as an "immediate takedown" unless the registrant knew before effectiveness that such offering was more likely than not to occur immediately after effectiveness, and the terms of the offering were so clearly established at such time as to be susceptible to disclosure in a Rule 430A prospectus supplement

- Three commenters requested eliminating the requirement to file an unqualified legal opinion with each takedown (referenced in footnote 85).[154] Two of the commenters believed the requirement is contrary to past practice and burdensome.[155] The other argued that the qualified opinion at effectiveness should be sufficient, if the underwriting or other purchase agreement includes a condition that all assumptions in the original opinion have been satisfied and the prospectus discloses that the ABS will upon issuance be legal, valid and, in the case of debt securities, binding obligations.[156] The commenter believed the current requirement is an expense with virtually no marginal benefit. Alternatively, the commenter requested permitting an opinion with each takedown that addresses each legal assumption qualifying the original opinion in lieu of a full opinion. One commenter also suggested an alternative that the opinions be available free of charge upon request or via a website in lieu of filing.[157]

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[151] BMA.

[152] NYCBA.

[153] ABA.

[154] ABA; ASF; Citigroup.

[155] ABA; Citigroup.

[156] ASF.

[157] Citigroup.

3. Form S-3 Eligibility Requirements for ABS

- Two commenters expressed concern that expanding shelf access through Form S-3 eligibility would have the unintended consequence of investors having to make more investment decisions under extremely compressed time periods and with access to less information.[158] This results from the ability to effect takedowns off the Form S-3 often with incomplete or no disclosure documents. ABS that must use Form S-1 today include a prospectus specific to the transaction and although not necessarily delivered, is accessible through EDGAR.

- Three commenters believed that, for the same reasons summarized for the basic ABS definition, proposed bright-line tests for Form S-3 be relaxed, revised or, in some cases, eliminated to allow more securities shelf access on Form S-3.[159]

- One commenter believed the investment-grade requirement causes non-investment grade classes in the same transaction to be offered privately as it is impractical to simultaneously register them on Form S-1.[160] This deprives securities offered to institutional investors the benefits of registration. The commenter recommended making Form S-3 available for non-investment grade rated or unrated ABS if initial sales are limited to QIBs and institutional accredited investors and initial sales and subsequent resales are required by the terms of the securities to be in minimum denominations of $250,000. If this approach is adopted, conforming changes should be made to '40 Act Rule 3a-7.

- One commenter also recommended an alternative to the investment grade requirement for offerings where the securities meet a certain minimum denomination, such as $100,000.[161] Investors with this much to invest should be sophisticated and experienced.

- One commenter suggested concerns with "ratings shopping" in the ABS market, where a sponsor refuses to engage with and provide information to a rating agency that may give a less favorable rating and instead takes it business to other agencies that provide higher ratings.[162] The commenter suggested as options either:

    - Eliminating the use of ratings as a bright-line test for Form S-3 eligibility, thereby eliminating the incentive to ratings shop to meet a regulatory requirement; or

    - Requiring an investment grade rating that is the lower of two ratings.

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[158] FMR; ICI.

[159] ABA; ASF; Auto Group.

[160] ABA.

[161] Kutak.

[162] Moody's.

The commenter also referred to its response to the Commission's concept release on rating agencies regarding using ratings for Form S-3 eligibility.

- One commenter believed an investment grade rating requirement is of limited utility for Form S-3 eligibility, as the level of disclosure provided and the extent of rating agency due diligence does not change markedly at the investment grade threshold.[163] Such a requirement simply curtails below-investment grade issuance. Instead, the commenter believed a sponsor experience requirement would be more appropriate for Form S-3 eligibility (e.g., Exchange Act reporting history for ABS of the same asset type).

- One commenter suggested clarifying that privately offered securities issued in conjunction with registered securities need not be investment grade rated.[164]

- Thirteen commenters objected to disqualifying Form S-3 eligibility for untimely Exchange Act reporting by any issuing entity established directly or indirectly by the sponsor.[165] The commenters believed this would carry unintended and unjust consequences. Potential problems advanced by the commenters included:

    - Shelf registration is critical to ABS issuance. Form S-1 registration is not broadly used, too slow and the 144A market will likely be used as an inferior alternative.

    - It is unclear whether the seller of the assets, or some direct or indirect parent, would be the sponsor.

    - Some transactions (e.g., "rent-a-shelf" transactions and most CMBS transactions) include assets transferred by two or more entities (including entities that in turn had assets transferred to them) and not only is it not clear which entity or entities would be "sponsors," but also multiple unrelated parties, with otherwise no nexus to the transaction, could be considered "sponsors" that would greatly increase risk of disqualification and discourage asset transfers.

    - The sponsor definition focuses, in part, on who organizes and initiates the transaction but in many transactions, the entity or entities that sell assets to the depositor is unrelated to the depositor and play no such role, so it is unfair to disqualify in such instances.

    - Conditioning form eligibility for "sister" company compliance is new. One commenter believed it ignores fundamental corporate law principles.[166]

[163] State Street.

[164] Kutak.

[165] ABA; ASF; BMA; BOA; CGMI; Citigroup; CMSA; FSR; JPMorganChase; MBA; MS&K; NYCBA; UBS.

[166] CGMI.

- In some transactions, the entity or entities transferring assets change and are not known until the takedown (e.g., after effectiveness), so it is not possible to identify the entities whose reporting compliance need to be assessed.

- Some sponsors have hundreds of issuing entities. Tracking compliance is burdensome and disqualifying for one error is draconian. The increased information required by the proposals magnifies the risk for error.

Six of the commenters suggested an alternative where a depositor or issuing entity established by such depositor would be precluded from filing a Form S-3 as a result of untimely reporting and, until such time as the depositor is again Form S-3 eligible, no other affiliated depositor would be Form S-3 eligible for ABS of the same asset class.[167] Two commenters also suggested two clarifications for this alternative.[168] First, if a sponsor acquires a depositor that was delinquent before acquisition and the acquisition is not part of a transaction designed to evade reporting requirements, only the acquired depositor and not the acquirer's pre-existing depositors should be disqualified.[169] Second, if an affiliated depositor has a pre-existing registration statement involving the same asset type as those backing deficient ABS registered under a separate registration statement, and the existing registration statement is not designed to evade reporting requirements, the affiliate should be able to continue to use its registration statement and file new registration statements if it independently remains Form S-3 eligible.

Three of the commenters suggested an alternative by modifying Rule 12b-25 so that:[170]

- If an ABS report required to be filed is not filed timely, a Form 12b-25 would need to be filed within 5 business days after the due date disclosing the failure and reasons in reasonable detail.

- If Form 12b-25 asserts that the reason relates to a person other than the registrant, the registrant would not lose Form S-3 eligibility, although a signed statement from a third party for inclusion with the Form 12b-25 should not be required.

- If the Form 12b-25 discloses another reason, the registrant (but not a non-registrant sponsor or other affiliated entity) would lose its ability to file a new Form S-3 for some period (3 months suggested), but only after the required report is actually filed. Existing Form S-3's would not be affected.

[167] ASF; BMA; CMSA; FSR; NYCBA (alternative formulation given); UBS.

[168] ASF; CMSA.

[169] Two additional commenters requested such confirmation (ABA and Citigroup).

[170] ABA; Citigroup; CMSA.

- The staff could waive ineligibility for good cause, and such waiver would be deemed effective if the registrant asserts good cause in the Form 12b-25 and the Commission does not object in 10 business days.

Some of these commenters also generally argued that if this Rule 12b-25 alternative is not used, tying Form S-3 eligibility to Exchange Act reporting should be deferred until the Commission can separately consider how Rule 12b-25 can be accommodated to ABS. Whatever approach is adopted, failure by one affiliate should not affect other affiliates.

One commenter requested the Commission work with the industry to develop an alternative remedy for reporting noncompliance in lieu of Form S-3 eligibility.[171]

- Eight commenters believed any Form S-3 disqualification for untimely Exchange Act reporting should be limited to subsequent registration statements and continued takedowns off of existing registration statements should not be affected.[172] Immediate disqualification would have severe market consequences, interfere with issuers already marketing transactions (such as using hedging transactions and ABS informational and computational material in anticipation of an offering (causing Section 5 problems)) and ultimately interfere with the operation of consumer debt markets. Any other interpretation is contrary to Form S-3 instructions and Rule 401 and would question whether every takedown might violate Section 5. Existing stop order authority should be sufficient for existing registration statements.

- Seven commenters believed any Form S-3 disqualification for untimely Exchange Act reporting should be limited to depositors of the same asset class.[173] Securitizations of separate asset classes are often separately managed business units and to penalize all for the acts of one would be harsh and inconsistent with the treatment of independent subsidiaries of the same parent in the corporate market.

- Fifteen commenters believed Form S-3 eligibility should not be impaired by good faith immaterial, inadvertent or involuntary failures in reporting.[174] The commenters generally argued that these instances would not be rare given that, unlike a corporate issuer, an ABS sponsor may have multiple issuing entities to report and often report month. Form S-3 registration statements for ABS do not rely on prior reporting, and thus prior reporting history is less of an issue. Investors also are not dependent on Exchange Act reporting. In particular, the commenters believed eligibility should not be limited as a result of untimely reporting if caused by the inability to include unaffiliated third party information and the issuer otherwise acted in good faith and without intent to avoid the

[171] MBA.

[172] ABA; ASF; BMA; BOA; CMSA; FSR; Sallie Mae; TMCC.

[173] ABA; ASF; BMA; BOA (alternative formulation given); CMSA; NYCBA; UBS.

[174] ABA; ASF (referenced Rule 165(e) as an alternative); BMA; BOA; Citigroup; CMSA; FSR; JPMorganChase; Kutak; MBA; MS&K; NYCBA; Sallie Mae; TMCC (referenced Rule 165(e) as an alternative); UBS.

reporting requirements. The commenters believed not providing this provision would result in a 100% compliance requirement for continued Form S-3 eligibility.

One of the commenter suggested such an exception if the following conditions had been met at the time of filing (arguing it ensures sponsors make full disclosure of required information but avoids disqualifications for inadvertent mistakes):[175]

- All reporting is current (if not previously timely)
- Distribution date reports included within the late filed reports were timely distributed to the trustee or ABS holders;
- Distributions of funds described in the distribution repots were timely made; and
- The distribution reports in the late filed reports were posted to the sponsor's or depositor's website in the period they were required to be filed with the SEC.

Another commenter suggested limiting the requirement that reporting be current for the previous 12 months (or shorter period required to report), but not timely.[176]

- One commenter, for many of the reasons as above, believed Form 10-D should only be an elective filing because it is an unnecessary administrative burden.[177] Alternatively, failure to file should be recognized as a technical or administrative failure and not result in Form S-3 ineligibility.

- Two commenters requested a provision whereby a noncompliant issuer can request staff waivers.[178] Another commenter requested a provision that if non-compliance has been waived or cured, then eligibility will be immediately restored.[179]

- One commenter believed any Form S-3 disqualification for untimely Exchange Act reporting should exclude reports filed solely pursuant to Item 6.01 (ABS informational and computational material) or Item 6.06 (Securities Act updating disclosure) because they relate to an offering for a specific transaction to update the registration statement.[180]

- One commenter requested clarifying that once a Form S-3 registration statement is effective, Exchange Act eligibility requirements will be deemed to be satisfied at the time of filing.[181] An additional commenter requested clarification of Rule 401(b) (and

[175] MS&K.

[176] Kutak.

[177] CGMI.

[178] BOA; US Bank.

[179] BMA.

[180] ASF.

[181] FSR.

Telephone Interpretations B.55 and H.72) that eligibility for takedowns under Form S-3 will be based only on eligibility of the registrant depositor at the time of filing of the registration statement and not upon the Form S-3 eligibility of any affiliate depositor.[182]

4. Determining the "Issuer" and Required Signatures

- Two commenters did not object to designating the depositor as "issuer" for Securities Act and Exchange Act purposes for domestic entities but, for foreign entities, also suggested including the term "manager" (as set forth in Securities Act Section 2(a)(4)).[183] Foreign jurisdictions such as Australia have created "managers" rather than "depositors" to be the issuer on behalf of the trusts. One commenter explained all substantial duties and rights of the trust will either be exercised directly by the manager on behalf of the trust or by the trustee but only at the direction of the manager.[184] The commenter indicated that the "sponsor" could not alternatively serve as the issuer since a bank is subject to Australian prudential regulations. The commenter also noted that Australian ABS are often one step transfers from the sponsor to the trust with no intermediate transfer to the manager.

- One commenter, while noting the same concern as above regarding foreign entities, believed the rule should include flexibility that "issuer" can be modified in particular circumstances subject to staff confirmation through pre-filing conferences.[185]

- One commenter, while supporting the definition of "issuer," suggested revising the language that the depositor is the issuer for purposes of the ABS "of the issuing entity" to instead read for purposes of the ABS "issued in the name of" the issuing entity or, alternatively "issued by" the issuing entity.[186] Similarly, the commenter suggested revising the proposed language that the person acting as depositor is a different issuer from that same person acting for purposes of "that person's own securities" to read for purposes of "non-asset-backed securities issued by the depositor." The commenter believed there was potential for confusion without these revisions. For the first change, the proposed language could identify securities other than those issued in the name of the issuing entity for which the depositor is the statutory issuer. For the second change, there may be confusion that the reference to "that person's own securities" means that the depositor is not the statutory issuer of the ABS because some other securities are the depositor's "own securities." The commenter also believed the suggested changes would avoid uncertainty with the "dealer" exemptions under the Exchange Act.

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[182] NYCBA.

[183] ASF; Aus. SF.

[184] Aus. SF.

[185] ABA.

[186] Trenam (alternative formulation given).

- One commenter believed the trustee should never be considered "issuer" because although it may authenticate the security, it is not the obligor.[187] The trustee also should never be required to sign the registration statement on behalf of the issuing entity.

- Two commenters believed issuing entities should not be required to sign the registration statement, even if formed prior to effectiveness.[188]

- One commenter believed, that for UK RMBS master trusts, the originator (e.g., the sponsor) should not be required to sign.[189] The originator is the party who transfers the pool assets to the mortgages trustee who then issues interests to a funding entity that repays loans from the ultimate issuing entity of the RMBS.

5. Market-Making Prospectuses

- Nine commenters believed the requirement for registering market-making transactions and/or delivery of market-making prospectuses should be eliminated in its entirety, particularly for ABS.[190] Several of the commenters referenced the 1996 Report of the Task Force on Disclosure Simplification that recommended eliminating an affiliated broker-dealer's prospectus delivery obligation in "regular way" market-making transactions in outstanding securities of a Section 12 reporting company. One commenter believed the need for a market-making prospectus in affiliated ABS market maker transactions is not based on investor or policy considerations, but rather on a too technical interpretation of the securities laws.[191]

  Five of the commenters argued that ABS is different from the corporate market and applying the same market-making requirements is inappropriate.[192] For example, given that each issuing entity is a separate Exchange Act reporting person and that periodic reports are filed monthly, continued reporting just for market-making purposes is a burden not shared by corporate issuers.

  Seven of the commenters believed that, although issuers routinely cease Exchange Act reporting as soon as possible, investors continue to have access to information either contractually or through a transaction party or third party website.[193] An affiliated

[187] Am. Bankers.

[188] ABA; Aus. SF.

[189] A&O.

[190] ABA; ASF; BMA; BOA; CGMI; CMSA; FSR; JPMorganChase; NYCBA.

[191] BMA.

[192] ABA; BMA; BOA; CMSA; JPMorganChase.

[193] ABA; BMA (arguments about lack of access to information particularly stressed for repackaging transactions); BOA; CGMI; CMSA; JPMorganChase; NYCBA.

broker-dealer is unlikely to have material information not already disclosed and readily available and investor protection would not be sacrificed by eliminating market-making prospectuses. If such an affiliate has any material non-public information, Rule 10b-5 is enough. One commenter also believed "Chinese Walls" provide sufficient protection.[194]

As alternatives to a complete exemption:

- Four argued for an exemption for investment-grade ABS or where the purchaser is an institutional investor.[195]

- One suggested using the conditions in a 1998 request for comment in the "Aircraft Carrier" release for exempting market-making registration.[196]

- Two argued for an exemption if the prospectus discloses that distribution statements containing Item 1119 information are available on a website or free upon request,[197] with one of the commenters also adding that current loan level information also be available on a website accessible to all investors.[198]

- Six commenters thought the position described in the proposing release on updating market-making prospectuses is broader than what practitioners' understood and is detrimental to continued market-making (or, at a minimum, reflective of only a small minority of prior staff interpretations).[199] One commenter urged clarification of how often prospectuses need to be updated for market-making and remarketing transactions and what specific information must be updated (with the commenter believing it should be limited to asset pool information).[200] Two urged no changes that would increase market-making registration/prospectus burdens until the Commission addresses the topic more generally as part of any Securities Act reform.[201]

  Five of the commenters requested confirmation of what they believe was understood that a market-making prospectus is sufficient where either the issuer continues to file, and the prospectus incorporates by reference, Exchange Act reports for the ABS[202] (or, as two of

[194] JPMorganChase.

[195] ASF; BMA (also suggested alternative where an institutional investor could elect not to require a market-making prospectus); BOA; FSR.

[196] NYCBA.

[197] ABA; CMSA.

[198] ABA.

[199] ABA; ASF; BMA; BOA; JPMorganChase; NYCBA.

[200] NYCBA.

[201] BMA; NYCBA.

[202] ABA; ASF; BMA; JPMorganChase; NYCBA.

these commenters explained, where the issuer has suspended its reporting obligations but the prospectus is accompanied by a copy of at least the most recent distribution report).[203]

- Three commenters requested confirmation of what they believe is understood that market-making registration and prospectus delivery is required only when the broker-dealer is affiliated with both the issuer and the servicer (and not just by affiliation with the issuer alone because issuers/depositors typically do not have access to servicing data).[204] An additional commenter, however, did not agree with requiring market-making requirements based on affiliation with entities other than the issuer (e.g., a servicer).[205]

C. Foreign ABS

- Seven commenters supported the proposed approach with respect to foreign ABS.[206] One commenter also requested confidential review of foreign ABS filings.[207]

- One commenter noted that Item 1100(e) requires a description of the home country legal regime affecting the ABS, while the release also includes language expecting disclosure "clearly articulating the material differences and effects" of the home country regime.[208] The commenter requested clarification that the release language does not expand the scope of Item 1100(e) (e.g., there is no specific requirement for material differences to be discussed). A description of the actual requirements should be enough.

- One commenter requested clarification whether the required disclosure list under Item 1100(e) is a codification of, or an addition to, current practice, in particular as to the phrase "other economic, fiscal, monetary or potential factors."[209] The commenter thought the list too broad and may be interpreted to require predictions of future or potential trends which may prove to be misleading or incorrect.

- One commenter requested an initial exemption or a specified phase-in period for static pool data for foreign ABS because securitization is a relatively recent development in foreign countries and foreign sponsors may not have historically gathered the data.[210] In addition, although sponsors and entities providing credit enhancement (such as financial

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[203] ASF; BMA.

[204] ASF; BMA; JPMorganChase.

[205] NYCBA.

[206] A&O; ABA; ASF; Aus. SF; ESF; Jones Day; MBA.

[207] Jones Day.

[208] A&O.

[209] Aus. SF.

[210] Jones Day.

guarantors) should be required to file US GAAP reconciled financial statements, these requirements should be relaxed for financial information provided by parties not providing credit enhancement and significant obligors. Home country financial statements should be included or referenced so long as they are audited in accordance with such country's GAAP and comply with home country law and regulations.

D. Proposed Exclusion from Exchange Act Rule 15c2-8(b)

- Three commenters supported excluding Form S-3 ABS from the preliminary prospectus delivery requirements of Rule 15c2-8(b) and also recommended extending the exclusion to Form S-1 ABS if investment grade.[211] Another commenter supported availability of the exclusion for foreign ABS.[212] One of the commenters believed the initial policy behind Rule 15c2-8(b) was to address sales abuses arising in connection with IPOs of companies with no reporting history, many of which were of a "highly speculative character."[213] The commenter believed an investment grade rating mitigates this for ABS. Another commenter believed any additional timing and delivery obligations on Form S-1 issuers without evidence of significant market malfunctions adds burdens with no benefit.[214] One of the commenters suggested an alternative of excluding Form S-1 ABS that are not new asset types or new issuers or that are substantially similar to previous transactions because they would not be "new or speculative."[215]

- One commenter noted the proposal does not address application of Rule 15c2-8(b) when no preliminary prospectus is delivered and requested relief from the requirement of a final prospectus in transactions where no preliminary prospectus was circulated and the offering was sold solely on the basis of the final prospectus; provided that a final prospectus is sent or given to a purchaser prior to, or at the same time as, the confirmation is sent.[216]

- One commenter believed that because most investors are institutional and continue to purchase ABS under the no-action letter, it would appear they have sufficient time to consider investment.[217] If they do not, they can refrain from buying. The availability of prior prospectuses by the issuer or for similar issuers and asset types provide general familiarity and ABS informational and computational material provides specifics. The

[211] ABA; ASF; NYCBA.

[212] Aus. SF.

[213] ASF.

[214] NYCBA.

[215] ABA.

[216] ABA.

[217] ABA.

primary purpose of ABS informational and computational material is to substitute for a preliminary prospectus, or to supplement one if prepared.

- Four commenters believed there are problems and inconsistencies with the absence of material information at the time investment decisions are made, especially given the complexity of ABS and the need to properly assess risk.[218] Sometimes investors do not have enough time or information to consider investments. One commenter noted that in most instances issuers fail to provide materials until less than 24 hours before sale and sometimes so late they cannot be reviewed until after the deal closes.[219]

- Three commenters did not support excluding any ABS from Rule 15c2-8(b).[220] The commenters believed purchasers should receive information early enough in the offering process to enable them to make an informed investment decision and public offerings sometimes do not provide enough time (e.g., as little as a few hours). In order for investors to receive the full benefits of the proposed new disclosure requirements, it is critical they receive them before investment decisions.

- Four commenters also recommended requiring delivery (e.g., conditioning shelf access on required delivery (or notification of access)) of ABS informational and computational material (e.g., term sheets) in a reasonable time frame prior to effecting sales (e.g., two business days but not less than one business day or 24 hours).[221] One of the commenters recommending requiring the following in such material:[222]

    - Information in a matrix-style or graphical format about the asset pool, such as weighted average coupon, annual percentage rate, LTV ratio and credit scores;
    - Extent to which the sponsor relies on securitization as a funding source;
    - Size, growth and composition of the servicer's portfolio;
    - Ratings or if not known, expected ratings, of the servicer's portfolio;
    - Any material changes to the servicer's policies and procedures in servicing assets of the same type in the past three years;
    - List of significant investment risks for the particular ABS offering; and
    - Description of the total credit enhancement (qualified as a percentage of the amount of each of the tranches to be credit enhanced) and a summary of the different attributes of the credit enhancement.

  Another commenter requested at a minimum the following:

[218] CFAI; FMR; ICI; MetLife.

[219] CFAI.

[220] CFAI; FMR; ICI.

[221] CFAI; FMR; ICI; MetLife.

[222] ICI.

- Summary of transaction structure, including number of classes, seniority and payment terms;
- Cash flow waterfall under all scenarios, including under trigger events;
- Detailed information regarding the characteristics of the asset pool;
- Material terms of the servicing agreement;
- Information regarding any interest rate swap and the counterparty thereto; and
- Any existing or potential conflict of interest that a transaction party may have relating to the offering.

- One commenter requested requiring loan level data as well as "bucketed" data in ABS informational and computational material in formats that can be analyzed by investors (e.g., Excel or Intex files).[223] The commenter believed the data is available and presenting data only in buckets and running models based on such bucketed data decreases transparency and does not reveal true value and risk. Only in prefunded transactions where information is not available are buckets appropriate.

- One commenter was concerned that the private nature of communications between investors and servicers can create information asymmetry relating to ABS, particularly where the servicer is a private entity and there is no other information source.[224] The commenter was concerned about this selective disclosure and endorsed the practice of some companies that have taken steps to address the problem, such as by creating repositories on their websites of answers given in response to questions they receive.

E. Registration of Underlying Pool Assets

- One commenter requested permitting the necessary disclosure with respect to the ABS and the underlying securities to be combined into one prospectus.[225]

- One commenter objected to requiring that, where the underlying security must be registered, the prospectus cannot disclaim or limit responsibility by the trustee for information regarding the underlying security, as the trustee has no control over it.[226]

- One commenter requested clarifying that the subsequent registration of the underlying securities would not require payment of another registration fee and therefore would not count against the capacity of the shelf on which the underlying securities were registered, which the commenter believed was consistent with staff practice.[227]

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[223] MetLife.

[224] CFAI.

[225] ABA.

[226] Am. Bankers.

[227] ABA.

- With respect to the proposals regarding registration when an asset pool includes a pool asset representing an interest in another pool asset:

    - Three commenters requested clarifying that no additional filing fee is payable for the registration of the underlying financial asset apart from the filing fee for the ABS, which the commenters believed was consistent with staff practice.[228]

    - Three commenters requested that the underlying financial asset not be required to be rated investment grade, which the commenters believed departed from staff practice.[229] The requirement that the ABS is investment grade should be enough.

    - Two commenters believed the underlying financial asset should be exempt from Form S-3 eligibility requirements and any additional registration requirements.[230] The securities would not otherwise be Form S-3 eligible and Form S-1 registration would create an obstacle to opening up lease offerings to Form S-3.

    - One commenter, in reference to footnote 117 that states that any intervening transferors must be named as underwriters, noted that the financial asset (e.g., a SUBI) sometimes is issued to an affiliate that is also a registrant which subsequently transfers it to the issuing entity.[231] The commenter requested clarification regarding the treatment of a transferor that is an affiliate but not itself a registrant. The commenter also requested stating for what purposes the transferor would be considered an underwriter and requested clarity that such a transferor is not required to register as a dealer solely on the basis of the transfer.

- One commenter requested clarification that the presumptive underwriter doctrine is no longer applicable with respect to the requirement that an underlying pool assets may need to be registered, given that no mention is made of it (e.g., if 50% of the registered securities of an issuer are included in an asset pool, it is not clear that those registered securities would be freely resalable under the presumptive underwriter doctrine).[232]

V. Disclosure

A. General Comments

- One commenter believed more rigorous disclosure standards are needed for ABS in order to ensure that investors can make informed investment decisions at the time of initial

[228] ABA; ASF; JPMorganChase.

[229] ASF; Capital One; Citigroup.

[230] ABA; Citigroup.

[231] ABA.

[232] Kutak.

purchases and on an ongoing basis.[233] At the same time, any new regulatory framework must continue to foster innovation in the ABS market.

- One commenter believed consistency, comparability and clarity should guide the disclosure requirements, including the composition of the asset pool and static pool data, so investors can effectively compare the data.[234] Information should be presented using comparable methodology and formats, if feasible, and if unfeasible then issuers should be required to present sufficient information in order to permit an investor to make it comparable. The commenter also was concerned that a lack of sufficient specificity may result in additional boilerplate and urged tailored specific disclosure requirements.

- Eight commenters supported "principles-based" disclosure rules in lieu of detailed asset guides.[235] Two of the commenters believed Regulation AB represents a major step in improving disclosures provided to investors and includes many of the items investors have previously recommended as critical to investors.[236] However, three of the commenters believed that some of the proposed disclosure standards were still too rigid and specific, even when prefaced with "if material" or "to the extent material," and may result in costly disclosure of immaterial information.[237] For example, illustrative lists could be viewed as "presumptively material." One commenter requested clarification of any additional disclosure required beyond current disclosure practices.[238]

- One commenter suggested a distinction in required disclosure for offerings directed to institutional investors as opposed to offerings directed to retail investors (e.g., relaxed disclosure standards and "plain English" requirements for offerings only sold to institutional investors or to investors with a high minimum denomination).[239]

- One commenter suggested considering whether some disclosures could be omitted or reduced if the transaction is guaranteed by a sufficiently well-rated financial guaranty insurer (e.g., static pool data, financial information on derivative counterparties, information regarding representations and warranties and information on ratios, coverage or other tests).[240] Where guaranteed, investors care more about the insurer and less about details of the pool, other parties and ancillary credit support. The commenter further

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[233] ICI.

[234] State Street.

[235] ABA; ASCS; ASF; FMR; FSR; ICI; MBA; MBNA.

[236] FMR (specific examples given); ICI (specific examples given).

[237] ASF; MBA; MBNA.

[238] FSR.

[239] Kutak.

[240] AFGI.

suggested specifying that an issuer may determine, in the context of a transaction guaranteed by such an insurer, that one or more of the disclosure requirements as to the pool assets are not material, and accordingly omit them.

B. Forepart of Registration Statement and Prospectus

- Two commenters thought it difficult, if not impossible at times, to list all classes offered on the cover page when there are multiple classes.[241] One requested permission to include class information in the summary,[242] and the other requested permission to put the information either in the summary or in an immediately preceding separate table.[243]

- One commenter supported Item 1103 regarding transaction summary disclosure.[244]

- One commenter did not think a list of representative risk factors would be necessary or helpful, but thought publication of comment letters and model comments would be.[245]

C. Transaction Parties

1. General Comments

- One commenter particularly applauded efforts to improve disclosure regarding transaction parties, especially servicers.[246]

- Seven commenters requested a rule recognizing that, given the amount of unaffiliated third party information that may be required, an issuer may reasonably rely on any information provided by unaffiliated parties in connection with preparing a prospectus or filing. [247]

- Seven commenters requested modifying the Commission's opinion regarding unenforceability of indemnification of Securities Act liabilities to exclude ABS for information provided by an unaffiliated third party.[248]

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[241] ABA; ASF.

[242] ABA.

[243] ASF.

[244] ICI.

[245] ABA.

[246] FMR.

[247] ABA; ASF; BMA; Capital One; FSR; MBA; MBNA.

[248] ABA; ASF; BMA; Capital One; JPMorganChase; NYCBA; Wells.

- One commenter requested providing that the party responsible for signing Forms 10-D and 10-K is held to an actual knowledge standard with respect to information related to an unaffiliated third-party.[249] The commenter believed this is consistent with proposed instructions to Items 1.03 and 6.03 of Form 8-K for ABS and would avoid unfair liability for information outside the scope of knowledge of the registrant.

- One commenter urged a pragmatic solution for responsibility for third party information.[250] If market access is denied because an issuer, despite reasonable efforts, cannot obtain data from an unaffiliated party, this could be draconian, inefficient and give the third party enormous leverage. To place full responsibility on issuers will reduce benefits of ABS. The commenter urged a balance, believing neither full liability for third-party reporting nor a complete safe harbor seems appropriate.

- One commenter believed the rules should list and describe each participant's typical functions in an ABS transaction (e.g., what a servicer does, what a trustee does, etc.), in particular so that the trustee role is clearly defined.[251] Parties should be able to change the scope of responsibilities beyond these roles, so long as it is disclosed. The commenter proposed developing standardized disclosure language for the typical roles of a trustee (and indicated it would be providing suggested language) and suggested that changes to the standard text could be noted in bold text or other obvious manner to highlight differences from the "standard" transaction. This would simplify alerting investors and regulators of changes from the norm and protect trustees from liability.

- One commenter did not recommend disclosure regarding personnel or management of transaction parties.[252]

2. Financial Statements of Transaction Parties

- Ten commenters objected to requiring financial statements for parties such as the issuing entity arguing they are unnecessary, misleading and unrelated to the pool assets to which the investors rely solely for payment.[253] Such information also does not provide assurance about the ability of a party to meet its obligations. The staff has recognized the lack of financial statements for registration statements and numerous no-action letters have recognized the same for Exchange Act reporting. For ongoing reporting, an assessment and attestation approach (properly structured) is more useful than audited financial statements. Whatever marginal benefit cash-basis financial statements might be

[249] NYCBA.

[250] Foley.

[251] Am. Bankers (examples of trustee role given).

[252] ABA.

[253] A&O; ABA; AICPA; ASF; E&Y; JPMorganChase; KPMG; NYCBA; PWC; Wells.

is outweighed by the cost of the change. The fact that the market as it developed has not required financial statements confirms this.

- Three commenters supported not requiring direct auditor attestation for financial data presented for the ABS issuer.[254] Instead, the commenters believed ABS issuers should be encouraged to experiment with alternative forms of financial reporting beyond the minimum requirements. An ABS issuer should be allowed to file GAAP-basis financial statements, which could be full or partial statements, and which could be either audited or unaudited. Further, an ABS issuer should be allowed to file an accountant's attestation opinion covering all or part of the financial data filed in the Form 10-K in response to Item 1119. Consideration should be given to allowing such an examination opinion to be filed as an alternative to an attestation opinion on compliance with servicing criteria.

3. Sponsor

- Three commenters expressed concern with the "sponsor" definition," such as:[255]

  - Sometimes, as many as eight or more entities may transfer assets to an unaffiliated depositor, and none may play a role in organizing or initiating the transaction. One commenter thought in such a case it may be appropriate to treat each loan seller as a sponsor solely for disclosure requirements but not for Form S-3 eligibility requirements.[256] Several other commenters, however, did not believe multiple sponsors would be practical for the amount of disclosure that would be required, particularly for static pool data.

  - Sometimes, a loan seller will sell to a loan purchaser and the loan purchaser will want to securitize through the loan seller's registration statement. In this instance, it would appear the loan seller should be the sponsor.

  - Sometimes, two or more entities affiliated with a depositor may transfer assets to a depositor, and one commenter thought the definition contemplates only one sponsor.[257]

  - Sometimes the transfer may be three steps: originator to intermediate affiliated entity and then to depositor, and it is unclear which entity is the sponsor (though one commenter thought it should be the originator).[258]

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[254] AICPA; E&Y; KPMG.

[255] ABA; ASF (see also note 165 and accompanying text); First Marblehead.

[256] ABA.

[257] ASF.

[258] ASF.

One of the commenters thought the definition was generally workable, but recommended considering flexibility as follows to address situations like those outlined above.[259] For disclosure purposes, if the static pool data and other required information pertaining to an entity, other than the entity defined as the sponsor, would clearly be more meaningful to investors, and if static pool data and other information of that entity can be obtained, then there should be an ability to provide the static pool data and other information of that other entity in place of that for the entity defined as the sponsor.

Another commenter suggested an alternate definition as any person or affiliated group who organizes and initiates an ABS transaction by selling or transferring, either directly or indirectly, to an issuing entity more than 50% of the pool assets, with a proviso that if based on facts and circumstances the depositor determines someone else should be the sponsor, such depositor, by mutual agreement with such entity or group, may designate such entity or group as the sponsor (so long as that entity does, in fact, organize and initiate the ABS transaction and is identified as a sponsor in the prospectus, accompanied by the reasons for the designation).[260] The commenter also suggested an instruction that the sponsor would ordinarily be the depositor unless, immediately prior to the transfer of the assets to the issuing entity, an entity or affiliated group transferred to the depositor, either directly or indirectly, more than 50% of the pool assets, in which case the sponsor would ordinarily be such entity or group. The instruction would also state that ultimately, the sponsor should be the entity or group that organizes and initiates the transaction.

One commenter requested an alternative that if two or more entities participate solely as sellers of assets for cash, without receiving any subordinate or residual interests in the transaction and without any recourse for the securities issuers, they would not be sponsors (although they may be deemed originators).[261]

- One commenter believed the definition is somewhat unclear for UK RMBS master trusts because the issuing entity does not hold the pool assets. The commenter suggested clarifying the originator as the sponsor in these structures.[262]

- Two commenters supported Item 1104(c) regarding disclosure of the sponsor's securitization program.[263] One of the commenters also recommended disclosure of the sponsor's marketing channels to originate assets to better evaluate credit quality (citing an example that for a given FICO score, default is 10 times higher for Internet than mail originations).[264] Another of the commenters believed disclosure should be expanded to

[259] ABA.

[260] ASF.

[261] First Marblehead.

[262] A&O.

[263] ICI; State Street.

[264] State Street.

include the extent the sponsor relies on securitization as a funding source as it would facilitate evaluation of asset quality and underwriting and documentation standards.[265]

- Two commenters believed the scope of sponsor disclosure in Item 1104(c) is too broad.[266] The commenters believed that, notwithstanding the condition of providing information "to the extent material," the item would be viewed as "presumptively material" and encourage excessive and potential distracting information beyond current disclosure practices and a principles-based standard of materiality, thereby diverting investor attention from information about the ABS being issued.

- Two commenters recommended adding the qualifier "to the extent material" to the second sentence of Item 1104(c).[267]

- Two commenters believed any sponsor disclosure should be limited to public securitization programs as disclosure of private programs is inappropriate, confidential and not material to public investors.[268]

- One commenter recommended excluding repackagings from Item 1104(c) as irrelevant.[269]

4. Depositor

- One commenter believed there are instances when information about the depositor's securitization program differs from the sponsor's, but believed that in such situations, information regarding the depositor's program should only be required if material to an investor's understanding of the ABS.[270]

- One commenter believed the depositor definition in UK RMBS master trusts is somewhat unclear because the issuing entity does not hold the pool assets. The commenter suggested clarifying that the depositor is the "funding entity," which owns the main economic interest in the trust property, or the "mortgages trustee," which owns the trust property (e.g., the underlying mortgages), in these structures.[271]

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[265] ICI.

[266] AFSA; Capital One.

[267] AFSA; Capital One.

[268] AFSA; Capital One.

[269] BMA.

[270] ABA.

[271] A&O.

5. Issuing Entity and Transfer of Asset Pool

- Seven commenters recommended eliminating Item 1106(i) regarding the amount paid for pool assets as confidential, irrelevant and sometimes not a meaningful concept.[272] One commenter indicated the amount paid in auto loan transactions is the aggregate principal amount of the assets, which is already disclosed.[273] Another commenter particularly urged deleting the requirement for repackagings because the principal assets will typically be publicly traded securities with readily available quotes.[274]

- One commenter believed disclosure required by Item 1106(k) regarding provisions or arrangements relating to perfection, bankruptcy remoteness, true sale and non-consolidation issues would not be appropriate or helpful.[275] Because these issues are complex, describing the process would be cumbersome and unnecessary. Industry and rating agency standards are sufficient.

- Two commenters would object to filing opinions of counsel regarding the matters in Item 1106(k) as they are complex, reasoned analyses and there is concern about potential Section 11 liability for their contents.[276] Filing them also might convey to investors the misimpression that the opinions are more definitive than they actually are.

- One commenter believed Regulation AB should explicitly require filing of the pooling and servicing agreement and the trust indenture, noting that certain issuers do not do so currently and instead require investors to ask for a copy.[277] Amendments to these documents should be required exhibits to Form 8-K.

6. Servicers

a. Definitions and Thresholds

- Eight commenters believed the "servicer" definition should be revised so as not to include administrators (those who calculate amounts and make distributions but do not handle collections on pool assets).[278] Six commenters also requested further revisions to ensure that the trustee is not included.[279] One also believed it should not include

[272] ABA; AHFC; ASF; BMA; JPMorganChase; MBA; TMCC.

[273] AHFC.

[274] BMA.

[275] ABA.

[276] ABA; Citigroup.

[277] State Street.

[278] ABA; Am. Bankers; ASF; JPMorganChase; MBA; Sallie Mae; US Bank; Wells.

[279] ABA; Am. Bankers; CMSA; JPMorganChase; MBA; Wells.

resecuritization trustees.[280] In each case, such parties are passive and limited in their role compared to servicers/master servicers who have the most direct effect on performance. The detailed background and other information in Item 1107 is excessive and burdensome, and five commenters suggested Item 1108 disclosure as an alternative.[281] One recognized it may be appropriate to require a compliance statement from such parties similar to Item 1121, and believed any such statement should be tailored and limited to its own activities/duties under its transaction agreement.[282]

- One commenter requested that the rule clearly state that a trustee can contract to provide additional services in its role as trustee (e.g., additional administrative duties) without being considered a servicer so as to not expose the trustee to liability as a servicer.[283]

- Three commenters recommended a separate definition of "master servicer."[284] Two of the commenters believed reduced information should be required for master servicers that perform only a monitoring or oversight function over other servicers and suggested Item 1108 as an alternative.[285] Alternatively, one commenter requested clarifying those portions of Item 1107 that would be applicable to a master servicer.[286]

- One commenter believed there should be disclosure of underlying servicers even if there is a master servicer, particularly where the master servicer just has an oversight role.[287]

- Six commenters believed the detailed disclosure required by Item 1107 should apply only to those servicers and master servicers contractually responsible to the issuing entity for the performance of servicing activities.[288] Subservicers and special servicers used by these servicers and master servicers should be excluded because the responsible servicer or master servicer institutes policies to monitor their performance. Investors are primarily concerned only with the entity to which the trust has ultimate recourse and subservicers and special servicers are too remote.

- Seven commenters, based in part on the reasons above, suggested the following alternate

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[280] US Bank.

[281] ABA; CMSA; JPMorganChase; US Bank; Wells.

[282] US Bank.

[283] Am. Bankers.

[284] ABA; ASF; Wells.

[285] ASF; Wells.

[286] Wells (examples given of potentially inapplicable items).

[287] Wells.

[288] ABA; ASF; BMA; CMSA; Dewey; Sallie Mae.

definitions (brackets represent alternative formulations):[289]

"Servicer" means any person [that is contractually] responsible for the management or collection of any of the receivables or other financial assets underlying the ABS [, provided that no other servicer or master servicer is contractually liable to the issuing entity for such person's activities as to those assets.] [The term "servicer" [also] includes any person responsible for making allocations or distributions to holders of the ABS that also performs servicing functions.]

"Master Servicer" means any person that does not itself perform [primary] servicing functions but as to the issuing entity is either: 1) contractually liable for the activities of servicers or subservicers in servicing the pool assets, or 2) contractually responsible for monitoring the activities of the servicers or subservicers and replacing them if needed. [The term "master servicer" also includes any person [otherwise meeting the foregoing tests but that is also responsible for direct servicing of a portion of a pool or] responsible for making [and/or calculating the amount of] allocations or distributions to holders of the ABS [and] that also performs master servicing functions.]

"Administrator" means any person responsible for making [and/or calculating the amount of] [allocations or] distributions to holders of the asset-backed securities, but that does not also perform the functions of servicer[, master servicer or trustee]. [The term administrator does not include a trustee, paying agent or other person that makes allocations or distributions to holders of the ABS if such person receives such allocations or distributions from a servicer (or receives such distributions on pool assets that are securities) and such person does not also perform the functions of a servicer.] [The administrator also may be responsible for preparing and fling required securities law and tax reports and serving as securities registrar.]

- One commenter would define servicer as "any person responsible, pursuant to the transaction documents, for the management, collection or allocation of pool assets received from the obligor."[290] The commenter also requested a clear distinction between CMBS servicer roles by using the word "servicers" instead of "servicer." This commenter also suggested definitions for the following: primary servicer, master servicer, affiliated servicer, unaffiliated servicer and special servicer.

[289] ABA; Am. Bankers; ASF (the commenter also suggested an additional sentence that would read "The term servicer does not include a trustee, paying agent, administrator or other person for the issuing entity or the ABS that makes allocations or distributions to holders of the ABS if such person received such allocations or distributions from a servicer (or receives such distributions on pool assets that are securities) and such person does not otherwise perform the functions of a servicer"; CMSA; JPMorganChase; US Bank; Wells.

[290] MBA.

- One commenter believed the detailed disclosure required by Item 1107 should only apply to entities not contractually liable to the issuer if transfer of the functions by the specific entity is reasonably likely to materially adversely affect the pool assets or the ABS.[291] For example, the commenter outsources administrative functions, such as vehicle title tracking. These services are easily transferable to others. The proposed requirement may prevent efficient outsourcing of administrative functions for fear of disclosure.

- One commenter objected to referring to "any other servicer" on which the ABS is materially dependent because it is too broad and could lead to disclosure obligations from parties not directly affiliated with the specific pool assets.[292] For example, in CMBS the loan may be split up and sold into multiple transactions with each piece interconnected by inter-party documents. However, the parties designated to service the different pieces can be separate and unaffiliated and may have no leverage to compel information.

- One commenter requested clarifying whether disclosure for special servicers is contingent on any concentration threshold.[293] The commenter also recommended excluding special servicers that are essentially just "waiting" for the specific situation to arise that they have been designated to remedy. Alternatively, the commenter suggested limiting disclosure to information specifically related to the function the special servicer is designated to handle. Additionally, the commenter suggested eliminating disclosure if the special servicer has not contracted to perform its servicing obligations with respect to 20% or more of the pool assets.

- One commenter was confused over application to outsource companies, vendors and other contractors.[294] The term "subservicer" has different meanings. A "subservicer" in RMBS often refers to a servicer under the primary servicer, while a "subservicer" in CMBS often refers to the primary servicer under the master servicer. The commenter did not believe subservicing contractors, vendors and outsource companies (e.g., parties not named in the transaction documents) should be included. The commenter requested not using the term "subservicer" and clarifying that outsource companies and vendors need not be disclosed (suggested language given).

- One commenter requested clarifying that none of a clearing agency (e.g., DTC), its nominee, or, in such capacity, any direct or indirect participant in such clearing agency, will be considered a servicer or administrator.[295]

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[291] TMCC.

[292] MBA.

[293] Dewey.

[294] MBA.

[295] ASF.

- One commenter supported a 10% disclosure threshold for unaffiliated servicers.[296] An additional commenter supported the threshold if the level of servicing disclosure is reduced to what is in the pooling and servicing agreement.[297]

- Seven commenters recommended increasing the unaffiliated servicer disclosure threshold.[298] One, analogizing to significant obligors, recommended 20%[299] Four others recommended 25%.[300] One recommended 30%.[301] One commenter argued that using the same thresholds as significant obligors and credit enhancers is inappropriate because those parties have direct financial obligations to the ABS while servicers are only the channel and not the source of payments.[302] Plus, ABS transactions include safeguards to detect substandard servicing, such as the right to replace for nonperformance. If a master servicer or other servicer has ultimate authority, information on other servicers is less relevant. Setting a threshold too low means gathering information about multiple parties.

  Five commenters suggested, alternatively, limited disclosure for servicers greater than 10% but less than the higher percentage threshold.[303] Various suggestions included: name, form of organization, brief description of business (including length of time servicing generally and of the type securitized) and, where available, NRSRO servicing ratings or a statement there are none.

- One commenter believed it is inappropriate to treat unaffiliated servicers different from affiliated servicers and believed disclosure thresholds should apply for both.[304] If the pool concentration is not material enough to warrant disclosure for a non-affiliated servicer, the same should be true for an affiliated one.

- One commenter requested that the servicer disclosure threshold be recalculated each year to allow servicers to adjust their compliance requirements.[305]

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[296] MetLife.

[297] MBA.

[298] ABA; ASF; BMA; Dewey; JPMorganChase; MBA; NYCBA.

[299] NYCBA.

[300] ABA (however, on page 35 of its letter the commenter references 30%); ASF; BMA; Dewey.

[301] MBA.

[302] ASF.

[303] ABA; ASF; JPMorganChase; MBA; NYCBA.

[304] ABA.

[305] MBA (suggested language given).

- One commenter objected to any information for unaffiliated servicers as the sponsor generally has no leverage to obtain it.[306] The information also would be suspect as it is not subject to verification by the sponsor. The costs would discourage public offerings.

b. Required Disclosure

- One commenter believed the proposed disclosure would elicit significant information regarding the function, experience and servicing practices of servicers and backup servicers, which, in light of their importance, would greatly improve the quality of disclosure.[307]

- One commenter believed Item 1107 should set forth specific disclosures that will be required about servicers.[308] In particular, the commenter recommended disclosure of a historical breakdown of loss, delinquency and prepayment rates by year of origination experienced by the servicer with respect to the existing pool or on a comparable pool of assets. Such "vintage analysis" is critical to enable investors to understand changes in underwriting and servicing standards (and therefore loss and prepayment rates) over time. The commenter also supported disclosure of the size, growth and composition of the servicer's portfolio; servicer ratings or, if not known, expected ratings; and material changes to the servicer's policies and procedures in servicing assets of the same type in the past three years.

- Five commenters believed the proposed disclosure for servicers was too extensive.[309] Two commenters thought prefacing items with "if material" is not helpful because issuers may fear it "presumptively material" and suggested being more principles-based to avoid due diligence expenses and to be consistent with what is currently provided.[310] One of these commenters foresaw servicers attaching their policies and procedures manuals, which are proprietary, can constitute hundreds of pages and would be unwieldy to update.[311] It could also limit the ability to sell servicing rights or effect servicing changes because the prospectus disclosure would effectively lock servicing in place. This commenter suggested limiting disclosure to a summary of key provisions of the pooling and servicing agreement. Another commenter suggested deleting or modifying the following items,[312] several of which were also cited by the other commenters:

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[306] Kutak.

[307] FMR.

[308] ICI.

[309] ABA; ASF; Auto Group; JPMorganChase; MBA.

[310] ASF; MBA.

[311] MBA.

[312] ABA.

- Deleting disclosure about computer systems and back-up systems as not relevant and burdensome.

- Deleting disclosure of material changes to servicer's policies or procedures in servicing the asset type as it may lead to extensive, detailed descriptions of policies and procedures that are difficult to materially assess and change often. Three additional commenters also requested this deletion.[313]

- Clarify disclosure of financial condition where it could have a material impact on the asset pool and the ABS. At a minimum, provide a materiality qualifier. Two additional commenters raised this concern,[314] and two commenters asked for examples of financial conditions and disclosure that could be material.[315]

- Delete material statistical information about prior servicer advances because it is not material. Two additional commenters also requested deletion.[316]

- One commenter believed only general information about the servicer's experience should be required if a servicer has received a rating agency's highest rating.[317]

- One commenter recommended eliminating information on prior securitizations that have defaulted or had an early amortization or performance triggering event due to servicing, arguing that it may not accurately portray the servicer's ability to service the current pool if the prior pool consisted of different assets.[318] Alternatively, clarify that such information is applicable only if the prior securitization involved a similar asset type.

- Two commenters supported disclosure of changes to loan servicing, such as changes to underwriting and collection strategies, that could materially affect pool performance.[319]

- One commenter requested expressly limiting the "detailed discussion" of servicing procedures required by proposed Item 1107(a)(2) to material details.[320]

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[313] Auto Group (delete, or at the very least, limit to changes that materially and adversely impact investors); JPMorganChase; MBA.

[314] MBA (believed audited financial statements would be excessive and suggested that servicers be permitted to use their parent's financial statements or supply a statement of their compliance with specified capital requirements, such as the capital requirements of Fannie Mae/Freddie Mac); Wells.

[315] ABA; Wells.

[316] BMA; JPMorganChase.

[317] JPMorganChase.

[318] Dewey.

[319] ICI; MBNA.

[320] CMSA.

- Two commenters believed the discussion of policies and procedures in Item 1107(a)(2) is too broad and would require disclosure of competitive information.[321] One of the commenters believed an investor view of servicer procedures is not of material value compared with the possible detriment and chilling effect to competition.[322] The commenters suggested limiting only a description of the general character of the servicer's business, how long the servicer has been servicing the asset, and information regarding size, composition and growth of the servicer's portfolio (suggested language given).

- One commenter requested clarifying the phrase "servicer's portfolio" and suggested that it be defined by asset type.[323]

- One commenter objected to filing servicing agreements as noted in Item 1107(b)(1).[324] These agreements are typically not completed until after the prospectus has been finalized and printed. Moreover, they often contain confidential pricing information and are not currently considered public documents.

- One commenter requested clarifying with respect to Item 1107(b)(7) that although *disclosure* of whether asset segregation is required, segregation *itself* is not required.[325]

- One commenter requested clarification or examples of the type of information intended by Item 1107(b)(8) regarding any material minimum servicing requirements not in the servicing criteria or, alternatively, removing this item.[326]

- Four commenters supported disclosure of rating agency servicer rankings, if any.[327] Three requested revisions to Rule 436 to exclude servicer rankings from consent requirements.[328]

- One commenter believed back-up servicer disclosure should not be applicable to the trustee when the trustee is back-up servicer.[329]

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[321] JPMorganChase; MBA.

[322] MBA.

[323] MBA.

[324] MBA.

[325] ASF.

[326] MBA.

[327] ABA; ICI; MBA; Wells.

[328] ABA; ASF; BMA.

[329] JPMorganChase.

- One commenter believed the final rule should make clear that the trustee does not assume the responsibility of a servicer (or a "responsible party") because the trustee may have the responsibility to be or provide a backup servicer.[330] Moreover, disclosure of backup servicing should focus more on the procedural arrangements under the transaction documents rather than on disclosure of the backup servicer or potential successor servicer (suggestions given, such as the triggers for backup servicing, notice requirements and requirements for backup).

7. Trustees

- Three commenters supported disclosure on trustee duties and responsibilities.[331]

- One commenter requested that as part of the disclosure requirement that trustees be held accountable for their duties, including accurately verifying monthly reports, cash transfers and distributions.[332]

- Six commenters[333] suggested a definition of "trustee" to be the person with obligations (four further qualified as "fiduciary obligations")[334] to protect the interests of ABS holders under the primary operative document establishing the rights of those holders, with an additional sentence clarifying that the trustee may or may not be responsible for making allocations or distributions to ABS holders.

- Three commenters urged a distinction between indenture trustees, which have fiduciary obligations to ABS holders, and "owner trustees" (such as under a Delaware statutory trust), which do not and typically have only ministerial responsibilities.[335] One of the commenters supported Item 1108 for trustees with fiduciary obligations, but suggested limited disclosure for other trustees of basic identifying information and the limited nature of their roles and responsibilities.[336]

- One additional commenter thought it was unclear which entities should be deemed "trustees" for UK RMBS master trusts, which may have multiple

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[330] Am. Bankers.

[331] ABA; Am. Bankers; MetLife.

[332] MetLife.

[333] ABA; Am. Bankers; ASF; CMSA; US Bank; Wells.

[334] ABA; ASF; US Bank; Wells.

[335] ABA; ASF; CMSA.

[336] ASF.

intermediate entities.[337] The commenter believed the roles of the trustees, and therefore the appropriate disclosure, varies and the rules should reflect this.

8. Originators

- Four commenters suggested a definition for "originator" as, with respect to any receivables or other financial assets underlying the ABS, the entity whose underwriting or credit granting criteria were applied in making the decision to approve the asset prior to funding, and that agreed to fund or purchase the asset.[338] One would also add a sentence that the originator does not include an entity that funds financial assets in accordance with underwriting criteria established by another person.[339]

- One commenter supported the proposed 10% disclosure threshold.[340]

- In addition to the 10% disclosure threshold, one commenter recommended requiring disclosure only if the originator actually is responsible to the deal for representations it makes regarding the related assets.[341] Otherwise, the originator has no connection to the deal and if the sponsor "stands behind the deal" through representations, that should be enough.

- Two commenters recommended increasing the disclosure threshold from 10% to 25%.[342] One of the commenters argued that using the same thresholds as significant obligors and enhancers is inappropriate because those parties have direct financial obligations to the ABS while originators do not and may not have a continuing role.[343] Alternatively, the commenters suggested limited disclosure for 10%-25% originators of just name and length of time engaged in originating assets of the type securitized.

- Two commenters believed that if pool assets are re-underwritten by the sponsor at the time of acquisition, then disclosure of the originator's and the originator's underwriting criteria should not be material, provided the re-underwriting criteria is disclosed.[344]

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[337] A&O.

[338] ABA; ASF; MBA; US Bank.

[339] ABA.

[340] MetLife.

[341] Dewey.

[342] ABA(however, on page 35 of its letter the commenter references 30%); ASF.

[343] ASF.

[344] ABA; Sallie Mae.

- One commenter recommended excluding repackagings from Item 1109 as irrelevant.[345]

- One commenter believed static pool data should not be required for originators as it would be burdensome and not as relevant as the sponsor's data.[346]

- One commenter objected to any information for unaffiliated originators as the sponsor generally has no leverage to obtain it.[347] The information also would be suspect as it is not subject to verification by the sponsor. The costs would discourage public offerings.

- One commenter believed the materiality of originator information may vary significantly depending on the nature and structure of its program, and the proposed disclosure Item is unnecessary as the sponsor will cause all material disclosures to be included.[348]

- Two commenters believed requiring disclosure about originators of FFELP student loans would be impracticable and largely immaterial.[349] The Department of Education sets the underwriting criteria for all FFELP loans. Loans in an asset pool may be originated by many different institutions. Disclosure on originators would be unnecessary because the origination criteria is the same and all FFELP loans are guaranteed.

D. Static Pool Data

- Four commenters supported disclosure of static pool data.[350] Two additional commenters, acknowledging that static pool data may be material to investors and should be disclosed in some circumstances, noted that including such data will increase the amount of data disclosed to investors.[351] One commenter who supported disclosure believed that although investors do not get this information today, it is an invaluable source of information for investors and is readily available, easily presentable and already given to rating agencies.[352] The commenter expressed specific support for data regarding both the sponsor's portfolio and for prior securitized pools. The commenter did request guidelines on how the information should be reported to allow for an accurate comparison between sponsors. One commenter believed disclosure for the sponsor's

[345] BMA.

[346] ABA.

[347] Kutak.

[348] First Marblehead.

[349] Kutak; Sallie Mae.

[350] FMR; ICI; MetLife; State Street.

[351] AFSA; Capital One.

[352] MetLife.

portfolio, prior pools and the current pool, if seasoned, should be required.[353] Another commenter believed issuer concerns about over-disclosure because of uncertainty about the materiality threshold would be mitigated if issuers included a reasonable description of the methodology used in determining whether static pool data was material (e.g., based on a measure of statistical significance).[354] Such disclosure also would facilitate comparability.

- One commenter noted that investors believed it would rarely be the case that static pool data outlined in the commenter's letter would not be material.[355]

- Eight commenters expressed concern as to whether static pool data was material because prevailing market practice has been not to disclose it.[356] The commenters generally believed the requirements as proposed would be burdensome and create an environment of legal uncertainty as to whether all material information has been disclosed. One commenter thought it was an "unnecessary novelty"[357] and another thought the data may confuse investors.[358] One commenter believed sponsors have competitive concerns about disclosing the data and not all have the systems in place to capture it.[359] Two commenters explicitly recommended deleting the requirement.[360] If investors want the information, eventually it will emerge as a standard. Issuers have an obligation to disclose all material facts and should be allowed to determine the best way to provide material information. Other commenters suggested alternatives (discussed below). One of the commenters, while noting that static pool can be a useful analytic, believed it is insufficient to simply require "material" information without guidance since issuers have previously determined it is not "material."[361] One of the commenters believed any disclosure standard should be based on "materiality," but also believed more specific guidance is warranted given the absence of any existing market practice.[362]

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[353] FMR.

[354] State Street.

[355] ASF.

[356] A&O; ABA; ASF; Auto Group; Citigroup; JPMorganChase; MBA; UBS.

[357] A&O.

[358] MBA.

[359] A&O.

[360] A&O; MBA.

[361] Auto Group.

[362] ASF.

- One commenter agreed there is a need for minimum disclosures of static pool data, but requested more guidance and flexibility on the scope of these items.[363] Two other commenters requested more clarity of the types of static pool data required.[364]

- Five commenters believed that for most asset types (particularly for non-revolving amortizing pools), static pool data relating to previously securitized pools is more likely reasonably comparable than would be vintage static pool data of a sponsor's entire portfolio.[365] For example, the overall portfolio is not "static" in the sense that it changes over time, the overall portfolio could include assets not eligible for securitization making the data less comparable than data based on pools that were securitized, and the overall portfolio may include "servicing released" assets such that the sponsor is no longer tracking data on those assets. In addition, static pool data about all prior pools securitized in a given year, as opposed to static pool data about the vintage for that fiscal year, is more readily available and allows variations in performance as between the different securitized pools to become apparent. This is particularly relevant for sponsors that are aggregators from a variety of originators. If data were shown for prior securitized pools, with disclosure showing relevant parameters for each pool, the effect of variances in those parameters would be more apparent than a conglomeration of vintage data.

- Based on the above, two commenters recommended static pool data based on reasonably comparable prior securitized pools, if available, for the prior three years.[366]

- Two commenters supported a hierarchical approach, as follows:[367]

    - First, if the sponsor had at least 3 full fiscal years of experience in securitizing pools of the same asset type, the required static pool data could be limited to prior securitized pools for the three-fiscal-year (plus stub) period.

    - Second, if the sponsor did not have at least 3 full fiscal years of experience in securitizing pools of the same asset type, the required data would include a combination of vintage and (if applicable) prior securitized pool data for the three-fiscal-year (plus stub) period.

    - Third, if the sponsor did not have at least 3 full fiscal years in originating or purchasing loans of the same asset type, the required static pool data would

[363] FSR.

[364] CGMI; Kutak.

[365] ABA; Auto Group; BMA; JPMorganChase; TMCC.

[366] BMA; TMCC.

[367] ABA; JPMorganChase. An additional commenter (Auto Group), while not suggesting a hierarchical approach, also noted that circumstances might arise in which it would be appropriate to provide vintage pool data rather than prior pool data (e.g., a pool to be securitized that varies so much from prior pools that data about the prior pools would be misleading but a vintage pool could be cut that would provide a meaningful comparison).

include a combination of vintage and (if applicable) prior securitized pool data for whatever period such data were available, plus additional disclosure, as warranted, relating to the sponsor's lack of experience.

These commenters also believed there should be flexibility regarding certain asset types and structures. For example, the above is primarily geared toward fixed pools of fungible assets. A different approach may be preferable for other assets or structures. For example, static pool data on neither prior pools or vintages may be appropriate if the pool being securitized has a revolving period so that new assets are continually being transferred and therefore not static (e.g., auto loan or credit card master trusts). For such asset types, disclosure about the overall portfolio may be more appropriate.

- Another commenter supported a hierarchical approach.[368] Static pool data (or a variation thereon) for a single data group (prior pools or entire portfolio) should be sufficient, with the appropriate data group for any given transaction dependent on two principal variables: (1) whether the pool is an amortizing asset pool or a master trust revolving asset pool; and (2) in the case of amortizing pools, the seasoning of the sponsor. A "seasoned sponsor" would be a sponsor with (a) at least 3 full fiscal years of experience in securitizing assets of the same type; or (b) at least one full fiscal year of experience in securitizing assets of the same type where it has completed at least 3 registered transactions supported by the same or reasonably comparable pools.

  For amortizing pools:

  - For seasoned sponsors, information would be disclosed regarding delinquency and cumulative loss data, and cumulative prepayments, if applicable, for reasonably comparable prior securitized pools (list of variables by asset class provided). Issuers also would include selected information concerning the prior pool characteristics (list of data elements by asset class provided).

  - For unseasoned sponsors, to the extent material and available, information would be disclosed regarding delinquency and cumulative loss data by vintage origination years in periodic increments for portfolio originations and purchases. Issuers also would include selected information, if available, concerning characteristics of the vintages or disclose why the information is unavailable.

  For master trust revolving pools, sponsor members of the commenter believed static pool data would rarely be relevant or available and suggested an alternative format for presentation of static pool data for delinquency and loss experience. The sponsors believed many of the reasons for not providing vintage information also apply to a master trust.[369] The sponsors did not believe static pool is always used in the ratings process, although investors indicated this does not limit potential usefulness of the data. The sponsors proposed delinquency and loss disclosure for the master asset pool itself, based

[368] ASF.

[369] See also text accompanying footnote 378 for additional reasons given.

on the age of the accounts or other assets of the pool. Some investors, however, saw this as only the beginning and would like more information (e.g., also presenting payment rate and yield data in increments based on account age). The commenter noted it is continuing to reach consensus and was interested in meeting with the staff.

- One commenter recommended an opposite approach that permits seasoned sponsors to provide data for the sponsor's total securitized portfolio in lieu of data about prior pools, believing this could be more reliable than data on selected prior pools.[370]

- One commenter supported static pool data for the current pool and that it should be presented separately according to relevant factors, however the commenter did not support disclosure for prior securitized pools because they may not be comparable.[371] Extra disclosure would be needed to distinguish the prior pools from the current pool.

- One commenter believed static pool information for the pool being offered should only be required if material.[372] The commenter believed in most instances it will not be. If the pool is unseasoned, performance to date will not be indicative of future performance. Instead of static pool data, the prospectus should disclose the delinquency criteria applicable to the selection of the pool assets and delinquency information for those assets. Even for pools of seasoned loans, static pool data might be misleading of future performance given that the pool by definition only represents loans still outstanding and satisfy the selection criteria for the pool.

- Twelve commenters were concerned that Items 1104(e) and 1110(c) create an expectation that static pool data is always required.[373] The commenters generally requested clarification that static pool is not material in all cases, is not presumptively material, and determinations should be left to the issuer taking into account the assets and features of its program. Without such clarification and guidance with respect to the standard of materiality for static pool data, the market may presume such disclosure is material and encourage excessive, immaterial and costly burdens on issuers. One of the commenters suggested a "principles-based" approach.[374] However, another of the commenters thought a "principles-based" approach will create uncertainty as to the factors to use in presenting the data.[375] One commenter suggested that static pool should not be required for each and every securitized pool, but only for a selection of pools

[370] Citigroup.

[371] First Marblehead.

[372] ABA.

[373] A&O; AFSA; ASF; Auto Group; BMA; Capital One; CGMI; Citigroup; First Marblehead; JPMorganChase; MBNA (suggested language given); NYCBA.

[374] MBNA.

[375] NYCBA.

deemed by the sponsor to be representative.[376] Another commenter believed the inclusion of static pool data should be determined by the sponsor taking into account all relevant factors and should not be required.[377]

Examples provided as to why the data may not be material included:

- Few registrants include the data today, which is indication that registrants do not consider it material and current disclosure is sufficient.

- Information about other pools is "apples and oranges" and proper disclosure will be needed of why the information is not indicative of future performance.

- Static pool data for some asset types may not be meaningful, such as in CMBS where individual loans may be unique and non-fungible.

- Unless there are negative trends with respect to a sponsor's generation of assets of the type being securitized, static pool data will reveal little not already conveyed through current disclosure. Disclosure of such trends would be more relevant.

- For large, well-seasoned master trusts, the relevance of static pool data from prior securitizations is limited. Because prior data is effectively contained in the data on the seasoned pool, any long-term trends should already be apparent. When accounts are continually added or removed, the pool will be comprised of accounts of various ages and to show performance by each addition would show performance based arbitrarily on the issuer's decision to add to the pool. In addition, if a master trust does not contain a concentration of unseasoned accounts, underlying credit losses are not likely to be materially understated such that static pool data will be revealing. One commenter particularly recommended carving out master trusts from the requirement.[378]

- Static pool data is retrospective and may not reflect macro-economic conditions, current servicer activities or the current quality of the portfolio.

- To the extent static pool data is material and disclosed for the offered pool pursuant to Item 1110(c), in most instances the static pool data for the sponsor described in Item 1104(e) would be less material as it would most likely reveal similar trends. Materiality needs to be determined separately for Items 1104(e) and 1110(c) on a case-by-case basis. In some instances, the securitized pool will be nearly co-existent with the sponsor's portfolio.

[376] Citigroup.

[377] First Marblehead.

[378] A&O.

- One commenter, in seeking additional guidance, believed the touchstone for materiality should be whether the data reveals a trend or pattern concerning one or more material elements of pool performance and risk that are not evident from data otherwise presented.[379] The commenter recommended instructions expressly acknowledging this criterion as a benchmark in assessing materiality of the data.

- One commenter requested an acknowledgement that static pool information, though material and helpful to investors in certain asset types, may not be material for other asset types, perhaps citing CMBS as an example.[380] The commenter also requested cautioning issuers against including disclosure that is immaterial, potentially misleading or that may encourage investors not to fully evaluate other available disclosure. Static pool becomes particularly less relevant with non-homogenous pool assets. With typically fewer and larger assets, CMBS disclose much more detailed information about each pool asset and the need to gauge the sponsor's origination history is not as relevant. Static pool data also would be noncomparable given the individualized loans and property types.

- One commenter, for many of the same reasons as above, recommended expressly excluding CMBS from the static pool requirement.[381]

- Two commenters recommended expressly excluding repackagings from the static pool requirement because such data would be irrelevant because of the heterogeneous characteristics of each loan or pool.[382]

- Seven commenters expressed concern as to application in transactions, such as "rent-a-shelf" and aggregator transactions, where one or more entities transfer assets to an unaffiliated depositor.[383] Commenters were concerned there may be instances when data is unavailable from unaffiliated sellers. Similarly, differences in origination standards and changes in servicing after acquisition could change performance which would make older data misleading.

  One of the commenters was concerned as to whose static pool data would need to be disclosed.[384] In some cases, the data of the depositor/sponsor for reasonably comparable pools might be appropriate, particularly for pools of the same asset type where the group of sellers was similar. But if the pool consisted primarily of one seller's assets, static pool data of the seller may be more appropriate. The commenter suggested providing that in lieu of static pool data of the sponsor, the prospectus may instead include static

[379] ASF.

[380] CMSA.

[381] ASF.

[382] ASF; BMA.

[383] A&O; ASF; BMA; CGMI; Citigroup; JPMorganChase; MBNA.

[384] BMA.

pool data of another entity or entities, if available and if that data would be more reasonably comparable to the pool being offered. The commenter also suggested that in cases where the sponsor is unaffiliated with the issuer, the issuer is not required to disclose static pool data if it cannot be obtained after reasonable attempts.

Another commenter questioned whether any data on a portfolio basis or for prior pools for aggregators would be material since it is likely to have no relevance to the particular assets that are bought and securitized for the present pool.[385] The only prior pool information that may be material is information on prior pools that involve assets of a comparable quality with the same originator and servicer. Determination of what static pool data to disclose, if any, should be left to the issuer with no "per se" materiality.

- Eight commenters believed the proposal to provide data in stratified subsets is overreaching and unnecessary, arguing that as long as the pools for which data is provided are reasonable comparable to the pool being securitized, stratification serves no useful purpose.[386] Stratification would be burdensome and involves assumptions and selection methodology that should instead be performed by an investor through analysis of loan level information. Instead, some commenters suggested providing brief summary information about relevant pool characteristics at pool formation. One commenter requested clarifying that the factors by which static pool data are stratified are within the sponsor's judgment, and the fact that stratification by additional factors is contained in the prospectus should not be binding for updating purposes.[387]

- Nine commenters suggested not requiring the data in the prospectus, but instead permitting the information to be made available on a website accessible to investors.[388] Four commenters noted that many issuers already publicly provide performance information on a regular basis on the internet and it is an ideal medium for this type of disclosure in lieu of EDGAR.[389] Other commenters believed including static pool data in the prospectus for seasoned issuers would result in many additional pages and repetition.

  One commenter suggested a requirement that a permanent record be kept of the data shown on the website at any given time.[390] Another commenter suggested two alternatives.[391] One was requiring an undertaking as a condition to filing an ABS registration statement to publish on an unrestricted website static pool data for the last

[385] JPMorganChase.

[386] A&O; ABA; ASF; BMA; Kutak; MBA; Sallie Mae; TMCC.

[387] Citigroup.

[388] ABA; ASF; Auto Group; BMA; Citigroup; First Marblehead; JPMorganChase; NYCBA; TMCC.

[389] ABA; ASF; Auto Group; BMA.

[390] BMA.

[391] ABA.

three years on reasonably comparable pools or on all pools of the same asset type. The other alternative, also supported by another commenter,[392] was allowing the issuer the option to deliver the data through any of the following means: a website; a Form 8-K pursuant to Rule 426 (and therefore incorporated by reference); by providing it in electronic form with the prospectus (e.g., CD-ROM); or including it in the prospectus. The commenters proposed the website should meet the following conditions: unrestricted access (although prior registration should be allowed); a permanent record is kept of the data displayed at any given time;[393] and the prospectus refers to the availability of the data on the website and provides the website address.

If the non-prospectus option is chosen, one commenter was not opposed to the inclusion of some summary static pool information in the prospectus, such as a narrative discussion of trends in static pool performance and graphs that show the prior loss or prepayment experience of a limited number of comparable pools.[394]

- Four commenters believed no matter how the delivery method is crafted, Rule 10b-5 should be the only liability standard for the data.[395] Two commenters argued the data is ordinary business information not prepared for use as offering material.[396] Another commenter believed the extra burden of assembling static pool data for which a sponsor and underwriter would have Section 11 liability, and the cost of due diligence, may drive sponsors to the Rule 144A market, and thus the information should be defined as not a "prospectus" and not subject to Section 11 liability.[397] One commenter believed that if the Commission insists on Section 11 liability, then it allow Form S-3 issuers to incorporate the data by reference (e.g., via an undertaking) from a website into the prospectus in lieu of filing on EDGAR.[398] In addition and if necessary, it could be conditioned to provide the data in paper form upon request.

- Three commenters requested, if the internet option above is not elected, allowing static pool data to be filed in one or more reports on Form 8-K and incorporated by reference into the prospectus.[399]

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[392] ASF.

[393] One of the commenters, ASF, suggested maintaining a daily record that is preserved until the later of five years from the record date or the date on which the related ABS are paid in full.

[394] ABA.

[395] ABA; ASF; BMA; NYCBA.

[396] ABA; BMA.

[397] NYCBA.

[398] ABA.

[399] ABA (detailed suggestions given); BMA; TMCC.

- Two commenters requested modifying the Commission's opinion concerning unenforceability of indemnification of Securities Act liabilities to permit sponsors and underwriters to be indemnified by originators for static pool data (e.g., in "rent-a-shelves").[400]

- Eight commenters requested liability safe harbors for the data.[401] Without an existing practice of disclosing static pool data, issuers may be concerned about second-guessing of materiality decisions, leading to unpredictable litigation and/or a tendency to over-disclose. The commenters requested a safe harbor similar to that provided for forward-looking information. One commenter thought the accuracy of data provided should be subject to Section 11 and 12(a)(2) (if it is considered prospectus disclosure), however, there would be no liability for the selection of the data that was disclosed, unless the selection was knowingly misleading.[402] The commenter also requested a similar safe harbor for any trend analysis or discussion that was included. Three commenters requested a similar safe harbor but with only Rule 10b-5 liability (and not Section 11 or 12(a)(2) liability) for the data presented.[403] One commenter believed there should be an explicit safe harbor for data provided and omissions in good faith.[404]

- One commenter requested clarifying that a sponsor need not present static pool data on all relevant pools to the extent it would be repetitive, in terms of materiality, of the static pool data actually presented in the prospectus.[405]

- One commenter believed sponsors should be able to exclude any information about prior securitized pools that are not reasonably comparable to the pool being securitized.[406]

- Three commenters requested providing that an issuer is not required to disclose static pool data if the data does not exist or cannot be provided without unreasonable effort or expense, including from unaffiliated third parties.[407]

- Four commenters requested that any static pool requirement should be prospective only (only for periods from and after the effective date or some transition period).[408]

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[400] FSR; NYCBA.

[401] ABA; ASF; BMA; CGMI; Citigroup; JPMorganChase; NYCBA; UBS.

[402] BMA.

[403] ABA; ASF; UBS.

[404] CGMI.

[405] NYCBA.

[406] ABA.

[407] ABA; ASF; BMA.

[408] AFSA; ASF (examples suggested with a 12 month phase-in); Capital One; TMCC.

- Two commenters believed sponsors should be able to exclude from static pool data information on prior securitized pools that were privately offered.[409]

- One commenter requested clarifying "periodic originations or purchases" in Item 1104(e) that it implies the date of origination of the assets, which the commenter understood is typically the case for static pool data currently provided to rating agencies.[410]

- Two commenters noted the release refers to "static pool data for the sponsor's overall portfolio" while Item 1104(e) refers to "static pools or periodic originations or purchases."[411] The commenters requested clarifying whether a difference is intended.

- One commenter noted that loss rates for some asset types take longer to appear and although three years of data is appropriate for certain asset classes (e.g., student loans), five years would be recommended for residential mortgages and home equity loans.[412]

- One commenter suggested extending the data requirement to five years or since inception of the sponsor, whichever is shorter, as this is the minimal amount of time investors need to properly evaluate trends.[413] The commenter also believed the information can be updated monthly on an ongoing basis and included as part of distribution reports.

- One commenter objected to an updating requirement, arguing that the concept behind the disclosure is to assist the offering process and updating would overlap with Exchange Act reporting.[414] Repeat issuers would already, in effect, be updating their information in connection with new offerings, and website posting would further this.

- Three commenters believed that in addition to loss and delinquency experience, static pool data also should include information regarding prepayments.[415] One of the commenters believed investors thought disclosure of cumulative prepayments would be useful, which would include voluntary prepayments and liquidations after defaults or charge-offs.[416]

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[409] ABA; First Marblehead.

[410] NYCBA.

[411] ABA; ASF.

[412] ASF.

[413] MetLife.

[414] ABA.

[415] ABA; ASF; FMR.

[416] ASF.

- One commenter believed explanatory or interpretive statements about static pool information should be encouraged, but not required.[417]

- One commenter suggested providing statistical information on variables that are predictive of the credit performance and payment speeds of the assets underlying the securitization.[418] The commenter believed such statistical information would vary by the asset type and sponsor. The commenter also believed updating statistical information provided in the initial static pool disclosure facilitates transparency and liquidity in the secondary market by providing more detailed collateral information to the marketplace.

- One commenter preferred the issuance of a Commission policy statement on static pool data (analogy to projections disclosure in Item 10 of Regulation S-K) and then refinement of issuers' responses through the comment process.[419] The policy statement would be a general directive to make static pool data available on the internet with factors to be considered in guiding what information should be presented. The commenter, noting that relevancy and availability varies by asset class, suggested the following examples as application of the suggested factors:

    - For auto and auto lease ABS, cumulative loss data on prior securitized pools could be given, which for leases would include credit losses and residual losses. Availability of information is high and static pool data is relevant.

    - For dealer floorplan ABS, it is widely acknowledged that historical loss and delinquency data is irrelevant, either for prior pools or for vintage pools. In fact, delinquency data is not typically tracked because delinquencies are rare.

- One commenter proposed the following static pool requirements for student loans for prior securitized pools during the previous three years:[420]

  For FFELP student loans:
    - Cumulative (since date of sale) pool realized losses;
    - Quarterly, periodic pool realized losses; and
    - Loans by status (in-school, grace, deferment, forbearance and repayment).

  For other private student loans:
    - Cumulative (since date of sale) pool realized losses;
    - Quarterly, periodic pool realized losses;
    - Cumulative and quarterly periodic losses by relevant loan type;
    - Loans by status (in-school, grace, deferment, forbearance and repayment); and

[417] ABA.

[418] Lewtan.

[419] Auto Group (suggested language).

[420] Sallie Mae.

- Delinquency in 30 day increments.

The commenter believed underlying pool characteristics for the prior pools is provided as part of their initial issuance and, if required, could be repeated in subsequent prospectuses, although it is already available on EDGAR and would increase prospectus sizes. Alternatively, issuers could be permitted to incorporate by reference the relevant sections of ongoing filed servicing reports to satisfy static pool disclosure requirements.

- Two commenters believed issuers would need to have auditors "comfort" the data, which adds to the burden.[421] While one of these commenters ultimately recommended deleting the requirement,[422] the other commenter suggested additional time to provide the data since for large, frequent issuers completing this process in time for an issuance would be a challenge.[423] The commenter requested that static pool data not be required until 90 days after a pool's normal distribution reporting date.

- One commenter recommended that in cases where the sponsor and servicer are the same entity, providing loss and delinquency information on the total servicing portfolio should be acceptable in lieu of information required under Item 1104(e) regarding the static pool of the sponsor.[424] This information is likely to be more relevant than a sponsor's data.

- One commenter suggested an alternative in lieu of static pool data of requiring identification of any known trends or uncertainties the sponsor reasonably expects will have a material impact on delinquency and loss rates.[425] If the delinquency and loss information discloses material increases, a narrative discussion of the reasons would be required. If the sponsor knows of events that will cause a material change in performance or risk, such events would be disclosed. The commenter would define a 10% change as not requiring disclosure. If this approach is not adopted, the commenter still suggested that defining the addition of 10% of receivables to a master trust where there have not been any material changes to credit underwriting standards as not a material change to the credit quality of the pool and that requires static pool disclosure.

- One commenter, while noting the potential value of static pool data, also believed analysis of it is complex and can be confusing or even misleading when presented as mass data or without context.[426] Further, to always require static pool data, even if not available, as a condition for Form S-3 would eliminate access. If reasons for lack of static pool data are properly disclosed, along with a description of what such information

[421] A&O; Sallie Mae.

[422] A&O.

[423] Sallie Mae.

[424] Citigroup.

[425] MBNA (suggested language given).

[426] Foley.

reveals when disclosed, investors can evaluate the gap. Similarly, where pools are new or growing, there may not be sufficient history for a reasoned static pool analysis and disclosure on the type of information that is not available would be more valuable. Even when available, static pool data is not without its weakness. Where statistically significant static pool data is not available, issuers should not be forced to invent it or be denied market access, and alternative explanatory disclosures that advise investors of the value of the missing information should be sufficient.

E. Pool Assets

1. General Comments

- One commenter believed Item 1110 should be modified for repackagings to instead require a general description of each security repackaged and a reference to the original registration statement for that security.[427]

2. Pool Composition

- Three commenters supported disclosure guides for asset classes.[428] The commenters expressed concern that requiring generic disclosure does not consider unique asset type characteristics. This could result in possible important data being omitted, lack of comparability or confusion that could result in disclosure not relevant to particular asset classes. One commenter suggested four disclosure guides (home equities, autos, student loans and credit cards) with a principles-based approach for other asset classes.[429] The hybrid approach would not inhibit development of new assets classes given issuers would use the principles-based "catch-all" in lieu of new guides. Another commenter suggested an approach similar to Item 1119 that specifies that actual disclosures must be tailored to the asset pool involved.[430]

- One commenter did not believe detailed asset guides were necessary, but requested expanding the scope of the disclosure requirements to capture performance metrics across asset classes.[431] A number of material factors cited included delinquencies, gross and net loss rate, excess spread and charge-offs as equally important across asset classes. The commenter believed a broader and consistent disclosure guideline would allow investors to choose the metrics they deemed most important. Other examples cited by commenter as in need of further clarification and consistency (including for presentation in ABS information and computational material), included:

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[427] BMA.

[428] AICPA; PWC; State Street.

[429] State Street.

[430] PWC.

[431] MetLife.

- Documentation guidelines for each loan documentation type (Full, Limited and Standard);

- Reporting methods on FICO scores (e.g., one score, middle of three scores, average of scores, etc.); and

- Debt-to-income ratios (DTI) of the asset pool under a standardized calculation that includes all outstanding obligor debts within the ratio numerator.

- Two commenters supported proposed Item 1110 regarding description of the assets, but also recommended that material statistical information about pool assets also be presented on a matrix or cross-tabulated format, where two material factors are presented relative to each other (e.g., LTV and FICO).[432] The commenters believed this is simply a presentation issue as data about the related variables is already presented individually. In addition, one commenter also noted that other information, such as credit score distributions, should be graphically displayed and not just disclosed as a weighted average, as the "shape" of the distribution can significantly affect performance.

- One commenter, while suggesting several specific comments, believed the proposed items in Item 1110 are in most respects comparable to prevailing industry practice.[433]

- Two commenters believed Item 1110(a)(6), which contemplates disclosure of legal or regulatory provisions that may materially affect the pool assets or ABS, should be limited disclosure to material potential effects of such laws (without a detailed discussion of the laws themselves),[434] and one commenter would further limit only to the extent that such effects are not otherwise disclosed in respect of such laws generally.[435]

- Six commenters believed the use of illustrative lists may create a standard of presumptive materiality.[436] Three commenters recommended deleting the list in Item 1110(b) altogether,[437] with one arguing that issuers are already required to disclose all material information.[438] Alternatively, four commenters suggested modifying the list such that the inference of materiality for the entire list is eliminated.[439]

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[432] ICI; MetLife.

[433] ABA.

[434] ABA; ASF.

[435] ASF.

[436] AFSA; ASF; Capital One; Citigroup; MBA; MBNA.

[437] AFSA; Capital One; MBNA.

[438] AFSA.

[439] ASF (suggested language); Capital One; Citigroup; MBNA (suggested language).

- Two commenters, regarding Item 1110(b)(3), believed the "interest" rate on an asset pool is difficult to calculate and reveals little more than examining existing yield data.[440]

- Three commenters believed disclosure of annual percentage rates in Item 1110(b)(3) should be deleted because it is not material to securitization investors.[441]

- One commenter requested clarifying that "loan-to-value" disclosures, referenced in Item 1110(b)(7)(iii), include combined LTV ratios resulting from other loans incurred by the same borrower at the same time as the securitized loans.[442] The commenter explained that structured mortgages (often called 80-10-10s where a borrower takes out a first and second lien) have increased credit risks compared to a similar financing with a first lien and mortgage insurance. Without the combined LTV, flings may be misleading and investors may misunderstand the real risk of these mortgages, because the LTV presented does not take into account the combined debt.

- Three commenters believed disclosure of points and charges in Item 1110(b)(7)(v) should be deleted because it is not captured by many sponsors, is not subject to standardized definition and in any event is not material to investors as these cash flows are not available to the securitization and could be misleading.[443]

- One commenter believed the proposed disclosure for revolving balance receivables in Item 1110(b)(8) is generally in line with current practices, although credit lines are usually presented in dollar buckets without reference to a maximum credit line.[444] For most transactions, this information is not material. The commenter also suggested the following replacements:

    - "Type of receivable account" to "Type of asset";
    - "Gross and net purchases and returns granted" to "Balance reductions granted for refunds, returns, fraudulent charges or other reasons"; and
    - "Percentage of full-balance and minimum payments made" to "Minimum payment requirements."

- Two commenters believed gross and net purchases and returns granted in Item 1110(b)(8)(vii)) are less indicative of performance than information on actual account balances and therefore immaterial.[445]

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[440] AFSA; Capital One.

[441] ABA; ASF; MBA.

[442] MICA.

[443] ABA; ASF; MBA.

[444] ABA.

[445] ASFA; Citigroup.

- Two commenters believed the percentage of full-balance and minimum payments made (Item 110(b)(8)(viii)) is of collateral relevance when compared to yield data.[446]

- Three commenters believed that, for CMBS, while some of the items in Item 1110(b)(9) are currently disclosed for each loan, others are disclosed only for larger loans (e.g., >10%), such as descriptions of proposed renovations and improvements, general competitive conditions, management of properties, principal businesses and full rent-roll information.[447] This information would not be material for smaller loans. Two commenters requested the ability to limit all items to >10% loans.[448] The other commenter, while noting that the required disclosure already has the qualifier "to the extent material," requested guidance that the examples cited above are only required with for loans that represent, by dollar value, 10% or more of the pool balance (as measured on the date of issuance).[449]

- One commenter, regarding Item 1110(b)(11), noted that its issuer and investor members are exploring whether FICO or other measures for assessing credit risk should be disclosed.[450] Master trust issuers, particularly credit card issuers, have concerns with disclosure, such as not all assets are scored with FICO or are scored consistently, scores are only a factor in the credit decision, scores are often obtained only at origination and not updated and scores may not always be available. Investors discount these concerns and believe there is an established meaningful, continuing correlation between scores and loss experience recognized across asset sectors. The commenter noted it is still working toward consensus and suggested meeting with the staff.

- Three commenters believed Item 1110(b)(11) should be deleted.[451] Material information surrounding the credit underwriting process and data used to determine suitability and extension of credit should be disclosed, although this should not always include disclosure of credit scores, particularly when credit scores are not the primary basis for the credit decision. The reliability of credit scores has been subject to debate, may not always be material and would disclose competitive information. One commenter believed sponsors are required to disclose material information so credit scores are not necessary.[452] One commenter suggested alternatively only requiring standardized credit

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[446] ASFA; Citigroup.

[447] ABA; ASF; CMSA.

[448] ABA; ASF.

[449] CMSA.

[450] ASF.

[451] AHFC; MBNA; TMCC.

[452] MBNA.

scores on a prospective basis, only as of the origination date (rather than cut-off date) and only credit bureau scores, not internally derived scores.[453]

- An additional commenter recommended deleting standardized credit score disclosure in Item 1100(b)(11), or at least requiring it only for jurisdictions where there is a standardized, national credit scoring system.[454] For example, the commenter believed there is not such a system in the UK and internal credit scores that lenders use are not comparable, not disclosed and not necessary tracked for prospectus disclosure.

- One commenter believed disclosure for credit scores in Item 1110(b)(11) only should be required to the extent material.[455]

- Six commenters believed disclosure of economic or other factors specific to geographic concentrations and statistical data for such concentrations in Item 1110(b)(14) should be deleted as it would be burdensome and unreasonable.[456] One commenter indicated it is current practice to disclose material risk due to the economic environment of materially concentrated regions and the details of any material local laws, but additional information and statistical information would be too much.[457] One commenter suggested alternately raising the general disclosure threshold from 10% to 30%, raising the statistical data threshold to 50%, and clarifying how "geographic region" is to be determined both inside and outside the US (e.g., in the EU, is it different regions or countries).[458]

- One commenter agreed with the proposal to present the data in 30-day increments beginning with assets 30 days delinquent.[459] The commenter also recommended the increments end at 120 days delinquent or at charge-off.

- Four commenters suggested that delinquency experience required by Item 1110(c) should be presented in 30-day increments until 90 days or more delinquent and on an aggregate basis for assets 90 days or more past due (instead of the proposal of 30-day increments through the point assets are charged-off), arguing that is typical of disclosure today and further stratification beyond 90 days would provide no incremental benefit to investors.[460] In addition, RMBS and CMBS also carry assets until collateral is liquidated, which may

[453] TMCC.

[454] A&O.

[455] ABA.

[456] A&O; ABA; AFSA; ASF; Citigroup; TMCC.

[457] TMCC.

[458] A&O.

[459] MetLife.

[460] ABA; ASF; Auto Group; MBA.

depend on state law, and presenting 30-day increments after 90 days would be burdensome. One commenter believed presentation should be left to industry practice since some issuers only track delinquencies to 60 days.[461] One commenter suggested presentation "in a manner consistent with industry norms, so long a at least the categories of 30-59 days, 60-89 days and 90 days or more are shown."[462]

- Two commenters suggested removing or modifying the clause "beginning with assets 30-59 days delinquent" because some present increments of 31-60 days and others also use 0-30 days.[463]

3. Sources of Pool Cash Flow

- One commenter requested clarifying Item 1110(d)(2)(vi) whether estimated residual value refers to the estimated residual value used to structure the transaction, as in Item 1110(d)(2)(i), and what statistical information is required.[464]

4. Changes to the Asset Pool

- Two commenters recommended deleting Item 1110(g)(3) regarding the maximum amount of additional assets that may be acquired during the revolving period since it is not possible to determine for asset types allowed an unlimited revolving period.[465]

- One commenter recommended qualifying the disclosure in Item 1110(g)(7) "to the extent known" because acquisition or underwriting criteria may change over time.[466] Material future changes to the criteria must be disclosed under Item 1119(n)(1).

- One commenter supported disclosure of credit underwriting standards and changes in credit underwriting standards that could have a material effect on the credit quality of pool assets in or added to a master trust.[467] Material variances in credit quality should be disclosed and quantified.

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[461] Auto Group.

[462] ABA.

[463] ASF; Auto Group.

[464] ABA.

[465] ABA; JPMorganChase.

[466] ABA.

[467] MBNA.

5. Rights and Claims Regarding the Pool Assets

- One commenter requested clarification that disclosure of claims on pool assets does not include possible borrower defenses, including set-off rights against originators that are also depository institutions, as such possible claims would be virtually impossible to detect.[468] Disclosure should be limited to claims of third parties.

F. Transaction Structure

- One commenter supported disclosure regarding prefunding (Item 1112(g)) and allocation of voting rights within the classes (Item 1112(a)(12)).[469]

- One commenter believed any disclosure of trustee fees should explicitly state that the trustee is not required to advance or incur costs from its own funds to pay extraordinary expenses in a default or for successor servicing.[470]

- Two commenters believed disclosure should state that it is impossible for the trustee to estimate costs and expenses in a default or workout situation and a formula or fixed amount cannot be applied in such circumstances.[471] One commenter explained it would be appropriate to require an estimate of expected fees and expenses with respect to ordinary services in a non-default situation.[472] However, when unexpected circumstances arise, particularly in a default or servicing transition, expenses cannot be estimated *ex ante* (e.g., trustee out-of-pocket expenses in such a situation are not fixed or determinable by formula). It would not be possible to estimate such fees for the fee table.

- One commenter believed any requirement by a rating agency or other party that limits or caps funds or imposes changes to the waterfall to fund successor servicing or other extraordinary services should be highlighted.[473] The commenter suggested the Commission consider its own level of comfort regarding such limits.

- One commenter supported disclosure of all fees paid from cash flows, including rating surveillance fees or other monitoring fees that are charged out of cash flows before payments are made to investors.[474]

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[468] ABA.

[469] ICI.

[470] Am. Bankers.

[471] Am. Bankers; US Bank.

[472] US Bank.

[473] Am. Bankers.

[474] Moody's.

- Two commenters objected to an itemized list of fees and expenses from cash flows as it may require disclosure of competitive information about credit enhancement or trustee fees and expenses.[475] One commenter believed disclosure should be permitted of only the total expenses paid from cash flows, except where disclosure of a particular party's charges is material.[476] If disclosure is to be made at several points in the waterfall, disclosure should be required of expenses at each point in the waterfall. If expenses are variable, disclosure of the ceiling on expenses or worst case amounts should be sufficient.

- One commenter recommended excluding repackagings from the fee table requirement because fees and expenses are often paid by the depositor and even if they are not, only one or a minimal number of fees are typically paid out of cash flows.[477]

- Four commenters urged eliminating Item 1112(d)(1) regarding who owns any residual or retained interests to the cash flow because such information is not material and proprietary.[478] Alternatively, limit to where such information is material.

- One commenter supported disclosure of residual holders, particularly disclosure of any side-agreements the sponsor or servicer may have with the residual holder as well as any affiliation between the residual holder and any parties related to the transaction.[479]

- One commenter suggested deleting Item 1112(d)(3) regarding disclosure of features to facilitate a securitization of excess cash flows as not material.[480]

- One commenter believed, regarding Item 1112(f)(1)(ii), that instead of the source of funds for a redemption, disclosure should be required of the entity or class that holds the option or obligation.[481] The source of funds would generally not be known at issuance.

- One commenter believed securities backed by revolving assets should not be required to be titled "callable" under Item 1112(f)(2) if they are subject to early amortization as a result of the occurrence of events outside the sponsor's control.[482] Another commenter requested clarifying that the provision focuses on clean-up calls.[483]

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[475] ABA; AFGI.

[476] AFGI.

[477] BMA.

[478] ABA; ASF; BMA; JPMorganChase.

[479] MetLIfe.

[480] ABA.

[481] ABA.

[482] ABA.

[483] Citigroup.

- Two commenters suggested that for master trusts, the test for titling a security "callable" should be to securities of that series rather than pool assets.[484] In a master trust, the servicer typically has a clean-up call when a series of securities has declined to 10% or 5% of its original balance, although the assets of the trust may not have declined.

- One commenter recommended excluding repackagings from the "callable" requirement.[485] As proposed, the transaction may have to terminate upon a reporting failure of the obligor. The requirement is directed toward servicer clean-up calls. In addition, a repackaging may include a limited call right held by a third party.

G. Significant Obligors

- One commenter supported the 10% and 20% disclosure thresholds.[486]

- One commenter noted that the financial information requirements for 10% obligors (Item 301 of Regulation S-K) requires five years of data, while the requirement for 20% obligors (Regulation S-X financial statements) require only two years of balance sheets and three years of income statements.[487] The commenter believed this was inconsistent and requested the requirement for 10% obligors be reduced to be consistent with the time periods for 20% obligors.

- One commenter noted that, with respect to 20% obligors, the staff has allowed Rule 3-14 income statements to be used in lieu of Rule 3-01 and Rule 3-02 financial statements for newly acquired properties.[488] Rule 3-14 financial statements are required only for the most recent fiscal year, rather than three years, under certain conditions. The commenter requested continuing this practice for 20% obligors and also requested that the requirements for 10% obligors related to assets secured by newly acquired properties be revised so that the time period and type of information is consistent with the practice for 20% obligors (e.g., if the asset meets the requirements for only one year of income statements under Rule 3-14, then the only information that should be required is one year's net operating income).

- One commenter supported instruction 3 to the definition of "significant obligor" that clarifies that if the loan is non-recourse to a special purpose entity borrower,

[484] ASF; Capital One.

[485] BMA.

[486] MetLife.

[487] CMSA.

[488] CMSA.

the 10%/20% tests apply only to the real property and not to the borrower.[489]

H. Credit Enhancement and Other Support

1. Description of Enhancement and Other Support Generally

- One commenter believed credit enhancement and other support related to an ABS transaction requires additional disclosure.[490]

- One commenter believed Item 1113(a) appropriately provides investors with important information regarding the ABS.[491]

- One commenter, in addition to Item 1113, also requested a description of the total credit enhancement (qualified as a percentage of the amount of each of the tranches to be credit enhanced).[492]

- One commenter supported the 10% and 20% disclosure thresholds.[493]

- Two commenters requested clarifying that enhancement and other support contemplated by Item 1113 does not include arrangements obtained by the underlying obligors or lenders in connection with the original extension of credit, such as loan-level mortgage or hazard insurance.[494] The commenters did not think this information is relevant.

- Four commenters requested clarifying that "credit enhancement" and "liquidity facilities" in Item 1113 does not apply to servicer and trustee advances.[495] For example, one commenter explained it is common in CMBS that if a borrower is delinquent in a payment, the servicer, or sometimes the trustee, will advance the payment to avoid an interruption of payment to investors.[496] The rules already require disclosure about advances in Item 1107, so disclosure again under Item 1113 would be redundant.

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[489] ABA.

[490] MBNA.

[491] Auto Group.

[492] ICI.

[493] MetLife.

[494] ABA; ASF.

[495] CMSA; Jones Day; MBA; Wells.

[496] CMSA.

- Two commenters requested limiting the requirement in Item 1113(a) to file agreements relating to enhancement or support to material agreements.[497]

- One commenter requested limiting filing of enhancement or support agreements only to agreements with enhancers for whose financial statements are required.[498] Prospectus disclosure for other agreements is enough.

2. Significant Providers of Credit Enhancement and Other Support

- Two commenters objected to measuring payments as a percentage of cash flow supporting any offered class as a disclosure trigger.[499] The commenters believed historically the measurement was by reference to the enhancement's maximum limit or coverage as a percentage of the total principal amount of the pool assets at initial issuance (and if the enhancement only relates to one or more classes, the percentage of the total principal amount of those classes).

- One commenter requested clarification of the phrase "cash flow supporting a particular class."[500] Is it intending to capture both interest and principal payments or some other calculation? How should the calculation be performed if the enhancement supports the entire asset pool or several classes, rather than one specific class?

- One commenter requested that additional disclosures not be required if the enhancement provider does not have any future funding obligations with respect to the transaction (e.g., where a credit enhancement account is funded at commencement of the transaction through a loan by the enhancement provider).[501]

- Six commenters requested flexibility to provide third party financial information using non-GAAP financial information, such as regulatory accounting principles.[502] To do otherwise would result in movement to the private market, force certain enhancement providers out of the market and increase costs. One commenter believed the staff has accepted financial information prepared under other standards, such as regulatory accounting principles, considering factors such as the amount, duration and conditions of the enhancement and other material factors regarding the relationship between the enhancer and the purchaser's anticipated return.[503] The commenter requested a similar approach for significant obligors.

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[497] ASF; BMA.

[498] ABA.

[499] ASF; BMA.

[500] NYCBA.

[501] ABA.

[502] ABA; AFSA; ASF; BMA; Capital One; NYCBA.

[503] ASF.

- One commenter requested consideration of whether, in respect of foreign ABS involving foreign transaction parties or significant obligors, information filed with foreign regulatory authorities and/or foreign stock exchanges or otherwise publicly available could be referenced in lieu of restating the same in the SEC filing, so long as the information is in English and accessible on the internet.[504]

- Fourteen commenters objected to the proposed disclosure trigger for derivative instruments, such as interest rate and currency swaps, based on the contingent liability of the instrument.[505] Reasons included:

    - The proposal departs from the commenters' belief of current staff and industry practice. Staff comments typically focus on credit exposure and issuers make assumptions about market conditions and other factors that would affect future payments in order to reach a valuation of assumed future payments, which is consistent with how the market evaluates these instruments.

    - The proposal inappropriately treats liabilities and contingent liabilities the same, without taking into account the probability of the contingency arising. Failure to consider the probability of the contingency goes against standards of materiality.

    - No guidance is given on how to calculate contingent liability and there is no provision for volatility. Mandating a worse case assumption is too rigid, thereby making all counterparties significant enhancers, resulting in irrelevant disclosure.

    - The proposal would be costly and burdensome and counterparties generally do not have financial statements anyway, thereby shrinking the market.

    - The proposal would slow down marketing and pricing of transactions due to the need to provide increased disclosure.

    - There is no compelling investor interest in additional disclosure. Investors have requested more information and counterparties would instead prefer to provide investors with an address should an investor desire detailed financial information.

    - Swap providers are already structured so that they are subject to specially calculated capital requirements based on their overall derivatives exposure.

    - A guarantee is distinguished because a guarantee is usually of a specific amount, such that the amount of exposure is easily calculable. A derivative necessarily requires market assumptions before the maximum amount and likelihood of

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[504] Jones Day.

[505] A&O; ABA; AFSA; ASF; Auto Group; BMA; Capital One; ESF; Jones Day; JPMorganChase; MBNA; NYCBA; Sallie Mae; TMCC.

exposure can be determined. A derivative counterparty also is typically required to post collateral if its rating is downgraded, which is not typical for guarantors. Another commenter explained a guarantee is a direct obligation to pay, although probability of payment is remote, as opposed to a derivative which is a contingent obligation to pay, where the probability of an obligation to pay is remote.[506]

- It is only appropriate to measure exposure against a precise percentage when the exposure itself is capable of precise measurement or at least has a clear methodology for calculation, which derivatives do not.

- Prospectuses historically provide only the identity and credit ratings of the counterparty with a very brief description of their business, a brief summary of the material terms of the agreement and a description of the events that terminate the agreement. Deviating would be costly.

Two of the commenters recognized that the market value of a derivative may not be an appropriate measure of materiality.[507] As an alternative, four of the commenters suggested measuring against the maximum probable exposure of a counterparty at the time of transfer to the issuing entity.[508] Two commenters explained such exposure should be determined in connection with a bona fide evaluation of the creditworthiness of the counterparty, in the case of an unsecured contract, or in determining the required collateral level, in the case of a secured contract.[509] Another commenter suggested determining exposure "under reasonable and customary procedures for making credit decisions in the derivatives markets."[510] One commenter also requested that any financial disclosure requirement applicable to derivative counterparties be limited to counterparties who are not investment grade rated.[511]

Two commenters did not believe any financial information should be required.[512]

Eight commenters suggested what they believe is current market practice of focusing on the counterparty's rating.[513] Suggestions for disclosure included the identity of the counterparty, the general character of its business, its ratings, if any, the effect of any downgrading or withdrawal of the rating (including any obligation of the counterparty to

[506] ASF.

[507] BMA; MBNA.

[508] ABA; ASF; BMA; Sallie Mae.

[509] ASF; BMA.

[510] ABA.

[511] ASF.

[512] ABA; BMA.

[513] ABA; AFSA; ASF; BMA; Capital One; ESF; JPMorganChase; Sallie Mae.

post collateral based on the market value of the derivative), the right of the ABS issuer to terminate and replace the counterparty if the counterparty's rating declines below a specified level or is withdrawn, a description of the material terms of the agreement and a description of events that would terminate such agreement, to the extent material.

- One commenter believed contingent liabilities, such as interest rate and currency swap derivatives that can reasonably be viewed as independent of the performance of the receivables, should not give rise to financial disclosure requirements with respect to the contingently liable party where at least one class of the ABS is investment-grade and the contract with the party has provisions that call for collateralization or replacement at or before its ratings drop before investment grade.[514] Where these conditions are not met, a widely accepted option pricing model should be used to quantify, in present value terms, the exposure of the ABS issuer to its counterparty and that exposure could then be used to determined if the percentage tests were met. The threshold would also vary on counterparty ratings as a further alternative.

- One commenter requested an instruction such that where the swap counterparty does not provide credit enhancement (e.g., the credit ratings of the ABS do not depend on payments from the swap counterparty), information about that party may be omitted.[515] The commenter also suggested a calculation of a "risk factor" applied to the notional amount of the swap. Risk factors are generally derived using a normal distribution of changes in interest rate/currency values based on the value of the instrument. Alternatively, a simpler approach would be to conclude that when the ABS rating is closely aligned with the counterparty rating, Item 1113(b) disclosure is required.

- One commenter suggested eliminating swaps entered into with market terms from the list of credit enhancements.[516] Alternatively, the commenter recommended allowing issuers to incorporate by reference solely to the financial statements that are required to be disclosed and not to all of the Exchange Act reports filed by the swap providers.

- One commenter suggested establishing a matrix to determine the likely magnitude of exposure to the credit of the derivative product counterparty.[517] The matrix would be based on both the probability of a counterparty with a specified rating defaulting on its obligations during the term of the derivative (based on rating agency published criteria) and the likely amount of payment required to be made by the derivative product counterparty based on ten years or more history of the relationship of the rates to the index. The commenter believed the staff has approved a matrix approach.

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[514] Auto Group.

[515] MBNA.

[516] TMCC.

[517] TMCC.

- Two commenters believed that many derivative providers achieve their credit ratings on the strength or a parent or affiliate guarantee and any final rule should permit any required financial information to be provided solely by the guarantor.[518]

- One commenter recommended grandfathering all existing derivatives from the proposed disclosure requirements because of expense and liability concerns.[519]

- One commenter recommended that guarantors of FFELP student loans, such as non-profits and state agencies, be excluded from the requirement for full disclosure and required financial information because the US government stands behind the guarantees.[520] The commenter indicated that 30 or more guarantee agencies may be involved in one transaction and may change in transactions with revolving periods.

- One commenter recommended alternate disclosure for guarantors of FFELP student loans, which the commenter believed has been approved of by the staff.[521] Reasons for the alternate approach included: The reinsurance by the Department of Education makes financial information less material; the limited nature of publicly available information about any guarantor; the absence of Regulation S-X financial statements because they are state agencies or non-profits; and the ratings of the ABS are not dependent on the identity of the guarantors. The suggested disclosure for each 10% guarantor included name, number and aggregate principal balance of loans guaranteed by the guarantor, and five federal fiscal years, to the extent available, of:

    - history of all FFELP loans guaranteed by the guarantor;
    - reserve ratio at the end of each fiscal year;
    - recovery rates of the guarantor;
    - historical claim rates of the guarantor.

I. Other Disclosure Items

1. Tax Matters

- One commenter recommended clarifying Item 1114(b) that the federal income tax consequences to be disclosed should be those pertaining to the principal categories of US taxpayers that may purchase the securities for investment as capital assets.[522]

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[518] BMA; NYCBA.

[519] NYCBA.

[520] Kutak.

[521] Sallie Mae.

[522] ABA.

2. Legal Proceedings

- Two commenters believed disclosure of proceedings known to be contemplated by governmental authorities would require disclosure of non-public information and in some cases may violate such authorities' regulations or policies.[523] It also may be impossible to obtain the information from third parties. The commenters suggested limiting the requirement to public information only.

- Two commenters believed the proposed disclosure of legal proceedings on an ongoing basis for Form 10-K and 10-D is too burdensome and unwarranted.[524] One commenter believed a standard in numerous modified reporting no-action letters should be used, which is a description of material legal proceedings with respect to or involving the issuing entity, the trustee, the originator, the seller or the servicer, in accordance with Item 103 of Regulation S-K.[525] Alternatively, both commenters suggested limiting disclosure to actual knowledge.

- One commenter believed the proposed disclosure with respect to trustees is too broad and should be limited to legal proceeding actually pending that if adversely determined would have a material adverse effect on the specific transaction.[526] In addition, the proposed requirement to disclose any proceedings "known to be contemplated by governmental authorities" should be limited to actual current proceedings that if adversely determined would have a material adverse effect on the transaction.

3. Affiliations and Certain Relationships and Related Transactions

- One commenter supported disclosure of affiliations between transaction parties at both the individual and entity level as it provides investors with information on actual and potential conflicts of interest and may deter fraud.[527] The commenter recommended a low threshold for the ownership percentage sufficient to trigger affiliation and disclosure.

- One commenter thought disclosure at the individual level was unnecessary.[528]

- One commenter requested not requiring disclosure with unaffiliated sponsors.[529]

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[523] ABA; JPMorganChase.

[524] ABA; ASF.

[525] ASF.

[526] Am. Bankers.

[527] State Street.

[528] ABA.

[529] ASF.

- One commenter requested clarifying that, due to the number of potential affiliations between the trustee and transaction parties that the trustee may not know of, "to the extent known" in Item 1117(a) applies with respect to disclosure of such relationships.[530]

- Two commenters requested limiting Item 1117(b) to transactions that could materially affect the rights of holders of the ABS, or that are necessary to understand the ABS.[531]

- Five commenters requested deleting the reference in Item 1117(b) to material credit arrangements with an underwriter/promoter, such as a warehouse line of credit to fund originations, as such arrangements are generally not material, are entered into the ordinary course and do not represent an example of disclosure called for by Item 1117(b), which relate to transactions outside the ordinary course.[532] If proceeds are used to pay down these arrangements, this already will be disclosed as use of proceeds.

- One commenter thought the instruction referencing material terms and dollar amounts is inconsistent with the general Item requirement to disclose the "general character" of any such relationships.[533]

- One commenter thought relationships with the underwriter apart from the transaction are not material.[534] The commenter did not believe the underwriter would jeopardize investor relations because of business relations with the issuer. The commenter did not object to disclosure of relevant services offered by the underwriter that are used but objected to dollar amounts, fees or the extent and depth services were used.

4. Ratings

- One commenter believed that, in addition to Item 1118, prospectuses should be required to disclose any expected ratings for the ABS, even if the issuance is not conditional upon the assignment of a certain rating.[535] This disclosure is frequently provided today and provides important information to investors.

- One commenter believed greater transparency in the ratings process is critical to investors, and suggested the following as required disclosure:[536]

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[530] Am. Bankers.

[531] ABA; TMCC.

[532] ABA; ASF; BMA; JPMorganChase; TMCC.

[533] TMCC.

[534] AHFC.

[535] ICI.

[536] State Street. The commenter also cited to the Commission's concept release which requested views on conditioning NRSRO regulation on similar disclosure and suggested addressing these issues in connection with developing Regulation AB.

- The key bases for, and any material assumptions underlying, the rating agency's ratings as well as the scope and nature of rating agency due diligence, particularly with respect to issues related to fraud.
- Any information requested by the rating agency but not provided.
- Rating fees paid by issuers.
- If information is provided to the rating agencies under Regulation FD, but not to investors, the nature of the information disclosed.

- One commenter expressed concern that greater disclosure about the ratings process may cause rating agencies to be viewed as participants in a distribution for purposes of the federal securities laws.[537] If greater disclosure is required on the role and process of rating agencies, the commenter requested making clear that rating agencies are independent opinion providers and neither prepare prospectuses nor participate in the marketing or sales of the securities. The commenter also proposed that the Commission reiterate its views on important matters to be considered when disclosing ratings, including the limited nature of ratings (citing Item 10 of Regulation S-K).

- One commenter would support disclosure of rating fee information as increasing transparency, but cautioned that this could cause rating agencies to compete on the basis of price rather than quality of product.[538] The commenter also believed rating fees tend to be a fraction of the overall fees for an ABS transaction.

- One commenter believed that if additional disclosures about ratings and potential conflicts of interest of rating agencies are required, the Commission also consider:[539]

  - Disclosure of the measures developed by the rating agencies to safeguard the agencies' independence, integrity and objectivity, or, alternatively,

  - Disclosure of all other NRSROs which were contacted prior to issuance regardless of whether a rating was ultimately assigned.

  Such disclosure will help mitigate the concern that rating agencies will "rate high" to get business at the expense of objectivity.

5. Reports and Additional Information

- One commenter supported disclosure of whether Exchange Act reports are made available on a transaction party's website.[540] The commenter otherwise thought the proposed disclosure is consistent with current practice.

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[537] Moody's.

[538] Moody's.

[539] Moody's.

- One commenter believed a copy of the form of the distribution report should be filed as an exhibit to the registration statement, along with a listing of websites at which the information may be accessed and the issuer's intended policy regarding archiving of historical reports.[541] This allows investors to factor an issuer's quality of and commitment to transparency into investment decisions.

J. Alternatives to Present Third Party Financial Information

- One commenter expressed support for the additional flexibility in the proposals for presenting third party information.[542]

- One commenter did not believe it was appropriate to require ABS issuers to include financial information of third parties in their filings.[543] In addition to lack of control over the information, sometimes, especially for foreign entities, the information is unavailable.

- Two commenters thought it anomalous to require financial information for significant obligors and enhancement providers when financial data is not required for other transaction parties or for the asset pool.[544]

1. Incorporation by Reference

- One commenter requested clarifying that incorporating a third party's financial statements by reference does not require permission of the third party or consent of its accounting firm and the protections in Section 11 for audited financial statements will still be available without such consent.[545] The commenter believed the current system of requiring a consent is a needless burden and expense.

- Two commenters recommended deleting the condition in Item 1100(c)(1)(ii) that the party whose financial statements are to be incorporated by reference must be current in Exchange Act reporting for 12 months, as it would be impractical to monitor for unaffiliated parties (e.g., that the third party missed a Form 8-K reportable event).[546]

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[540] ABA.

[541] FMR.

[542] ABA.

[543] A&O.

[544] AICPA; E&Y.

[545] ABA.

[546] ABA; JPMorganChase.

- One commenter suggested limiting the condition in Item 1100(c)(1)(iv) requiring a description of material changes to the incorporated information to changes known to the issuer, as the issuer must rely on the third party for the information.[547]

- One commenter suggested reconciling language in Items 1111(b) and 1113(b)(2) (which contemplates incorporation by reference of financial statements of a party and its *subsidiaries*) with Item 1100(c) (which contemplates incorporation by reference of financial statements of a party or *the entity that consolidates that party*).[548]

2. Reference Information

- One commenter, while suggesting revisions, welcomed codification of reference information as the it is the only practical approach for repackaging transactions.[549]

- Six commenters requested revisiting codification of the existing staff position that if the third party ceases reporting, the issuer must either provide the third party disclosure or terminate all or the affected portion of the transaction.[550] Requiring termination because information is in the hands of an unaffiliated third party and not available is contrary to Rule 409, inequitable, merit regulation, an unwise recent staff position and contrary to public policy and investor protection (e.g., it acts as a "penalty" to investors often producing a lower yield and possible adverse tax consequences). Distributing the underlying security to the investor does not change the lack of availability of the information, and holders of the underlying security are in the same position regarding the inability to access information. Terminating by the next report due date is also unworkable since it assumes the sponsor or trustee is monitoring the significant obligor's filings or that the sponsor or trustee will know the underlying obligor will be late.

  The commenters requested eliminating the termination requirement. Two recommended instead requiring an undertaking to provide the required financial information only to the extent such information is known or reasonably available to the issuer, in the same manner as Rule 409.[551] One commenter suggested, as an alternative, a Form 8-K requirement notifying holders of the ABS that the obligor has ceased reporting within 15 days following the scheduled distribution that follows the date the trust became aware of the ceased reporting.[552] One commenter suggested an alternative of requiring a provision that investors vote on whether they want to terminate.[553] Three commenters

[547] ABA.

[548] ABA.

[549] BMA.

[550] ABA; ASF; BMA; CGMI; NYCBA; UBS.

[551] ASF; BMA.

[552] BMA.

[553] CGMI.

recommended grandfathering existing securitizations if the current staff position is codified.[554] One commenter also recommended applying the proposal only to 20% obligors and exclude resecuritizations where the pool assets are securities.[555]

- One commenter requested providing that failure of an issuing entity to satisfy the termination requirement will not affect Form S-3 eligibility of the depositor or other issuing entity.[556]

- Two commenters did not believe failure of an underlying securities issuer to meet its continuing reporting obligations should have any effect on the repackaging trust or its sponsor or depositor.[557] One of these commenters explained that at the outset of the transaction, the trust should be required to verify that the underlying securities are those of reporting companies that are current for the past 12 months (subject to a knowledge standard for Form 8-K's).[558] After issuance, the trust should be limited to reporting all distributions received and any other material information received from the obligors.

- One commenter believed reference information should be permitted for foreign governments and subdivisions that register securities on Schedule B and file annual reports on Form 18-K, and for obligors that are exempt from Securities Act registration and Exchange Act reporting but make publicly available "substantially equivalent information."[559]

- Three commenters believed reference information should be allowed for all significant obligors and significant enhancement providers, regardless of involvement with the transaction or affiliation with any transaction party.[560] One commenter believed not requiring this for other parties is unfair as it could result in the inability of the depositor to use Form S-3 for untimely actions of the third party or its accountants, notwithstanding the fact that the depositor may be in a position of control, common control or contractual privity with the third party.[561]

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[554] ASF; BMA; NYCBA.

[555] ASF.

[556] BMA.

[557] ABA; UBS.

[558] ABA.

[559] BMA.

[560] A&O; ABA; NYCBA.

[561] ABA.

- Three commenters believed reference should be allowed to reports filed with other regulators, such as bank call reports, and information filed with NRMSIRs.[562]

- Two commenters requested clarifying that referring to information of a third party does not require permission of the third party or consent of its accounting firm.[563] One commenter also requested clarifying that the protections in Section 11 for audited financial statements will still be available without such consent.[564]

- One commenter requested a statement that where the issuer refers to financial statements of a third party as opposed to incorporating them by reference, the issuer is not liable for any errors or omissions in those financial statements.[565]

- One commenter believed Item 1100(c)(2)(ii)(D) should be clarified.[566] The commenter assumed the item was intended to accommodate a case when a subsidiary guarantee is S-3 eligible but the parent third-party is not (the converse of Item 1100(c)(2)(ii)(C)). If so, the commenter suggested revisions to the item.

VI. Communications During the Offering Process

A. ABS Informational and Computational Material

1. Proposed Exemptive Rule

- Five commenters recommended extending the exemptive rule beyond the no-action letters to include Form S-1 ABS.[567] Two of the commenters argued a preliminary prospectus is typically prepared too late in the process to begin a dialogue concerning structure.[568] Alternatively, the two commenters requested extending to Form S-1 if the ABS is to be rated investment grade or if the purchaser is anticipated to meet certain requirements, such as an institutional investor, QIB or accredited investor. One commenter requested extending the exemption to the "waiting period" for Form S-1 ABS.[569] Another commenter requested an amendment to Form S-1 to permit incorporation by reference to accommodate any such extension.[570] One commenter

[562] AFGI; BMA; NYCBA.

[563] ABA; NYCBA.

[564] ABA.

[565] ABA.

[566] BMA.

[567] A&O (particularly if UK RMBS master trusts are not Form S-3 eligible); ABA; ASF; FSR; NYCBA.

[568] ASF; NYCBA.

[569] A&O.

[570] ASF.

believed materials could be filed as an exhibit to the Form S-1.[571] The commenter also requested clarification that if the Commission did not extend the exemption to Form S-1 ABS, a joint offering of non-investment grade securities registered on Form S-1 or privately offered will not impact the use of the material for the Form S-3 ABS of the same series.

- One commenter requested extending the exemptive rule beyond the no-action letters to the "waiting period," arguing there is no meaningful difference between the waiting period and post-effective period for this purpose.[572]

- Two commenters generally believed ABS informational and computational material should not be considered a "prospectus" because they are by their nature incomplete, preliminary and are meant to facilitate oral communications.[573] Section 11 and 12(a)(2) liability is not appropriate. Any filing rule should provide a safe harbor for omissions.

- One commenter suggested deleting the Preliminary Note that the exemption does not apply to communications that have the primary purpose of conditioning the market for another transaction or are part of a plan or scheme to evade Section 5 or clarifying the Note by indicating one or more examples.[574] The commenter requested specific clarification that using such material to market ABS offered on Form S-3 will not be considered to meet the Note when securities of the same series as those referred to in such materials are also being offered privately (e.g., non-investment grade classes).

- One commenter would object to limiting the proposed exemption to ABS targeted to non-institutional investors.[575] Non-institutional investors would still have the benefit of a preliminary or final prospectus pursuant to Rule 15c2-8(b).

2. Definition of ABS Informational and Computational Material

- Nine commenters, with most noting that the proposing release indicated that the scope of the definition was intended to be the same as the existing no-action letters, nevertheless recommended expanding the definition, at least to more closely track the more fulsome principles-based descriptions of such material in the no-action letters and the information currently used in such materials, to avoid any confusion.[576]

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[571] ABA.

[572] ASF.

[573] ABA; CGMI.

[574] ABA.

[575] ABA.

[576] ABA (examples given); ASF (examples given); BMA (suggested adding the phrase "and miscellaneous similar terms"); CMSA (examples given); Dewey (specifically requested tax and ERISA information); FSR; JPMorganChase; NYCBA (examples given); TMCC (examples given).

- Two commenters recommended expanding the letters to allow the inclusion of "any information deemed material by the issuer or underwriter"[577] and an additional commenter would permit information "if it is material to an investor's decision or is information commonly provided to investors to enable the investor to determine if it is permitted to purchase the security."[578]

- One commenter requested expanding the scope to include "basic factual information" concerning the offering process, such as road show dates and anticipated pricing dates.[579]

- Three commenters were concerned that including static pool data communicated "in connection with an offering" in the definition (and hence being a "prospectus") could mean that regular publication on a website would constitute a prospectus.[580] Two of the commenters requested either clarifying or including an express provision to the effect that the routine publication of static pool data through any medium does not constitute a prospectus.[581] One commenter also requested that, if the SEC allows static pool data to be provided through a website and requires it to be incorporated by reference into the prospectus, then other static pool data regularly published on the website should not be considered a prospectus.[582] In addition, any required static pool data that is provided through the website should not be subject to a filing requirement.

- One commenter requested clarifying that graphical materials (e.g., photos, maps, site plans) are permitted as "descriptive factual information regarding the pool assets."[583]

3. Conditions for Use

- Three commenters requested an instruction indicating that the limited legend prescribed is not exclusive and other legends may be included to the extent appropriate and as otherwise required by law.[584] Two of the commenters believed it would be appropriate to include a legend that information contained in the material will be superceded by

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[577] CMSA; JPMorganChase.

[578] NYCBA.

[579] ASF.

[580] ABA; BMA; UBS.

[581] ABA; BMA.

[582] BMA.

[583] CMSA.

[584] ASF; BMA; FSR.

subsequent ABS information and computational material or the final prospectus, at least to the extent of the information included in the subsequent material or prospectus.[585]

- Two commenters thought it should be appropriate to use a legend that the information is incomplete and can change both in subsequent iterations and in the final prospectus to the extent such information is covered therein.[586]

- One commenter believed a prohibition on the use of standard ABS material disclaimers may mislead investors as to the nature and purpose of the material.[587]

- Four commenters requested expanding footnote 193 and clarifying (e.g., by an instruction) that a failure by any party to the ABS transaction and any person authorized to act on their behalf to cause the filing of required material does not affect the ability of any other party who has complied with the procedures to rely on the exemption.[588] One commenter requested the same for any future Securities Act reform.[589]

- One commenter requested clarifying that material can be delivered after distribution of a preliminary prospectus.[590]

4. Filing Requirements

- One commenter believed the no-action letters and proposal strike the right balance regarding information required to be filed, although, as noted below, the commenter requested departing from the no-action letters to exclude underwriter-only material from filing and Securities Act liability.[591]

- Two commenters believed the existing filing requirements in the no-action letters that are proposed to be codified present inappropriate issues regarding liability.[592]

- Four commenters requested treating computational materials prepared by an underwriter different from materials prepared by an issuer.[593] Two of the commenters believed the

[585] ASF; BMA.

[586] ABA; JPMorganChase.

[587] CGMI.

[588] ABA; ASF; FSR; NYCBA.

[589] NYCBA.

[590] ABA.

[591] ABA.

[592] FSR; NYCBA.

[593] ABA; ASF; BMA; JPMorganChase.

existing filing requirements in the no-action letters relating to underwriters have "chilled" the use of material because, due to liability for false and misleading statements, issuers are more careful about underwriters using materials without issuer involvement or where issuers cannot confirm the data or models being used.[594] The commenters believed more materials would be used if materials prepared and provided by underwriters without issuer involvement were excluded from the definition of "prospectus," and hence from filing and heightened liability requirements. Investors are deprived of helpful information due to liability concerns. Some commenters generally argued there is an interactive and collaborative process between underwriters and investors without issuer involvement and the materials are objective, factual, more like analytical material than offering material and not prone to manipulation or distortion and unlikely to be material to other investors. Only material prepared by or at the direction of the issuer, depositor or sponsor (e.g., all material other than computational material), should be subject to filing and liability requirements. Notwithstanding the above, one commenter argued underwriter material should be able to include information about the underlying pool assets and ABS structure as necessary for an analysis of the computational data, so long as the issuer files such information as proposed.[595]

- One commenter suggested that, if filing requirements for underwriter material are retained, an express compliance scheme be established for parties other than the issuer.[596]

- Two commenters requested adding a provision that preserves the exemption notwithstanding a good faith immaterial, unintentional or involuntary failure to file or delay in filing of the material.[597] The commenters thought issuer mistakes are bound to occur and such a provision could increase the use of such material.

- Two commenters requested relaxing the Commission's opinion on unenforceability of indemnification of Securities Act liabilities for indemnification from underwriters for ABS informational and computational material prepared without issuer involvement.[598] One of the commenters limited the suggestion to unaffiliated underwriters.[599]

- One commenter supported the ability to distribute loan level information and the manner in which the rules should be applied where underlying data is provided to investors or third party services for their independent use.[600]

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[594] ABA; ASF.

[595] ASF.

[596] ABA.

[597] ABA; ASF.

[598] ABA; ASF.

[599] ASF.

[600] ASF.

- One commenter requested clarity on what must be filed and the mechanics of doing so for data provided to third-party service providers for investor-driven analytics.[601]

- One commenter requested clarifying in the rules that a written communication by an issuer, underwriter or other participant that includes executable code used by a program to read information constitutes ABS informational and computational material.[602]

- Two commenters requested clarification that to the extent models and model inputs simply encapsulate other previously-filed material, they need not be filed separately.[603]

- Two commenters requested amending Regulation S-T to allow informational and computational material to be filed in "PDF direct output format" and, until then, to continue to allow paper filing.[604] Filing material electronically otherwise only provides marginal benefits to investors and cause additional issuer costs. An additional commenter also suggested the ability to file material in additional formats, such as PDF, Word and Excel, noting that converting to HTML is as burdensome as ASCII.[605]

B. Research Reports

- One commenter believed the 1997 no-action letter provides a workable compromise between providing investors with research and issuer with flexibility, although the commenter recommended eliminating one of the letter's conditions relating to the availability of sufficient public information (discussed below).[606]

- One commenter objected to codifying the no-action letter and instead urged a 30-day quiet period on ABS research.[607] Permitting research during this period is unlikely to provide any benefits to the large or sophisticated investors who make up most of the market because they will base their investment decisions on their own analyses of the prospectus and computational material. However, if retail investors take a more active role, research would be harmful. Moreover, permitting research could lead to structures designated as ABS but are, in effect, equity securities to avoid other research rules.

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[601] ABA.

[602] ASF.

[603] ASF; BMA.

[604] ASF; BMA.

[605] CMSA.

[606] ABA.

[607] CFAI.

- Three commenters recommended extending the proposal beyond the no-action letter to include Form S-1 ABS.[608] An additional commenter recommended extending to Form S-1 ABS where investment grade or where the offering is limited to accredited investors or QIBs.[609]

- Four commenters recommended eliminating the condition from the existing no-action letter that sufficient information be available from public sources to provide a reasonable basis for the broker-dealer's view, as selective disclosure concerns are now addressed by other regulations, such as Regulation FD, Regulation AC and SRO rules, and the condition "chills" the dissemination of research.[610]

- One commenter believed the no-action letter conditions are too rigid and recommended an alternative that would extend the letter to all ABS, regardless if Form S-1 or S-3, on the following more limited conditions:[611]

    - The publication in which the research is to be published is distributed with reasonable regularity in the normal course of business;

    - The subject ABS are expected to be rated investment grade; and

    - Either:

        - The subject ABS are being offered only to institutional investors; or

        - The broker has published or distributed with reasonable regularity research relating to ABS backed directly or indirectly by substantially similar collateral.

C. Miscellaneous Communications Comments

- One commenter believed disclosure that an investor would find helpful is access to a sponsor's or dealer's transaction-specific cash flow model.[612] In some segments of the market, particularly CMBS, sponsors and dealers commonly provide access to computer files that contain deal analytics to enable investors to perform their own analyses by adjusting assumptions contained in the sponsor's or dealer's model. This is not common for other asset types. The Commission should consider the benefit of rules designed to

[608] A&O (particularly if UK RMBS master trusts are not Form S-3 eligible); ABA; ASF.

[609] NYCBA.

[610] ABA; ASF; BMA; JPMorganChase.

[611] ASF.

[612] FMR.

(1) require the provision of deal analytics to investors for all asset classes, and (2) clarify the liability of sponsors and dealers that provide materially misleading deal analytics.

- Five commenters recommended amendments to Rule 134 for ABS-specific items.[613] Examples included:

    - The structure of the ABS and distributions, including key terms of each class, such as amount, coupon, first and last payment date, accrual periods, price and methods for determining price, weighted average life, expected final payment date, maturity, priority, anticipated ratings and summary characteristics (*e.g.*, PAC, IO, companion);

    - CUSIP numbers for each class and whether a particular class has been sold;

    - legal investment, tax, ERISA and Rule 2a-7 information;

    - nature, performance and servicing of the assets supporting the ABS, including appropriate pool level information which may include such elements as total dollar amount and range of assets sizes, weighted average coupon, maturity, seasoning, LTV ratio, weighted average FICO, grace and forbearance percentages, portfolio yield, and delinquency and losses, if material, and information concerning asset concentrations;

    - the identity of key parties such as sponsors, servicers, trustees and depositors;

    - any credit enhancement or other enhancement mechanisms associated with the ABS, including the identity of any such enhancement provider;

    - basic factual information concerning scheduling for the offering, such as road show dates and anticipated pricing dates;

    - whether a particular class of securities has been sold or retained; and

    - revising subsections (a)(5) and (14), regarding yield and ratings for debt securities, to also relate to ABS.

- One commenter requested clarifying that pre-sale reports by a NRSRO do not violate Section 5 so long as they are not distributed by an issuer or underwriter.[614] Alternatively, confirm that indirect involvement of an issuer or underwriter in these reports prior to their publication solely for purposes of correcting factual errors does not violate Section 5.

[613] ABA; ASF; BMA; FSR; JPMorganChase.

[614] ABA.

- One commenter recommended that the final rules modify the rules for electronic roadshows when used in connection with ABS informational and computational material to conform with the proposed Securities Act Rules as adopted.[615]

VII. Ongoing Reporting Under the Exchange Act

A. General Comments

- Two commenters generally supported the proposed approach to ongoing reporting.[616]

- One commenter believed issuers should be required to file any periodic surveillance information they provide to rating agencies.[617] As the information is already being sent to a third party, it should result in minimal additional costs to file it and it would provide valuable surveillance information to investors.

- Two commenters noted repackagings bear little resemblance to other ABS and believed Exchange Act reporting should be reduced even further.[618] The commenters argued these transactions are generally simple pass-throughs, with no servicing or management, and distribution reports are little more than a payment record confirming the remittance amount, which is neither material nor time sensitive. One commenter suggested just a Form 10-K, as supplemented when and if necessary by Form 8-K reports as may be required to report material events.[619] Alternatively, allow quarterly reporting of distributions, even if the distributions themselves are made monthly. Another commenter also suggested quarterly Form 10-D filings, even if monthly distributions.[620]

- One commenter requested clarification that ABS issuers are not "accelerated filers."[621]

B. Determining the "Issuer" and Section 15(d) Reporting Obligation

- Two commenters believed registration should be conditioned upon issuers agreeing to waive their right to suspend reporting under Section 15(d) (or to continue to make Form 10-D information publicly available on websites).[622] The commenters noted that under

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[615] ABA.

[616] FSR; ICI.

[617] FMR.

[618] ASF; BMA.

[619] ASF.

[620] BMA.

[621] ASF.

[622] FMR; ICI.

the current system, most ABS cease SEC reporting as soon as possible and investors are dependent on the commitment of issuers to voluntarily provide ongoing disclosure regarding performance and payment data. The commenter noted some issuers refuse to provide disclosures because of liability concerns, leaving investors in the dark. Suspension of reporting defeats the proposals to improve ongoing disclosure.

- Six commenters did not believe the ability to suspend the Section 15(d) obligation should be modified.[623] These commenters generally argued there is no reason to treat ABS differently from the fixed-income markets generally, such a change would be costly and ABS investors are mostly institutional and already have sufficient access to information through proprietary and third party websites.

- Two commenters expressed support for the proposed Section 15(d) interpretive rules.[624]

- Three commenters requested no Form 10-K be required for ABS issued in a year in which no distribution occurs because the cost is unjustified for the short period of time.[625]

- One commenter suggested specifying in Rule 15d-22(b) that the automatic suspension occurs without the need to file a Form 15.[626]

- Two commenters requested limiting the definition of "holder" for book-entry ABS to those of record with the trustee as registrar (including counting DTC or other clearing corporations as a single holder), without resort to DTC records.[627] Alternatively, one commenter requested that determination of the number of holders of record be waived altogether for issuers that elect to continue to file Exchange Act reports.[628]

- One commenter requested clarification with respect to the continuing reporting obligations of an issuer following termination of a securitization after receipt of final payment on the pool assets or following a cleanup call.[629] Specifically, the commenter asked: whether the issuer is required to file a Form 15 to terminate its reporting obligation with respect to a transaction that is terminated by its terms; whether the issuer must file a Form 10-D with respect to the final distribution date; and whether the issuer must file a Form 10-K for the fiscal year in which the securitization terminated. The commenter thought the answer to all three questions should be no.

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[623] ABA; Am. Bankers; ASF; Capital One; CMSA; Wells.

[624] ABA; ASF.

[625] Am. Bankers; ASF; Wells.

[626] ASF.

[627] Am. Bankers; Wells.

[628] Wells.

[629] ABA.

- One commenter supported Rule 15d-23 regarding reporting for intermediate financial assets (e.g., SUBI's), except for the condition that the asset is not part of a scheme to avoid registration or reporting requirements.[630] The commenter thought it uncertain and suggested deleting it or providing examples of when the condition would be met.

C. Reporting Under EDGAR

- Eight commenters thought EDGAR was difficult for issuers and investors to use and urged improvements.[631] Suggestions included:

    - Expand acceptable file formats, such as PDF, Excel and XML.
    - Extend filing hours (e.g., to midnight with the same filing date).
    - Allow the ability to preview documents before they are filed and the ability to identify errors through means other than a test filing.
    - Fully automate the process of obtaining CIK codes.
    - Depositors should be able to direct their own naming convention for CIK codes.
    - Submitting filings should be web-based and fully automated.
    - Create a user-friendly method to obtain CIK codes for older transactions without having to file a document to obtain such code.

- Four commenters suggested allowing filing requirements to be satisfied through private website posting instead of EDGAR.[632] One commenter supported allowing distribution reports to be available on a website designated in the prospectus as an alternative to SEC filing, with a cumulative annual filing on Form 10-K.[633] The commenter believed annual reporting of non-financial items (e.g., matters submitted to security holder vote) would be sufficient with Form 8-K reporting of legal proceedings, significant obligors and credit enhancers as material developments occur. With respect to significant obligors and enhancers, Form 8-K would report material changes in financial condition, but ordinary course updating would occur only in the Form 10-K.

  Another commenter suggested a process whereby depositors notify investors, either in a prospectus or Form 8-K, of their intent to post reports in a named website.[634] The website would be unrestricted and available to all investors. Depositors would maintain a daily record of website contents which would be preserved until the later of five years from such record date, or the ABS are paid in full. The commenter thought this system

[630] ABA.

[631] ABA; Am. Bankers; ASF; BMA; CMSA; MBNA; Sallie Mae; Wells.

[632] ABA; ASF; Sallie Mae; Wells.

[633] ABA.

[634] ASF.

would be most beneficial if the reports were not required to be filed later, but could nonetheless be covered by the Sarbanes-Oxley certification by reference to the website.

- One commenter would object to a mandatory website posting requirement.[635]

- Two commenters requested the ability to file combined reports for all issuing entities of a common depositor, including Form 8-K reports for common current events.[636] One commenter thought there had been informal discussions with the staff permitting greater use of combined reporting, notwithstanding footnote 238.[637] The commenter believed ABS is unique in having multiple reporting entities, often with monthly reporting obligations, and combined reporting should save costs and burdens since, for example, it allows sometimes 100 separate distribution reports to be filed as exhibits to one report with an index indicating which report is for which series. The commenter believed investors would likely find this approach easier as well.

D. Distribution Reports on Proposed Form 10-D

1. Proposed Content - General

- Eight commenters supported a separate Form 10-D for ABS distribution reporting.[638]

- One commenter believed Form 10-D should be only an elective filing because it is an unnecessary administrative burden.[639]

- Six commenters believed Form 10-D should be used only for filing distribution reports.[640] It would be more streamlined and less burdensome for issuers if other proposed items, which track information required by Part II of Form 10-Q and generally already required under the current modified reporting system, were instead Form 8-K items (with three commenters suggesting a 15 calendar day deadline from the event).[641] Two commenters suggested the same for any distribution information required under Item 1119 that is not included in a distribution report.[642] Another commenter suggested

[635] MBNA.

[636] ASF; Sallie Mae.

[637] ASF.

[638] ABA; ASF; Aus. SF; FMR; ICI; JPMorganChase; MBNA; Wells.

[639] CGMI.

[640] Am. Bankers; ASF; Capital One; CMSA; JPMorganChase; Sallie Mae.

[641] ASF; Capital One; CMSA.

[642] ASF; JPMorganChase (examples given).

that, if the items remain in the Form 10-D, disclosure should be allowed as part of the attached distribution report without repetition in the body of the report.[643]

- Two commenters supported the disclosure content of Item 1119 for Form 10-D.[644] Most significantly, one commenter supported repayment information, which is extremely important to investors in evaluating performance of underlying pool assets and payment surveillance.[645] Other specific items cited included distribution and pool performance information, delinquency, loss and prepayment rates, amounts drawn and changes to enhancement and other support and breaches of material representations and covenants.

- One commenter supported the approach in Item 1119 that actual disclosures must be tailored to the asset pool and transaction involved, as it recognizes the variety of assets types and structures and does not require a standardized presentation.[646]

- Eight commenters believed the contents of distribution information should be dictated by the market and the examples in Item 1119 should be scaled back.[647] While noting that Item 1119 states the described items are for illustrative purposes only, most of these commenters believed the Item would constitute a major expansion from the typical distribution report, requiring information not currently available, not agreed to among issuers and investors and in some cases available only from unrelated parties. Noting the highly diverse nature of ABS, the commenters thought the rules must be flexible. The commenters generally argued that information provided today is available through a variety of sources (e.g., Bloomberg and issuer websites) and already has been developed in response to investor needs and requests. Several of the commenters noted some of the elements listed do not have standards that apply across the industry. Three of the commenters suggested deleting Item 1119 altogether.[648] Alternatively, the commenters generally suggested specifying that the items are illustrative only, there is no implication that all items must be included, they are required only to the extent material and should be deemed modified as appropriate under the circumstances. Two commenters suggested limiting disclosure "to what is needed to inform investors and the market of the ongoing performance of the pool assets."[649]

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[643] ASF.

[644] CFAI; ICI.

[645] ICI.

[646] PWC.

[647] Am. Bankers; ASF; Aus. SF; CMSA; JPMorganChase; MBNA; US Bank; Wells.

[648] ASF; MBNA; Wells.

[649] CMSA; MBNA.

- One commenter was concerned about potential overlap between Form 10-D and Form 8-K disclosure, such as in reporting of additional securities and breaches of representations and warranties, and urged clarifying that information need be reported only once.[650]

- One commenter believed and requested confirmation that the information required by Item 1119 is limited to quantitative data.[651] The trustee has never had a role in providing a qualitative analysis or explanation of the data. Such an obligation is more appropriate for the sponsor or depositor and should be a Form 8-K requirement. As an example, the commenter cited the first sentence of Item 1119 that states that the distribution must be described. The commenter also objected to the second sentence to provide appropriate introductory and explanatory information of material terms and abbreviations as they are already disclosed in the prospectus or underlying transaction documents. The commenter also requested adding a materiality qualifier to the third sentence regarding presenting information in a tabular or graphical format as the commenter does not use them.

- One commenter thought the trustee should not be liable for any filing, failure to file or information in the Form 10-D that the trustee did not itself provide and disclosure should be required to such effect.[652]

2. Proposed Content – Specific Comments

- One commenter requested deleting Item 1119(a) regarding applicable record dates, accrual dates, determination dates and distribution dates as they are specified in the governing documents, disclosed in the prospectus and do not change.[653] An additional commenter believed accrual and determination date disclosure would be problematic.[654]

- One commenter requested clarifying Item 1119(b) that the description of the source of cash flows may be generic (e.g., collections on loans, collections of principal receivables) or, alternatively, deleting that paragraph.[655]

- One commenter thought Item 1119(b)'s reference to "portfolio yield, if any" is unclear.[656]

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[650] ASF (examples given).

[651] JPMorganChase.

[652] Am. Bankers.

[653] ASF.

[654] Wells.

[655] ASF.

[656] ASF.

- One commenter suggested relaxing the requirement in Item 1119(c) for itemizing the flow of funds by priority of payment because it does not do so currently and thought the information would be of limited usefulness to investors.[657]

- One commenter believed, regarding Item 1119(c)(1), that fees and expenses not paid by cash flow should not be disclosed.[658]

- One commenter believed, regarding Item 1119(c)(4), that the only amount of excess cash flow that should be reported is that released to the residual interest holder, because definitions and treatment of excess cash flow, spread and finance charges vary.[659]

- One commenter believed, regarding Item 1119(e), that if "interest rates applicable to the pool assets" is to be reported, it should be on a weighted average basis.[660] An additional commenter believed disclosure of rates in Item 1119(e) would be difficult because applicable rates vary not only between accounts but in accounts.[661]

- One commenter believed, regarding Item 1119(f), that the beginning and ending balances in the finance charge and principal accounts do not provide meaningful information to investors for credit card master trusts.[662] The allocation of the funds in the accounts is most relevant and is already disclosed in the commenter's distribution reports.

- One commenter believed beginning and ending balances, instead of daily transaction account activity, should be adequate disclosure for purposes of Item 1119(f).[663]

- Two commenters believed that, regarding disclosure of enhancement and other support under Item 1119(g), descriptions should be limited to amounts drawn and remaining amounts available for external credit enhancement or reserve accounts, and only for any period in which a draw occurs.[664] The purpose, method of calculation and use should be eliminated as it is provided in the governing documents and prospectus.

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[657] JPMorganChase.

[658] ASF.

[659] ASF.

[660] ASF.

[661] MBNA.

[662] MBNA.

[663] JPMorganChase.

[664] ABA; ASF.

- One commenter believed application of internal credit enhancement, such as application of funds to pay senior ABS prior to subordinate ABS, should not give rise to reporting.[665]

- One commenter believed that for bond insurance and swaps, the amount of remaining coverage would not be a known specific amount.[666] Swap payments made in the normal course of the functioning of the swap due to rate or currency changes should not be reported except for extraordinary payments made or due, such as a termination payment.

- Four commenters suggested deleting Item 1119(h) regarding updated pool composition information, such as weighted average coupon, weighted average life, weighted average remaining term, pool factors, prepayment amounts, prepayment speed and other prepayment or interest rate sensitivity information (and for lease ABS, turn-in rates and residual value realization rates).[667] One of these commenters thought that, while this information is initially included in the prospectus, with the exception of pool factors, it is not commonly provided today.[668] Mandating it for all transactions would be burdensome. Reporting should focus on ongoing performance of the pool as a whole and not on specific pool characteristics as they fluctuate. At a minimum, one commenter requested eliminating "current payment/prepayment speeds and other prepayment or other interest rate sensitivity information" because the former is difficult to generate and varies by model and the latter is too vague and subject to qualitative assessment.[669]

- One commenter believed, regarding Item 1119(h), that issuers should be guided by the specific information agreed to in the underlying documents and many of the factors in the item are not relevant to credit card or other revolving loan securitizations.[670]

- One commenter recommended not requiring graphical presentations or performance calculations based on distributions or asset performance due to the variety of potential requirements and non-standard definitions that exist for many performance indicators.[671] Any performance data required should be dictated by the transaction documents.

- One commenter believed that once the amount of prepayments is reported, converting it to a prepayment rate is unnecessary, as there are various models for doing so and this is easy enough for an investor to do on its own.[672] In addition, the commenter thought the

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[665] ASF.

[666] ASF.

[667] ASF; Aus. SF; JPMorganChase; Wells.

[668] ASF.

[669] JPMorganChase.

[670] MBNA.

[671] Am. Bankers.

[672] ABA.

reference to "other prepayment or interest rate sensitivity information" was vague and should be deleted. The commenter believed it should be sufficient to show the amount of prepayments received on pool assets and the current value of the index upon which the interest rate of any classes of securities is based.

- One commenter believed disclosure of prepayment speeds should be required and such data is readily available.[673] Disclosure should be required of voluntary prepayment speeds that exclude involuntary prepayments, such as foreclosures and bankruptcies, to reflect the natural course of borrowers making payments more than required.

- One commenter requested adding "(if applicable)" after "pool factors" in Item 1119(h).[674]

- One commenter believed, regarding Item 1119(i), that delinquency and loss information should be presented on a pool basis only.[675] Item 1110(c) (referenced by Item 1119(i)), requires pool stratifications. While sometimes this is presented initially in the prospectus, it is not commonly disclosed on an ongoing basis and the commenter questioned its usefulness since fluctuations in the subsets would be reflected in overall pool results.

- One commenter believed Item 1119(i) information should be limited to pool level information and "buckets" of 30-59, 60-89 and 90+ days.[676]

- One commenter believed disclosure of recovery values after the underlying asset experiences a default should be required under Item 1119(i).[677] In addition to monthly loss severity experience of the pool, servicers also should include information on the recidivism rate of habitually delinquent accounts.

- One commenter noted it does not capture on a monthly basis all delinquency and loss information in Item 1119(i).[678] For example, recoveries on previously-charged off loans are not mapped to individual charged-off accounts. The commenter also identified full balance payments as another example of information it currently does not track.

- Two commenters recommended deleting Item 1119(j) regarding servicer advances, arguing variously that they are common and made in the ordinary course.[679] If disclosure

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[673] MetLife.

[674] Wells.

[675] ASF.

[676] JPMorganChase.

[677] MetLife.

[678] MBNA.

[679] ASF; Wells.

is required, limit it to generic categories (e.g., total principal and interest advances and total tax and insurance advances, although one commenter suggested only principal and interest or "delinquency" advances).[680] If reimbursement sources must be described, also limit to generic descriptions (e.g., loan proceeds or general funds).

- One commenter thought disclosure of advances by category should be sufficient in lieu of detailed disclosure of individual advances and the source of reimbursement should not be reported at all because it is specified in the transaction documents.[681]

- Two commenters supported Item 1119(k) disclosure regarding material modifications, extensions or waivers to pool asset terms, fees, penalties or payments, arguing that such modifications can easily manipulate performance.[682] Both commenters also requested strengthening the disclosure to include the aggregate or cumulative amount (suggestions included number, amount and percentage) of accounts that have been modified, extended or repurchased from the pool, with one commenter suggesting the disclosure be broken out to identify the basis for the modification, extension or removal.[683]

- One commenter recommended modifying Item 1119(k) to make clear that a modification is "material" only if it is material to the pool as a whole and not on an asset by asset basis, as it is normal to modify, extend or waive terms, fees, penalties and payments on individual loans though they may not be material to the pool as a whole.[684]

- One commenter believed modifications of terms, fees and payments are commonly employed and therefore there should be a specific threshold of materiality.[685] The commenter suggested disclosure only if 30% or more of the aggregate principal balance of pool is modified during a distribution period.

- Two commenters believed the disclosure in Item 1119(k) (modifications and waivers) and Item 1119(l) (breaches of representations, warranties and covenants) would be problematic and/or unnecessary because it is not generally disclosed today.[686] An additional commenter believed Items 1119(k), (l) and (n) (pool changes) are extraordinary events more appropriate for Form 8-K.[687]

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[680] Wells.

[681] ABA.

[682] MetLife; State Street.

[683] State Street.

[684] ASF.

[685] ABA.

[686] Aus. SF; Wells.

[687] JPMorganChase.

- One commenter recommended deleting Item 1119(l) regarding breaches of representations, warranties and covenants as it believed disclosure provided by Form 8-K Item 2.04 of material early amortization, performance triggers or default events that materially modify payment priorities should be sufficient.[688] Breaches not meeting that standard need not be disclosed. Alternatively, limit to breaches that are a default or servicer default or trigger a repurchase obligation (as they often account for cure periods).

- One commenter believed Item 1119(l) disclosure is not common today and parties who prepare the reports may not be in a position to know of breaches by other parties.[689] The commenter suggested limiting disclosure to breaches (1) of which the reporting person has actual knowledge or has received notice under the transaction document, and (2) which exceed, in the aggregate during the distribution period, either 10% of the aggregate principal balance of the pool or any threshold specified in the transaction documents that creates a right by any transaction party to terminate another transaction party.

- Two commenters believed disclosure of new issuances of ABS backed by the same pool (Item 1119(n) and Form 10-D Item 3) should only be included to the extent material and if not otherwise included in a registration statement or Rule 424 prospectus.[690] It should not include information about privately offered classes or resecuritizations, if the issuance does not materially affect the interest of investors in the pool assets. It also should not include sales that are part of a master trust program described in the issuer's prospectus.

- One commenter would eliminate disclosure of additional sales because it is not typically disclosed today and should be immaterial.[691] Use of proceeds from additional ABS backed by the same pool is generally limited to purchasing new assets, and if disclosure is required, it should be limited to uses other than those described in the prospectus or for purposes other than to acquire pool assets. In addition, sales of unregistered securities are generally immaterial and the information required by Item 701 of Regulation S-K would result in disclosure of proprietary information.

- One commenter believed that, in most transaction and in master trusts in particular, the addition and removal of pool assets is routine and this fact and its methodology is disclosed in the prospectus.[692] Accordingly, Item 1119(n) should be limited to additional and removals only where they occur by amendments to the documents or if they materially change pool size or characteristics.

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[688] ASF.

[689] ABA.

[690] ASF; MBNA.

[691] ABA.

[692] ASF.

- Four commenters requested eliminating Item 1119(n)(2) requiring updated pool composition information as a result of material asset pool changes as it goes beyond current practice and would require extensive, detailed, updated information that is unnecessary.[693] Two commenters believed disclosure of the parameters that could result in possible pool changes in the prospectus is enough.[694]

  If retained, one commenter suggested not requiring disclosure for the following[695] (an additional commenter[696] also supported the first two):

  - Changes due to repurchases or substitutions.

  - Changes that occur in accordance with the terms and conditions, including eligibility criteria, in the transaction documents and disclosed in the prospectus.

  - As a result of "organic" or natural causes (e.g., prepayments) or the deposit of additional balances of revolving accounts (as opposed to new accounts).

  One commenter would limit disclosure to additions only.[697] Removals or substitutions are generally limited in scope and substitutions are pursuant to criteria generally required by transaction documents. With respect to additions, the commenter believed the standard should be whether pool composition at the time the pool becomes fixed (e.g., after a prefunding or revolving period or upon addition of assets to a master trust) deviates materially from the composition of the pool described in the prospectus. Also, a less than 10% change from the principal balance at issuance (excluding certain items) should not be deemed a material change.

- Two commenters would object to disclosure of material changes from the results of any prior payment or sensitivity analyses, models or estimates or projections as to pool performance based on the actual performance of the pool.[698] As one commenter explained, investors understand and assume that actual results will vary and disclosure of differences between past assumptions and actual performance is irrelevant.[699] The other commenter believed analytical tools are already available to allow investors to update.[700]

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[693] ABA; ASF; BMA; Wells.

[694] ABA; BMA.

[695] ASF.

[696] Wells.

[697] ABA.

[698] ABA; ASF.

[699] ASF.

[700] ABA.

- Three commenters did not believe Item 305 market risk disclosure is appropriate, believing market risk is not generally a concern for ABS.[701]

3. Proposed Form 10-D Deadline

- Five commenters supported the proposed deadline.[702] One commenter believed it is a better fit for issuers, especially if combined reporting is not allowed.[703] Shorter deadlines would be burdensome with no benefit. One commenter, however, thought that more information is required than currently provided, additional time may be needed.[704]

- One commenter thought the deadline was an absolute minimum and would in fact prefer it increased.[705] The commenter supported measuring the deadline from distribution date.

- One commenter supported tying Form 10-D filings to the payment frequency of the ABS, not to the payment frequency of the pool assets.[706]

- Six commenters believed a filing extension of at least five business days should be available under Rule 12b-25.[707]

- Five commenters requested a provision whereby the staff, in its discretion, may extend a filing deadline and waive delinquencies if subsequently cured.[708]

E. Annual Reports on Form 10-K

1. General Comments

- Two commenters generally agreed with the proposed application of Form 10-K items as consistent with the modified reporting system, although they suggested eliminating Item 12 (security ownership table) if the issuing entity has no executive officers or directors.[709] Disclosure of beneficial owners is burdensome with no corresponding benefit.

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[701] ABA; ASF; NYCBA.

[702] ABA; ASF; JPMorganChase; MBNA; Wells.

[703] ASF.

[704] Wells.

[705] Am. Bankers.

[706] ABA.

[707] ABA; ASF; Capital One; CMSA; JPMorganChase; US Bank.

[708] ASF; Capital One; JPMorganChase; MBNA; US Bank.

[709] ABA (requested similar exclusion for Form S-1 menu); ASF.

- One commenter suggested clarifying that, given that Item 1117 information regarding affiliations and related transactions has a two-year look-back, information previously disclosed in a prospectus or prior annual report need not be repeated.[710]

- In response to a request for comment, two commenters objected to requiring aggregated distribution information or updated pool composition information in the Form 10-K, arguing that, after issuance, investors rely primarily on other information sources, such as monthly distribution reports and issuer and third party websites, which are adequate.[711]

- One commenter requested requiring all information required by third parties for the Form 10-K, such as certifications and attestations, to be provided to the person preparing the report by 30 days prior to the Form 10-K due date.[712] The commenter also requested requiring such parties to provide such information without restrictions and allowing all parties be able to rely on all tax and SEC filings without restriction.

2. Annual Servicer Compliance Statements

- One commenter believed the servicer compliance statement, combined with the assessment and attestation of compliance with servicing criteria, would provide investors with significant assurances regarding the reliability and integrity of servicing.[713]

- One commenter believed servicer compliance statements should be required only for primary servicers in contractual privity with the trustee but not for subservicers.[714]

- One commenter believed servicer compliance statements should be required for each servicer, and not just for Item 1107(a) servicers.[715] The commenter believed it would not be appropriate or in the best interest of investors to delete Item 1121. Because the Item 1120 attestation is at the "platform" level, only Item 1121 addresses compliance with the actual transaction agreements. Entities that prepare the Form 10-K rely on the statements in making the Section 302 certification, which would be difficult to make without them.

- One commenter believed the servicer compliance statement, although focused on the transaction in question and not the platform, should be eliminated as it is a historical anomaly and would be largely subsumed in the new attestation procedures.[716]

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[710] ABA.

[711] ABA; ASF.

[712] Am. Bankers.

[713] MBA.

[714] ABA.

[715] Wells.

[716] ASF.

- One commenter recommended modifying the servicer compliance statement for repackagings as they generally do not employ a servicer but rather use only a passive trustee that merely passes payments.[717]

- One commenter, in response to a request for comment, would object to filing servicer compliance statements with each Form 10-D as unduly burdensome and unnecessary.[718]

F. Signatories for Proposed Form 10-D and Form 10-K

- Two commenters supported requiring the depositor or a servicer (or master servicer) sign and not allowing the trustee or administrator to sign.[719] One of the commenters would rephrase that the depositor is the party legally responsible for signing the reports, but is permitted to delegate that duty to a servicer.[720] The other did support the ability of the trustee to sign Form 10-D's as an administrative convenience and signing other reports by power of attorney.[721]

- Seven commenters believed additional parties should be able to sign.[722] To do otherwise would change current practice. These commenters generally argued that a trustee, administrator or any servicer (with some limiting to the servicer responsible for the greatest amount of pool assets determined as of closing if no master servicer) also should be permitted to sign. For example, a securitization may have multiple servicers, but instead of a master servicer, the trustee or an administrator may have active responsibility for administrative activities and is the only party engaged in activities related to the entire transaction. Repackagings are another example where there may not be a servicer. Two commenters believed a trustee should always be permitted to sign.[723] Four commenters believed transaction parties should be permitted to contract among themselves who should sign,[724] however, one of these commenters suggested making clear that if the trustee signs, it has no liability for information provided by third parties and disclosure is required of this fact and of the true sources of the information.[725]

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[717] BMA.

[718] Wells.

[719] JPMorganChase; Wells.

[720] Wells.

[721] JPMorganChase.

[722] ABA; Am. Bankers; ASF; BMA; Citigroup; JPMorganChase; US Bank.

[723] BMA; JPMorganChase.

[724] ABA; Am. Bankers; Citigroup; US Bank.

[725] Am. Bankers.

- Four commenters requested clarification that a power of attorney could be used to sign reports (thereby permitting a trustee or administrator to sign on behalf of a depositor).[726]

- One party requested clarifying that an administrator, or trustee that also acts as administrator, is captured within the "servicer" definition and therefore may sign reports and Section 302 certifications.[727]

- One commenter recommended clarifying in the instructions to Forms 8-K and 10-D that the report may be signed by a duly authorized representative of the depositor, as the proposal now just says "by the depositor."[728]

- One commenter requested clarifying that the manager in foreign ABS transactions (in lieu of the depositor) should be designated as one of the permitted signatories.[729]

- One commenter requested clarification of signature provisions for UK RMBS master trusts because of the different parties in these structures (mortgage trustee, funding entity and issuing entity).[730] Existing practice is for all three to sign. If the commenter's suggestion to clarify that the depositor is the funding entity or the mortgages trustee is adopted, this would be workable, with the mortgages trustee being the entity best placed to issue the reports.

G. Certifications Under Section 302 of the Sarbanes-Oxley Act

- Two commenters agreed with the proposals, but requested that:[731]

    - Like the reports themselves, additional parties be permitted to sign;
    - The existing procedure of certifying the Form 10-D information annually with the Form 10-K be preserved; and
    - The reasonable reliance instruction should be retained. One of the commenters believed reasonable reliance should be expanded to all unaffiliated parties, including the accounting firm performing the servicing attestation.[732]

- One commenter recommended also allowing the trustee or any servicer to sign, including any servicer acting as master servicer or administrator.[733]

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[726] ASF; BMA; JPMorganChase; US Bank.

[727] ABA.

[728] ASF.

[729] Aus. SF.

[730] A&O.

[731] ABA; ASF.

[732] ASF.

- Two commenters agreed the trustee should not sign.[734] An additional commenter agreed the trustee would not sign the certification in the normal course, however, transaction parties should be able to designate who can sign so long as it is clear that the trustee has no liability for third party information.[735]

- One commenter recommended allowing the manager (in lieu of the depositor) to certify.[736] The commenter believed that the servicer should only be required to execute the servicer compliance statement relating to its servicing obligations.

- Two commenters believed proposed paragraph 5 of the certification is unnecessary if some form of the Item 1120 attestation proposal is adopted.[737] However, one commenter noted that it relies heavily on Item 1121 servicer compliance statements and USAP reports in making its certification, and if paragraph 5 is retained and Items 1120 and 1121 carve out some percentage threshold of servicers, it would be appropriate to limit paragraph 5 to only those pool assets covered by Item 1120 and 1121.[738]

- One commenter, in recommending an alternative where each party submits a report of compliance with servicing criteria, recommended deleting the words "assessment" and "reasonably relied" as unnecessary if each party submits a report.[739]

- One commenter requested clarifying the signature provisions for UK RMBS master trusts because of the different parties in these structures.[740] A clarification of the "depositor" definition could solve the issue, or alternately permitting the trustee to sign.

- One commenter requested flexibility regarding "senior officer in charge of securitization" where the depositor does not have officers, and suggested adding "or the equivalent."[741]

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[733] BMA.

[734] Aus. SF; Wells.

[735] Am. Bankers.

[736] Aus. SF.

[737] ABA; Wells.

[738] Wells.

[739] MBA.

[740] A&O.

[741] A&O.

H. Updated Financial Information for Significant Obligors and Enhancement Providers

- Two commenters requested clarifying that, with respect to providing updated financial information regarding third parties, the determination as to which parties meet a given disclosure threshold should be made at closing and not change over time.[742] To do otherwise would be burdensome to monitor and unnecessary. One commenter noted it is typical to provide in documents for large loans that additional information is to be provided for securitization reporting, and if significant obligors are required to change, this may result in significant obligors who did not have this provision negotiated into their agreements.[743]

- One commenter, for similar reasons, proposed that the tests should be measured as of the date the significant obligor or enhancer is initially added to the transaction, with the same caveat that existing obligors and enhancers not be triggered as the pool pays down.[744]

- One commenter thought tests should be recalculated with pool fluctuations to permit omission of disclosure about parties that no longer meet the tests.[745]

- Two commenters believed no updated financial information should be required for third parties at all, arguing that it would be difficult to obtain and irrelevant.[746]

- One commenter believed, for ongoing reports, financial statements for an unaffiliated third party insurer with a sufficient rating should be allowed to be referred to, in lieu of incorporation by reference, if the insurer or its parent meets one of the eligible categories for reference information in Item 1100(c)(2)(ii), regardless of the insurer's involvement in the transaction.[747] The commenter acknowledged the financial strength of the insurer is relevant and agreed that incorporation of the financial statements by reference into the initial prospectus is appropriate. The commenter also noted no-action letters contemplating that issuers will continue to incorporate the financial statements by reference in ongoing Exchange Act reports. However, the commenter believed actual practices have varied and ABS issuers should not be held responsible for the information on an ongoing basis, especially since Exchange Act reports must be certified. The issuer also is not in a position to describe any material changes from the incorporated information. While it is realistic to expect due diligence on the financial statements at issuance, it is unrealistic to expect such diligence ongoing. The current position could

[742] ASF; CMSA (suggested language).

[743] CMSA.

[744] ABA.

[745] NYCBA.

[746] Am. Bankers; Wells.

[747] AFGI.

discourage financial guaranty insurance without significant incremental benefit to investors. On an ongoing basis, the relationship between the issuer and the insurer is comparable to a repackaging trust and the underlying issuer, where reference is allowed. If the insurer is a reporting company, it already is accountable for its information.

- One commenter suggested eliminating updated financial information for significant enhancement providers who, as of the date of the required report, are rated in the top three rating categories by an NRSRO.[748] The commenter believed many such parties are not reporting companies so obtaining the information is difficult. For those that do have the information, obtaining it is still costly. The risk of losing Form S-3 because of unavailability of the information is too high, and there is no compelling investor interest in or enhanced investor protection resulting from the disclosure. The commenter believed the market pays more attention to ratings than on financial strength since ratings evaluate the efficacy of hedged positions and collateralization.

I. Report of Compliance With Servicing Criteria and Accountant's Attestation

1. Proposed Definition of "Responsible Party"

- Thirteen commenters believed that instead of a single "responsible party," there should be separate assessments of compliance by each entity responsible for the particular criteria.[749] The concept of a single responsible party, even with the proposed permission of reasonable reliance, is misplaced, inequitable, possibly unworkable and not likely to produce the desired assurance. The assumption that a single party would have the requisite skills and information to make a global assessment is not necessarily true. Often there are multiple parties, some or all unaffiliated, none having complete access to information. Reasonable reliance would not provide enough comfort for a single assessment (e.g., a SAS 70 does little to address the criteria), and it may cause conflicting results as unaffiliated servicers could be faced with different thresholds of reasonable reliance by different responsible parties. In many instances, the responsible party as proposed would default to the depositor, although as a special purpose entity it is one of the least likely to be qualified. Responsibility for assessing compliance with the criteria should be placed solely, in each case, with the individual party whose servicing activities are being evaluated, and tested by an independent third party, if appropriate.

- One commenter noted that if a single party approach is used, the Commission will need to give further direction over what time period the assessment will cover and how a responsible party assesses the level of servicing compliance by unaffiliated parties which may not have originally been part of a transaction.[750] The proposed "reasonable means" approach can be subject to interpretation and similar circumstances could yield a differing assessment of compliance.

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[748] ABA.

[749] ABA; AICPA; ASF; BMA; CMSA; Dewey; E&Y; JPMorganChase; KPMG; MBA; MBNA; US Bank; Wells.

[750] PWC.

- One commenter supported reasonable reliance if the single party approach is retained.[751]

- Six commenters objected to establishing the responsible party as the same party that signs the Form 10-K.[752] Two believed a servicer or master servicer should be able to be contractually designated as the responsible party, irrespective of who signs the Form 10-K.[753] One commenter believed any transaction party should be permitted to be administratively responsible for gathering the items to be included in the reports, but did not believe that the mere fact that one party might sign the report means it should be a responsible party for assessing compliance.[754] Such responsibilities should be determined by contract within the transaction documents (and disclosed in the compliance report). One commenter believed the determination of responsible party should be dependent on facts and circumstances (e.g., who is best able to gather the necessary information) and flexibility should be given to allow multiple responsible parties.[755] One commenter believed the proposal restricts freedom of contract.[756] Neither the depositor nor the servicer would accept the role without significant additional compensation or indemnifications and may constrict the number of people willing to participate in such transactions. Inadequacies in the existing accounting role (e.g., USAP) should be fixed directly instead of linking it to signing all three forms.

- One commenter believed the responsible party should be either the entity that signs the Form 10-K or any other entity eligible to sign (which the commenter would expand to include the trustee or any servicer), if it agrees.[757]

- One commenter recommended the "responsible party" be the manager (in lieu of the depositor).[758] The commenter believed that in Australian MBS transactions, the manager should be deemed to be the depositor.

- Nine commenters supported an alternative that would require a single party to either confirm that an assessment and attestation covering each unaffiliated party with material servicing or administration responsibilities has been received, or disclose that an entity with such responsibilities has failed to deliver its required assessment and attestation.[759]

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[751] Wells.

[752] ABA; ASF; JPMorganChase; Dewey; MBA; PWC.

[753] ABA; Dewey.

[754] ASF.

[755] PWC.

[756] MBA.

[757] BMA.

[758] Aus. SF.

[759] AICPA; ASF; BMA; CMSA; E&Y; JPMorganChase; KPMG; MBA; Wells.

One of the commenters believed individual assessments can be performed by each such party at a platform level consistent with the proposal and these reports should be filed as exhibits to the Form 10-K along with the responsible party's assessment of its own servicing compliance, as applicable.[760] The trustee or administrator could be added to the extent it performs any servicing functions. The ultimate responsible party, however, should not be given the task of "looking behind" or investigating such assessments in order to itself assess the compliance by unaffiliated parties.

Another commenter suggested requiring the depositor (or other contractually obligated party) to obtain separate assessment and attestation reports from each party along with Item 1121 compliance statements identifying if any item of non-compliance in the assessment and attestation affects the particular transaction.[761]

Three commenters suggested expanding the Section 302 certification to certify that the filed reports collectively address all of the relevant servicing criteria and any minimum specified coverage threshold of the pool assets.[762]

- Four commenters suggested an alternative of expanding Item 1121 servicer compliance statements to include a separate certification that the servicer has performed an assessment of its platform against the criteria applicable to it and identifying any material instances of non-compliance.[763] A separate accountant's attestation should be made for each assessment. Trustees and bond administrators excluded from the definition of "servicer" could be added to Item 1121 solely for providing similar statements against the criteria. The depositor's role would be limited to collecting statements.

- Two commenters believed that neither trustees nor administrators are in a position to act as a "responsible party" to provide the overall assessment of servicing compliance.[764] They are typically not affiliated with other parties, receive limited fees, are merely recipients of information by others and do not necessarily have the expertise and generally do not have access to appropriate or complete information that would be necessary for such an assessment. One of the commenters believed the responsible party should be the issuer, the master servicer or the servicer.[765]

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[760] ASF.

[761] Wells.

[762] AICPA; E&Y; KPMG.

[763] ABA; CMSA; JPMorganChase; US Bank.

[764] Am. Bankers; US Bank.

[765] Am. Bankers.

2. Responsible Party's Report on Compliance with Servicing Criteria

- One commenter, in suggesting an alternative that allows multiple assessment reports by each party, suggested the following as an exhibit to the responsible party's report:[766]

    - A statement of the responsible party's responsibility for collecting each required unaffiliated servicer's report on compliance with the servicing criteria;
    - A statement that the responsible party is responsible for attaching an exhibit listing all required unaffiliated servicers' reports, and for providing explanations if they are not attached;
    - A statement that the responsible party is responsible for listing any material noncompliance reported by unaffiliated servicers.

3. Proposed Scope: Period to be Covered

- Two commenters agreed with the proposed assessment as of the end of, and for a full fiscal period, rather than a single point in time assessment.[767]

- One commenter preferred a point in time assessment as of the end of the reporting period, believing that, given the inherent complexity of servicing, materiality of non-compliance should be measured for the reporting period as a whole, and curative measures should be given effect in determining whether the servicer is in material compliance.[768]

- Three commenters noted that the fiscal period of a particular ABS transaction may not coincide with the assessment period for each party involved and suggested recognizing that a "lag" period is acceptable.[769] If a lag period is accepted, the SEC should provide guidance regarding the extent of evidence required to assess compliance during the lag period, broadly analogous to guidance in Auditing Standard No. 2. An acceptable lag should be up to a year. When the assessment and attestation become available for any periods subsequent to the period for which Form 10-K was filed, those reports could be required to be filed (either by Form 8-K or a Form 10-K amendment).

4. Proposed Scope: Level of Reporting

- Seven commenters supported an assessment at the platform, rather than transaction, level.[770]

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[766] MBA.

[767] ASF; KPMG.

[768] ABA.

[769] AICPA; E&Y; KPMG.

[770] AICPA; ASF; E&Y; KPMG; MBNA; PWC; Wells.

- Three commenters believed the final rule should acknowledge that an assessment and attestation at a platform level would not necessarily identify material instances of noncompliance with respect to the pool underlying the specific transaction.[771] Similar disclosure should be required in the Form 10-K. The disclosure should include the amount of assets in the platform at the beginning and end of the Form 10-K period.

- One commenter noted some servicers may have similar systems or processes for multiple asset classes (e.g., an administrator may perform Exchange Act reporting for multiple asset types using the same systems and processes) and requested an instruction that in such instances an assessment and attestation on this broader "platform" (rather than for each separate asset class) is permitted.[772]

5. Proposed Scope: Entire Servicing Function and Multiple Servicers

- One commenter believed more guidance is needed on how the responsible party is to assess waterfall calculations and for the auditor to attest.[773] Specifically, is it intended that the responsible party and external auditor should recalculate the waterfall? Such recalculations require significant time and expense and are currently performed by paying agents or trustees, neither of which is likely to be a responsible party.

- Three commenters believed it would be inappropriate to require an assessment and attestation from every entity with a role in servicing or administration, with there being a point where the cost would outweigh the benefit.[774] One commenter recommended a 20% servicing test.[775] Two commenters suggested the following:[776]

    - Every entity with contractual privity with the issuing entity and responsible for any servicing or administration function that can be assessed using the criteria.

    - Any servicer lacking contractual privity with the issuing entity and which services 10% or more the asset pool (determined on a dollar basis of original pool balance), unless another party has asserted responsibility for the related criteria and related internal control over compliance in its assessment.

- Three commenters would require reports from all parties whose activities are material, with materiality assessed individually and in the aggregate; for example, a report for any entity whose activities relate to more than a specified percentage (e.g., 10%) and reports

[771] AICPA; E&Y; KPMG.

[772] Wells.

[773] PWC.

[774] ASF; BMA; Dewey.

[775] Dewey.

[776] ASF; BMA.

for sufficient number of servicing entities whose activities collectively relate to a minimum percentage of pool assets (e.g., 80%).[777]

- One commenter believed all servicers and parties that perform aspects of the criteria, including administrators and trustees, should be required to deliver an assessment and attestation.[778] The threshold for servicer disclosure in Item 1107 should be treated separately from the assessment requirement. While the commenter appreciates concerns about obtaining assessments from multiple parties, not requiring assessments from all parties may be misleading. A transaction may have no servicers that meet the percentage tests such that there is no assessment on any of the pool assets. The resulting "clean" assessment may give the impression that nothing is wrong when in fact nothing was tested. In addition, the percentage of assets for a servicer may change. Basing tests on closing date percentages would be unfair to servicers who subsequently drop below that test and potentially misleading if new servicers meet the test but are not added, although the alternative of recalculating tests each year causes uncertainty. The ability of a servicer to use one platform assessment for all transactions minimizes the burden of providing a report for all transactions. If the scope of parties covered is limited, the responsible party's assessment should disclose which parties were excluded.

- One commenter noted that, on the one hand, requiring an assessment from each unaffiliated servicer could become costly (estimating "tens of thousands of dollars" for such an engagement), but on the other hand, establishing a threshold may be inappropriate in certain circumstances, such as if an unaffiliated servicer performs very limited but important functions, as is the case with many special servicers.[779] The commenter requested the opportunity to discuss the issue with the staff.

- One commenter, in recommending an alternative where multiple parties submit reports, requested clarification that a master servicer is not required to alter its compliance statement to reflect any deficiencies reported by an unaffiliated servicer.[780]

- Two commenters believed any alternative with multiple assessments should provide flexibility.[781] For example, if unaffiliated entities, such as a master servicer and subservicer, have structured a relationship that would allow the master servicer to represent to its accountants that it is responsible for both compliance with servicing criteria and the effectiveness of the internal control over compliance with servicing criteria, the final rules should permit that type of consolidated reporting.

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[777] AICPA; E&Y; KPMG.

[778] Wells.

[779] MBA.

[780] MBA.

[781] ASF; BMA.

- Two commenters opposed requiring trustees to make an assessment and obtain an attestation.[782] One of the commenters argued that such attestation would be of little value since distributions are scrutinized on a monthly basis by investors.[783]

- One commenter requested confirmation that none of DTC, any nominee of DTC or any direct or indirect participant in DTC (or any similar entities performing the functions of a clearing organization or related participant) would be construed as being required to provide an assessment and attestation against the criteria.[784]

6. Proposed Servicing Criteria

a. General Comments

- Two commenters supported a uniform set of servicing criteria.[785] One of these commenters, while noting that market participants could develop suitable uniform criteria if given enough time, nevertheless believed that rather than pursue that approach, the proposed criteria, if revised to give effect to the commenter's comments on certain specific items, would be an acceptable set of criteria that could be applied across asset types.[786] Another commenter commended the initiative to enunciate a consistent set of servicing criteria.[787]

- One commenter noted that approximately half of the criteria are taken from the existing USAP (including several standards with specific deadlines) and therefore felt comfortable with most of the criteria.[788]

- Two commenters thought the rules should permit the use of criteria established by a private body or group that followed due-process procedures, including broad distribution for public comment, so long as the criteria is identified.[789] An additional commenter recommended using the proposed criteria as an interim measure until appropriate industry groups can develop criteria for each major asset class.[790] Two commenters thought the Commission should encourage the development of criteria by the private sector as the

[782] Am. Bankers; CMSA.

[783] CMSA.

[784] ASF.

[785] ASF; KPMG.

[786] ASF.

[787] CMSA.

[788] MBA.

[789] E&Y; PWC.

[790] AICPA.

market will be better able to tailor to individual asset classes and timely developments.[791] Another believed that, given enough time (e.g., one to two years), market participants, including the MBA, BMA and ASF, could develop appropriate uniform criteria by asset class.[792] The commenter believed the proposed criteria, without further clarification for specific asset classes, would be subject to interpretation contrary to achieving standardization.

- One commenter thought some of the criteria appeared inconsistent with market standards, and while noting they are not mandatory, nevertheless believed requiring disclosure as to compliance is the functional equivalent of setting substantive standards, which should be avoided.[793] For example, several items (although copied directly from USAP) require specific deadlines that not all issuers meet or are required to meet and issuers will be reluctant to deliver a report saying so. The level of detail sometimes goes beyond what is currently in transaction documents.[794] The commenter proposed an alternative that the assessment simply state that the responsible parties have performed their duties as to the specified items in accordance with the applicable agreements (setting forth the contractually specified deadlines when applicable). Where the agreement is silent on the issue, the responsible party should be permitted to state there is no applicable requirement and the specified action has been taken within the number of days stated in the assessment.

- One commenter was concerned with looking to transaction documents in the criteria and suggested using more stand-alone criteria.[795] Transaction-specific criteria could result in reported noncompliance that has no relevance to a particular investor (e.g., the particular provision is not in that particular investor's transaction agreements). Transaction-specific criteria also introduce greater subjectivity into testing, raise doubts about the nature of testing to be performed and could increase the costs of the engagement. Stand-alone criteria would be a good complement to the statements of compliance with the actual transaction documents required under Item 1121.

- One commenter was in favor of establishing a standard set of criteria, but believed the criteria should be considered guidelines for establishing servicing standards applicable to the particular transaction rather than a mandated set of requirements.[796]

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[791] E&Y; KPMG.

[792] PWC.

[793] ABA.

[794] An additional commenter, MBNA, also expressed concern when specifics in the criteria differ from transaction agreements.

[795] MBA.

[796] TMCC.

- One commenter believed there is some inconsistency in requiring a "platform" level assessment and then having servicing criteria that refer to transaction agreements.[797] A platform assessment generally would include some assessment of compliance with a representative sampling of transaction agreements, but not for all transactions. Item 1121 compliance statements contain specific statements of compliance with transaction documents for particular transactions.

- One commenter believed substantial modifications to USAP were in order and the modifications are appropriate.[798] The commenter did suggest consideration to establishing a sample size for each of the tests to be conducted by auditors and also a measure of materiality. The commenter envisioned sample sizes determined by statistical sampling to derive a 98% confidence level that the error rate is less than 2%. Care would be needed to determine the risk factors to be used by the auditor in determining sample sizes, so guidance would need to be provided.

- One commenter believed additional guidance is necessary in determining whether there is a material instance of noncompliance with the criteria.[799] The commenter believed any instance of non-compliance may well be material and investors should make their own assessments of its importance. The commenter expected to report any instance of non-compliance of which it is aware and requested clarification that such an approach is consistent with Commission intent.

- One commenter requested clarification that performing some functions in the criteria does not subject that party to any other requirements (such as disclosure) as a servicer.[800]

b. Comments on Specific Criteria

- One commenter requested deleting "appropriate custodial bank accounts" from Item 1120(d)(2)(i) as not all transactions require a deposit in the specified 2-day time frame.[801]

- Four other commenters also objected to Item 1120(d)(2)(i) on the grounds that many transactions allow the servicer to commingle collections until they are required to be distributed, provided certain conditions are satisfied.[802] The commenters believed this practice has not harmed investors and should not be prevented. It would be unfair to force an issuer to say it was not in compliance with a standard when they are in compliance with their transaction documents. Two of the commenters suggested

[797] Wells.

[798] Walls.

[799] Wells.

[800] JPMorganChase.

[801] ASF.

[802] ABA; AFSA; JPMorganChase; TMCC.

alternatively modifying the item to read "no more than two business days, or such other number of days specified in the transaction documents."[803]

- One commenter requested clarification of Item 1120(d)(2)(ii), such as revising to read "Disbursements made via wire transfer to or on behalf of an obligor or to an investor are made only by authorized personnel," as the commenter didn't understand disbursements "on behalf of" investors.[804]

- Two commenters believed the reference to disbursements in Item 1120(d)(2)(ii) "on behalf of" should be moved to Item 1120(d)(3) if it is intended to refer to remittances to investors.[805] If this is not the intention, it should be deleted since this sort of wire transfer would not be part of a publicly-offered ABS transaction.

- One commenter requested changing "as set forth in" in Item 1120(d)(2)(iv) to "to the extent required in" so as to not imply that separation of funds is required.[806]

- One commenter believed the word "separately" in Item 1120(d)(2)(iv) should be removed as the standard to which accounts are maintained should be governed by transaction agreements.[807] An additional commenter requested confirmation that "related accounts" would not include custodial accounts and that if the transaction documents do not require segregation, then segregate is not required.[808]

- One commenter did not see the benefit of Item 1120(d)(2)(v) regarding maintaining accounts at federally insured institutions as the amounts on deposit generally exceed any federal insurance limits.[809]

- One commenter, regarding Item 1120(d)(2)(vii)(B), requested that reconciliations be prepared within 45 days instead of 30 days.[810] Even though cut-off may be month-end, it is several days before the commenter actually receives the statement.

- One commenter noted there is no time frame specified for the supervisory review of reconciliations called for by Item 1120(d)(2)(vii)(C) and requested clarification.[811]

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[803] ABA; JPMorganChase.

[804] ASF.

[805] ABA; JPMorganChase.

[806] ASF.

[807] ABA.

[808] JPMorganChase.

[809] ASF.

[810] JPMorganChase.

- Five commenters, regarding Item 1120(d)(3)(i)(D), did not believe it is possible to confirm that reports to investors agree with the records of those investors.[812] Two commenters suggested deleting the item,[813] while three suggested deleting the words "investors' and/or."[814] One commenter thought that if the reference is intended to refer to a sampling of confirmations of whether investors have received the distributions shown on the records of the entity that makes the distributions, this should be clarified.[815]

- One commenter recommended deleting Items 1120(d)(3)(ii), (iii) and (iv) as those are typically trustee rather than servicing functions.[816]

- One commenter suggested clarifying Item 1120(d)(3)(iii).[817] If it requires disbursements made to an investor to be posted to the servicer's records, this should be clarified. If this is not true, servicers cannot comply and it should be deleted. Two additional commenters recommended deleting the Item for the same reasons.[818]

- Two commenters believed Item 1120(d)(3)(iii) should be modified to refer to record holders of securities, rather than investors, because most ABS are in book-entry form.[819]

- Four commenters suggested clarity regarding Item 1120(d)(4)(iv).[820] Payments on pool assets may be posted by the servicer to its records, but it cannot control the posting to the obligor's records unless those records are maintained by the servicer. The commenters raised a similar concern with Item 1120(d)(4)(v), with three suggesting deleting it.[821]

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[811] Walls.

[812] ABA; AFSA; ASF; JPMorganChase; TMCC.

[813] AFSA; TMCC.

[814] ABA; ASF; JPMorganChase.

[815] ABA.

[816] MBA.

[817] ASF.

[818] AFSA; TMCC.

[819] ABA; JPMorganChase.

[820] AFSA; ASF; JPMorganChase; TMCC.

[821] AFSA; JPMorganChase; TMCC.

- One commenter requested confirmation that the current practice of sending negative confirmation letters is sufficient to obtain assurances for Item 1120(d)(4)(v).[822] Negative confirmation letters have been the traditional means of testing under USAP.

- One commenter expressed support for Item 1120(d)(4)(vi) regarding whether re-agings or modifications are made, reviewed and approved in accordance with agreements.[823]

- One commenter believed Item 1120(d)(4)(vii) regarding loss mitigation is too detailed.[824] In particular, the second sentence does not appear to be materially useful and should be removed (e.g., that such procedures include a hierarchy of workout procedures).

- One commenter believed Item 1120(d)(4)(x)(C) should be modified to state that "such funds are returned to the obligor within the time period required by the terms of the pool asset, the transaction documents or applicable law, following full repayment of the related pool asset."[825]

- One commenter believed Item 1120(d)(4)(xiii) should be modified to contemplate that disbursements made on behalf of an obligor may be posted to the obligor's records maintained by the servicer more than two days after the disbursement is made if permitted by the pool asset documents and the transaction documents.[826]

7. Identification of Inapplicable Criteria

- One commenter thought it critical to permit exclusion of inapplicable criteria from the assessment and did not object to requiring each assessing party to identify either all of the inapplicable criteria, or, alternatively, only the criteria that is applicable.[827]

- One commenter believed a servicer should be able to exclude any particular criterion, even if it cannot conclude that the criterion is not applicable to the asset class, as long as it discloses the exclusion in the assessment (e.g., the criterion is not required by the transaction documents).[828]

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[822] MBA.

[823] State Street.

[824] ASF.

[825] ABA.

[826] ABA.

[827] ASF.

[828] TMCC.

- One commenter requested a similar provision for identifying criteria that are inapplicable in certain foreign jurisdictions, as some of the proposed criteria do not apply to non-US issuers given there is not a corresponding concept in the home jurisdiction.[829]

8. Disclosure of Material Instances of Noncompliance

- One commenter, in recommending an alternative where reports are required by each entity, suggested the following alternative disclosure:[830]

    - Identify and provide references to each instance of material noncompliance reported by each unaffiliated third party in their individual assessments.

    - For each material instance of noncompliance in an individual assessment, the applicable assessing party should describe, to the extent possible, any material aspects or effects that have affected, or may reasonably be likely to affect pool assets performance, servicing of the pool assets (in each case related to its portion of the pool) or payments or expected payments on the ABS. However, given that assessments are platform level, the assessing party may not be able to describe the impact to a specific transaction. In that case, the issuer should be under an obligation to determine and disclose any material effects such noncompliance might have on pool asset performance, servicing or payments. The commenter did not believe the issuer could make this determination in the deadline for the Form 10-K, and suggested it be provided on Form 8-K.

- Three commenters believed material instances of non-compliance related to the particular ABS should be disclosed in the Form 10-K.[831] A platform assessment should not allow material noncompliance affecting the specific ABS to remain undisclosed.

- One commenter urged expanding Item 1121 compliance statements to require disclosure of any instance of non-compliance by a servicer with the Item 1120 criteria that affects the specific transaction.[832] Otherwise, it will be difficult for investors to assess the effect of any non-compliance on their securities. If this is not done, the commenter requested guidance as to how the responsible party is expected to make the proposed disclosure.

- One commenter believed material instances of noncompliance should be identified and disclosed in the responsible party's assertion, even if subsequently cured within the reporting period.[833] The commenter also endorsed timely disclosure, in either Form 10-D or 8-K, of any material instance of noncompliance identified as of an interim date.

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[829] A&O.

[830] ASF.

[831] AICPA; E&Y; KPMG.

[832] Wells.

[833] E&Y.

- One commenter recommended deleting the proposed disclosure requirement, arguing there would not be enough time to prepare the disclosure and investors should be able to review the assessments of compliance themselves to determine materiality.[834]

- One commenter, in recommending an alternative where reports are filed by each entity, recommended that disclosure not be required of any material impacts or effects related to noncompliance by unaffiliated servicers.[835]

9. Attestation Report on Assessment of Compliance

- Six commenters did not believe that, under current auditing guidance, a single responsible party as proposed would be able to obtain the proposed attestation report from a registered public accounting firm.[836] The commenters generally explained that although the proposal only purports to require the responsible party to accept responsibility for assessing compliance with the criteria by other parties, under SSAE No. 10 the assessing party would need to state that it is responsible for the applicable entity's actual compliance and the effectiveness of the entity's internal control over compliance. This is unworkable in most transactions where multiple unaffiliated parties are involved. Similarly, reasonable reliance does not seem consistent with SSAE No. 10. SSAE No. 10 also expects the accountant would perform procedures at every significant location of every entity performing the servicing function, which would be costly. Instead, the commenters recommended apportioning the assessments and attestations to parties performing the criteria.

- Three commenters requested the final rule acknowledge that an auditor's opinion on servicing compliance does not provide any form of assurance on the financial data presented in the Form 10-K regarding the asset pool, and investors should not interpret the auditor's association with the filing as providing any assurance as to the fair presentation of the financial data included therein.[837] Investors should also be made aware of this fact through disclosure in the Form 10-K (e.g., labeling financial data "unaudited" or other prominent disclosure).

- One commenter questioned whether the assessment and attestation, which cover a broader spectrum of servicing activities, could be provided within the Form 10-K timeframe.[838] Obtaining USAPs is already a challenge, and parties like master servicers

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[834] BMA.

[835] MBA.

[836] AICPA; ASF; BMA; E&Y; KPMG; MBNA.

[837] AICPA; E&Y; KPMG.

[838] Wells.

in particular must wait for other parties to perform their own assessment. The commenter sought clarification on this issue.

- One commenter recommended eliminating the attestation requirement where the depositor acts as the responsible party and multiple servicers are used.[839]

- One commenter requested eliminating the attestation requirement for asset classes in which servicing is relatively generic, such as prime mortgage, auto and credit cards.[840] Servicing issues generally have arisen only in subprime assets. The commenter also suggested eliminating the accountant's attestation, and perhaps even the assessment of compliance, for servicers that have received the highest servicer rankings by an NRSRO.

- One commenter objected to eliminating the assessment and attestation requirement for asset types for which servicing terms are thought to be homogenous or relatively standard, or for servicers that have the highest servicer ratings issued by NRSROs.[841] The commenter noted that the depositor or master servicer preparing the report use the Item 1121 compliance statements and the assessment and attestation reports (currently USAP) as important tools in assessing compliance and even in making Section 302 certifications. Eliminating these requirements is not in the best interests of investors.

10. Alternative Proposal

- One commenter believed that if the Commission did not incorporate its recommendations, the alternative proposal would be the only other viable alternative under current market structure and audit guidelines.[842]

11. Other Comments

- Two commenters requested additional guidance on the extent of documentary evidence to be prepared and maintained by assessing parties to support assertions of compliance, believing the appropriate standard should be similar to Auditing Standard No. 2.[843]

- Five commenters did not believe ABS transactions should be permitted to use a form of agreed upon procedures to fulfill filing requirements because of their restricted use.[844]

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[839] Dewey.

[840] ABA.

[841] Wells.

[842] ASF.

[843] AICPA; E&Y; KPMG.

[844] AICPA; ASF; E&Y; KPMG; PWC.

- One commenter requested clarification as to whether an issuer should amend its Form 10-K to file assessments or attestations that were missing as of the original filing date but were subsequently received.[845]

- Three commenters did not believe a material instance of noncompliance identified in an assessment should result in a penalty, such as Form S-3 ineligibility, noting that it would be unnecessary and no such penalty exists under the current system.[846]

- One commenter believed making compliance with the criteria mandatory would go beyond the Commission's authority.[847]

- One commenter recommended excluding repackagings from the assessment and attestation requirement because much of the criteria is irrelevant and requiring an attestation is not current market practice.[848]

J. Current Reporting on Form 8-K

1. General Comments

- Two commenters did not believe a Form 8-K safe harbor should be conditioned on disclosure on the next Form 10-D as the Form 10-D should be limited only to distribution and performance information required by the transaction documents.[849]

- Three commenters requested longer deadlines for Form 8-K to allow for information to flow between various unrelated parties.[850] One commenter suggested 15-days.[851] Two others supported a minimum of 10 business days,[852] with one of these commenters also supporting an additional extension of 10 business days with no penalties.[853]

- One commenter believed who may sign the Form 8-K should not be specified in the final rule, but instead should be determined by the transaction documents.[854]

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[845] Wells.

[846] ABA; ASF; MBNA.

[847] ABA.

[848] BMA.

[849] Am. Bankers; Wells.

[850] Am. Bankers; JPMorganChase; Wells.

[851] JPMorganChase.

[852] Am. Bankers; Wells.

[853] Am. Bankers.

[854] Am. Bankers.

2. Clarifying Amendments to Existing Items

- One commenter requested clarifying that Item 1.02 (termination of a material definitive agreement) does not require reporting of the termination of transaction agreements in connection with a clean-up call, as they happen in the ordinary course as contemplated by the agreements and security holders already receive notice.[855]

- One commenter requested clarifying that Item 2.02 (results of operations and financial condition) does not require Form 8-K reporting of routine publication of ABS performance information on an issuer's or trustee's website if the availability of the information is discussed in the prospectus or Form 10-D.[856]

- One commenter objected to excluding Items 2.03 (creation of a direct financial obligation or an off-balance sheet arrangement) and 5.01 (changes in control of a registrant) because it will deny investors information they need to understand the ABS.[857] Regarding Item 2.03, a sponsor that also acts as servicer could create a structure for certain assets or liabilities, thereby preventing market participants from recognizing their value or liability. Regarding Item 5.01, the loss of top executives at a servicer or a change in control could cause a change in an investment decision.

- One commenter believed there was overlap between and requested clarification regarding proposed instruction to Item 2.04 (early amortization event, performance trigger or other default event that would materially alter payment priority) and Item 1119(m) of Regulation AB for Form 10-D (amounts used to determine compliance with ratio, coverage or other tests to determine such triggers).[858]

- Also regarding Item 2.04, one commenter requested guidance on what is considered "material" and requested clarifying that the standard is materiality to the reasonable investor, as there are examples where an event would be considered material to a particular investor while not material to the average material investor.[859]

- One commenter requested qualifying Item 5.03 (amendments to governing documents) by materiality.[860] For example, a change to the minimum denomination or book-entry status of a subordinate unregistered class is irrelevant to registered classes and should not

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[855] ABA.

[856] ABA.

[857] CFAI.

[858] ASF (alternative suggestions given).

[859] US Bank.

[860] ABA.

trigger filing or the consequences of non-filing. At a minimum, do not apply the four business day deadline to non-material amendments.

3. Proposed New Items

- One commenter believed Item 6.02 (change of servicer or trustee) should not be subject to the four business day deadline, or, alternatively, should be added to the Form S-3 safe harbor for non-timely filing as it requires information from third parties and could delay the appointment of a successor if the information cannot be obtained.[861]

- One commenter requested clarifying Item 6.04 (failure to make a distribution) that minor calculation or distribution errors that are corrected when discovered need not be reported.[862] An additional commenter requested clarification on the materiality of the amount or nature of the failed distribution that would require filing.[863]

- One commenter believed Item 6.05 (sales of additional securities) should have a materiality threshold, arguing particularly that for master trusts, additional series are commonly issued with no effect or significance on outstanding holders.[864] Also, pricing information for private sales should not be required as confidential and not material.

- One commenter believed Item 6.05 should be confined to Form 10-D, if required at all.[865]

- One commenter believed master trusts should be excluded from Item 6.06 (Securities Act updating disclosure if 5% change between prospectus and issuance).[866] The commenter argued that investors buy an ever-changing pool in such trusts that will always change during this period and the prospectus explains how. The commenter thought the scope was intended to be more narrow to transactions where the assets comprising a fixed pool.

- One commenter, regarding Item 6.06, noted that an asset pool, whether fixed or revolving, changes continually and naturally over time and these "organic" changes can be significant.[867] The commenter believed such changes are understood and requested clarifying that disclosure is triggered only where the composition of an asset pool intended to be fixed changes during the measuring period.

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[861] ABA.

[862] ASF.

[863] TMCC.

[864] ASF.

[865] ABA.

[866] ASF.

[867] ASF.

- Two commenters believed Item 6.06 needs to be clarified as to what "differs by 5% or more" means, particularly the parameters that should be used for measurement.[868] One of the commenters believed the ability to track changes in pool characteristics on a real-time basis for any metric other than the most basic (e.g., pool balance, number of assets, etc.) is virtually impossible.[869] The other commenter suggested the standard be revised to expressly be limited to a 5% change in aggregate principal balance, rather than a separate evaluation of each pool characteristic.[870] The commenter also requested clarifying that the servicer information called for Item 6.06 would not be required if it is provided under Item 6.02 (or vice versa).

K. Other Exchange Act Reporting Proposals

- Two commenters supported excluding ABS from Form 10-Q.[871]

- Two commenters supported exempting ABS from Section 16.[872]

- One commenter supported the proposals regarding transition reports.[873]

- One commenter suggested modifying Rules 13a-10 and 15d-10 for transition reports to make clear they refer to changes in the fiscal year of the issuing entity.[874] As proposed, the rules refer to the "asset-backed issuer" which might be construed to be the depositor.

X. Transition Period

- Twenty-four commenters urged extending the transition periods.[875] Compliance will require changes in procedures and systems and will require the cooperation of a variety of market participants, including unaffiliated parties that may have needed information. ABS transactions are governed by contractual arrangements which must be modified. Suggested alternatives included:

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[868] ABA; ASF.

[869] ASF.

[870] ABA (suggestions given).

[871] ABA; ASF.

[872] ABA; ASF.

[873] ASF.

[874] ABA.

[875] A&O; ABA; AFGI; AFSA; AICPA; Am. Bankers; ASF; Auto Group; BMA; BOA; Capital One; Citigroup; CMSA; FSR; Jones Day; JPMorganChase; KPMG; MBA; NYCBA; PWC; Sallie Mae; TMCC; US Bank; Wells.

- Eighteen commenters requested applying the final rules only to offerings after the effective date of the rules.[876] Existing transactions represent particular difficulties because the issuer cannot compel a third party, which is not contractually obligated to do so, to provide any new information. While some transactions involve repetitive parties who must adjust on a going forward basis and might agree to similar changes for existing transactions, many transactions have parties who do not have such a relationship. Plus, existing transactions were not priced, and fees were not set, to accommodate any required changes.

- For new ABS issuances:

  - Two commenters suggested 12 to 24 months.[877]

  - Nine commenters suggested 12 months,[878] with one also suggesting two years for existing registration statements.[879]

  - One commenter suggested 9-12 months.[880]

  - Two commenters suggested 9 months.[881]

  - Two commenters suggested 6-12 months,[882] with one suggesting such a period for all but the communications proposals.[883]

  - One commenter requested 6-9 months for discrete trusts, not less than a year for master trusts of assets originated by a sponsor, and a limited grandfathering with disclosure for master trusts with assets originated by third parties.[884]

[876] A&O; ABA; AFGI; Am. Bankers; Auto Group; BMA; BOA; Citigroup; CMSA; FSR; Jones Day; JPMorganChase; KPMG; MBA; NYCBA; Sallie Mae; US Bank; Wells.

[877] AICPA; PWC.

[878] ABA; ASF; Auto Group; BMA; BOA; Capital One; CMSA; MBA; NYCBA.

[879] CMSA.

[880] Am. Bankers.

[881] AFSA; Wells.

[882] A&O; FSR.

[883] FSR.

[884] Citigroup.

        - One commenter suggested 6 months.[885] An additional commenter suggested 6 months if static pool data is prospective and 12 months if it is not.[886]

    - Five commenters requested an exemption from the new ongoing reporting rules for ABS issued within 12 months after publication of the final rule.[887]

    - One commenter suggested, with respect to outstanding ABS, applying the Exchange Act proposals for fiscal years ending twelve months after the effective date.[888] Another commenter had a similar suggestion but for nine months after the effective date.[889]

    - One commenter recommended that master trusts be allowed to postpone compliance with those portions of the disclosure requirements that require cooperation of third parties until 12 months after publication date.[890]

- Five commenters requested grandfathering all future takedowns from existing shelf registration statements.[891] Alternatively, two requested a two year transition period.[892]

- One commenter suggested that for registration statements filed prior to the effective date of the rules, the disclosure rules should apply to any Rule 424 prospectus filed after the effective date of the rules.[893] If a post-effective amendment is filed after the effective date of the rules, the new rules will apply to the registration statement and any subsequent prospectus at that time.

- One commenter requested the ability to apply for a hardship exemption for additional time on a case by case basis, or on a "class of transactions basis" (e.g., common depositor, sponsor or other party, asset type or structure).[894]

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[885] US Bank.

[886] TMCC.

[887] ABA; ASF; Auto Group; BMA; FSR.

[888] Capital One.

[889] AFSA.

[890] ABA.

[891] Auto Group; MBA; NYCBA; Sallie Mae; TMCC.

[892] Sallie Mae; TMCC.

[893] ASF.

[894] ASF.

- One commenter believed that with respect to master trusts, Exchange Act reporting under the new rules should commence at the time each series issued prior to the end of the transition period for new transactions is paid in full.[895]

- One commenter believed the effective date for the attestation proposals should be the first fiscal year beginning on or after the enactment date of the final rules.[896]

- Four commenters suggested phasing-in the requirements in sections or on a staggered basis as opposed to all at once.[897] One commenter did not object to a three-month transition period for those aspects of the rule where the ability to comply is not dependent upon obtaining cooperation of third parties.[898]

- One commenter requested a transition rule to allow post-effective amendments to registration statements necessary to comply to become effective on filing.[899]

- One commenter did not believe the final rules would amount to a "fundamental change" that would require registrants to file post-effective amendments, but requested guidance in the adopting release on this topic.[900]

- One commenter believed, but requested confirmation, that if a registration statement complied with the existing rules at the time it was filed, any subsequent change to the rules relating to the ABS definition would not cause the registration to cease to be effective.[901] The commenter believed this is consistent with Rule 401(a).

- One commenter requested clarification that any new disclosure provisions do not apply to transactions outstanding prior to the effective date of the rules, regardless of whether a prospectus delivery obligation exists after the effective date (e.g., because of an unsold allotment or market-making prospectus delivery obligation).[902]

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[895] BOA.

[896] KPMG.

[897] ABA; Am. Bankers; FSR; NYCBA.

[898] ABA.

[899] ASF.

[900] Auto Group.

[901] ASF.

[902] BOA.

- One commenter believed issuers with effective Form S-11 registration statements should be permitted to continue using existing capacity for as long as two years from publication of the final rules if they are forced to switch their filings to Form S-3.[903]

- One commenter suggested a safe harbor for grandfathered transactions from claims based on the new rules.[904] Also, the commenter believed the mere presence of the proposal has created uncertainty with respect to appropriate disclosures, and therefore consideration should be given to evidentiary rules prohibiting the use of the proposal or any final rules as evidence as to material misstatements or omissions for grandfathered transactions.

XI. Cost-Benefit Analysis

- Two commenters believed each incremental step beyond current market practice should be evaluated to determine whether the perceived benefit to investors is outweighed by the additional burdens that would be imposed, and whether the benefits sought can be achieved in a less intrusive manner.[905]

- One commenter noted that the costs of any increased regulatory compliance burdens are likely to be passed through to obligors of underlying pool assets.[906] The commenter was unable to provide any estimates of increased compliance costs, but offered to organize a project to attempt to calculate such costs.

- One commenter believed the cost-benefit analysis should take into account that, because of the limited recourse special purpose nature of most ABS transactions, the costs of compliance for existing transactions will fall almost entirely on whatever investor owns the residual or junior cash flows in the transaction.[907] These may be effectively retained by the sponsor or an affiliate, but sometimes are sold in private placements or pledged to support financings.

XII. Miscellaneous Comments

- Eight commenters requested re-publishing the proposed rules because of their length, complexity, comprehensiveness and in order to offer another opportunity to comment.[908] Another commenter suggested dialogue with industry participants, sponsoring a roundtable or republishing as possible ways to allow market participants to review the

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[903] ABA.

[904] Jones Day.

[905] ABA; ASF.

[906] ASF.

[907] AFGI.

[908] ASF; Auto Group; Citigroup; FSR; MBA; JPMorganChase; NYCBA; Sallie Mae.

requirements and suggest improvements.[909] An additional commenter requested consideration of re-proposal if comments merit such a course.[910] Several of these commenters also requested the Commission take its time in adopting final rules.

- One commenter recommended monitoring implementation of the rules and periodic evaluation of whether revisions are needed to avoid unintended outcomes and costs.[911]

- One commenter thought the staff will comment heavily on filings once the rules are effective and suggested publishing standard or typical comments to aid in compliance.[912] The commenter also supported publishing comment letters on the SEC website.

- One commenter thought that the requirements for registered offerings are often adopted as *de facto* disclosure standards for Rule 144A offerings and therefore consideration should be given to the impact of the proposals on that market.[913]

- One commenter suggested considering whether the definition of "asset-backed security" in Rule 902 of Regulation S should be updated for consistency with Regulation AB's definition.[914]

- One commenter suggested that an issuer that only issues ABS as defined in the proposal should also by definition meet Investment Company Act Rule 3a-7.[915] The commenter also urged clarification that failure to qualify as an issuer of ABS for purposes of the proposal will not in itself disqualify an entity from relying on Rule 3a-7.

- One commenter suggested the following revisions to Rule 3a-7:[916]

    - If the commenter's suggestion to allow non-investment grade ABS on Form S-3 is adopted, Rule 3a-7 should permit secondary market resales of non-investment grade ABS to any class of investor provided the suggested minimum denomination requirements are observed.

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[909] ABA.

[910] A&O.

[911] NYCBA.

[912] ABA.

[913] A&O.

[914] Strauss.

[915] BMA.

[916] ABA.

- Harmonize the definition of "eligible assets" in Rule 3a-7 with the commenter's proposed definition of "asset-backed security."

- Eliminate the prohibition on affiliations between the trustee and the issuer or any person involved in the organization or operation of the issuer, including underwriters. An additional commenter raised this suggestion.[917]

- One commenter believed the Commission should review and revisit Investment Company Act rules related to ABS.[918] In particular, changes should be made to Rule 2a-7 to address issues created when the rule was amended in 1998.

- One commenter recommended defining "earnings statement" for ABS issuers for Section 11(a) of the Securities Act.[919] The commenter suggested that an issuer that has met all Exchange Act reporting requirements for 12 months should be deemed to have made generally available to its security holders the required earnings statement.

- One commenter suggested the following revisions regarding the Trust Indenture Act:[920]

  - Provide an exemption from the requirement in Section 314(d)(2) to deliver fair value certificates.

  - Exempt ABS from the certificate requirements in Sections 314(c) and (d).

  - Relax the requirement in Section 314(b)(2) regarding delivery of perfection opinions for investment-grade ABS so that delivery is mandated only when required by the term of the indenture.

[917] JPMorganChase.

[918] Foley.

[919] ABA.

[920] ABA.