SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 228, 229, 230, 232, 239, 240, 242, 245 and 249

[Release Nos. 33–8419; 34–49644; File No. S7–21–04]

RIN 3235–AF74

Asset-Backed Securities

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing new and amended rules and forms to address comprehensively the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act of 1933 and the Securities Exchange Act of 1934. Principally, we are proposing to: Update and clarify the Securities Act registration requirements for asset-backed securities offerings, including expanding the types of asset-backed securities that may conduct delayed primary offerings on Form S–3; consolidate and codify existing interpretive positions that allow modified Exchange Act reporting that is more tailored and relevant to asset-backed securities; provide tailored disclosure guidance and requirements for Securities Act and Exchange Act filings involving asset-backed securities; and streamline and codify existing interpretive positions that permit the use of written communications in a registered offering of asset-backed securities in addition to the statutory registration statement prospectus.

DATES: Comments should be received on or before July 12, 2004.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–21–04 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number S7–21–04. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Jeffrey J. Minton, Special Counsel, or Jennifer G. Williams, Attorney-Advisor, Office of Rulemaking, Division of Corporation Finance, at (202) 942–2910, or Eric J. Schuppenhauer, Professional Accounting Fellow, Office of Chief Accountant, at (202) 942–4400, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing to amend Rules 1–02, 2–01, 2–02 and 2–07 [1] of Regulation S–X [2] under the Securities Act of 1933 (the ''Securities Act'') [3]; to amend Items 10, 308, 401 and 406 [4] of Regulation S–B [5] under the Securities Act; to amend Items 10, 202, 308, 401, 406, 501, 503, 512 and 601 [6] of Regulation S–K [7] under the Securities Act, to add a new subpart of Regulation S–K, the 1100 series (''Regulation AB''); [8] to amend Rules 411, 424 and 434 [9] under the Securities Act; to add Rules 139a, 167, 190, 191 and 426 [10] under the Securities Act; to amend Rule 311 [11] of Regulation S–T; [12] to amend Forms S–1, S–2, S–3, S–11, F–1, F–2 and F–3 [13] under the Securities Act; to amend Rules 10A–3, 12b–2, 12b–15, 13a–10, 13a–11, 13a–13, 13a–14, 13a–15, 13a–16, 15c2–8, 15d–10, 15d–11, 15d–13, 15d–14, 15d–15 and 15d–16 [14] under the Securities Exchange Act of 1934 (the ''Exchange Act''); [15] to add Rules 3a12–12, 3b–19, 13a–17, 13a–18, 15d–17, 15d–18, 15d–22 and 15d–23 [16] under the Exchange Act; to amend Rule 100 [17] of Regulation M [18] under the Exchange Act; to amend Rule 101 [19] of Regulation BTR [20] under the Sarbanes-Oxley Act of 2002 (the ''Sarbanes-Oxley Act''); [21] to amend Forms 20–F, 40–F, 8–K and 10–K [22] under the Exchange Act; and to add Form 10–D [23] under the Exchange Act.

Table of Contents

[1] 17 CFR 210.1–02; 17 CFR 210.2–01; 17 CFR 210.2–02; and 17 CFR 210.2–07.

[2] 17 CFR 210.1–01 *et seq.*

[3] 15 U.S.C. 77a *et seq.*

[4] 17 CFR 228.10; 17 CFR 228.308; 17 CFR 228.401; and 17 CFR 228.406.

[5] 17 CFR 228.10 *et seq.*

[6] 17 CFR 229.10; 17 CFR 229.202; 17 CFR 229.308; 17 CFR 229.401; 17 CFR 229.406; 17 CFR 229.501; 17 CFR 229.503; 17 CFR 229.512; and 17 CFR 229.601.

[7] 17 CFR 229.10 *et seq.*

[8] 17 CFR 229.1100 through 1121.

[9] 17 CFR 230.411; 17 CFR 230.424; and 17 CFR 230.434.

[10] 17 CFR 230.139a; 17 CFR 230.167; 17 CFR 230.190; 17 CFR 230.191; and 17 CFR 230.426.

[11] 17 CFR 232.311.

[12] 17 CFR 232.10 *et seq.*

[13] 17 CFR 239.11; 17 CFR 239.12; 17 CFR 239.13; 17 CFR 239.18; 17 CFR 239.31; 17 CFR 239.32; and 17 CFR 239.33.

[14] 17 CFR 240.10A–3; 17 CFR 240.12b–2; 17 CFR 240.12b–15; 17 CFR 240.13a–10; 17 CFR 240.13a–11; 17 CFR 240.13a–13; 17 CFR 240.13a–14; 17 CFR 240.13a–15; 17 CFR 240.13a–16; 17 CFR 240.15c2–8; 17 CFR 240.15d–10; 17 CFR 240.15d–11; 17 CFR 240.15d–13; 17 CFR 240.15d–14; 17 CFR 240.15d–15; and 17 CFR 240.15d–16.

[15] 15 U.S.C. 78a *et seq.*

[16] 17 CFR 240.3a12–12; 17 CFR 240.3b–19; 17 CFR 240.13a–17; 17 CFR 240.13a–18; 17 CFR 240.15d–17; 17 CFR 240.15d–18; 17 CFR 240.15d–22; and 17 CFR 240.15d–23.

[17] 17 CFR 242.100.

[18] 17 CFR 242.100 through 105.

[19] 17 CFR 245.101.

[20] 17 CFR 245.101 through 104.

[21] 15 U.S.C. 7201 *et seq.*

[22] 17 CFR 249.220f; 17 CFR 249.240f; 17 CFR 249.308; and 17 CFR 249.310.

[23] 17 CFR 249.312.

I. Overview

A. What Are Asset-Backed Securities?

Asset-backed securities, or ABS, are securities that are backed by a discrete pool of self-liquidating financial assets. Asset-backed securitization is a financing technique in which financial assets, in many cases themselves less liquid, are pooled and converted into instruments that may be offered and sold more freely in the capital markets.[24] In a basic securitization structure, an entity, often a financial institution and commonly known as a ''sponsor,'' originates or otherwise acquires a pool of financial assets, such as mortgage loans, directly or through an affiliate. It then sells the financial assets to a specially created investment vehicle that issues securities backed by those financial assets, which are ''asset-backed securities.'' Payment on the asset-backed securities depends primarily on the cash flows generated by the assets in the underlying pool and other rights designed to assure timely payment, such as guarantees or other features generally known as credit enhancements. The structure of asset-backed securities is intended, among other things, to insulate ABS investors from the corporate credit risk of the sponsor that originated or acquired the financial assets.

The ABS market is fairly young and has rapidly become an important part of the U.S. capital markets. One source estimates that U.S. public ABS issuance grew from $46.8 billion in 1990 to $416 billion in 2003.[25] Another source estimates 2003 new issuance closer to $800 billion.[26] While residential mortgages were the first financial assets to be securitized, non-mortgage related securitizations have grown to include many other types of financial assets, such as credit card receivables, auto loans and student loans. The Commission has not previously addressed on a comprehensive basis the regulatory treatment of asset-backed securities under the Securities Act or the Exchange Act.

Asset-backed securities and ABS issuers differ from corporate securities and operating companies. In offering these securities, there is generally no business or management to describe. Instead, information about the transaction structure and the quality of the asset pool and servicing is often what is most important to investors. Many of the Commission's existing disclosure and reporting requirements, which are designed primarily for corporate issuers, do not elicit the information that is relevant for most asset-backed securities transactions. Over time, Commission staff, through no-action letters and the filing review process, has developed a framework to address the different nature of asset-backed securities while being cognizant of developments in market practice.

We now propose to address comprehensively the treatment of asset-backed securities under the Securities Act and the Exchange Act. With a few exceptions, our proposals consolidate and codify current staff positions and industry practice. Our proposals relate to four primary regulatory areas: Securities Act registration; disclosure; communications during the offering process; and ongoing reporting under the Exchange Act.

B. Securities Act Registration

We propose a definition of asset-backed security that would demarcate the securities and offerings to which the new proposed rules would apply. The proposed definition would consolidate several staff positions regarding the definition of asset-backed security, including those regarding delinquent and non-performing pool assets. The proposed definition also would allow more lease-backed transactions to be included in the definition of asset-backed security and permit the use of master trusts and revolving periods by more asset classes. These changes are designed to remove regulatory uncertainty and reduce regulatory obstacles and costs of securitization.

In 1992, the Commission amended Form S–3 to allow registration of offerings of investment grade asset-backed securities on a delayed, or

[24] ''Securitization'' is a commonly used term to describe this financing technique, although other terms, such as ''asset-backed financing,'' also are used.

[25] *See* Bank One Capital Markets, Inc., 2004 Structured Debt Yearbook.

[26] *See* Asset Securitization Report (pub. by Thomson Media Inc). See also Asset-Backed Alert (pub. by Harrison Scott Publications).

''shelf,'' basis.[27] We propose that all registered offerings of asset-backed securities be registered either on Form S–1 or Form S–3, and we propose to specify in those forms which disclosure items would be required. We propose to expand the types of investment grade asset-backed securities that qualify for shelf registration. Consistent with existing staff positions, we do not propose to add a reporting history requirement for Form S–3 eligibility. However, we do propose to codify that previously established reporting obligations regarding other asset-backed securities transactions by the sponsor or the depositor must have been satisfied to maintain Form S–3 eligibility for new transactions. Consistent with a staff no-action letter, we also propose to exclude offerings of asset-backed securities eligible for Form S–3 registration from the requirements of Exchange Act Rule 15c2–8(b) to deliver a preliminary prospectus prior to delivery of a confirmation of sale.

We propose to clarify that the depositor—often the sponsor or an affiliated intermediary that receives the pool assets and transfers them to the issuing entity—would be the statutory ''issuer'' for purposes of signing the registration statement for the asset-backed securities transaction. We also propose to alleviate impediments to the shelf registration of offerings of asset-backed securities by foreign issuers or backed by foreign financial assets. Finally, we propose to codify, consolidate and streamline staff positions regarding when and how the offering of underlying debt securities must be concurrently registered with an offering of the asset-backed securities backed by those underlying securities.

C. Disclosure

Currently, there are no disclosure items specifically tailored to asset-backed securities. We propose a new principles-based set of disclosure items, ''Regulation AB,'' that would form the basis for disclosure in both Securities Act registration statements and Exchange Act reports. While we request comment on this point, we do not believe it would be practical or effective to draft detailed disclosure guides for each asset type that may be securitized. Instead, we have attempted to identify the disclosure concept required and provide several illustrative examples, while understanding that the application of the particular concept must be tailored to the information material to the particular transaction and asset type involved.

For the most part, our proposed disclosure items are based on the market-driven disclosures that appear today. With a proposed codification of a universal set of disclosure items, however, we do seek a reevaluation by transaction participants of the manner and content of presented disclosure, including the elimination of unnecessary boilerplate and a de-emphasis on unnecessary legal recitations of terms. We also understand that existing disclosure standards may not adequately capture certain categories of information that may be material to an asset-backed securities transaction, such as the background, experience, performance and roles of various transaction parties, including the sponsor, the servicing entity that administers or services the financial assets and the trustee. Our proposed disclosure items relating to these entities are designed to elicit more useful information in these areas. We also propose to require, for the first time, that certain statistical information on a ''static pool'' basis be provided if material to the transaction to aid in an investor's analysis of current and prior pool performance. Consistent with current practice, we do not propose to require audited financial statements regarding the issuing entity for the asset-backed securities in Securities Act or Exchange Act filings, although we do request comment on this point.

Finally, we propose to consolidate and codify current staff positions on when financial or other descriptive information would be required regarding certain third parties, such as obligors of financial assets that reach pool concentration levels or significant providers of credit enhancement or other support for the asset-backed securities. We also propose to streamline and codify current staff positions on when financial information regarding such third parties may be incorporated by reference or referred to in an asset-backed securities filing in lieu of actually including the information in the filing.

D. Communications During the Offering Process

In the mid 1990s, Commission staff issued a series of no-action letters permitting the use of various written materials in addition to the statutory registration statement prospectus in an offering of asset-backed securities.[28] These materials provide data about the potential payouts of the financial assets and the asset-backed securities using various prepayment and other assumptions as well as disclose information about the structure of the offering or about the underlying asset pool. We propose to codify and simplify current staff positions on when these materials can be used and when they must be publicly filed with the Commission. We also propose to clarify several interpretive issues regarding the use of these materials given market developments over the decade since the letters were issued. In this regard and given advances made to EDGAR (our electronic data gathering, analysis and retrieval system), we also propose to eliminate the current exemption from electronic filing for these materials.

Shortly after the no-action letters referred to above were issued, Commission staff also issued a no-action letter regarding the publication of research reports by brokers or dealers proximate to an offering of asset-backed securities registered or to be registered on Form S–3.[29] The Commission had previously adopted several rules that provided safe harbors under which the publication of research reports would not be deemed a violation of the communications restrictions of Section 5 of the Securities Act.[30] However, several of the conditions in those rules were not relevant or practical for asset-backed securities. We propose to codify the modified conditions in the staff no-action letter to provide a similar safe harbor for research reports as they relate to registered offerings of asset-backed securities on Form S–3.

E. Ongoing Reporting Under the Exchange Act

As with registration, the ongoing periodic and current reporting requirements applicable to operating companies do not elicit information that would be the most relevant for asset-backed securities. First through a series of exemptive orders, and then primarily through the issuance of no-action letters and other interpretations, Commission staff has allowed modified Exchange Act reporting by ABS issuers. In lieu of quarterly reports on Form 10–Q,[31] ABS issuers generally file under cover of

[27] See Release No. 33–6964 (Oct. 22, 1992) [57 FR 48970] (the ''1992 Release'').

[28] See *Greenwood Trust Co., Discover Master Card Trust I* (Apr. 5, 1996); *Public Securities Ass'n* (Mar. 9, 1995); *Public Securities Ass'n* (Feb. 17, 1995); *Public Securities Ass'n* (May 27, 1994); and *Kidder Peabody Acceptance Corporation I* (May 20, 1994). The ''statutory registration statement prospectus'' refers to the full prospectus required by Section 10(a) of the Securities Act (15 U.S.C. 77j(a)).

[29] See *Public Securities Ass'n* (Feb. 7, 1997).

[30] 15 U.S.C. 77e. See Securities Act Rules 137, 138 and 139 (17 CFR 230.137; 17 CFR 230.138; and 17 CFR 230.139).

[31] 17 CFR 249.308a.

Form 8–K the distribution reports required to be prepared under the transaction agreements that detail the payments and performance of the financial assets in the asset pool and payments on the securities backed by that pool. Current reporting on Form 8–K for certain extraordinary events also is required regarding asset-backed securities, but historically only for a narrow subset of events. A modified annual report on Form 10–K is required with two items being most important: A servicer's statement of compliance with its servicing obligations; and a report by an independent public accountant regarding compliance with particular servicing criteria. Financial statements of the issuing entity are not required. An asset-backed issuer is required to include a certification under Section 302 of the Sarbanes-Oxley Act [32] with its Form 10–K, and, as provided by the Commission's rules governing certification, the staff has previously provided a special form of certification for ABS issuers to use.[33] ABS issuers are exempt from the rules implementing Section 404 of the Sarbanes-Oxley Act [34] regarding reporting on internal control over financial reporting.[35]

We propose to codify the basic modified reporting system for asset-backed securities. To distinguish periodic reporting regarding distributions from disclosure of important events that appropriately call for current reporting, we propose one new form type, Form 10–D, to act as the report for the periodic distribution information currently provided under cover of Form 8–K. We also propose to specify which of the Commission's recently adopted Form 8–K events would be applicable to asset-backed securities, and we propose a few additional events specific to asset-backed securities. Consistent with the modified reporting no-action letters, we propose to exclude ABS from quarterly reporting on Form 10–Q and exempt ABS from reporting under Section 16 of the Exchange Act.[36] We also propose to clarify how transition reports are to be filed regarding a change in fiscal year.

We propose to specify the disclosure requirements applicable for annual reports on Form 10–K regarding asset-backed securities, which also will be drawn from Regulation AB, and to codify the form of certification to be used under Section 302 of the Sarbanes-Oxley Act. We propose to retain the long-standing requirements for a servicer compliance statement and a report by an independent public accountant as to compliance with particular servicing criteria. Regarding servicing criteria, there are very few existing criteria for evaluating compliance, the most widely used of which currently is the Uniform Single Attestation Program, or USAP, promulgated by the Mortgage Bankers Association of America. However, the USAP's ''minimum servicing standards'' are designed to be applicable only to servicing of mortgages and do not necessarily represent the full spectrum of servicing activities that may be material to an asset-backed securities transaction. We propose disclosure-based servicing criteria that would form the basis for an assessment and assertion as to material compliance with such criteria (or disclosure as to non-compliance). We also continue the practice of accountant involvement in assessing compliance with servicing criteria by proposing a requirement that a registered public accounting firm attest to the assertion of compliance. Both the report containing the assertion of compliance and the accountant's attestation report would be required to be filed with the report on Form 10–K.

As with the Securities Act, we propose to codify that the depositor is the ''issuer'' for purposes of Exchange Act reporting regarding asset-backed securities. We also propose to specify who may sign the various Exchange Act reports. Under the proposals, either the depositor or the servicer may sign the reports on Form 10–K, Form 10–D and Form 8–K, and the same party that signs the annual report on Form 10–K also would be the party that would be required to sign the Sarbanes-Oxley Act Section 302 certification and make the proposed assertion of compliance with servicing criteria. We also propose to clarify how filings regarding asset-backed securities are to be filed on EDGAR and the operation of the reporting obligation for asset-backed securities under Section 15(d) of the Exchange Act,[37] including proposals to codify several interpretive positions as to when the obligation starts and when it may be suspended.

F. Other Miscellaneous Proposals

Finally, our proposals include several miscellaneous and technical amendments to our rules and forms to accommodate the new proposals and update references regarding asset-backed securities. We also request comment on any additional areas that should be addressed regarding the registration, reporting and disclosure requirements for asset-backed securities under the Securities Act or the Exchange Act.

II. Background and Development of ABS and Regulatory Treatment

The ABS market rapidly has developed into an important part of the U.S. capital markets.[38] The modern securitization market originated in the 1970's with the securitization of residential mortgages.[39] Since the mid-1980's, the techniques pioneered in the mortgage-backed securities, or MBS, market have been used to securitize other asset types. Most asset types that have been securitized have homogenous characteristics, including similar terms, structures and credit characteristics, with proven histories of performance, which in turn facilitate modeling of future payments and thus analysis of yield and credit risks.

While the ABS market is still fairly young, it has rapidly become very large. By way of example, one source estimates that annual issuance of U.S. public non-GSE ABS grew from $46.8 billion in 1990 to $416 billion in 2003.[40]

[32] 15 U.S.C. 7241.

[33] See Exchange Act Rules 13a–14 and 15d–14; Release No. 33–8124 (Aug. 28, 2003) [67 FR 57276]; and Division of Corporation Finance, ''Revised Statement: Compliance by Asset-Backed Issuers with Exchange Act Rules 13a–14 and 15d–14'' (Feb. 21, 2003). *See also Merrill Lynch Depositor, Inc.* (Mar. 28, 2003) and *Mitsubishi Motors Credit of America, Inc.* (Mar. 27, 2003).

[34] 15 U.S.C. 7262.

[35] See Exchange Act Rules 13a–15 and 15d–15.

[36] 15 U.S.C. 78p.

[37] 37 15 U.S.C. 78o(d).

[38] See, *e.g.*, Gary Silverman *et al.*, ''A $2.5 Trillion Market You Hardly Know,'' Business Week, Oct. 26, 1998 (''Securitization is one of the most important and abiding innovations to emerge in the financial markets since the 1930s'' (quoting Leon T. Kendall)).

[39] The modern ABS market can be traced to 1970 when the Government National Mortgage Association (Ginnie Mae), a wholly owned Federal government corporation, first guaranteed a pool of mortgage loans. The Federal Home Loan Mortgage Corporation (Freddie Mac) in 1971 issued its first mortgage-backed participation certificates. For a number of years, mortgage-backed securities were almost exclusively a product of government-sponsored entities (GSE's), such as Freddie Mac and the Federal National Mortgage Association (Fannie Mae), and Ginnie Mae. MBS issued by these GSE's and Ginnie Mae have been and continue to be exempt from registration under the Securities Act and most provisions of the Federal securities laws. For example, Ginnie Mae guarantees are exempt securities under Section 3(a)(2) of the Securities Act (15 U.S.C. 77c(a)(2)) and Section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)). The chartering legislation for Fannie Mae and Freddie Mac contain exemptions with respect to those entities. See 12 U.S.C. 1723c and 12 U.S.C. 1455g. Only non-GSE ABS, or so called ''private label'' ABS, would be required to comply with these proposals. For more information regarding the GSE's and Ginnie Mae, see Task Force on Mortgage-Backed Securities Disclosure, ''Staff Report: Enhancing Disclosure in the Mortgage-Backed Securities Markets'' (Jan. 2003) (hereinafter, the ''2003 MBS Disclosure Report''). This report is available on our website at *www.sec.gov*.

[40] 40 See note 25 above. Amounts cited include MBS as well as ABS for other asset-classes. As

Continued

Another source estimates 2003 new issuance at $800 billion.[41] The four primary asset classes currently securitized are residential mortgages, automobile receivables, credit card receivables and student loans, which represented approximately 52%, 19%, 16% and 9% of 2003 new issuance, respectively.[42]

There are several distinguishing features between asset-backed securities and other fixed-income securities. For example, ABS investors are generally interested in the characteristics and quality of the underlying assets, the standards for their servicing, the timing and receipt of cash flows from those assets and the structure for distribution of those cash flows. As a general matter, there is essentially no business or management (and therefore no management's discussion and analysis of financial performance and condition) of the issuing entity, which is designed to be a solely passive entity. GAAP financial information about the issuing entity generally does not provide useful information to investors. Information regarding characteristics and quality of the assets is important for investors in assessing how a pool will perform. Information relating to the quality of servicing of the underlying assets also is relevant to assessing how the asset pool is expected to perform and the reliability of the allocation and distribution functions. Another focus is the legal and structural nature of the issuing entity and the transfer of the assets to the issuing entity to assess legal and credit separation from third parties. ABS investors also analyze the impact and quality of any credit enhancements and other support designed to provide additional protection against losses and ensure timely payments.

A sponsor typically initiates a securitization transaction by selling or pledging to a specially created issuing entity a group of financial assets that the sponsor either has originated itself or has purchased in the secondary market.[43] Sponsors of asset-backed securities often include banks, mortgage companies, finance companies, investment banks and other entities that originate or acquire and package financial assets for resale as ABS. In some instances, the transfer of assets is a two-step process: the financial assets are transferred by the sponsor first to an intermediate entity, often a limited purpose entity created by the sponsor for a securitization program and commonly called a depositor, and then the depositor will transfer the assets to the issuing entity for the particular asset-backed transaction.[44]

The issuing entity, most often a trust with an independent trustee, then issues asset-backed securities to investors that are either backed by or represent interests in the assets transferred to it. The proceeds of the sale of the asset-backed securities are used to pay for the assets that were transferred to the trust. Because the issuing entity is designed to be a passive entity, a ''servicer,'' which may often be an affiliate of the sponsor, is often necessary to collect payments from obligors of the pool assets, carry out the other important functions involved in administering the assets and to calculate and pay the amounts net of fees due to the investors that hold the asset-backed securities to the trustee, which actually makes the payments to investors.

The predominant purchasers of asset-backed securities today are institutional investors, including financial institutions, pension funds, insurance companies and money managers.[45] Generally, ABS are not marketed to retail investors. However, securitizations of one fairly unique asset type—transactions that pool and securitize outstanding debt securities of other issuers—often are marketed to retail investors and are listed on a national securities exchange.[46]

While some ABS transactions consist of simple pass-through certificates representing a pro rata share of the cash flows from the underlying asset pool, ABS transactions often involve multiple classes of securities, or tranches, with complex formulas for the calculation and distribution of the cash flows. In addition to creating internal credit enhancement or support for more senior classes, these structures allow the cash flows from the asset pool, and hence varying degrees of risk from pool performance, to be packaged into securities designed to address a given risk and return profile.

Transaction agreements specify the structure of an ABS transaction. A common form for these agreements is a ''pooling and servicing agreement,'' or PSA, often among the sponsor, the trustee and the servicer. A pooling and servicing agreement often governs the transfer of the assets from the sponsor to the issuing entity and sets forth the rights and responsibilities of participants. Typically the agreement also will detail how cash flows generated by the asset pool will be divided, typically referred to as the ''flow of funds'' or ''waterfall.'' The flow of funds specifies the allocation and order of cash flows, including interest, principal and other payments on the various classes of securities, as well as any fees and expenses, such as servicing fees, trustee fees or amounts to maintain credit enhancement or other support. Cash flows also may be directed into various accounts, such as reserve accounts to provide support against potential future shortfalls. The agreement also specifies the type and content of reports that will be provided to investors regarding ongoing performance of the transaction.

In addition to any internally provided credit enhancement or support, the sponsor or other third parties may provide external credit enhancements or other support for the asset-backed securities.[47] For example, third party insurance may be obtained to reimburse losses on the pool assets or the asset-backed securities themselves. In addition, the issuing parties may arrange with a counterparty for an interest rate swap or similar swap transaction to avoid a cash-flow mismatch, such as where a floating-rate interest is to be paid on ABS backed by financial assets that pay a fixed rate of interest.

Credit rating agencies play a large role in most ABS transactions. As with a traditional corporate debt security, a rating on an asset-backed security is designed only to reflect credit risk. The rating generally does not address other market risks that may result from changes in interest rates or from prepayments on the underlying asset pool.

To date, there have been few Commission initiatives directly related to ABS. In connection with the passage of the Secondary Mortgage Market Enhancement Act of 1984 (SMMEA),[48] the Commission permitted shelf

residential mortgages simply represent another asset type that may be securitized, unless otherwise specified, we use the term ABS to include MBS.

[41] See note 26 above.

[42] See note 25 above.

[43] While ''sponsor'' is a commonly used term for the entity that initiates the asset-backed securities transaction, the terms ''seller'' or ''originator'' also are often used in the market. However, as noted in the text, in some instances the sponsor is not the originator of the financial assets but has purchased them in the secondary market. Hence, we use the term ''sponsor.''

[44] Where there is not a two-step transfer, the terms ''sponsor'' and ''depositor'' are commonly used interchangeably in the market.

[45] See 2003 MBS Disclosure Report.

[46] A ''national securities exchange'' is an exchange registered as such under Section 6 of the Exchange Act (15 U.S.C. 78f).

[47] A guarantee of a security would be a separate ''security'' under Section 2(a)(1) of the Securities Act (15 U.S.C. 77b(a)(1)).

[48] Pub. L. 98–440, 98 Stat. 1689. See also Section II.C.1. of the 2003 MBS Disclosure Report.

registration to SMMEA eligible securities.[49] In 1992, the Commission extended shelf registration to non-mortgage investment grade ABS.[50] That same year, the Commission also adopted a rule under the Investment Company Act of 1940 [51] to exclude ABS transactions under specific conditions from the definition of an investment company.[52] More recently, the Commission tailored rules for asset-backed securities in its implementing rulemakings under the Sarbanes-Oxley Act, including exempting asset-backed securities from the reporting and attestation requirements relating to internal control over financial reporting established by Section 404 of the Sarbanes-Oxley Act.[53] The Commission followed this approach in contemplation of current staff practice and this rulemaking initiative where applicable objectives underlying the Sarbanes-Oxley Act, including requirements suitable to ABS transactions, could be evaluated.

The staff has to date addressed the lack of a defined set of regulatory requirements for asset-backed securities through the filing review process and, where necessary, through staff no-action letters or interpretive statements. For example, through the filing review process, an informal disclosure scheme for ABS registration statements has developed taking into account evolving industry practices. The 2003 MBS Disclosure Report also provided valuable insight on the type of information investors find useful in ABS transactions. A system of modified reporting under the Exchange Act has developed, first through exemptive orders under Exchange Act Section 12(h),[54] and then subsequently through staff no-action letters and interpretative positions.

The Commission recognizes that securitization is playing an increasingly important role in the evolution of the fixed income financial markets. Our staff has attempted to accommodate the different nature of ABS and evolving business practices, while reducing unnecessary or impractical compliance burdens, through its numerous no-action and interpretive positions. However, the accumulated informal guidance, while helpful to some ABS transactions, has diminished the transparency of applicable requirements because an ABS registrant or investor seeking to understand the applicable requirements must review and assimilate a large body of no-action letters and other staff positions. This time-consuming practice decreases efficiency and transparency and leads to uncertainty and common problems. Many issuers, investors and other market participants have requested a defined set of regulatory requirements for guidance.[55] Staff reviews of filings provide further evidence that many compliance issues may be mitigated and potential issues avoided through clearer and more transparent regulatory requirements. Recent market events involving distressed transactions also have highlighted the need for improved disclosures as well as a renewed attention on servicing practices.[56] The Commission believes it is thus appropriate to clarify the regulatory requirements for asset-backed securities in order to increase market efficiency and transparency and provide more certainty for the overall ABS market and its investors and other participants.

III. Discussion of the Proposals

A. Securities Act Registration

1. Current Requirements

The 1992 Release, as part of a broad effort to expand access to shelf registration, allowed shelf registration for offerings of investment grade [57] asset-backed securities without requiring a reporting history requirement for the issuing entity.[58] As a result, a sponsor or depositor may register asset-backed securities to be offered on a delayed basis in the future through one or more offerings, or ''takedowns,'' of securities off of the shelf registration statement. Since the 1992 Release, shelf registration on Form S–3 has become the predominant method of registration for public offerings of asset-backed securities. Offerings generally are only registered

[49] See Release No. 33–6499 (Nov. 17, 1983) [48 FR 52889] and Securities Act Rule 415(a)(1)(vii) (17 CFR 230.415(a)(1)(vii)).

[50] See note 27 above.

[51] 15 U.S.C. 80a–1 *et seq.*

[52] See Release No. IC–19105 (Nov. 19, 1992) [57 FR 56248] and Investment Company Act Rule 3a–7 (17 CFR 270.3a–7). See also Release No. IC–18736 (May 29, 1992) [57 FR 23980] (proposing Investment Company Act Rule 3a–7 and explaining the application of the Investment Company Act to ABS transactions). The application of the Investment Company Act to ABS transactions is beyond the scope of this release. We note, however, that an ABS transaction that relies on Rule 3a–7 must comply with the conditions of that rule regardless of whether the issuer may register the offering of its asset-backed securities on Form S–3 or S–1. We encourage pre-filing conferences with the staff to discuss, as appropriate, questions or issues that may arise regarding the availability of Rule 3a–7, or any other applicable exemption, under the Investment Company Act to an ABS transaction.

[53] See, *e.g.*, Release No. 33–8238 (Jun. 5, 2003) [68 FR 36636] (Management's report on internal control over financial reporting and certification of disclosure in Exchange Act reports); Release No. 33–8220 (Apr. 9, 2003) [68 FR 18788] (Standards relating to listed company audit committees); Release No. 33–8183 (Jan. 28, 2003) [68 FR 6006] (Commission requirements regarding auditor independence); and Release No. 33–8177 (Jan. 23, 2003) [68 FR 5110] (Disclosure required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002).

[54] 15 U.S.C. 78*l*(h).

[55] See, *e.g.*, Letter from the Association for Investment Management and Research (''AIMR'') to Brian J. Lane, Director, Division of Corporation Finance, ''Recommendations for a Disclosure Regime for Asset-Backed Securities'' (Sep. 30, 1996); Letter from the Investment Company Institute (''ICI'') to Michael H. Mitchell, Special Counsel, Division of Corporation Finance, ''Asset-Backed Securities Offerings'' (Oct. 29, 1996); Letter from the Bond Market Association (''BMA'') to Brian Lane, Director, Division of Corporation Finance, ''Response to Staff Request for Suggestions Concerning Possible Reforms of Disclosure and Reporting Rules for Mortgage and Asset-Backed Securities'' (Nov. 5, 1996); Letter from BMA to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''Securities Acts Concepts and Their Effects on Capital Formation (Release No. 33–7314) (File No. S7–19–96)'' (Nov. 8, 1996); Letter from the Mortgage Bankers Association of America (''MBA'') to Brian J. Lane, Director, Division of Corporation Finance (Feb. 18, 1997); Letter from The Association of the Bar of the City of New York to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''Securities Act Release No. 33–7606A File No. S7–30–98'' (Apr. 5, 1999); Letter from American Bar Association (''ABA'') to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (Jun. 29, 1999); Letter from ICI to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (Jun. 29, 1999); Letter from MBA to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (Jun. 30, 1999); Letter from Merrill Lynch & Co., Inc. to Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (Jun. 30, 1999); Letter from Residential Funding Corporation to Securities and Exchange Commission, ''File No. S7–30–98—The 'Aircraft Carrier Release' '' (Jun. 30, 1999); Letter from BMA to David B.H. Martin, Director, Division of Corporation Finance, ''Securities Act Reform'' (Nov. 30, 2001); and Letter from BMA to Alan L. Beller, Director, Division of Corporation Finance, ''Prior Correspondence Regarding Asset-Backed Securities Reform'' (Apr. 23, 2002).

[56] See, *e.g.*, notes 120, 136, 139, 262 and 264 below.

[57] ''Investment grade'' is defined in General Instruction I.B.2 of Form S–3 to mean that, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Exchange Act Rule 15c3–1(c)(2)(vi)(F) (17 CFR 240.15c3–1(c)(2)(vi)(F))) has rated the security in one of its generic rating categories which signifies investment grade. Typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

[58] Securities Act Rule 415 (17 CFR 230.415) permits registration of offerings of securities on a delayed or continuous basis, and paragraph (a)(1)(x) of that rule permits such registration with respect to offerings registered (or qualified to be registered) on Form S–3. The 1992 Release, among other things, added General Instruction I.B.5 to Form S–3, which permits registration of offerings of investment grade asset-backed securities. Certain mortgage-backed securities, as defined in Section 3(a)(41) of the Exchange Act (15 U.S.C. 78c(a)(41)), were previously permitted to be offered on a delayed basis under Securities Act Rule 415(a)(1)(vii). See note 49 above.

on another form, most likely Form S–1 and less frequently Form S–11, if for some reason the securities technically do not meet the definition of ''asset-backed security'' in General Instruction I.B.5 of Form S–3 or an interpretation of that definition.

For offerings registered on a shelf basis on Form S–3, the prospectus disclosure in the registration statement is often presented through the use of two primary documents: The ''base'' or ''core'' prospectus and the prospectus supplement. The base prospectus outlines the parameters of the various types of ABS offerings that may be conducted in the future, including asset types that may be securitized, the types of security structures that may be used and possible credit enhancements. The registration statement at the time of effectiveness also contains a form of prospectus supplement, which outlines the format of deal-specific information that will be disclosed at the time of each takedown. At the time of a takedown, a final prospectus supplement is prepared which describes the specific terms of the takedown, and the base prospectus and the final prospectus supplement together form the final prospectus which is filed with the Commission pursuant to Securities Act Rule 424(b).[59]

2. Definition of Asset-Backed Security

Currently, the term ''asset-backed security'' is defined only for purposes of Form S–3. As many of our proposals relate to the treatment of asset-backed securities regardless of the form on which their offering is initially registered, we are proposing to move the definition of ''asset-backed security'' to the definition section of proposed Regulation AB, our proposed sub-part in Regulation S–K for asset-backed securities (discussed more fully in Section III.B). We propose to retain any additional conditions appropriate for Form S–3 eligibility, such as an investment grade requirement, in General Instruction I.B.5 of Form S–3. Under our proposed format, however, a security that met the general definition of ''asset-backed security'' would be subject to the disclosure and other requirements we propose regardless of how registered.

After more than ten years of experience with the definition of ''asset-backed security,'' we believe that the core definition is still sound. The definition allows broad flexibility as to asset types and structures that we believe should be subject to the alternative disclosure and regulatory regime that exists for asset-backed securities. As the Commission stated in the 1992 Release, the definition does not distinguish between pass-through (*i.e.*, equity) and pay-through (*i.e.*, debt) asset-backed securities nor does it limit application to a list of ''eligible'' assets that can be securitized, so long as such assets meet the general principle that they are financial assets that by their terms convert into cash within a finite time period.[60] We believe, conversely, that the alternative regime for asset-backed securities would not be appropriate for securities that fall outside the definition.

Experience with the definition has resulted in several interpretations since its adoption. These interpretations have developed primarily through staff processing of ABS registration statements and in a few instances through staff no-action letters. As such, these interpretations may not always have been transparent.

Accordingly, we propose to retain the same basic definition of asset-backed security, with one modification discussed below with respect to leases. We also propose to codify several clarifying interpretations of the definition that recognize and build upon the operational and structural distinctions between ABS and non-ABS transactions. In many cases, through the process of codifying these interpretations, we also are proposing to expand many of the existing interpretations to allow additional asset types and transaction features to be considered an ''asset-backed security,'' including for purposes of shelf registration if the asset-backed securities meet the additional criteria for registration on Form S–3, such as the investment grade requirement.

Our proposed definition and interpretations are intended to establish parameters for the types of securities that are appropriate for our proposed alternative regulatory regime for asset-backed securities, including, for securities that meet the additional criteria for Form S–3 registration, delayed shelf registration and the use of certain written communications. The proposals would not mean or imply that public offerings of securities outside of these parameters may not be registered with the Commission, but only that the disclosure and other requirements in the regime for asset-backed securities are not designed for those securities. The proposals would mean that such securities would need to rely on non-ABS form eligibility for registration, including shelf registration. Additional disclosures are currently required for such securities under our existing disclosure regime.

a. Basic Definition

Under our proposal, the basic definition of ''asset-backed security'' would be ''a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the securityholders; provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases.''[61] The only change we propose from the current definition is the addition of the proviso with respect to leases, discussed below.

The proposed definition of ''asset-backed security'' includes the same basic concept of a discrete pool of financial assets that by their terms convert into cash within a finite time period. We believe this does not include so-called ''synthetic'' securitizations.[62]

[59] 59 17 CFR 230.424(b).

[60] For example, common stock and similar equity instruments would not meet this general principle.

[61] As the Commission stated in the 1992 Release, the definition is sufficiently broad to encompass any self-liquidating asset which by its terms converts into one or more cash payments within a finite time period. There are no substantive requirements as to the timing of the cash flows under the definition, such as that they must be constant and uninterrupted. The payments on the asset-backed securities, however, must be based primarily upon the cash flow from the pool assets.

[62] Synthetic securitizations do not meet the basic concepts embodied in our definition of an asset-backed security for several reasons. For example, payments on the securities in a synthetic securitization comprise or include payments based on the value of a reference asset, unrelated to the value of or payments on any actual assets in the pool. Payment is therefore by reference to an asset not in the pool instead of primarily from the performance of a discrete pool of financial assets that by their terms convert into cash and are transferred to a separate issuing entity. Neither does the derivative act as credit enhancement on existing pool assets or as rights or other assets designed to ensure timely servicing or distribution, because it does not relate to the value of any pool asset but instead relates to an external asset, in order to bring the risk of that asset into the pool synthetically. Further, in a synthetic securitization, if a credit event occurs there may be a transfer of assets that would no longer make the pool discrete.

Another example of a synthetic exposure would be a transaction where the asset pool consists of securities coupled with a swap or other derivative under which payments are made based on the value of an equity or commodity or other index such that the payments on the security comprise or include payments based on the performance of the external index and not by the performance of the actual securities in the pool. Our view that securities resulting from synthetic securitizations are not ABS within the proposed definition is not altered by the fact that payments on the swap or other derivative based on the value of assets or indices not related

Synthetic securitizations are a relatively recent development in structured finance designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool. These synthetic transactions are often effectuated through the use of credit derivatives such as a credit default swap or total return swap. Synthetic securitizations do not actually own the underlying assets; instead, the assets that are to constitute the actual ''asset pool'' under which the return on the ABS is primarily based are only referenced through the credit derivative.

Questions regarding the proposed definition of ''asset-backed security:''

- We request comment on our proposed definition. Are any further modifications to the definition necessary? If so, what modifications should be made and why?

b. Nature of the Issuing Entity

The first set of interpretations we propose to codify relates to the nature of the issuing entity in whose name the asset-backed securities are issued. In this regard, we believe that two interpretations always have been implied. We propose to codify both as additional conditions to the definition of ''asset-backed security.''

The first condition is that neither the depositor nor the issuing entity is an investment company under the Investment Company Act, nor will either become one as a result of the asset-backed securities transaction. If either was the case, we believe the separate regulatory regime for investment companies should be followed in lieu of our proposals for asset-backed securities.

The second condition is that the issuing entity must be passive and its activities restricted to the asset-backed securities transaction. In particular, the activities of the issuing entity must be limited to passively owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto.[63] As we stated in the proposing release for the 1992 amendments, the legal nature of the issuing entity—whether a trust, limited purpose subsidiary or other legal person—is not necessarily relevant.[64] However, we believe the limited function and permissible activities of the issuing entity are fundamental to the notion of a security that is to be backed solely by a pool of assets.

Questions regarding the nature of the issuing entity:

- We request comment on the proposed conditions regarding the nature of the issuing entity. Is the proposed condition on the passive and restricted nature of the issuing entity appropriate? Is any additional specificity or clarification needed for the condition? Should there be any exceptions to the condition? If so, what would they be and how would they be consistent with the notion of an ''asset-backed security?''
- Should there be any additional conditions on the nature of the issuing entity?

c. Delinquent and Non-Performing Pool Assets

In 1997, Commission staff issued a no-action letter clarifying that an asset pool having total delinquencies of up to 20% at the time of the proposed offering may still be considered an ''asset-backed security.'' [65] In addition, there also exists a longstanding staff interpretive position that no non-performing assets may be included as part of the asset pool at the time of the proposed offering. The issue in either case is that such assets may no longer be (or in the case of non-performing assets, are not) converting into cash within a finite time period, as required by the definition of asset-backed security, given that such assets are not performing in accordance with their terms and management or other action may be needed to convert them to cash.

We propose to codify these interpretations. First, we propose that no non-performing assets may be part of the original asset pool at the time of issuance of the asset-backed securities.[66] Part of the difficulty for issuers in complying with the existing interpretive position is that there is no uniform definition of what is a ''non-performing asset.'' We understand that the point at which a financial asset is considered ''non-performing'' is often dependent upon asset type, with some financial assets being considered non-performing before other types of financial assets would. However, we believe the point at which the financial asset should be charged-off appears to be a consistent reference point, even if the point at which that event would occur may vary. Accordingly, we propose to define ''non-performing'' to be a pool asset if any of the following was true:

- The pool asset meets the requirements in the transaction agreements for the asset-backed securities for when a pool asset should be charged-off; or
- The pool asset meets the charge-off policies of the sponsor.[67]

We believe this definition provides flexibility for different asset classes while still ensuring that no assets are included in the pool that would otherwise be considered to be non-performing and thus charged-off under

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to the assets in the pool held by the issuer are conditioned on performance of the assets in the pool held by the issuer. Because payments in synthetic securitizations are based on the performance of assets or indices not included in the pool, such a securitization would not fall within the ABS definition. Payments on ABS must be based primarily on the performance of the financial assets in the pool.

Synthetic securitization transactions differ from ABS transactions where swaps or other derivatives are used either to reduce or alter risk resulting from assets contained in the pool held by the issuer, or to provide credit enhancement related to assets in the pool. For example, the existence of an interest rate or currency swap covering either or both of the principal or interest payments on assets in the pool held by the issuer are designed to reduce or alter risk resulting from those assets and fall within the definition of asset-backed security. The return on the ABS are still based primarily on the performance of the financial assets in the pool.

As another example of a swap or other derivative permissible in an ABS transaction, a credit derivative such as a credit default swap could be used to provide viable credit enhancement for asset-backed securities. For example, a credit default swap may be used to reference assets actually in the asset pool, which would be analogous to buying protection against losses on the pool asset. The issuing entity would pay premiums to the counterparty (as opposed to the counterparty paying the premiums to the issuing entity). If a credit event occurred with respect to the referenced pool asset, the counterparty would be required to make settlement payments regarding the pool asset or purchase the asset to provide recovery against losses.

[63] In this regard, so-called ''series trusts'' would not qualify as an ''asset-backed security'' under our proposed definition. Under a series trust, the same trust will hold multiple pools of assets and will issue multiple classes of securities, some of which are backed by one pool while others are backed by other pools. Securities backed by one pool do not have rights to the other pools. In this instance, the issuing entity is not limited to owning and holding one asset pool and issuing securities backed by that pool. This is not to be confused with a master trust structure typical in credit card ABS and discussed later where all securities are backed by one pool, which would meet the definition. Of course, an ABS transaction with one asset pool could divide allocations of the cash flows from the pool among separate classes of securities and still qualify as an ''asset-backed security.''

[64] See Release No. 33–6943 (July 16, 1992) [57 FR 32461].

[65] See *Bond Market Ass'n* (Oct. 8, 1997). The no-action letter also confirmed that notwithstanding whether a security meets the definition of ''asset-backed security'' set forth in General Instruction I.B.5 of Form S–3, an offering of securities may nevertheless be eligible for registration on Form S–3 so long as the issuer satisfies the issuer requirements in General Instruction I.A. (including, but not limited to, the reporting history requirements in General Instructions I.A.2 and I.A.3) and satisfies an applicable transaction requirement in General Instruction I.B. (*e.g.*, a registered offering of investment grade securities under General Instruction I.B.2). This option, which has always existed without regard to General Instruction I.B.5, would remain under our proposals.

[66] Consistent with the existing staff no-action letter, the cut-off date (the date on and after which collections on the pool assets accrue for the benefit of the ABS holders) may be employed to establish delinquency and non-performance levels.

[67] As a result, the charge-off requirement that was more restrictive would govern.

an objective standard. We propose to require disclosure of these charge-off policies in Regulation AB, discussed more fully in Section III.B.

We also propose to codify a delinquency concentration limit in a manner consistent with the staff no-action letter. However, as we are proposing a general definition of ''asset-backed security'' regardless of eligibility for shelf registration, we propose two separate delinquency concentration limits. For the general definition (*e.g.*, for offerings that could be registered on a non-shelf basis on Form S–1), we propose that delinquent assets may not constitute 50% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities. We believe concentrations above that threshold begin to raise serious doubt that the transaction should be characterized as an ''asset-backed security'' as the payments on the securities in such transactions would appear to depend more on the ability of the entity or entities that provide collection services for the delinquent assets than on the self-liquidating nature of the underlying assets. For shelf registration eligibility, we propose to retain the existing 20% delinquency concentration level. For purposes of determining whether a pool asset is delinquent under either threshold, we propose to define a pool asset as ''delinquent'' if any portion of a contractually required payment on the asset is 30 days or more past due. This is the existing standard in the staff no-action letter.[68]

With regard to determining delinquency, one potential area of concern is improper re-aging or restructuring of delinquent accounts, such as declaring an asset with multiple past-due payments as current even if only the last payment was made. Improper re-aging or recharacterization of delinquent accounts cannot be employed for purposes of satisfying delinquency concentration limits. We propose to clarify in the definition of ''delinquent'' that a pool asset that was more than one payment past due could not be characterized as not delinquent if only partial payment on the total past due amount had been made, unless the obligor had contractually agreed to restructure the obligation, such as part of a workout plan.[69] In proposing our delinquency limits, we also are proposing to require disclosure, discussed more fully in Section III.B., of policies regarding grace periods, re-aging, restructures or other such practices on delinquencies. We also propose disclosure on an on-going basis, discussed more fully in Section III.D., regarding material modifications, extensions or waivers to pool asset terms, fees, penalties or payments.

Questions regarding proposals for delinquent and non-performing assets:

- We request comment on the codification of these existing interpretations. Is there a reason to re-evaluate these interpretations? In particular, should there still be an absolute bar on non-performing assets? We also request comment on the proposed delinquency concentration limits. The 50% non-shelf limit is designed to help assure that even those asset-backed securities that do not qualify for shelf registration are appropriately subject to our proposed ABS disclosure and reporting regime. Should either limit be higher or lower? Should these tests be conducted at any time other than issuance of the asset-backed securities?
- We request comment on our proposed definitions of ''non-performing'' and ''delinquent.'' Should the definition of non-performing be tied to the charge-off policies of both the transaction documents and the sponsor? Is it necessary to require disclosure of the sponsor's charge-off policies? Is the proposed clarification regarding re-aging appropriate? Should there be a specific delinquency date for when an asset is non-performing? What would that date be (*e.g.*, 90 or 180 days delinquent)? If possible, please provide supporting data in relation to current market practices.

d. Lease-Backed Securitizations and Residual Values

The one change we propose to the basic definition of ''asset-backed security'' is to expand the definition to include securitizations backed by leases where part of the cash flows backing the securities is to come from the disposal of the residual asset underlying the lease (*e.g.*, selling an automobile at the end of an automobile lease).[70] In that instance, the asset-backed securities are not backed solely by financial assets that ''by their terms convert into cash,'' because the transaction also involves a physical asset that must be sold in order to obtain cash. As a result, securitizations where a portion of the cash flow to repay the securities is anticipated to come from the residual value of the physical property do not fall within the current definition of ''asset-backed security'' in Form S–3 and thus are often registered on a non-shelf basis on Form S–1.

Lease-backed ABS have grown into a common and recognized segment of the overall ABS market.[71] However, even though we are recognizing the growth in lease-backed ABS that include securitizations of residual value, such securitizations are subject to additional factors that are not present in securitizations backed solely by financial assets that convert into cash. Residual value is often determined at the inception of a lease contract and represents an estimate of the leased property's resale value at the end of the lease. Assumptions and modeling are necessary to determine the amount of the residual value. In addition, the transaction is not simply dependent on the servicing and amortization of the pool assets, but also on the capability and performance of the party that will be used to convert the physical property into cash and thus realize the residual values.

The higher the percentage of cash flows that are to come from residual values, the more important these other factors become and the less the transaction resembles a traditional securitization of financial assets for which our regime for asset-backed securities is designed. We propose to address this concern in two ways. First, we propose additional disclosures, discussed more fully in Section III.B., on how residual values were estimated and derived, statistical information on historical realization rates and disclosure of the manner and process in which residual values will be realized, including disclosure about the entity that will convert the residual values into cash. Second, similar to existing practice regarding delinquencies, we propose limits on the percentage of the cash flow anticipated to come from residual values in order to be considered an ''asset-backed security.''

In proposing residual value limits, we recognize that market practice regarding lease-backed securitizations vary on the typical percentage of cash flows that are expected to come from residual values. For example, auto lease securitizations often have higher residual value percentages than equipment-backed securitizations due to the higher resale values that often exist between automobiles and other equipment. Accordingly, after reviewing residual value percentages for typical lease-backed securitizations, we propose that for the general definition of ''asset-backed security,'' the portion of the cash

[68] See note 65 above.

[69] We propose similar language for the definition of ''non-performing.'' We propose to define ''obligor'' to mean any person who is directly or indirectly committed by contract or other arrangement to make payments on all or part of the obligations on a pool asset.

[70] Securitizations backed solely from the payment on the leases and not including the residual value of the underlying physical property would not of course need to comply with the proposed thresholds.

[71] See, *e.g.*, Fitch, Inc., ''Under the Hood: Automobile Lease ABS Uncovered'' (Jun. 14, 2000).

flow to repay the securities anticipated to come from the residual value of the physical property underlying the leases may not constitute:

- For automobile leases, 60% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities;[72] and
- For all other leases, 50% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities.

In addition, we propose a more stringent limitation for cash flow from residual values for offerings of securities backed by leases other than automobile leases that may be registered on Form S–3 and thus eligible for shelf registration. For Form S–3 eligibility, we propose that for leases other than automobile leases, the portion of the cash flow anticipated to come from residual values may not constitute 20% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities, which we believe is consistent with market practice and the types of offerings that would be appropriate for shelf eligibility. We believe these proposals will expand eligibility of lease-backed transactions for shelf registration and appropriately permit lease-backed transactions under our proposed rules while continuing to apply the basic principles underlying the definition of ''asset-backed security.''

Questions regarding the proposals for lease-backed ABS:

- Should ABS backed in part by cash flows from residual values be included in the definition of asset-backed security? Does the proposed proviso to the definition of asset-backed security capture the types of lease transactions that include residual values? Should there be any additional requirements for such securitizations apart from those proposed?
- We request comment on our proposed limits on the cash flows that are anticipated to come from residual values. Should there be such limits? What alternatives could be used in lieu of limits to address the concerns identified? Is there a disclosure-based solution that would preclude the need for such limits? Are there additional concerns we have not identified? Should there be different limits for automobile leases versus other leases? Should there be different limits for non-automobile leases for shelf registration eligibility? Should there be such limits for automobile leases? Should any of the proposed limits be higher or lower? Should the limits be based on a different amount (*e.g.*, percentage of offering proceeds instead of asset pool)? If possible, please provide supporting data in relation to current market practices.

e. Exceptions to the ''Discrete'' Requirement

The last set of interpretations we propose to codify relates to exceptions to the requirement in the definition of ''asset-backed security'' that the asset pool be ''discrete.'' The existence of the ''discrete'' requirement is to prevent a level of portfolio management that is not contemplated by the definition of ''asset-backed security'' or consistent with this registration and reporting regime. In addition, the lack of a ''discrete'' requirement would make it difficult for an investor to make an informed investment decision when the composition of the pool is unknown or could change over time.

However, ever since the original definition of ''asset-backed security'' was adopted, there has been some confusion over the meaning of the term ''discrete'' in the definition, particularly with respect to language in the definition that specifies the asset pool must be a ''discrete pool of receivables or other financial assets, either fixed or revolving.'' The 1992 Release specified that the phrase ''fixed or revolving'' was added ''in order to make clear that the definition covers 'revolving' credit arrangements, such as credit card and short-term trade receivables, home equity loans and automotive dealer floorplan financings, where account or loan balances revolve due to periodic payments, charge-offs and closings of the receivables.''[73] Thus, the basic principle is that the balance of a pool asset may revolve, but not the asset pool itself.[74]

Nevertheless, in response to market developments, the staff has allowed certain exceptions, with limits, to the discrete pool requirement. These exceptions relate to master trusts, prefunding periods and revolving periods. In a master trust, the ABS transaction contemplates adding additional pool assets in connection with future issuances of asset-backed securities backed by the same, but expanded, asset pool. Pre-existing securities also would therefore be backed by the same expanded asset pool. In a prefunding period, a limited portion of the proceeds of the offering is set aside for the future acquisition of additional pool assets within a specified period of time after the issuance of the asset-backed securities. In a revolving period, a limited amount of cash flows from the asset pool may be recycled for a specified period to acquire new pool assets instead of being applied to payments on the asset-backed securities.[75]

The staff's interpretive history in this area has resulted in limits on which asset classes may use these structures and still be considered an ''asset-backed security.''[76] We now propose to codify these three exceptions and also expand them so that they are applicable to all asset types.[77] A transaction could employ one or more of these features and still qualify as an ''asset-backed security.'' These expansions should result in increased flexibility in structuring transactions that meet market demands without regard to regulatory restrictions.

As in the case of our proposals for lease-backed ABS that involve residual values, we believe the concern relating to these structures can be appropriately addressed through disclosure, both at the time of issuance of the asset-backed securities as well as on an ongoing basis through disclosure of how the asset pool is materially changing.[78] As such, we

[72] For purposes of our proposal, automobile leases would include motorcycle leases but not leases for leisure craft such as watercraft or snowmobiles. The 60% threshold is consistent with our understanding of how the market currently views auto lease-backed ABS.

[73] See note 27 above. The 1992 Release also explained that, ''In credit card financings, for example, the securities are backed by current and future receivables generated by specified credit card accounts. The balances of the pool assets fluctuate as new receivables are generated and existing amounts are paid or charged off as a default. If the accounts do not generate sufficient cash flow to support the securities, the sponsor may be required to assign additional receivables from other accounts to the public security holders' interest in the pool.''

[74] There are additional instances when the asset pool may change under the current definition without infringing the ''discrete pool'' requirement. For example, often the depositor or other seller of the pool assets will make standard representations and warranties regarding the pool assets, such as to their principal balance and status at the time of transfer to the trust. If an asset fails to meet the requirements of those representations or warranties, there may be obligations for the depositor to repurchase or substitute that asset for assets that do comply with the representations or warranties. These pool composition changes are permissible under the current defintion as ''rights or other assets designed to assure the servicing or timely distribution of proceeds to securityholders.'' There is thus no need to specify a separate exception from the ''discrete'' requirement for such instances.

[75] The period after the revoling period when cash flows are applied to payments on the asset-backed securities is often called the ''amortization'' or ''pay-down'' period.

[76] For example, nearly all asset classes may employ a limited prefunding period. However, only a limited subset of asset classes are permitted to have revolving periods. Not all of these interpretations may be transparent.

[77] But see note 111 and the accompanying text regarding other factors that may limit the use of these features where the distribution of the underlying pool assets may need to be separately registered.

[78] See, *e.g.*, Letter from the Investment Company Institute to Michael H. Mitchell, Special Counsel, Division of Corporation Finance, ''Asset-Backed Securities Offerings'' (Oct. 29, 1996).

are proposing more detailed disclosures in Regulation AB, discussed more fully in Section III.B., regarding the operation of such structures and changes to the asset pool over time.

Consistent with current staff practice, we also are proposing limits on the amount and duration of prefunding and certain revolving periods to limit the amount of changes to the asset pool, while still allowing flexibility to accommodate market demands. These limits are designed to establish parameters for the types of securities that should be subject to the ABS regulatory regime. As with lease-backed ABS, we believe these proposals will expand eligibility of these structures while continuing to apply the basic principles underlying the definition of ''asset-backed security.''

Our proposal would allow master trust structures to meet the definition of ''asset-backed security'' without any pre-determined limits.[79] For prefunding periods, we propose separate limits for shelf and non-shelf offerings similar to our proposals for lease-backed ABS. For the general definition of ''asset-backed security,'' the amount of proceeds that may be used for a prefunding period may be up to 50% of offering proceeds and the length of the prefunding account may last up to one year from the date of issuance of the asset-backed securities. As with our other proposed thresholds, we believe prefunding periods above these thresholds begin to raise serious doubt that the transaction should be characterized as an ''asset-backed security.'' For Form S–3 eligibility, we propose that the amount of proceeds that may be used for a prefunding period may be up to 25% of offering proceeds over a similar one-year period. With larger prefunding periods, as with larger revolving periods discussed below, we believe investors should be entitled to the additional time and information they would receive that is typical for transactions conducted on a non-shelf basis.

For revolving periods, our proposals would recognize the nature of the asset being securitized (*i.e.*, whether it itself is fixed or revolving). For receivables or other financial assets that by their nature revolve (*e.g.*, credit cards, dealer floorplan financings or home equity lines of credit), there would as today be no limit on the number of assets that may revolve nor a limit on the duration of the revolving period. For fixed receivables or other financial assets (*e.g.*, standard residential mortgages, auto loans and leases), we propose limits similar to prefunding periods; that is, the general definition of ''asset-backed security'' would specify that the additional assets that may be acquired in the revolving period may constitute up to 50% of the proceeds of the offering and the duration of the revolving period may last for up to one year from the date of issuance of the asset-backed securities. For Form S–3 eligibility, the revolving period would be limited to 25% of proceeds over a one-year period.

Questions regarding proposed exceptions to the ''discrete pool'' requirement:

- Should asset-backed securities transactions be allowed to have master trusts, prefunding periods and revolving periods? Are there some asset types where the inclusion of such features should disqualify any issued securities from being considered an ''asset-backed security?'' Should one or more of the features (*e.g.*, master trusts or revolving periods) not be included or expanded for all asset types? Are there any additional exceptions that should be made?
- Should there be any pre-determined limits on master trust structures? Are the proposed limits appropriate for the use of prefunding or revolving periods? Should there be such limits? What alternatives could be used in lieu of limits? Should there be different limits for shelf registration eligibility? Should there be different limits based on the nature of the asset (fixed or revolving)? Should there be a limitation that the assets that may be acquired in a prefunding or revolving period are of the same character as the original pool? Should any of the proposed limits be higher or lower? Should the limits be based on a different amount? Should the length of prefunding or revolving periods be longer or shorter than one year? If possible, please provide supporting data in relation to current market practices. Please see Section III.B.4. for comment requested regarding disclosure related to these features.

3. Securities Act Registration Statements

a. Form Types

We do not propose a new registration statement form for offerings of asset-backed securities. We preliminarily believe that the existing form structure is sufficient, provided there are appropriate instructions in the applicable forms as to their use for ABS offerings. We do propose to limit the registration of asset-backed securities offerings to two forms: Form S–1 or Form S–3.[80] As is currently the case, Form S–3 would retain the requirements that would qualify an offering for delayed shelf registration on that form. Form S–1 would thus become the form for all offerings that meet the basic definition of an ''asset-backed security'' but do not meet the additional eligibility requirements for Form S–3 (*e.g.*, investment grade and proposed additional limits on lease-backed ABS, delinquent pool assets and prefunding and revolving periods). We propose to amend our other Securities Act registration statement forms for primary offerings to exclude explicitly their use for ABS offerings.[81] Since as discussed below we do not intend to have a separate disclosure regime or requirements for foreign ABS, there is no need to provide separate form types for foreign ABS offerings. These offerings also would be registered on Forms S–1 or S–3, as applicable.

While Form S–3 currently specifies eligibility for ABS offerings, neither it nor any other form clarifies how the form is to be prepared for such an offering. Therefore, we propose separate general instructions for both Form S–1 and Form S–3 to specify use for ABS offerings.

Proposed General Instruction VI. to Form S–1 would clarify how that form is to be prepared for an ABS offering. In particular, the proposed instruction would clarify who is to sign the registration statement (discussed more fully in Section III.A.3.d.) as well as the menu of required disclosure items. As to the latter, the proposed instruction would identify the existing items in the form that may be omitted as well as substitute core disclosure items from proposed Regulation AB that would be required. As discussed in Section III.B., proposed Items 1102–1118 of Regulation AB would represent the basic disclosure package for registered ABS offerings. Any other applicable items specified in Form S–1, such as the description of the securities and the offering, would continue to be required.[82] The proposed application of the disclosure items for Form S–1 is presented in the following table:

[79] Of course, each additional issuance of securities backed by the same pool and the additional pool assets would need to be consistent with the requirements for an ''asset-backed security.''

[80] Form S–4 also would remain available with respect to transactions, such as exchange offers, authorized by that Form.

[81] See proposed amendments to Form S–2, S–11, F–1, F–2 and F–3. Any offerings meeting the definition of asset-backed security that previously used one of these forms for registration, such as Form S–11, in lieu of Form S–3 would henceforth be registered on Form S–1 instead. As discussed in Section III.F., we also are proposing to clarify that ABS issuers could not qualify as a ''small business issuer.'' Therefore, ABS offerings would be ineligible for Forms SB–1 and SB–2 (referenced in 17 CFR 239.9 and 17 CFR 239.10).

[82] As is generally the case today, no disclosure need be provided in response to items that are not applicable to the transaction in question. See Securities Act Rule 404(c) (17 CFR 230.404(c)).

PROPOSED DISCLOSURE FOR FORM S–1 FOR REGISTERED ABS OFFERINGS

Existing form items	Required if applicable	May be omitted
Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus	•	
Item 2. Inside Front and Outside Back Cover Pages of Prospectus		
Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges	•	
Item 4. Use of Proceeds	•	
Item 5. Determination of Offering Price	•	
Item 6. Dilution	•	
Item 7. Selling Security Holders	•	
Item 8. Plan of Distribution	•	
Item 9. Description of Securities to be Registered	•	
Item 10. Interests of Named Experts and Counsel	•	
Item 11. Information with Respect to the Registrant:		
(a) Item 101 of Regulation S–K, description of business		•
(b) Item 102 of Regulation S–K, description of property	•	[1] •
(c) Item 103 of Regulation S–K, legal proceedings		•
(d) Item 201 of Regulation S–K, market price of and dividends on the registrant's common equity and related stockholder matters.	•	
(e) Financial statements meeting the requirements of Regulation S–X		•
(f) Item 301 of Regulation S–K, selected financial data		•
(g) Item 302 of Regulation S–K, supplementary financial information		•
(h) Item 303 of Regulation S–K, management's discussion and analysis of financial condition and results of operations.		•
(i) Item 304 of Regulation S–K, changes in and disagreements with accountants on accounting and financial disclosure.		•
(j) Item 305 of Regulation S–K, quantitative and qualitative disclosures about market risk		•
(k) Item 401 of Regulation S–K, directors and executive officers		[2] •
(l) Item 402 of Regulation S–K, executive compensation		[2] •
(m) Item 403 of Regulation S–K, security ownership of certain beneficial owners and management		[3] •
(n) Item 404 of Regulation S–K, certain relationships and related transactions		[4] •
Item 12. Disclosure of Commission Position on Indemnification for Securities Act Liabilities	•	
Item 13. Other Expenses of Issuance and Distribution	•	
Item 14. Indemnification of Directors and Officers	•	
Item 15. Recent Sales of Unregistered Securities	•	
Item 16. Exhibits and Financial Statement Schedules	•	
Item 17. Undertakings	•	
Additional Disclosure Items from Regulation AB:		
Items 1102–1118 of Regulation AB	•	

[1] Descriptions regarding pool assets and relevant property underlying the pool assets would be covered under new Items in proposed Regulation AB.
[2] If the issuing entity does not have any executive officers or directors.
[3] Except for Item 403(a) of Regulation S–K and if the issuing entity does not have any executive officers or directors.
[4] If the issuing entity does not have any executive officers or directors. We propose a separate item in Regulation AB regarding affiliations and related transactions among transaction participants.

Proposed General Instruction V. to Form S–3 would perform a similar function for that form. Unlike current practice on Form S–1, non-ABS offerings on Form S–3 rely predominately on incorporation by reference of Exchange Act reports for disclosure unrelated to the offering. As a result, existing Form S–3 does not set forth a detailed menu of disclosure items apart from disclosure about the offering. However, because a reporting history is not required for ABS for Form S–3 eligibility, investment grade ABS offerings registered on that form often must present all of their disclosure in the base prospectus and prospectus supplement in lieu of incorporating information by reference. Accordingly, the proposed Form S–3 instruction for ABS does not specify any existing items that may be omitted, but rather simply specifies the addition of the same basic disclosure package from Regulation AB. The other disclosure items required by Form S–3, such as the description of the securities and the offering, would continue to be required as applicable. Therefore, as shown in the following table, the effect of the proposed general instruction is to add the basic disclosure package of proposed Items 1102–1118 of Regulation AB:

PROPOSED DISCLOSURE FOR FORM S–3 FOR REGISTERED ABS OFFERINGS

Existing form items	Required if applicable	May be omitted
Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus	•	
Item 2. Inside Front and Outside Back Cover Pages of Prospectus	•	
Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges	•	
Item 4. Use of Proceeds	•	
Item 5. Determination of Offering Price	•	
Item 6. Dilution	•	
Item 7. Selling Security Holders	•	
Item 8. Plan of Distribution	•	

PROPOSED DISCLOSURE FOR FORM S–3 FOR REGISTERED ABS OFFERINGS—Continued

Existing form items	Required if applicable	May be omitted
Item 9. Description of Securities to be Registered	•	
Item 10. Interests of Named Experts and Counsel	•	
Item 11. Material Changes	•	
Item 12. Incorporation of Certain Information by Reference	•	
Item 13. Disclosure of Commission Position on Indemnification for Securities Act Liabilities	•	
Item 14. Other Expenses of Issuance and Distribution	•	
Item 15. Indemnification of Directors and Officers	•	
Item 16. Exhibits	•	
Item 17. Undertakings	•	
Additional Disclosure Items from Regulation AB:		
Items 1102—1118 of Regulation AB	•	

Questions regarding proposed form types:

• We request comment on our proposal to require ABS offerings to be registered on either Form S–1 or Form S–3. Is there a reason to continue to provide access to another form type? Would there be any reason to provide a separate form type specifically for ABS?

• We request comment on the proposed general instructions to Forms S–1 and S–3. Is the proposed menu of disclosure items appropriate? Should any additional items be included or omitted? For example, should information required by Item 305 of Regulation S–K regarding quantitative and qualitative disclosures about market risk be included? Should disclosure be required of any changes in or disagreements with accountants used in prior transactions by the sponsor or depositor involving the same asset class regarding attestations of assessments of compliance with servicing criteria? If so, should the disclosure be similar to that required by existing Item 304 of Regulation S–K? Are there any additional instructions that should be included for ABS offerings?

b. Presentation of Disclosure in Base Prospectuses and Prospectus Supplements

In proposing to specify the menu of disclosure items applicable for ABS offerings eligible for Form S–3, and thus shelf registration, we do not intend to change the current practice or ability to present such disclosure in a separate base prospectus and prospectus supplement, a practice also available for non-ABS offerings.[83] Items in the basic disclosure package that are known or reasonably available should continue to be described in the base prospectus, while disclosure dependent on the final terms of the particular takedown could still be provided in the prospectus supplement.[84] A form of prospectus supplement would still be required to accompany the base prospectus in the registration statement at the time of effectiveness that outlines the format of deal-specific information that will be disclosed at the time of each takedown.[85]

As referenced in the 1992 Release, the type or category of asset to be securitized must be fully described in the registration statement at the time of effectiveness. The structural features contemplated also should be disclosed. In addition, risks associated with changes in interest rates or prepayment levels should be fully disclosed. The various scenarios under which payments on the asset-backed securities could be impaired also should be discussed, as well as identification of the types or categories of securities that may be offered, such as interest-weighted or principal-weighted classes (including IO or PO securities), planned amortization or companion classes or residual or subordinated interests.

In presenting disclosure in base prospectuses and prospectus supplements, registrants are reminded that, as is the case today for all shelf offerings, the base prospectus must fully describe the types of offerings contemplated by the registration statement. A takedown off of a shelf that involves assets, structural features, credit enhancement or other features that were not described as contemplated in the base prospectus will usually require either a new registration statement (*e.g.*, to include additional assets) or a post-effective amendment (*e.g.*, to include new structural features or credit enhancement) rather than simply describing them in the final prospectus filed with the Commission pursuant to Securities Act Rule 424.[86] Registrants should exercise discretion, however, in describing only the material

[83] However, as stated in the 1992 Release and as applicable to all shelf offerings, registrants are reminded that disclosure in the registration statement at the time of effectiveness should accurately reflect the registrant's current plans and arrangements with respect to the distribution of its securities. If a registrant plans to conduct a prompt takedown of asset-backed securities, the registration statement at the time of effectiveness must include all available information regarding the offering, including information about the asset pool, subject to any omissions permitted by Securities Act Rule 430A (17 CFR 230.430A), including a completed prospectus supplement and not just a form of prospectus supplement. Tax and legality opinions reflecting the takedown and related consents also would need to be filed pre-effectively with respect to any proposed offering contemplated to occur promptly.

[84] For example, the base prospectus should likely contain risk factors applicable to the transaction as a whole or the nature of the securities to be issued. The base prospectus also should include a discussion of the material Federal income tax consequences from investing in asset-backed securities. Of course, the prospectus supplement would include any additional risk factors or more specific disclosure as to tax consequences applicable to the particular structure and securities to be offered.

[85] In addition, any applicable opinions of counsel regarding tax consequences and the legality of the securities being registered would continue to be filed prior to effectiveness of the registration statement. See Items 601(b)(5) and 601(b)(8) of Regulation S–K. Note that these requirements exist independently from any contractual requirements of the transaction to deliver opinions at the closing of the asset-backed securities transaction. Where a prompt offering under the registration statement is not contemplated, opinions filed as of effectiveness may be appropriately conditioned or qualified pending the actual issuance of securities in the future. However, the opinions filed as of the time of effectiveness must still be signed opinions, not unsigned or draft forms of opinion. For each takedown that occurs, as with other exhibits representing the final terms of the takedown, amended or final opinions without such conditions or qualifications must be filed, either as an exhibit to the registration statement (See Securities Act Rule 462(d) (17 CFR 230.462(d)) which provides for immediate effectiveness of a post-effective amendment filed solely to add exhibits), or under cover of Form 8–K and incorporated by reference into the registration statement.

[86] Regarding the registration of market-making or remarketing transactions on Form S–3, in non-ABS transactions the registration statement is kept current by the incorporation by reference of subsequent Exchange Act reports. In an ABS transaction, the incorporation by reference of subsequent Exchange Act reports also is important, although the information in those reports does not include the extent of disclosure in the registration statement regarding the asset pool, such as the pool composition tables. Consistent with staff interpretations, this information should be kept current for use in ABS market-making and remarketing transactions. This can be accomplished either by filing a new prospectus under Securities Act Rule 424 or through the filing of a Form 8–K with the updated information that is incorporated by reference.

asset types or features reasonably contemplated to be included in an actual takedown in lieu of attempting to identify every conceivable permutation, no matter how remote. Such a practice only exacerbates unnecessarily the length of the base prospectus and limits the usefulness of this method of disclosure by including unnecessary and uninformative disclosure that obscures material information.

We do propose to specify in the proposed general instruction to Form S–3 the existing requirement to prepare separate base prospectuses and forms of prospectus supplements when multiple asset types may be securitized. As stated in the 1992 Release, a registration statement may not merely identify several alternative types of assets that may be securitized. A separate base prospectus and form of prospectus supplement must be presented for each asset class that may be securitized in a discrete pool in a takedown under that registration statement. Any difference in country of origin or country of property securing the pool assets also would require a separate base prospectus and form of prospectus supplement for each country.

An additional issue that often results in staff comment is the inclusion of language in registration statements that investors should rely on the information in the prospectus supplement if the terms of a particular series of securities conflict or vary between the base prospectus and the accompanying prospectus supplement. Disclosure in prospectus supplements regarding the transaction may enhance disclosure in the base prospectus regarding contemplated transactions, but should not contradict it. Similarly, including language to the effect of ''Except as otherwise provided in the prospectus supplement'' will permit some supplemental or modified terms of transactions, but should not be construed as creating the ability to add asset types or structural features in a takedown that were not otherwise contemplated by and described in the base prospectus.

Questions regarding presentation of disclosure in base prospectuses and prospectus supplements:

- Is any additional guidance or clarification necessary regarding the presentation of base prospectus and prospectus supplement disclosure? Should we be more specific, including by rule if necessary, on what information must be in the base prospectus as opposed to the prospectus supplement? If so, how should disclosures be delineated? Are there additional ways to cut down on unnecessary volume or detail in base prospectuses?
- Is the proposed specification that a separate base prospectus and form of prospectus supplement must be presented for each asset class and country of origin appropriate? If not, how would the staff ensure the base prospectus provides clear disclosure that did not confuse investors?
- Does the process of a base prospectus and a later prospectus supplement ensure that investors have adequate information at the time of their investment decision? Do the provisions permitting additional written communications in shelf ABS offerings, discussed in Section III.C., permit adequate information to be provided to investors in that time?

c. Form S–3 Eligibility Requirements for ABS

We propose to maintain the existing requirement for ABS Form S–3 eligibility that the asset-backed securities must be rated ''investment grade'' by a nationally recognized statistical rating organization, or NRSRO, at the time of offer and sale to the public.[87] The definition of ''investment grade'' would remain the same as for other investment grade securities that may be registered on Form S–3.[88] The ''investment grade'' requirement has existed for over ten years with respect to asset-backed securities and for over twenty years with respect to other non-convertible securities. The Commission is engaged in a review of the role of credit rating agencies in the operation of the securities markets, including whether credit ratings should continue to be used for regulatory purposes under the Federal securities laws.[89] However, pending outcome of that review, we propose to maintain the same rules and standards currently used for purposes of Form S–3 eligibility.

As discussed previously, we propose four additional conditions regarding the types of asset-backed securities that would qualify for Form S–3 eligibility. First, we propose to codify the current position that delinquent assets may not constitute 20% or more, as measured by dollar volume, of the original asset pool. Second, for securities backed by leases other than automobile leases, the portion of the cash flow to repay the securities anticipated to come from the residual value of the physical property underlying the leases may not constitute 20% or more, as measured by dollar volume, of the original asset pool. Third, the offering may not contemplate a prefunding account in excess of 25% of the proceeds of the offering or that lasts for more than one year. Finally, with respect to fixed financial assets that do not by their nature revolve, the amount of additional assets to be acquired in a revolving period may not exceed 25% of the proceeds of the offering or last for more than one year.

Consistent with existing requirements, we do not propose to add a reporting history requirement for ABS Form S–3 eligibility. However, we do propose codifying that reporting obligations regarding other asset-backed securities transactions established by the sponsor and the depositor have been complied with for the prior 12 months for continued Form S–3 eligibility for new transactions.[90] This proposal would not require that there be a reporting history with respect to any prior transactions, only that any existing or prior requirements during the past year have been met. This would include all prior reporting obligations during the preceding year, even if and only up until those obligations were suspended at some point during the year pursuant to Section 15(d) of the Exchange Act. While we believe the instances when this requirement would not be met should be rare, we do not believe it would be appropriate to continue to allow the benefits of shelf registration to new transactions established by sponsors or depositors that have not complied with ongoing reporting obligations involving previous asset-backed securities transactions.

Questions regarding Form S–3 eligibility:

- Should we continue to require an investment grade requirement for Form S–3 eligibility? Are any modifications to that requirement necessary? Should alternatives be considered, such as investor sophistication, minimum denomination or experience criteria?[91] If so, what criteria should be considered?
- Are there any additional conditions that should be required to qualify for Form S–3 eligibility? Are the proposed conditions appropriate?
- Should our proposed clarification of the impact of prior reporting obligations be limited to prior transactions by the same sponsor and depositor involving the same asset class? If so, why?

[87] NRSRO would continue to have the same meaning as used in 17 CFR 240.15c3–1(c)(2)(vi)(F).

[88] See General Instruction I.B.2 of Form S–3 and note 57 above.

[89] See Release No. 33–8236 (Jun. 4, 2003) [68 FR 35258]. For a detailed discussion on credit rating agencies and the Commission's use of credit ratings under the Federal securities laws, see the U.S. Securities and Exchange Commission, ''Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets, As Required by Section 702(b) of the Sarbanes-Oxley Act of 2002'' (Jan. 2003). The Report is available on our website.

[90] This proposal with regard to the depositor is consistent with existing staff policy.

[91] See note 89 above.

d. Determining the ''Issuer'' and Required Signatures

We propose to clarify which entity is considered the ''issuer'' under the Securities Act with respect to an offering of asset-backed securities. The Securities Act defines the term ''issuer'' in part to include every person who issues or proposes to issue any security, except that with respect to certificates of deposit, voting-trust certificates, or collateral trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions), the term issuer means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provision of the trust or other agreement or instrument under which the securities are issued.[92] Under current staff positions, the depositor must sign the Securities Act registration statement for an ABS offering. In addition, the issuing entity also must sign in the rare situation where it is formed prior to effectiveness.

We propose to clarify that the depositor for the asset-backed securities, acting solely in its capacity as depositor to the issuing entity, is the ''issuer'' for purposes of the asset-backed securities of that issuing entity.[93] Further, our proposed rule would specify that the person acting in its capacity as the depositor for the issuing entity of an asset-backed security is a different ''issuer'' from that same person acting as a depositor for any other issuing entity or for purposes of that person's own securities. As the proposed definition of asset-backed security would clarify that the issuing entity would need to be a passive special purpose investment vehicle, the proposed rule would apply regardless of the issuing entity's form of organization.

By clarifying that the person acting as the depositor in its capacity as depositor to the issuing entity is a different ''issuer'' from that person in respect of its own securities, any applicable exemptions from registration that person may have with respect to its own securities would not be applicable to the asset-backed securities.[94] Similarly, the reporting history with respect to a particular class of asset-backed securities would not affect Form S–3 eligibility with respect to the depositor's or sponsor's own securities, although as discussed above we do propose that the reporting history with respect to prior asset-backed securities transactions established by the sponsor or the depositor could affect continued Form S–3 eligibility for future ABS transactions.

Consistent with this proposal, we propose to codify in the general instructions for Forms S–1 and S–3 that the registration statement would need to be signed, as is currently the case, by the depositor, the depositor's principal executive officer or officers, principal financial officer and controller or principal accounting officer, and by at least a majority of the depositor's board of directors or persons performing similar functions. We would no longer require the issuing entity to sign if formed prior to effectiveness as such a requirement would be superfluous.

Questions regarding proposed definition of ''issuer'' and signatures required:

- We request comment on our proposed rule clarifying the ''issuer'' for an asset-backed security. In addition to, or in lieu of the depositor, should another entity be considered the ''issuer,'' such as the sponsor, the servicer, the trustee or the issuing entity? What would be the bases for designating such entity or entities as the ''issuer?''
- Is there still a reason to require the issuing entity to sign the registration statement if formed prior to effectiveness? If so, who should sign on behalf of the issuing entity? Should any other party to the transaction be required to sign the registration statement?
- Our proposal regarding which individuals of the depositor must sign is consistent with requirements for all registration statements. Should they be modified for ABS? If so, how?

4. Foreign ABS

While not as prevalent as in the U.S., securitization by foreign issuers has been developing rapidly.[95] However, asset-backed securities issued by a foreign issuer[96] or that are backed by foreign assets raise special issues due to potential differences in the legal and regulatory regime of the relevant home country. Differing laws and practices regarding banking regulation, accounting, bankruptcy, property rights, secured transactions, ''true sale,'' tax, asset servicing, consumer protection and other matters may alter fundamentally the basic principles underlying an ''asset-backed security.'' Also, given the early stage of securitization in some foreign markets, ABS may be used not just as an alternative funding source, but more for capital management, including efforts to ''prune'' a lender's portfolio by off-loading poorly performing assets.[97]

As a result of these concerns, the staff currently requires additional conditions for the processing of Form S–3 registration statements involving foreign ABS offerings. These conditions may include first requiring one or more registered offerings on a non-shelf basis on Form S–1 or S–11 that is fully reviewed by the staff, as well as other steps or conditions to help assure that novel or unique questions can be addressed by the staff. As experience with a particular issuer, asset type and laws related to asset-backed issues in the home country increases, the requirements decrease. Nevertheless, while designed to address the concerns noted above, these additional steps and conditions can result in delays and possible impediments to access to the U.S. public capital markets through shelf registration for foreign ABS, even if the other requirements for shelf registration, such as an investment grade rating, can be met.

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[92] See Section 2(a)(4) of the Securities Act (15 U.S.C. 77b(a)(4)).

[93] See proposed Securities Act Rule 191 (17 CFR 230.191). We propose an identical rule for purposes of the Exchange Act. See proposed Exchange Act Rule 3b-19 (17 CFR 240.3b–19) and Section III.D.2. As noted in Section III.B.2., we propose to define the ''depositor'' as the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity. For asset-backed securities where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term ''depositor'' would refer to the sponsor. See proposed Item 1101(e) of Regulation AB. It should be noted that the definition of ''issuer'' under the Investment Company Act is different from the definitions in the Securities Act and the Exchange Act. See 15 U.S.C. 80a–2(a)(22). Our proposals would not affect that definition.

[94] For example, in an ABS transaction where there is not an intermediate transfer of the pool assets from the sponsor to the issuing entity and the sponsor is a bank, the proposed rule would not mean that because the bank is acting as depositor, the asset-backed securities would then be a ''security issued * * * by a bank'' and thus exempt from registration under Section 3(a)(2) of the Securities Act (15 U.S.C. 77c(a)(2)). See, *e.g., Bank of America National Trust & Savings Ass'n* (May 19, 1977).

[95] For example, one source estimates that non-U.S.ABS issuance grew from $93 billion in 2000 to $185 billion in 2003. See Asset-Backed Alert (pub. by Harrison Scott Publications).

[96] The term ''foreign issuer'' is defined in Securities Act Rule 405 (17 CFR 230.405) as ''any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.''

[97] See, *e.g.*, Brian Bremner *et al.*, ''An Exit Plan for Japan?'' Business Week, Oct. 26, 1998. Our separate proposed limits on delinquency concentrations and non-performing assets would act somewhat as a limiter on such transactions qualifying as an ''asset-backed security.'' In particular, the proposed standard for non-performing assets would be linked to the charge-off policies of the sponsor, regardless of whether those policies were enforced by the sponsor or any relevant regulatory authority.

To address the foreign and legal and regulatory issues while appropriately treating foreign ABS transactions, we are not proposing a different disclosure or regulatory regime for foreign ABS, with the one exception discussed below. Foreign ABS would be registered on the same Securities Act registration forms as domestic ABS, and with the exception of the disclosure discussed below, foreign ABS would be subject to the same disclosure requirements in proposed Regulation AB. Foreign ABS offerings registered on Form S–3 also would be eligible for our proposals regarding the use of ABS informational and computational material and ABS research reports discussed in Section III.C.

Like several of our other proposals, we believe that many of the concerns relating to foreign ABS can be appropriately addressed through adequate disclosure. As such, we are proposing an additional general instruction in Regulation AB focused on foreign ABS that if asset-backed securities are issued by a foreign issuer, are backed by foreign assets, or are affected by credit enhancement or other support provided by a foreign entity, then in providing the disclosures required, the filing also must describe any pertinent governmental legal or regulatory or administrative matters and any pertinent tax matters, exchange controls, currency restrictions or other economic, fiscal, monetary or potential factors that could materially affect payments on the performance of, or other matters relating to, the assets contained in the pool or the asset-backed securities.[98] This disclosure should particularly address the material items and legal and regulatory or administrative factors discussed above. Similar to the proposed requirement that registrants have separate base prospectuses for different asset classes, as discussed in Section III.A.3.c., is a proposed requirement that a registrant would need to prepare separate base prospectuses for each country of origin or country of property securing the pool assets.

We would expect that at the time of filing, the registration statement would include fully developed disclosure clearly articulating the material differences and effects of the home country legal and regulatory regime. In this regard, we also encourage pre-filing conferences with the staff where appropriate to discuss the home country legal and regulatory environment, the proposed transaction and the relevant disclosures that would be required.[99]

We also do not propose a different Exchange Act reporting structure for foreign ABS. We believe periodic disclosure of distribution and pool performance information, reports regarding servicing compliance (including an attestation report on an assessment of compliance with servicing criteria) and current disclosure of significant events would be equally relevant and applicable for foreign ABS as they are for domestic ABS. Thus, like domestic ABS, foreign ABS would be required to report on Forms 10–D, 10–K and 8–K. In addition, ongoing disclosures would be required in Forms 10–D and 10–K regarding any material impact caused by foreign legal and regulatory developments during the period covered by the report which had not been previously described.

Questions regarding foreign ABS:

- We request comment on the application of our proposals to foreign ABS. Is there a need to create different regulatory requirements for foreign ABS? If so, what accommodations should be made and why? In particular, is there any reason why foreign ABS should be subject to differing ongoing Exchange Act reporting obligations than domestic ABS? We request comment particularly from the point of views of potential issuers of foreign ABS who would prepare this information as well as potential investors in foreign ABS regarding what information would be material to their investing decisions.
- Should our proposed general instruction regarding foreign ABS disclosure be more specific? Are there any particular categories of disclosure that should be delineated?
- Are there any investor protection concerns raised by the approach of the proposals to foreign ABS? Should there be any additional conditions for Form S–3 eligibility for foreign ABS? For example, should there be a requirement of one or more previous registered offerings on a non-shelf basis? Should certain representations or undertakings be required, such as that subsequent offerings will be substantially similar to prior transactions? Should there be any minimum denomination requirements, investor sophistication or other suitability requirements regarding the types of investors that may invest? Should we have different standards regarding the type of pool assets (*e.g.*, level of delinquencies) that may be securitized? Should any of these conditions also be imposed with respect to Form S–1, such as an investment grade requirement?
- Are there structures commonly used in foreign ABS transactions that would be restricted from the definition of ''asset-backed security'' under our proposals? Would this limit the ability of these transactions to register public offerings in the U.S.? Are there any foreign structures that would be contemplated by our proposals but should not be considered appropriate for an ''asset-backed security?''

5. Proposed Exclusion From Exchange Act Rule 15c2–8(b)

Through a series of staff no-action letters, in connection with offerings of asset-backed securities eligible for registration on Form S–3, broker-dealers are not required under Exchange Act Rule 15c2–8(b) to deliver a copy of a preliminary prospectus to any person who is expected to receive a confirmation of sale at least 48 hours prior to the sending of such confirmation.[100] Without these no-action letters, most broker-dealers would be required to deliver a preliminary prospectus in ABS offerings because Rule 15c2–8(b) requires such delivery if the issuer has not previously been required to file reports with the Commission pursuant to Section 13(a)[101] or 15(d) of the Exchange Act, which most ABS issuers at the time of the ABS offering are not. In arguing for the no-action relief, the incoming requests to the staff cited the ability to use term sheets and computational material as substitutes,[102] the expense of preparing a preliminary prospectus and practical difficulties in preparing a preliminary prospectus given that the structure of an ABS transaction often evolves during the offering process.

Given our more than eight years of experience with the staff no-action letters, we are proposing to codify the position as a formal exclusion from Exchange Act Rule 15c2–8(b).[103] Although we propose to codify the staff position regarding Rule 15c2–8(b), the proposal does not affect any other obligation in that rule nor any other prospectus delivery obligation that may

[98] See proposed Item 1100(e) of Regulation AB. Information specified in Item 101(g) of Regulation S–K and Instruction 2 to Item 202 of Regulation S–K also would be required by the proposed Item.

[99] Registrants also should consider building additional time into their planning schedules given the possibility for staff review of the disclosure The review of these disclosures could include, for example, representative prospectus supplement disclosure, including statistical disclosure, regarding a hypothetical portfolio of financial assets that would be securitized in a takedown under the registration statement.

[100] See *Bond Market Ass'n* (Dec. 15, 2000); *Bond Market Ass'n* (Dec. 15, 1999); *Bond Market Ass'n* (Nov. 20, 1998); *PSA The Bond Market Ass'n* (Sep. 26, 1997); and *Public Securities Ass'n* (Dec. 15, 1995).

[101] 15 U.S.C. 78m(a).

[102] See Section III.C.1.

[103] The original no-action relief included a condition that the ABS offering would not contemplate a prefunding account in excess of 25% of the principal balance of the offered securities, which was consistent with staff practice regarding prefunding periods at the time. As we are proposing specific prefunding limits in the definition of ''asset-backed security'' and limiting Form S–3 to a 25% prefunding limit, the prefunding limit contained in the no-action letters for the Exchange Act Rule 15c2–8(b) exclusion will now be in Form S–3 eligibility requirements.

be applicable. The proposed exclusion only would be available with respect to registered offerings of investment grade asset-backed securities that meet the requirements of General Instruction I.B.5 of Form S–3. With respect to asset-backed securities that do not meet Form S–3 requirements (*i.e.*, those that would be registered on Form S–1), we believe investors should be entitled to the additional time and information they would receive as a result of Rule 15c2–8(b). We also believe that because of a separate registration statement for each Form S–1 offering, the impact of complying with the rule is less significant in that context.

Although we do propose to codify the exclusion from Rule 15c2–8(b) for Form S–3 ABS, we are concerned with statements from investors in previous communications to the staff that a combination of factors, including the introduction of shelf registration for ABS, relief from Rule 15c2–8(b) and the ability to use term sheets and computational material, has reduced the amount of time and information investors have to make informed investment decisions.[104] In this regard, we note that investors should have adequate information at the time of an investment decision in an ABS offering, as in the case of all offerings. We request comment regarding these concerns.

Questions regarding proposed exclusion from Exchange Act Rule 15c2–8(b):

- Should we codify an exclusion from the preliminary prospectus delivery requirements of Rule 15c2–8(b) for Form S–3 ABS? Do investors have enough time and information before the offering to make fully informed investment decisions? What alternatives might exist to Rule 15c2–8(b) to address this concern?
- What would be the costs and benefits of not codifying the staff position? Should there be any additional conditions to the exclusion? Should the proposed exclusion not apply to ABS targeted to non-institutional investors? For example, should preliminary prospectus delivery be required if the ABS is expected to have low minimum investment denominations (*e.g.*, less than $1,000) or for ABS that are to be listed? Should the exclusion be available for foreign ABS?
- Is the proposed limitation to Form S–3 ABS still appropriate? If not, under what circumstances should the proposal be extended to Form S–1 ABS? In particular, are there any additional conditions that should be required for extending the exclusion to Form S–1 ABS?

6. Registration of Underlying Pool Assets

a. Current Requirements

The 1992 Release included a statement that the definition of ''asset-backed security'' does not encompass securities issued in structured financings for one obligor or group of related obligors. It also stated that asset-backed offerings with a significant asset concentration—that is, a significant concentration of obligations of one obligor or related obligors—may involve one or more co-issuers under Securities Act Rule 140.[105] In interpreting these provisions, the staff has focused on ensuring that an ABS offering does not constitute an unregistered distribution of underlying securities and that non-S–3 eligible registrants do not circumvent Form S–3 eligibility requirements by attempting to structure their offering as an asset-backed offering. One of the basic premises underlying ABS offerings is that an investor is buying participation in the assets. Therefore, if the assets being securitized are themselves securities under the Securities Act, the offering of those securities also must be registered or exempt from registration from the Securities Act.[106]

In considering whether the distribution of the underlying assets must be registered in addition to the distribution of the ABS, the basic proposition is that where the underlying securities themselves are not exempt from registration, the depositor must be free to publicly resell the underlying securities without registration. Otherwise, their distribution must be registered. If registration of the underlying securities distribution is required, certain conditions and disclosures have developed through the staff comment process and industry practice regarding the method and manner of such registration. These conditions are designed to provide clear disclosure to investors of the different distributions involved, the relationships between the distributions and investor rights with respect to each distribution.

The nature of the distribution of the underlying securities is the important factor in determining whether concurrent registration is required, not necessarily their concentration in the pool. For example, if a $100 million asset pool included $5 million of securities that were not freely resalable by the depositor without registration, then the distribution of those $5 million of securities through the ABS distribution also would need to be registered, even though such securities only constituted 5% of the asset pool. Similarly, if a depositor obtained $100 million of freely resalable securities of one obligor from the secondary market, the offering of ABS backed by those securities would not require concurrent registration of the distribution of the underlying securities, even though one obligor represented 100% of the pool, because the securities were not purchased from the issuer or underwriter but rather were purchased in the secondary market. In that case, additional disclosure would be required regarding the concentrated obligor, including financial information about the obligor, but the concentration itself would not trigger a separate registration requirement.[107] As a result, the definition of ''asset-backed security'' may encompass securities issued in structured financings for one obligor or group of related obligors, so long as any required disclosure about the underlying obligor is provided and any distribution of the underlying securities is registered, if required.

b. Proposal for When Registration Is Required

To provide further clarification and regulatory certainty regarding this topic, we propose to codify in substantial part existing staff positions, as well as to streamline the conditions that would be required if the distribution of the underlying securities also must be registered.[108] First, we propose to delineate the conditions when registration of the distribution of the underlying security would not be required. Most asset types that are securitized today, including residential

[104] See, *e.g.*, Letter from ICI to Michael H. Mitchell, Special Counsel, Division of Corporation Finance, ''Asset-Backed Securities Offerings'' (Oct. 29, 1996); and Letter from AIMR to Brian J. Lane, Director, Division of Corporation Finance, ''Recommendations for a Disclosure Regime for Asset-Backed Securities'' (Sep. 30, 1996). These letters also questioned the premise that there are ongoing dialogues with investors regarding structuring publicly offered ABS classes.

[105] 17 CFR 230.140. Securities Act Rule 140 states, in pertinent part, as follows:

''A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, * * * to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of the securities of such issuer or affiliated issuers within the meaning of section 2(a)(11) of the [Securities] Act.''

[106] Similarly, if a loan participation were securitized, that would be viewed as a public distribution of the loan participation and the loan participation would therefore be a security, the offer and sale of which would be subject to the registration requirements of the Securities Act. See, *e.g., Pollack* v. *Laidlaw Holdings*, 27 F.3d 808 (2nd Cir. 1994).

[107] See Sections III.B.6 and 7. See also Section III.B.9. regarding alternative methods that may be available to present information regarding the concentrated obligor, such as through incorporation by reference or by including a reference to the obligor's Commission filings.

[108] See proposed Securities Act Rule 190 (17 CFR 230.190).

mortgages, student loans, auto loans and credit card receivables, would meet these conditions and thus would not be affected.

Under our proposal, in an ABS offering where the asset pool includes securities of another issuer, unless the underlying securities are exempt from registration under the Securities Act, the offering of the underlying securities itself must be registered as a primary offering of such securities, unless all of the following are true:

- The depositor would be free to publicly resell the underlying securities without registration under the Act;
- Neither the issuer of the underlying securities nor any of its affiliates has a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the underlying securities and the asset-backed securities transaction; and
- Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction.

The first condition states the basic proposition that the securities of the underlying issuer must be freely resalable without registration. Consistent with existing staff practice, we propose to include two examples to clarify this condition. First, the underlying securities may not include restricted securities (*e.g.*, privately placed securities) that do not meet the conditions for resale in Securities Act Rule 144(k) (*e.g.*, a two-year holding period by non-affiliates).[109] Second, the offering of the asset-backed security could not constitute part of a distribution of the underlying securities. Underlying securities which at the time of their purchase for the asset pool are part of a subscription or unsold allotment would be considered a distribution of the underlying securities.

We also propose to codify a staff interpretive position where the ABS offering involves a sponsor, depositor or underwriter that was an underwriter or an affiliate of an underwriter in a registered offering of the underlying securities.[110] Under the proposal, the distribution of the asset-backed securities would not constitute part of a distribution of the underlying securities if the underlying securities were purchased at arm's length in the secondary market at least three months after the last sale of any unsold allotment or subscription by the affiliated underwriter that participated in the registered offering of the underlying securities. In this instance, we believe three months provides sufficient certainty that the purchase was not part of the original distribution.

The second and third conditions clarify that if the issuer of the underlying securities is engaged in the distribution of its securities through the asset-backed securities or is affiliated with the sponsor, depositor, issuing entity or any underwriter for the ABS offering, then registration of the underlying distribution would be required along with registration of the ABS offering.

If any of the three conditions was not met, the offering of the relevant underlying securities itself would be required to be separately registered as a primary offering of such securities. Such registration would need to be conducted in accordance with the following proposed conditions:[111]

- If the ABS offering is registered on Form S–3, the offering of the underlying securities itself must be eligible to be registered under Form S–3 or F–3 as a primary offering of such securities;[112]
- The plan of distribution in the registration statement for the offering of the underlying securities contemplates this type of distribution at the time of the commencement of the ABS offering;[113]
- The prospectus for the ABS offering describes the plan of distribution for both the underlying securities and the asset-backed securities;
- The prospectus relating to the offering of the underlying securities is delivered simultaneously with delivery of the prospectus relating to the ABS offering, and the prospectus for the ABS offering includes disclosure that the prospectus for the offering of the underlying securities will be delivered with it or is combined with it;
- The prospectus for the ABS offering identifies the issuing entity, depositor, sponsor and each underwriter for the ABS offering as an underwriter for the offering of the underlying securities;
- Neither prospectus disclaims or limits responsibility by the issuing entity, sponsor, depositor, trustee or any underwriter for information regarding the underlying securities; and
- If the ABS offering and the underlying securities offering are not made on a firm commitment basis, the issuing entity or the underwriters for the ABS offering must distribute a preliminary prospectus for both the underlying securities offering and the ABS offering that identifies the issuer of the underlying securities and the expected amount of the issuer's underlying securities that is to be included in the asset pool to any person who is expected to receive a confirmation of sale of the ABS at least 48 hours prior to sending such confirmation.[114]

c. Proposed Exceptions From Disclosure and Delivery Conditions

Some ABS transactions are structured such that the asset pool consists of one or more financial assets that represent an interest in or the right to the payments or cash flows of another asset pool solely in order to facilitate the asset-backed issuance and not in order to re-securitize other securities. For example, some older credit card master trust structures have added an ''issuance trust'' structure to provide additional flexibility in the types of ABS that may be offered. An issuance trust generally receives a collateral certificate from the master trust representing an interest in the master trust asset pool. The master trust often may have issued its own ABS backed by the same pool. The issuance trust then issues its own ABS backed by the collateral certificate, and hence indirectly by the whole master trust pool.

Similarly, in some auto lease transactions, the auto leases and car titles often are originated in the name of a separate trust, sometimes called an ''origination'' or ''titling'' trust, to avoid administrative expenses in retitling the physical property underlying the leases. The origination trust will issue to the issuing entity for the ABS a certificate, often called a ''special unit of beneficial interest'' or SUBI, representing a beneficial interest in a pool of leases and automobiles in the origination trust which is to constitute the asset pool. The ABS issuing entity will issue ABS backed by the SUBI certificate, and hence indirectly by the assets underlying the SUBI.

In each instance, these structures are solely designed to facilitate the ABS transaction. The ABS will be primarily serviced by cash flows from the

[109] 17 CFR 230.144(k). The term ''restricted securities'' is defined in Securities Act Rule 144(a)(3) (17 CFR 230.144(a)(3)).

[110] See, *e.g.*, Section VIII.B.3.b.i. of the Division of Corporation Finance's ''Current Issues and Rulemaking Projects'' (Nov. 14, 2000).

[111] The proposed conditions, except as noted, are consistent with existing staff practice. In addition, as a result of the proposed conditions, a prefunding or revolving period could not be used to purchase unidentified securities whose distribution would need to be registered. We also do not propose to codify an existing staff condition that the prospectus include affirmative disclosure that ABS holders may proceed directly against issuers and underwriters of the underlying securities because even without such a condition ABS holders could proceed directly against such parties.

[112] This condition ensures that an offering of underlying securities that itself would not be eligible for shelf registration could not be conducted through the distribution of an ABS offering that was shelf eligible.

[113] For underlying securities that have already been registered under a previous shelf registration statement, this may require a post-effective amendment to that registration statement to incorporate this type of distribution into the plan of distribution description.

[114] In this instance, this condition would therefore overrule the proposed exclusion from Exchange Act Rule 15c2–8(b).

underlying pool assets.[115] However, the deposit of the certificate of interest regarding the other pool would likely fail to satisfy our proposed conditions to avoid registration of its distribution. In fact, the deposit of the certificate of interest is concurrently registered today in connection with ABS offerings involving these structures.

While these certificates do trigger additional registration obligations, they do not raise the same issues discussed above regarding the resecuritization of other underlying securities because they are merely facilitating structural devices.[116] Accordingly, although the distribution of the underlying financial asset in connection with the ABS offering would still need to be separately registered, we propose to exclude such transactions from the proposed disclosure and delivery conditions above with respect to other resecuritizations, if the following conditions were met:[117]

- Both the issuing entity for the asset-backed securities and the entity issuing the underlying financial asset were established under the direction of the same sponsor or depositor;
- The financial asset was created solely to satisfy legal requirements or otherwise facilitate the structuring of the ABS transaction;
- The financial asset was not part of a scheme to avoid registration or our resecuritization proposals; and
- The financial asset was held by the issuing entity and was a part of the asset pool for the asset-backed securities.

Questions regarding registration of underlying financial assets:

- We request comment on the list of conditions that clarify when the distribution of underlying securities in the asset pool needs to be separately registered. Are any modifications or clarifications necessary? Should we address further examples?
- We also request comment on the proposed conditions codifying the manner of registration of the underlying securities distribution. Are any modifications or clarifications necessary? Should any of these conditions no longer be required? Should any additional conditions be added?
- Should transactions that involve features such as issuance trusts or SUBIs be excluded from the proposed disclosure and delivery conditions? Should we specify more particularly the manner in which they should be registered? Does our proposed list of conditions adequately identify the relevant structures while excluding the resecuritization of other underlying securities? Are any other exceptions necessary?

B. Disclosure

1. Proposed Regulation AB

No disclosure items currently exist that are specifically tailored to asset-backed securities. While some disclosure items in Regulation S–K are relevant, such as a description of the security, most items do not elicit the most useful disclosure for ABS investors. There is generally no business or management to describe; rather, information about the pool assets, servicing, transaction structure, flow of funds and enhancements is more relevant. Analysis regarding the characteristics of the pool assets is necessary to determine the timing and amount of expected payments on the assets and thus payments on the ABS. In addition, the legal and often complex flow of funds of the transaction and the impact of any credit enhancement or other support must be analyzed. Through the staff comment process and industry practice, informal disclosure practices have developed. These practices, however, may not be fully transparent to issuers and investors.

We propose a new principles-based set of disclosure items in one central location in a subpart of Regulation S–K, called Regulation AB.[118] These disclosure items, which are based on existing disclosure practices, would form the basis for disclosure in both Securities Act registration statements and Exchange Act reports for asset-backed securities. As noted in Sections III.A. and D., specific disclosure requirements in ABS registration statements and forms would be keyed to items in Regulation AB in a manner consistent with the integrated disclosure system applicable to other issuers.

We believe a principles-based approach would provide the best framework for disclosure in the context of asset-backed securities. In addition, due to differences between asset classes, we believe it would be impractical to provide an exhaustive list of disclosure items required for each asset class. Not only do we believe this approach would be impractical due to the many existing asset classes that are securitized today, it would not provide any effective guidance with respect to new asset classes that may be securitized in the future. Due to the dynamic nature of the ABS market, any such list would likely become outdated.

Under our proposed principles-based approach, we identify the disclosure concept or objective required and provide one or more illustrative examples. Application of the particular concept or objective would need to be tailored in preparing and presenting the disclosure to the information material to the particular transaction and asset-type involved. The balance we strive to achieve through this approach is to provide enough clarity so that the disclosure concept or objective is understood and can be applied on a consistent basis, while not providing too much detail that could obscure or override the concept or objective. Of course, in some instances we believe we must and therefore do propose certain disclosure items with greater specificity. Further, we propose to codify several existing percentage tests that provide guidance as to when particular disclosure is required, particularly regarding concentrated obligors or significant credit enhancement or other support. We believe these proposed breakpoints provide consistency, comparability and clarity.

The structure of Regulation AB would be as follows:

- Item 1100 would set forth items of general applicability for the whole subpart, such as guidance regarding the presentation of delinquency and loss information when it is required, alternative methods for presenting third party financial information (discussed further in Section III.B.9.) and guidance regarding disclosures related to foreign ABS (previously discussed in Section III.A.4.).
- Item 1101 would set forth definitions applicable to asset-backed securities.
- Items 1102—1118 would constitute the basic disclosure required for Securities Act registration statements for ABS offerings. In addition, several of the items would be required on an ongoing basis in Exchange Act reports, such as updated financial information regarding certain third parties and disclosure regarding legal proceedings.
- Item 1119 would form the basis for disclosure required in distribution reports on proposed Form 10–D regarding cash flows and performance of the asset pool and the allocation of cash flows and distribution of payments on the ABS. This item is discussed more fully in Section III.D.4.
- Items 1120 and 1121 would address two long-standing requirements for the Form 10–K report based on market practice and the modified reporting system. Item 1120 would specify the form of the proposed report on compliance with servicing criteria based on an assessment by the depositor or servicer. It also would require filing of the registered public accounting firm's attestation report on

[115] See Section III.B.2 regarding our proposed general instruction regarding the scope of disclosure that would be required regarding these structures. In addition, any additional material risks regarding these structures should be clearly described.

[116] These other resecuritizations would be subject to the proposals in the previous section on the method and manner of registering the distribution of the underlying securities.

[117] Any separate registration of the distribution of the underlying financial asset would need to be on a form eligible for such distribution. The issuer of the underlying financial asset would need to sign the registration statement and any intervening transferors of the asset to the ABS issuing entity would need to be named as underwriters.

[118] See proposed Items 1100–1121 of Regulation AB.

the assessment. This item is discussed more fully in Section III.D.7. Item 1121 would specify the form of the separate servicer compliance statement. This compliance statement pertains to the servicer's compliance with the particular servicing agreement for the transaction, as opposed to an attested assertion of compliance against a general set of servicing criteria. This item is discussed more fully in Section III.D.5.

Many of our proposed disclosure items are based on the market-driven disclosures that appear in filings today. In addition, our consideration of the proposed disclosure items was informed by the staff review process as well as the staff's participation in the 2003 MBS Disclosure Report. However, we are concerned that disclosure practice without a previously defined set of universal disclosure standards has resulted in the inclusion of undue boilerplate language in ABS filings, particularly prospectuses and registration statements, and a disproportionate emphasis on legal recitations of transaction terms. Further, as disclosure practice may have been driven primarily by the staff review process and by observing and conforming to filings for other transactions, disclosures may have been included from other filings or retained from prior filings without necessarily considering their applicability or continued applicability with respect to the transaction in question.

However, the cumulative effect of these practices is to diminish in some cases the usefulness of the document through the accumulation of unnecessary detail, duplicative or uninformative disclosure that obscures material information and legalistic recitations of transaction terms. Efforts to revise disclosure documents in response to our ''plain English'' initiative have certainly helped by demonstrating that even the most complex structures can be described clearly and accurately without resorting to overly legalistic presentations.[119] However, we believe more work can be done regarding the manner and content of disclosures.

Therefore, in connection with our proposed codification of a universal set of disclosure items, we seek a reevaluation by transaction participants of the manner and content of presented disclosure, including the elimination of unnecessary boilerplate and immaterial legal recitations of terms. Transaction participants should view this rulemaking initiative as an opportunity to evaluate whether there is information that has been included in registration statements and prospectuses that is not required, not material and not useful to investors, and therefore should be reduced or omitted. Transaction participants should similarly consider whether disclosure should be revised so that its relevance to the transaction in question is more apparent and is presented in a manner that is more focused on providing clear and understandable disclosure for investors. Transaction participants also should continue to be mindful of the plain English disclosure principles to avoid legalistic or overly complex presentations and recitations that make the substance of the disclosure difficult to understand. Transaction participants should continue to focus on the use of tabular presentations, flow charts and other design elements that aid understanding and analysis.

In addition to the manner and presentation of disclosures, we also are concerned that existing disclosure standards may not adequately capture certain categories of information that may be material to an asset-backed securities transaction, such as the background, experience, performance and roles of various transaction parties, including the sponsor, the servicer and the trustee. While asset-backed securities are not intended to be direct obligations of these entities, it seems apparent from recent market events that their roles often can be as important to the performance of an ABS transaction as the transaction structure or its governing documents.[120]As a result, our proposed disclosure items relating to these entities are designed to elicit more useful information in these areas.

Consistent with current practice, we do not propose to require audited financial statements for the issuing entity in either Securities Act or Exchange Act filings. It does not appear that audited financial statements prepared in accordance with generally accepted accounting principles would provide material information to investors.[121] Often a new issuing entity is created for each transaction, so prior financial information about that entity would likely be of little use. On an ongoing basis, while an annual audit could provide benefits in providing some assurance with respect to controls over the administration of the transaction and the pool assets, we preliminarily believe our proposal to require an attestation by a registered public accounting firm as to an assessment of compliance with particular servicing criteria discussed in Section III.D.7. is a more direct and targeted approach to achieve such objectives. Similarly, we believe that one of the other objectives for financial statements—to present results of financial activity during a period—can be addressed more particularly by our proposed disclosure requirements regarding distributions on the asset-backed securities.

Questions regarding overall approach to proposed Regulation AB:

- We request comment on our proposed principles-based approach for Regulation AB. Should we provide detailed disclosure guides by asset type instead? In evaluating the proposed items in Regulation AB, do the items provide sufficient clarity in identifying the disclosure concept? Should we be more specific (or less specific) regarding any particular items?
- We also request comment on methods to improve the usefulness of disclosure documents. What additional actions can we take to encourage focus on clear and understandable material disclosures?
- Is additional disclosure regarding the background, experience, performance and role of transaction parties needed? In evaluating the proposed disclosure items relating to these parties, should we be more specific on particular aspects that should be disclosed?
- Should audited financial statements be required to be filed for issuing entities? If so, for what periods? What would be the costs and benefits of such a requirement? Should they be required in some filings (*e.g.*, ongoing Exchange Act reports) but not others (*e.g.*, Securities Act registration statements)? Are there alternative methods to reach the same objectives that would be achieved by requiring financial statements?
  - Are one or more of the basic audited financial statements (balance sheet, statement of income, retained earnings, or cash flows) more relevant for issuing entities than the

[119] See, *e.g.*, Release No. 33–7497 (Jan. 28, 1998) [63 FR 6370]. See also Division of Corporation Finance Staff Legal Bulletin No. 7A, ''Plain English Disclosure'' (Jun. 7, 1999) and Office of Investor Education and Analysis, ''A Plain English Handbook: How to Create Clear SEC Disclosure Documents'' (Aug. 1998). All of these documents are available on our website at *www.sec.gov*.

[120] *See*, *e.g.*, Michael Gregory, ''Lessons of Risk in AAA-rated ABS: In the Rare Bankruptcy, It's Servicers, Not Collateral, That Are the Problem,'' Investment Dealers Digest, Mar. 15, 2004; Luis Araneda, ''Distress in Credit Card ABS,'' Asset Securitization Report, Mar. 3, 2003, at 8; Moody's Investors Service, Inc., ''Securitizations that Dodge Bankruptcy 'Bullet' Rest on Qualitative Strengths'' (Sep. 16, 2002); ''Integrity Analysis to the Forefront: Is Issuer Quality More Important Than Structure,'' Asset Securitization Report, Oct. 14, 2002, at 4; Moody's Investors Service, Inc., ''Two Key Components of Mortgage Servicer Ratings Are Technical Ability and Financial Stability'' (Dec. 2, 2002); Moody's Investors Service, Inc., ''Evaluating Seller/Servicer Risk Concentrations in Structured Transactions Wrapped by Financial Guarantors'' (Jan. 30, 1998); and *Securitization of Financial Assets* § 8.08 (2nd ed. 1996).

[121] For example, GAAP financial statements are primarily based on historical cost measurements and allocations that are not necessarily meaningful to an ABS investor that is trying to assess the amount and timing of cash distributions from an ABS transaction.

others? If so, which one(s) and should it (they) be required to be filed?

◦ Should a statement of cash flows using the direct method be required? [122]

◦ What additional disclosures would be relevant if only one or more basic financial statements, rather than full audited financial statements, are provided (for example, disclosures about the fair value of financial instruments pursuant to FASB Statement 107)? [123]

◦ Instead of GAAP financial statements, should financial statements be required that are prepared on another basis, such as on the basis of cash receipts and cash disbursements? [124]

2. Forepart of Registration Statement and Prospectus

Existing Items 501–503 of Regulation S–K would still provide the basic disclosure requirements for the forepart of Securities Act registration statements and registration statement prospectuses, which cover items such as the cover page of the prospectus, the prospectus summary and risk factors. Proposed Items 1102 and 1103 of Regulation AB would amplify those requirements by providing guidance on preparing those sections for ABS offerings consistent with current practice. In particular, they would clarify information that is to appear on the cover page of the prospectus, as well as inform the type and manner of presentation for ABS-specific disclosure items for the prospectus summary.

As with prospectuses for all registered offerings, disclosure on the cover page is to be limited and brief. For example, credit enhancement disclosure for the cover page should consist of only brief identifying statements, such as bond insurance provided by the particular named insurer.

Consistent with common ABS-specific items such as a summary of the flow of funds and credit enhancement, disclosure specified for the summary would include disclosure of the classes offered by the prospectus and classes issued in the same transaction or residual or equity interests in the transaction not being offered by the prospectus. [125] Also required would be a summary of any prefunding or revolving periods, such as the length and amount of such periods and the requirements for assets that may be added. [126] A summary of the amount or formula for calculating the servicing fee, including the source of payment of those fees and their distribution priority, also would be separately required in the prospectus summary.

We do not propose to identify a representative list of risk factors that may be common to many ABS transactions. We are concerned that any such list would result in boilerplate and generic disclosures in all prospectuses even if not applicable to the particular transaction. Registrants should take care in analyzing the most significant factors that make the ABS offering speculative and risky, and explain briefly yet particularly how those risks affect investors. We do propose to clarify that in identifying risk factors, registrants are to identify any risks that may be different for investors in any offered class of asset-backed securities (such as subordinated classes or principal-weighted or interest-weighted classes), and if so, identify such classes and describe such differences.

Questions regarding proposed disclosure for forepart of registration statement and prospectus:

• Are any modifications needed to the proposed list of items? Should we be more specific (or less specific) regarding any items?

• Should we provide a list of representative risk factors? How could we address our concern that any such list would become boilerplate disclosure in all filings?

3. Transaction Parties

a. Sponsor

We propose to define the ''sponsor'' as the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity. As discussed above, in addition to basic identifying information about the sponsor, we propose to require a description of the sponsor's securitization program. The purpose of the description would be to provide context within which to analyze the characteristics and quality of the asset pool.

Such a description would consist of both a general discussion of the sponsor's experience in securitizing assets of any type, as well as a more detailed discussion of the sponsor's experience in and overall procedures for originating or acquiring and securitizing assets of the type to be included in the current transaction. Information should be included, to the extent material, regarding the size, composition and growth of the sponsor's portfolio of assets of the type to be securitized and information or factors related to the sponsor that may be materially relevant to an analysis of the origination or performance of the pool assets. For instance, this could include whether any prior securitizations organized by the sponsor have defaulted or experienced an early amortization or other performance triggering event, or if any action was taken outside the ordinary performance of the transaction to prevent such an occurrence.

Other relevant information, to the extent material, would include the sponsor's credit-granting or underwriting criteria for the asset types being securitized (and the extent to which they have changed), the extent to which the sponsor outsources to third parties any of its origination or purchasing functions and the extent to which the sponsor relies on securitization as a funding source. A description of the sponsor's roles and responsibilities in its securitization program and the sponsor's participation in structuring the transaction also would be required, including whether the sponsor or an affiliate is responsible for the selection of the pool assets.

In addition to this information, an increasingly valuable tool to analyze performance is the use of static pool

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[122] *See* paragraph 27 of FASB Statement No. 95, Statement of Cash Flows (Nov. 1987).

[123] *See* FASB SFAS No. 107, Disclosures about Fair Value of Financial Instruments (Dec. 1991).

[124] The cash basis system of accounting is a system in which an issuer recognizes revenues when it receives cash and records expenses as it makes disbursements. Reporting oil and gas royalty trusts sometimes prepare financial statements under this system of accounting. *See, e.g.,* Topic 12.E. to Release No. SAB–103 (Dec. 17, 2003) [68 FR 26840].

[125] A particular issuance of asset-backed securities often involves one or more publicly offered classes (*e.g.*, classes rated investment grade) as well as one or more privately placed classes (*e.g.*, non-investment grade subordinated classes). In most instances, the subordinated classes act as structural credit enhancement for the publicly offered senior classes by receiving payments after, and therefore absorbing losses before, the senior classes. Cash flows from the pool assets back both the senior classes and the subordinate classes, and thus allocation of the cash flows to the subordinate classes could affect directly or indirectly the publicly offered classes. For example, while historically the servicing fee is near the top of the flow of funds, if the servicing fee in the flow of funds is subordinated below payments to the subordinated classes, and there are insufficient funds to pay the servicing fee in full after distribution to the subordinated classes, then the drop in the level of funds to the servicer could impact overall servicing, which could affect cash flows to senior classes. Identification of all classes and their impact on the transaction is thus relevant to the offering of the publicly offered classes. So long as the description of the non-offered classes is presented in this manner, that description alone in the prospectus would not raise general solicitation issues with respect to the private placement of the subordinated classes.

[126] Similar disclosure would be required for other instances when pool assets could be added, removed or substituted (for example, non-compliance with representations and warranties regarding pool assets). Like all of the proposed disclosure items, reference to particular activities would not imply that limits that exist elsewhere regarding such activities (*e.g.*, the requirement that the asset pool be ''discrete'') could be disregarded.

data.[127] Such data indicate how the performance of groups, or static pools, of assets, such as those originated at different intervals, are performing over time. By presenting comparisons between originations at similar points in the assets' lives, such data allow the detection of patterns that may not be evident from overall portfolio numbers and thus may reveal a more informative picture of material elements of portfolio performance and risk.

For example, while presentation of a delinquency or loss statistic at the pool level, such as an overall charge-off rate, may be useful, it does not indicate the amount and timing of charge-offs over time. Static pool analysis may indicate that more recent originations are experiencing higher delinquencies at each point in their life cycle than older originations, which could suggest a declining quality in the obligor pool or a possible relaxation of credit standards. In that case, as more seasoned originations with a lower delinquency profile matured and exited the asset pool, the pool would increasingly be left with more recent originations with a higher delinquency profile, which may begin to affect performance. However, the overall delinquency statistic presented at the beginning of the transaction would be a blending of all originations and thus may not indicate the potential performance change. Without static pool data, an investor might have no means to identify a material potential increase in delinquency rates that would be indicated by these data.

Static pool data for several different data groups may be material for the current offering. For example, static pool data for the sponsor's overall portfolio can indicate origination trends relevant to how a currently offered pool can be expected to perform, particularly if the offered pool is unseasoned. Static pool data on a pool level basis with respect to prior securitized pools of the sponsor also can provide valuable information on both the quality and experience of pool selection as well as additional insight into asset performance. Finally, if the offered pool is seasoned, static pool data based on originations in the pool itself may reveal trends that may not be evident by aggregate pool-level statistics.

We have previously received requests that disclosure of such data should be received because investors view static pool data regarding delinquency and loss experience as important information in evaluating an investment in asset-backed securities.[128] We understand that such data are often available to sponsors and in many instances may be used in the rating process for asset-backed securities. We propose to require disclosure of such data if material to the transaction. In particular, we propose to require three years of static pool data with respect to the sponsor's overall portfolio (or for such shorter period as the sponsor has been making originations or purchases) because we preliminarily believe this would be the minimum period to provide meaningful evaluation of the data.[129] Such data should be presented for delinquency and loss information relevant to the particular asset type involved. Similarly, increments for the static pools and increments in which performance is presented (*e.g.*, monthly or quarterly) should be material to the asset type being securitized. Statistical data should be presented in tabular or graphical format, such as by loss curves, if such presentation will aid understanding.

If material, static pool data also would be required on a pool level basis with respect to prior securitized pools involving the same asset type established by the sponsor during the period. Static pool data, whether with respect to the sponsor's portfolio, prior pools or the pool itself, should be presented separately, to the extent material, according to factors relevant to the pool involved, such as by asset term, asset type, yield, geography or ranges of credit scores or other applicable measures of obligor credit quality. Selection of factors should result in disclosure of material information. How and according to which factors static pool information is presented, if at all, will depend on the particular asset class, the sponsor's history and the asset pool and transaction involved. Our proposals would not require preparation or disclosure of static pool data for data groups or factors that are immaterial.

In providing static pool data that is material to the transaction, registrants are encouraged to provide accompanying explanatory information about the data to place it in context for the current pool, such as how the composition of the offered pool may differ from the static pool data provided. In instances where the particular assets selected for the pool differ materially from the data provided regarding the overall portfolio or prior transactions, such additional information may be required.[130]

b. Depositor

We propose to define the ''depositor'' as the person who receives or purchases and transfers or sells the pool assets to the issuing entity. For asset-backed securities transactions where there is not an intermediate transfer of assets from the sponsor to the issuing entity, the sponsor would be deemed to be the depositor.[131]

If the depositor was not the same entity as the sponsor, separate identifying information about the depositor would be required, including information on the ownership structure of the depositor and the general character of any activities of the depositor other than securitizing assets. In addition, if materially different from the sponsor, information similar to that discussed above regarding the depositor's securitization program and its experience would be required. Finally, disclosure would be required regarding any continuing duties of the depositor after issuance of the asset-backed securities with respect to the asset-backed securities or the pool assets.

c. Issuing Entity and Transfer of Asset Pool

The nature of the issuing entity and the transfer of the pool assets is elemental to the concept of securitization. We propose to define the ''issuing entity'' to mean the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

Consistent with existing practice, disclosure would be required regarding both the nature of the issuing entity and the sale or transfer of the pool assets. Information about the issuing entity

[127] *See*, *e.g.*, Moody's Investors Service, Inc., ''Undisclosed Truths: Are ABS Investors Being Left in the Dark?'' (May 23, 1996) and Letter from AIMR to Brian J. Lane, Director, Division of Corporation Finance, ''Recommendations for a Disclosure Regime for Asset-Backed Securities'' (Sep. 30, 1996). Static pool data also is sometimes referred to as ''vintage data.''

[128] *See, e.g.*, note 104 above.

[129] We also propose to require static pool data to the extent material for the pool itself.

[130] *See* Securities Act Rule 408 (17 CFR 230.408); Exchange Act Section 10(b) (15 U.S.C. 78j(b)); Exchange Act Rule 10b–5 (17 CFR 240.10b–5); and Exchange Act Rule 12b–20 (17 CFR 240.12b–20).

[131] As noted in Section III.B.5, some ABS transactions, such as issuance trusts, are structured such that the asset pool consists of one or more financial assets that represent an interest in or the right to the payments or cash flows of another asset pool. In an issuance trust structure, the collateral trust certificate that is deposited into the asset pool comes from the master trust. For ABS transactions where the person transferring or selling the pool assets is itself a trust, we propose to specify that the ''depositor'' of the issuing entity is the depositor of that trust.

itself would include a description of its permissible activities, restrictions on activities and capitalization. The governing documents of the issuing entity would need to be filed as an exhibit.[132] The material terms of any management or administration agreement for the issuing entity also would need to be described,[133] and such agreement would need to be filed as an exhibit. If the issuing entity has its own executive officers, board of directors or persons performing similar functions, all of Item 403 of Regulation S–K, as well as Items 401, 402 and 404 of Regulation S–K, would be required.

In addition to a material narrative description of the sale or transfer of the pool assets, such information also should be provided graphically or in a flow chart if it will aid understanding. The discussion also must describe the creation (and perfection and priority status) of any security interests for the benefit of the transaction. Information would be required on the amount paid or to be paid for the pool assets, including the principles followed in determining such amounts, as well as information on any expenses incurred in connection with the selection and acquisition of the pool to be payable from offering proceeds.

Disclosure would be required to the extent material regarding any provisions or arrangements included to address any one or more of the following issues:[134]

- Whether any security interests granted in connection with the transaction are perfected, maintained and enforced;
- Whether a declaration of bankruptcy, receivership or similar proceeding with respect to the issuing entity can occur;
- Whether in the event of a bankruptcy, receivership or similar proceeding with respect to the sponsor, originator, depositor or other seller of the pool assets, the issuing entity's assets will become part of the bankruptcy estate or subject to the bankruptcy control of a third party; and
- Whether in the event of a bankruptcy, receivership or similar proceeding with respect to the issuing entity, the issuing entity's assets will become subject to the bankruptcy control of a third party.

Of course, any material risks related to the above must be discussed in the risk factors section of the prospectus.[135] Consistent with current practice and our proposed disclosure, we do not propose to require the filing of any statement or opinion, such as an opinion of counsel, regarding any of the above items, although we request comment on this point.

d. Servicers

The role of the servicer is often not limited to administration and collection of the pool assets. The servicer also often is the primary party responsible for calculating the flow of funds for the transaction, preparing distribution reports and disbursing funds to the trustee who in turn uses the allocations provided by the servicer to distribute funds to security holders. Our proposed definition of ''servicer'' is designed to capture this entire spectrum of activity to include both collection and asset maintenance activities as well as cash flow allocation and distribution functions for the ABS. We propose to define ''servicer'' as any person responsible for the management or collection of the pool assets or making allocations or distributions to holders of the asset-backed securities. This would include parties often referred to as ''administrators.'' Also, given that some of these functions may be performed by the trustee in certain transactions, the definition would clarify that the term ''servicer'' does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities, if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

Given the increasing realization of the importance of the role of the servicer in ABS transactions, our proposed disclosure requirement regarding servicers is designed to elicit additional information regarding their function, experience and servicing practices.[136] We also recognize that many transactions use multiple servicers to perform different servicing functions. For example, an ABS transaction may involve one or more master servicers that oversee the actions of other servicers and perform allocation and distribution functions. Different servicers, often called ''primary servicers,'' may be responsible for primary contact with obligors and collection efforts. In addition, one or more ''special servicers'' may exist for specific servicing functions, such as borrower work-out or foreclosure functions. While some servicers may be affiliated with the sponsor, other non-affiliated sub-servicers may be employed. Understanding the material aspects of the entire servicing function is important to understanding how servicing may impact expected performance.

Our proposed disclosure requirements would require information regarding the entire servicing function, including a clear description of the roles, responsibilities and oversight requirements of the entire servicing process and the parties involved. In addition, separate information would be required regarding certain sub-servicers. In particular, where servicing of the pool assets utilizes multiple servicers, separate information would be required for the master servicer, each affiliated servicer, each unaffiliated servicer (such as primary servicers) that services 10% or more of the pool assets and any other servicer, such as a special servicer, that performs work-outs, foreclosures or other material aspect of the servicing of the pool assets upon which the performance of the pool assets or the asset-backed securities is materially dependent. The 10% threshold we propose for unaffiliated servicers is consistent with our proposed thresholds for disclosure regarding other parties to the ABS transaction, such as third party originators, concentrated obligors and providers of enhancement or other support. We believe this breakpoint provides consistency and clarity in determining a triggering event for disclosure, and is consistent with many other longstanding standards used for our existing disclosure requirements.[137]

For servicers where disclosure is required, the information to be provided can be categorized into three general

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[132] Proposed Item 1100(f) of Regulation AB would specify that where agreements or other documents are specified by Regulation AB to be filed as exhibits to a registration statement, such final agreements or other documents, if applicable, may be incorporated by reference as an exhibit to the registration statement, such as by filing a Form 8–K in the case of offerings registered on Form S–3.

[133] Any such description should include the specific material duties imposed on the parties and not generic disclosure such as ''various administrative services.''

[134] If applicable law prohibits the issuing entity from holding the pool assets directly (for example, an ''eligible lender'' trustee must hold student loans originated under the Federal Family Education Loan Program of the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*)), a description would be required of any arrangements to hold the pool assets on behalf of the issuing entity. Disclosure would need to be included regarding steps taken regarding bankruptcy separation and remoteness, as applicable, with respect to any such additional entity.

[135] In addition, additional disclosure may be required depending on the disclosures provided about any such issues, provisions or arrangements. *See* Securities Act Rule 408 (17 CFR 230.408); Exchange Act Section 10(b) (15 U.S.C. 78j(b)); Exchange Act Rule 10b–5 (17 CFR 240.10b–5); and Exchange Act Rule 12b–20 (17 CFR 240.12b–20).

[136] *See, e.g.*, Fitch, Inc., ''Seller/Servicer Risk Trumps Trustee's Role in U.S. ABS'' (Mar. 4, 2003).

[137] *See, e.g.*, Items 101(c)(7), 503(d), 601(b)(4)(ii) and 911(c)(5) of Regulation S–K (17 CFR 229.101(c)(7), 17 CFR 229.503(d), 17 CFR 229.601(b)(4)(ii) and 17 CFR 229.911(c)(5)); Instruction 2 to Item 103 of Regulation S–K (17 CFR 229.103); Instruction 1(a)(2) to Item 401 of Regulation S–K (17 CFR 229.401); and Topic 1.I. to Release No. SAB–103.

categories: Basic information and experience; the agreement with the servicer and servicing practices; and back-up servicing. Basic information and experience regarding the servicer would include a description of the general character of the servicer's business and how long it has been servicing assets. As with the sponsor, this description would include both a general discussion of the servicer's experience in servicing assets of any type, as well as a more detailed discussion of the servicer's experience in, and procedures for, servicing assets of the type included in the current transaction. Information should be included, to the extent material, regarding the size, composition and growth of the servicer's portfolio of serviced assets of the type to be securitized and information on factors related to the servicer that may be material to an analysis of the servicing of the pool assets, such as collection processes, billing processes, computer systems and back-up systems.

Other information that may be material could include whether any prior securitizations involving the servicer have defaulted or experienced an early amortization or other performance triggering event because of servicing, the extent of outsourcing the servicer utilizes or if there has been previous disclosure of material noncompliance with servicing criteria with respect to other securitizations involving the servicer. Disclosure would be required of any material changes to the servicer's policies or procedures in servicing assets of the same type during the past three years in order to demonstrate recent trends involving the servicer. Finally, information regarding the servicer's financial condition would be required where it could have a material impact on one or more aspects of servicing of the pool assets and where those aspects could materially impact pool performance on the asset-backed securities. General financial information would not be required. We are seeking particular information that could have a material impact as described.

The material terms of the servicing agreement and the servicer's duties regarding the asset-backed securities transaction would need to be described, and the servicing agreement would be required to be filed as an exhibit. A description of the servicer's servicing practices also would be required, which would include such commonly disclosed items as:[138]

- The manner in which collections on the pool assets will be collected and maintained, including the extent of commingling of funds.
- Terms or arrangements regarding advances of funds regarding cash flows, including interest or other fees charged and terms of recovery. Statistical information regarding past advance activity would be required, if material.
- The servicer's process for handling delinquencies and losses.
- Any material ability to waive or modify any terms, fees, penalties or payments on the pool assets.
- Custodial requirements regarding the pool assets.
- Any material minimum criteria the servicer is required to meet not specified in our proposed list of servicing criteria discussed in Section III.D.7.

As the ABS market has matured, another aspect of such transactions that has increased in importance is the role of servicer transition arrangements, or back-up servicing.[139] An efficient transition from one servicer to another can be essential to prevent portfolio deterioration and possible losses. However, depending on the nature of the assets and the availability of alternative servicers, the process of transferring servicing can be complex. In particular, if the existing servicing fee in a transaction is insufficient to attract a replacement servicer, delays may occur that could affect portfolio performance, and any additional fees required by a replacement servicer could affect cash flows that otherwise would be available to security holders.

As a result, the scrutiny of back-up servicing arrangements has increased, including the level of arrangements with a particular back-up servicer, often referred to in market practice as how ''warm'' the back-up servicer is. We propose to require disclosure regarding any terms regarding a servicer's removal, replacement, resignation or transfer, including arrangements regarding, and any qualifications required for, a successor servicer. Material information on the process for transferring servicing would need to be described, as well as any provisions for the payment of expenses associated with a servicing transfer or any additional fees that may be charged by a successor servicer.

e. Trustees

An ABS transaction may involve one or more trustees. For example, there may be a separate trustee for the issuing entity and for the ABS indenture. In addition to basic identifying information about any such trustee, disclosure would be required regarding the general character of the trustee's business, the trustee's prior experience in similar ABS transactions, indemnification provisions, limitations on liability and removal or replacement provisions.

Recently, there has been debate in the market on the nature and role of the trustee in ABS transactions, in particular the trustee's level of oversight regarding the transaction.[140] To help provide transparency to this topic, we are proposing to require explicit disclosure of the trustee's duties and responsibilities regarding the asset-backed securities under the governing documents and under applicable law. In providing this information, the description should address factors such as the extent to which the trustee independently verifies distribution calculations, access to and activity in transaction accounts, compliance with transaction covenants, use of credit enhancement, the addition, substitution or removal of pool assets, and the underlying data used for such determinations. In addition, the proposed item would require disclosure of any actions required by the trustee, including whether notice is required to investors, rating agencies or other third parties, upon an event of default, potential event of default (and how defined) or other breach of a transaction covenant. The required percentage of a class or classes of asset-backed securities needed to require the trustee to take action also would need to be described.

f. Originators

Some ABS transactions involve pool assets that were not originated by the sponsor. The sponsor may have acquired the pool assets from a separate originator or through one or more intermediaries in the secondary market before securitizing them. If the pool

[138] Note that while this is a proposed list of commonly disclosed items, there may exist other applicable requirements regarding these items as well. For example, Investment Company Act Rule 3a–7(a)(4)(iii) has requirements for segregating funds.

[139] *See, e.g.*, note 136; ''Trustees Seek to Reinforce Loan Servicing,'' Asset-Backed Alert, Jul. 18, 2003; and Moody's Investors Service, Inc., ''Warming Up to Backup Servicing: Moody's Approach'' (Aug. 8, 1997).

[140] Compare, *e.g.*, Moody's Investors Service, Inc., ''Moody's Re-examines Trustee's Role in ABS and RMBS'' (Feb. 4, 2003) with the American Bankers Association, ''The Trustee's Role in Asset-Backed Securities'' (Mar. 10, 2003). See also ''Moody's Unearths Trustee Failures,'' Asset-Backed Alert, Jun. 27, 2003; ''Trustee Role Seen as 'Minimal' at ASF Gathering,'' Asset Securitization Report, Jun. 16, 2003, at 12; and Paul Beckett, ''Asset-Backed Deals Draw Scrutiny—Trustees Must Administer and Oversee, Moody's Says, or Downgrades are Likely,'' The Wall Street Journal, Feb. 5, 2003, at C13.

assets from a single originator or group of affiliated originators reach a certain concentration threshold, information regarding that originator and its own origination program may become relevant.

Accordingly, we propose to require disclosure regarding any originator apart from the sponsor that has originated, or is expected to originate, 10% or more of the pool assets. As noted above with respect to disclosure regarding unaffiliated servicers, a 10% threshold is consistent with our proposed thresholds for disclosure regarding other parties to the transaction, such as concentrated obligors and providers of enhancement or other support. For any originator that meets the 10% threshold, the originator's origination program would need to be described, to the extent material, including the size and composition of the originator's portfolio, as well as other information material to an analysis of the performance of the pool assets, such as the originator's credit-granting or underwriting criteria.

g. Other Transaction Parties and Scope of Disclosure

ABS transactions may involve additional or intermediate parties other than the typical ones identified above, such as intermediate transferors. We propose to clarify in the general applicability section of Regulation AB that if the ABS transaction involves such a party, information is required to the extent material regarding that party and its role, function and experience in relation to the asset-backed securities and the asset pool.[141] The material terms of any agreement with such party would need to be described, and the agreement with that party would need to be filed as an exhibit.

In addition, as noted in Section III.A.6., some ABS transactions arestructured such that the asset pool consists of one or more financial assets that represent an interest in or the right to the payments or cash flows of another asset pool, such as in the case of an origination trust in an automobile lease transaction. In many cases, such structures are established under the direction of the same sponsor and depositor and are designed solely to facilitate the ABS transaction. The actual source of the cash flows that are to be used to service the asset-backed securities is the asset pool underlying the intermediate financial asset. Consistent with current practice, we propose to clarify that in such an instance, references to the asset pool and the pool assets of the issuing entity also include the other asset pool.[142] As such, required disclosure regarding the composition of the asset pool would include disclosure of the composition of the underlying asset pool, as material. In addition, our proposed requirement for an assessment of compliance with servicing criteria and the proposed servicer compliance statement would encompass the assets underlying the intermediate financial asset.

Questions regarding proposed disclosure for transaction parties:

- We request comment on the proposed disclosure regarding transaction parties. We also request comment on our proposed definitions. Are there additional parties not mentioned that should be specifically referenced? For each particular disclosure item, are there any modifications that should be made to the list of items to be disclosed? For example, should information regarding personnel or management of the sponsor, servicer or other party, including any recent turnover in personnel or management, be listed as an additional item for disclosure, if material? Should any of the examples of disclosure be added explicitly to the proposed items? Would information about the depositor's securitization program ever materially differ from the sponsor's? Several rating agencies provide ratings for servicers. Should these be required to be disclosed?
- Should specific financial information be required regarding any of the transaction parties? If so, for which parties should information be required? What information should be required (*e.g.*, audited financial statements) and for what periods? Under what circumstances should such information be required? Should audited financial statements be required for the servicer? Would this place too much emphasis on the servicer?
- We request comment on the proposed requirement to include static pool data for the sponsor's portfolio and for prior securitized pools by the sponsor. Is such data material? Is such data available? Is additional clarity needed regarding the scope of the requirement? For what period should such data be presented? How should variations in what may be relevant for each asset type or asset pool be considered? Are there particular statistics that should be specifically identified for presentation on a static pool basis? If data on a static pool basis are required, should any updates to the data be required on an ongoing basis? If so, what data should be updated, how often and where should they appear? Should we require explanatory information about static pool data?
- Is additional specificity required for disclosure of the transfer of the pool assets? For example, should there be any modifications to the disclosure regarding bankruptcy separation, bankruptcy remoteness and the creation of security interests? In the case of sponsors that acquire pool assets for securitization from other originators or issuers, should there be disclosure of the difference between the acquisition price and the price paid by the issuing entity?
- Should any statement or opinion, such as an opinion of counsel, regarding any bankruptcy separation or bankruptcy remoteness issues be required to be filed? Should they only be required if they are required by the underlying transaction documents? Should there be disclosure if such opinions are not provided?
- We request comment on requiring more disclosure regarding sub-servicers. What are the ramifications of including additional disclosure regarding sub-servicers, including the material terms of the agreements with such sub-servicers? Is such disclosure important to investors? Are there instances where this information should not be required?
- Is a 10% breakpoint appropriate for triggering disclosure regarding unaffiliated servicers and significant originators? Should the percentage be higher (*e.g.*, 20%) or lower (*e.g.*, 5%)? Should a specific percentage not be used for determining when disclosure is appropriate? Is disclosure regarding other servicers that account for a material portion or aspect of the servicing of the pool assets appropriate?
- Should the proposed disclosure regarding the trustee include more explicit examples of activities that the trustee does and does not do? Should there be disclosure of any other entity that would perform such activities if the trustee does not? Is the same disclosure needed for both the trustee for the issuing entity and the trustee for the ABS indenture?
- Should any information regarding third party originators be required other than what is provided today? If so, is it practical to obtain such information? Should material static pool data regarding such originators be required?
- We request comment on the clarification regarding the application of our proposals to the asset pool underlying a financial asset that represents an interest in or the right to the payments or cash flows of that asset pool. Does our proposed list of conditions adequately identify the relevant structures?

4. Pool Assets

Information about the composition and characteristics of the asset pool is a cornerstone of the disclosure necessary to make an informed investment decision regarding an asset-backed security. As noted above, we do not propose detailed industry guides for each asset type to be securitized. However, while the material characteristics will vary depending on the nature of the pool assets, there are certain broad categories of disclosure and examples of common characteristics that can be identified as representative of the material disclosure that is to be provided. The actual disclosure to be provided would need to be tailored to the asset type and asset pool involved for the particular offering, just as it is today.

[141] *See* proposed Item 1100(d) of Regulation AB.

[142] *Id.*

a. Pool Composition

Under our proposal, certain general information regarding the asset pool would be required, including a brief description of the asset type to be securitized and a general description of the material terms of the pool assets. In addition, the solicitation, credit-granting or underwriting criteria used to originate or purchase the pool assets would need to be described. The selection criteria for the asset pool also would need to be described, as well as the cut-off date or similar date for establishing pool composition. Finally, the effects of any legal or regulatory provisions would need to be described, such as any bankruptcy, consumer protection, predatory lending, privacy, property rights or foreclosure laws or regulations, to the extent they may materially affect pool asset performance or payments or expected payments on the asset-backed securities.[143]

As information about the asset pool necessarily includes statistical information, the need for clear and material presentations is important. Appropriate introductory and explanatory information should be provided to introduce characteristics and any terms or abbreviations used. As is the case today, statistical information should be presented in tabular or graphical format, if it would aid understanding. Statistical information also should be presented in appropriate distributional groups or incremental ranges material to an analysis of the information, in addition to presenting appropriate overall pool totals, averages and weighted averages.[144]

Currently, statistical disclosures by distribution groups or ranges often present just the number, amount and percentage of pool assets for each group or range. If material, registrants also should provide statistical information for each group or range by other material variables, such as, among others, average balance, weighted average coupon, average age and remaining term, average loan-to-value or similar ratio, and weighted average credit score or other applicable measure of obligor credit quality. Similarly, when presenting averages on an aggregate basis and within each group or range, registrants should consider providing minimums and maximums underlying the averages. As is often the case today, historical data on pool assets is to be provided, as appropriate, such as the lesser of three years or the time such assets have existed, to allow a material evaluation of the pool data.

Examples of material characteristics specified in the proposed disclosure item that may be common for many asset types and representative of disclosures currently provided include:

- Number of each type of pool assets.
- Asset size, such as original balance and outstanding balance as of a designated cut-off date.
- Interest rate or rate of return, including type of interest rate if the pool includes different types, such as fixed and floating rates, and annual percentage rate.
- Capitalized or uncapitalized accrued interest.
- Age, maturity, remaining term, average life (based on different prepayment assumptions), current payment/prepayment speeds and pool factors, as applicable.
- Servicer, if different servicers service different pool assets.
- If a loan or similar receivable: amortization period; loan purpose; loan status; loan-to-value (LTV) ratios and debt service coverage ratios (DSCR); type and/or use of underlying property, product or collateral; and number of points or other origination charges paid on the pool assets.
- If a receivable or other financial asset with a revolving balance, such as a credit card receivable: monthly payment rate; maximum credit lines; average account balance; yield percentages; type of receivable account; finance charges, fees and other income earned; gross and net purchases and returns granted; and percentage of full-balance and minimum payments made.
- Whether the pool asset is secured or unsecured, and if secured, the type(s) of collateral.
- Ranges of standardized credit scores of obligors and other information regarding obligor credit quality.
- Billing and payment procedures, including frequency of payment, payment options, fees, charges and origination or payment incentives.
- Information about the origination channel and origination process for the pool assets, such as originator information (and how acquired) and level of origination documentation required, as applicable.
- Geographic distribution, such as by state or other material geographic region.[145] In particular and consistent with existing practice and our other proposed thresholds for increased disclosure, if 10% or more of the pool assets are or will be located in any one state or other geographic region, information is to be provided regarding any economic or other factors specific to such state or region that may materially impact the pool assets or pool asset cash flows. In addition, if material, statistical data should be provided according to the factors or variables in this proposed list for each such geographic concentration.
- If material, other concentrations material to the asset type (*e.g.*, school type for student loans), with information regarding such concentrations similar to that provided for geographic concentrations.

In addition to the above and consistent with existing practice, delinquency and loss information for the pool would be required. A proposed item of general applicability for Regulation AB would provide guidance regarding the presentation of such information.[146] In addition to overall delinquency percentages, delinquency experience is to be presented in 30-day increments, beginning with assets 30–59 days delinquent, through the point that assets are written off or charged off as uncollectable. At a minimum, such information is to be presented by number of accounts and dollar amount. Disclosure also would be required on how delinquencies, charge-offs and uncollectable accounts are defined or determined, addressing the effect of any grace period, re-aging, restructure or other practices on delinquency experience. Similar information would be required with respect to the sponsor in a registration statement or otherwise if delinquency and loss information was being presented with respect to the sponsor.

As discussed in Section III.B.3.a., we also propose to require static pool data for the asset pool regarding delinquency and losses, to the extent material. As with static pool data at the sponsor level, additional explanatory disclosure regarding the static pool data could be included, and in some cases could be required.[147] We recognize, however, that there may be instances where such static pool data would not be material, such as where the asset pool predominantly consisted of new originations without a history of data to present.

In a commercial mortgage-backed securitization, given the importance of the underlying properties, our sample list of proposed disclosure items for these assets is consistent with similar disclosure required by existing Form S–11 for the registration of offerings of securities for certain real estate

[143] An instruction to the proposed Item would specify that unless a material concentration of assets exists, it is not necessary to provide details of the laws in each jurisdiction apart from the material potential effects of such laws. A legalistic description or recitation of the laws or regulations in a particular jurisdiction would not be required.

[144] As noted in the proposed Item, in making any calculations regarding overall pool balances, any funds set aside for a prefunding account should be disregarded.

[145] An instruction to this proposed item would specify that for most assets, such as credit card accounts, automobile leases, trade receivables and student loans, the location of the asset is the underlying obligor's billing address. For assets involving real estate, such as mortgages, the location of the asset is where the physical property underlying the asset is located.

[146] *See* proposed Item 1100(b) of Regulation AB.

[147] *See* note 130 above.

companies. This information would include, to the extent material: [148]

- Net cash flow information from the pool assets and the components of net cash flow.
- Location and general character of all materially important real properties.
- Nature and amount of other material mortgages, liens or encumbrances.
- Proposed renovation, improvement or development programs.
- Competitive conditions.
- Management of the properties, occupancy rates and property uses.
- Material tenants and lease terms.

b. Sources of Pool Cash Flow

In some ABS transactions, cash flows to support the asset-backed securities come from more than one source, such as in lease-backed transactions that include separate cash flows from lease payments and from the sale of the residual asset at the termination of the lease. In such instances, disclosure would be required, consistent with what is provided today, of the specific sources of funds and their uses, including, if applicable, the relative amount and percentage of funds that are to be derived from each source. Any assumptions, data, models and methodology used to derive such amounts also would need to be described.

As discussed in Section III.A.2.d., we propose additional specific disclosures if the asset pool includes leases or other assets where a portion of the cash flow is anticipated to come from the residual value of an underlying physical asset. Such disclosure would include information on how residual values are estimated and derived, statistical information regarding estimated residual values and historical statistics on turn-in rates and residual value realization rates. Information also would be required regarding the manner and process in which residual values are to be realized, including disclosure of the entity that will convert the residual values into cash and the experience of such entity. Finally, disclosure would be required of the effects if not enough cash flow was received from the realization of residual values, whether there existed any provisions to address such a contingency, as well as how any cash flow greater than that necessary to repay security holders would be allocated.

[148] Similar to Form S–11, an instruction to the proposed disclosure item would specify that what is required is information material to an investor's understanding of the asset-backed securities. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required.

c. Changes to the Asset Pool

As discussed in Section III.A.2.e., we are proposing more detailed disclosures on when and how the composition of an asset pool may change, such as through a prefunding or revolving period. Such disclosure would include:

- The term or duration of any prefunding or revolving period.
- Aggregate amounts and percentages involved in the prefunding or revolving period.
- Triggers that would terminate limits or terminate such periods.
- When and how new pool assets may be added, removed or substituted, and the acquisition or underwriting criteria for additional pool assets, and the party that makes determinations on such changes.
- Any minimum requirements to add or remove pool assets.
- Temporary investment of funds pending use.
- How investors will be notified of any changes to the asset pool.

d. Rights and Claims Regarding the Pool Assets

When pool assets are transferred to the issuing entity, the sponsor, transferor or other party often makes certain representations and warranties concerning the pool assets, such as to their principal balance and status at the time of transfer. If an asset fails to meet the requirements of those representations or warranties, there may be obligations for the depositor to repurchase or substitute that asset for assets that do comply with the representations and warranties. Consistent with current practice, disclosure of these rights and remedies would be required. Similarly, disclosure would be required regarding any material direct or contingent claims that parties other than the holders of the asset-backed securities have on any pool assets, such as prior mortgages, liens or encumbrances.

Questions regarding proposed disclosure for the asset pool:

- We request comment on the proposed disclosure regarding the asset pool. Are there any modifications that should be made to the list of representative items to be disclosed? For example, is additional specificity needed regarding when and how the asset pool may change? Is the disclosure regarding rights and claims regarding the pool assets appropriate?
- Is the proposed disclosure regarding lease-backed ABS appropriate? Is additional specificity needed regarding residual value disclosures or how residual values are to be realized?
- Should additional guidance be provided on the methods to present statistical disclosure so that it is presented in a clear and understandable format?
- Similar to our proposals for the sponsor, we request comment on the proposed requirement to include static pool data for the asset pool. Is such data material to an investment decision? Is it readily available for presentation? Is additional clarity needed regarding the scope of the requirement? Should any updates to the data be required on an ongoing basis? If so, what data should be updated, how often should they be updated, and where should they appear?

5. Transaction Structure

Existing Item 202 of Regulation S–K would continue to provide the core disclosure requirements for describing the securities being offered. Proposed Item 1112 of Regulation AB would provide additional guidance consistent with existing practice for preparing this disclosure for asset-backed securities. For example, the item would clarify that an explanation is to be given of the types or categories of securities that may be offered, such as interest-weighted or principal-weighted classes or planned amortization or companion classes, as well has how principal and interest on each class of securities is calculated and payable. Other specified items would include amortization, performance or similar triggers or events (and their effects on the transaction if triggered), overcollateralization or undercollateralization information, cross-default or cross-collateralization provisions, voting requirements to amend the transaction documents and any minimum standards, restrictions or suitability requirements regarding ownership of the securities.

A clear description of the flow of funds for the transaction would be required. Such a description would include payment allocations, rights and distribution priorities among all classes of the issuing entity's securities, and within each class, with respect to cash flows, credit enhancement and any other structural features in the transaction. Any requirements directing cash flows would need to be described, such as to reserve accounts, along with a description of the purpose and operation of those requirements. In addition to an appropriate narrative description, the flow of funds should be presented graphically if doing so would aid understanding.

There has been increased emphasis in the market on the level of fees and expenses involved in an ABS transaction.[149] To provide increased transparency of this information in a unified location, we propose to require in a separate table an itemized list of all estimated fees and expenses to be paid or payable out of the cash flows for the transaction. This fee and expense table would indicate for each item the

[149] *See, e.g.*, notes 136 and 140 above.

amount of the fee or expense, its general purpose, the party receiving such fees or expenses, the source of funds for such fees or expenses (if different from other fees or expenses or if such fees or expenses are to be paid from a specified portion of the cash flows) and the distribution priority of such expenses. If the amount of a fee or expense was not fixed, the formula used to determine it would need to be provided. The tabular presentation could be accompanied by footnotes or other accompanying narrative disclosure to the extent necessary for an understanding of the timing or amount of such fees and expenses. In addition, through footnote or other accompanying narrative disclosure, disclosure would be required if any, and if so how, any fees or expenses could be changed without notice to, or approval by, security holders.

Other disclosures regarding the transaction structure would include information on the frequency of distribution dates and the collection periods for the pool assets and arrangements for cash held pending use, including identification of the parties with access to cash balances and the authority to make decisions regarding their investment and use. Information on the ownership of any residual or retained interests to the cash flows would be required, as well as the disposition of excess cash flow. Disclosure would need to be provided of any requirements to maintain a minimum amount of excess cash flow or spread from, or retained interest in, the transaction, and effects on the transaction if the requirements were not met.

As with any fixed-income security, optional or mandatory redemption or termination provisions would need to be described, including any ''clean up'' calls if the principal balance of the pool assets reaches a specified minimum level. Many ABS transactions include ''clean up'' calls whereby the securities are called and the trust terminated before its stated termination date when the administrative costs no longer justify the limited outstanding life.[150] This is typically conducted only when less than 10% of the outstanding pool balance is outstanding. We also propose to codify the existing staff position that the title of any class of securities with an optional or mandatory redemption or termination feature that may be exercised when 25% or more of the original principal balance of the pool assets is still outstanding must include the word ''callable.'' This is to alert investors that the callable feature is greater than a typical ABS ''clean up'' call.

We propose to require additional information if the transaction structure involves a master trust. For example, information would be required to the extent material regarding any additional securities already outstanding or that may be issued in the future that are backed by the same asset pool, including:

- The relative priority of those additional securities to the securities being offered and their respective rights to the underlying pool assets and cash flows;
- Allocations of cash flow from the asset pool and any expenses or losses among the various series or classes;
- Terms under which additional series or classes may be issued and pool assets increased or changed; and
- The terms of any security holder approval or notification of any additional issuance.

In describing generally the scope of disclosure expected in ABS registration statements, the 1992 Release specifically referenced disclosure regarding prepayment, maturity and yield considerations that may be material to ABS. In our proposed disclosure requirements, a description would be required, which is often provided today, of any material models, including material assumptions and limitations, used as a means to identify cash flow patterns with respect to the pool assets. Similarly, the disclosure would need to explain, to the extent material, the degree to which each class of securities is sensitive to changes in the rate of payment on the pool assets, and describe the specific consequences of such changing rate of payment.[151] Consistent with market practice, statistical information of such effects is to be provided, such as the effect of prepayments on yield and weighted average life at one or more given prepayment speeds. Any special allocations of prepayment risks among the classes of securities would need to be described, as well as whether any class protects other classes from the effects of the uncertain timing of cash flow.

Questions regarding proposed disclosure regarding the transaction structure:

- We request comment on the above proposed disclosure regarding transaction structure. Are there any modifications that should be made to the list of items? For example, is additional specificity needed regarding the information that should be provided regarding prepayment, maturity and yield considerations?
- Is a separate itemized fee and expense table useful, or would disclosure of fees and expenses as part of a flow of funds discussion be sufficient?
- If the proposal regarding an assessment of compliance with servicing criteria is modified, should additional disclosure be required regarding controls and procedures over collections and cash balances?
- Is the proposed disclosure about additional series or classes of securities in master trust structures sufficient? Should disclosure of additional information be required?

6. Significant Obligors

In most securitizations, the asset pool represents obligations of a large enough number of separate obligors that information on any individual obligor is not material. However, as discussed in Section III.A.6., as concentration with a particular obligor or group of related obligors increases, additional disclosures regarding that obligor or group of related obligors, including financial information, is required. Analogizing to the standards in Topic 1.I of Staff Accounting Bulletin No. 103, current staff and market practice is to require additional disclosures regarding a particular obligor or group of related obligors when concentration reaches 10%, with more particular disclosures at 20%.[152]

Consistent with this long-standing practice, we propose to define a ''significant obligor'' that would trigger additional disclosures as any of the following:

- An obligor or a group of affiliated obligors on any pool asset or group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool;
- A single property or group of related properties securing a pool asset or a group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool; or
- A lessee or group of affiliated lessees if the related lease or group of leases represents 10% or more of the asset pool.

Instructions to the proposed definition would clarify that if separate pool assets, or properties underlying pool assets, are cross-defaulted and/or cross-collateralized, such pool assets are to be aggregated and considered together in determining concentration levels. With respect to lessees, the concentration calculation must focus on the leases whose cash flow supports the asset-backed securities directly or indirectly, regardless of whether the asset pool contains the leases themselves, mortgages on properties

[150] *See* Frank J. Fabozzi *et al.*, The Handbook of Nonagency Mortgage-Backed Securities, at 165 (1997).

[151] This would include, for example, information on interest rate sensitivity.

[152] Topic 1.I. to Release No. SAB–103.

that are the subject of the leases or other assets related to the leases. Finally, if the pool asset is a mortgage or lease relating to real estate and non-recourse to the obligor, and the obligor does not manage the property or does not own other assets and has no other operations, then the obligor need not be considered a separate significant obligor from the real estate. Otherwise, if any of the 10% tests were met, the obligor would be a separate significant obligor for which disclosure would be required.

For each significant obligor, both descriptive and financial information would be required consistent with existing practice. Descriptive information would include the identity of the significant obligor, its organizational form, the general character of its business, the nature of the concentration and the material terms of the pool assets or the agreements with the obligor involving the pool assets.

Consistent with current practice, different levels of financial information would be required depending upon the level of concentration.[153] If the pool assets relating to a significant obligor represented 10% or more, but less than 20%, of the asset pool, selected financial data required by Item 301 of Regulation S–K would need to be provided.[154] If the pool assets relating to the significant obligor represented 20% or more of the asset pool, audited financial statements meeting the requirements of Regulation S–X would be required. Both thresholds represent long-standing breakpoints in Commission and staff requirements for determining the level of required financial disclosure.[155] Section III.B.9. discusses proposals for alternative methods that may be available, subject to conditions, to present this disclosure, such as through incorporation by reference or by including a reference to the obligor's Commission filings.

We propose instructions to address exceptions to the requirement to provide financial information regarding a significant obligor. For example, no financial information would be required if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of the United States. Similarly, no financial information would be required if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of a foreign government, if the pool assets are investment grade securities. Otherwise, information required by paragraph (5) of Schedule B of the Securities Act[156] regarding the foreign government could be incorporated by reference. If the significant obligor was an asset-backed issuer and the pool assets relating to the significant obligor were asset-backed securities, rather than financial information we would require disclosure under proposed Items 1104–1113 and 1117 of Regulation AB regarding such asset-backed securities.

Questions regarding proposed disclosure regarding significant obligors:

- We request comment on the proposed definition of significant obligor. Are any modifications necessary? Is the test of whether the pool asset represents 10% or more of the asset pool the appropriate test? Should it instead be based on cash flows supporting the offered ABS, the principal amount of the offered asset-backed securities or a combination of any of these tests? Is the application to lessees appropriate? Should any other particular entities be included or excluded?
- Are the 10% and 20% breakpoints still appropriate for triggering when different levels of financial disclosure should be required? Should they be changed?
- We also request comment on the level of disclosure to be required, both descriptive and financial, regarding significant obligors. Are there alternative disclosures that should be required or permitted? For example, in the case of an insurance company or other regulated entity that is not subject to Exchange Act reporting requirements and does not otherwise provide GAAP financial statements, should financial statements prepared under the entities' regulatory accounting principles be acceptable as a substitute?
- Should there be any additional exclusions to when financial information would be required? Are the proposed instructions regarding governments and asset-backed securities appropriate?

7. Credit Enhancement and Other Support

The definition of asset-backed security contemplates the inclusion of ''rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders.'' Credit enhancement or other support for asset-backed securities can be provided in a variety of ways, including features internally structured into the transaction to provide support as well as externally provided enhancement. Disclosure would be required of all such methods of enhancement, to the extent material, including any of the following:[157]

- Any external credit enhancement designed to ensure that the asset-backed securities or pool assets will pay in accordance with their terms, such as bond insurance, letters of credit or guarantees;
- Any mechanisms to ensure that payments on the asset-backed securities are timely, such as liquidity facilities, lending facilities, guaranteed investment contracts and minimum principal payment agreements;
- Any derivatives that are used to reduce or alter risk resulting from financial assets in the asset pool and that provide payments in return for payments on such assets, such as interest rate or currency swaps, or that are used to provide credit enhancement related to assets in the pool;[158] and
- Any internal credit enhancement structured into the transaction to increase the likelihood that one or more classes of asset-backed securities will pay in accordance with their terms, such as subordination provisions, overcollateralization, reserve accounts, cash collateral accounts or spread accounts.

Disclosure of the material terms of any agreement to provide such enhancement would be required, including any limits on the timing or amount of the enhancement or any conditions that must be met before the enhancement can be accessed. Provisions permitting the substitution of enhancement also would need to be disclosed. The agreement relating to the enhancement would be required to be filed as an exhibit to the filing.

Similar to significant obligors, enhancement or other support by a particular entity or group of affiliated entities may reach a certain level of concentration such that additional disclosures, including financial disclosures, would be appropriate. Consistent with current practice, we propose that if an entity or group of affiliated entities providing enhancement or other support for the asset-backed securities is liable or contingently liable to provide payments representing 10% or more of the cash flow supporting any offered class of asset-backed securities, additional information, both descriptive and financial, would be required. The descriptive information would include the name of the enhancement provider, its organizational form and the general character of its business.

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[153] See, *e.g.*, Section VIII.B.3.a.ii. of the Division of Corporation Finance's ''Current Issues and Rulemaking Projects'' (Nov. 14, 2000).

[154] 17 CFR 229.301.

[155] See, *e.g.*, note 152 above.

[156] 56 15 U.S.C. 77aa.

[157] In addition to the level of disclosure required, credit enhancement may raise questions as to whether a separate security is involved that needs to be separately registered. For example, a guarantee of a security, rather than on the underlying assets, would be a separate ''security'' under Section 2(a)(1) of the Securities Act (15 U.S.C. 77b(a)(1)) and must be covered by a Securities Act registration statement filed by the guarantor, as issuer, unless exempt from registration.

[158] Derivatives that are not related to the financial assets, such as credit default swaps or other derivatives designed to create a synthetic exposure to an external asset or index, are not permitted under the definition of ''asset-backed security.'' See, *e.g.*, note 62 and the accompanying text.

Also consistent with current practice and our proposals for significant obligors, we propose to use 10% and 20% thresholds in determining the level of financial information that would be required regarding an enhancement provider. In particular, if any entity or group of affiliated entities that provided enhancement or other support for the asset-backed securities was liable or contingently liable to provide payments representing 10% or more, but less than 20%, of the cash flow supporting any class of the asset-backed securities, selected financial data required by Item 301 of Regulation S–K would need to be provided. If the entity or group of affiliated entities was liable or contingently liable to provide payments representing 20% or more of the cash flow supporting any class of the asset-backed securities, audited financial statements meeting the requirements of Regulation S–X would be required. As with financial disclosure regarding significant obligors, Section III.B.9. discusses a proposal for an alternative method that may be available to incorporate the information by reference. We also propose similar instructions if the obligations of the enhancement provider are backed by the full faith and credit of the United States or certain foreign governments.

These disclosure requirements would apply to all providers of external credit or liquidity enhancement, insurance or guarantees, counterparties to swap or hedging arrangements, interest rate exchange arrangements, interest rate cap or floor arrangements, currency exchange arrangements or similar arrangements, and any other parties providing external credit enhancement or other support for payments on the asset-backed securities. Enhancement may support payment on the pool assets or payments on the asset-backed securities themselves.

Unlike current practice, our proposals would base the triggering event for disclosure on payments that the enhancement provider is liable or contingently liable to provide. Valuation of the enhancement, such as for swaps or other derivatives, would not be the relevant test. Even if a swap, such as an interest rate swap, was currently ''out of the money'' and no payments were required, if the swap provider was contingently liable for more than 10% of the cash flow supporting a class (for example, if interest rates changed), disclosure would be required on the same basis as any other form of enhancement, such as a guarantee, even though probability of payment on the guarantee likewise could be remote due to a high quality asset pool.

Questions regarding proposed disclosure regarding credit enhancement and other support:

- We request comment on our proposals for disclosure regarding credit enhancement and other forms of support for an ABS transaction. Are any modifications necessary? Are there any additional examples we should provide?
- Is the test of whether the enhancement provider is liable or contingently liable for payments representing 10% or more of the cash flows to any class of the asset-backed securities the appropriate test? If not, why? What alternatives should be used? Should different tests be used for different forms of enhancement? What would be the rationale for different tests?
- Are the 10% and 20% breakpoints still appropriate for triggering when different levels of financial disclosure should be required? Should they be changed?
- We also request comment on the level of disclosure to be required, both descriptive and financial. Are there alternative disclosures that should be required or permitted? For example, in the case of an insurance company or other regulated entity that is not subject to Exchange Act reporting requirements and does not otherwise provide GAAP financial statements, should financial statements prepared under the entities' regulatory accounting principles be acceptable as a substitute?
- Should there be any additional exclusions as to when financial information would be required? Are the proposed instructions regarding U.S. and foreign government-backed obligations appropriate?

8. Other Basic Disclosure Items

a. Tax Matters

Consistent with existing practice, the registration statement would need to include a brief, clear and understandable summary of:

- The tax treatment of the asset-backed securities transaction under federal income tax laws.
- The material federal income tax consequences of purchasing, owning and selling the asset-backed securities. In addition, if any of the material federal income tax consequences are not expected to be the same for investors in all classes offered by the registration statement, the material differences would need to be described.
- The substance of counsel's tax opinion, including identification of the material consequences upon which counsel has not been asked, or is unable, to opine.

The filing and disclosure of tax opinions is a frequent topic of staff comment. The requirements with respect to tax opinions in ABS transactions are generally consistent with the requirements for non-ABS transactions.[159] For example, when using a ''short form'' tax opinion where disclosure in the prospectus is to constitute counsel's opinion, the tax opinion filed as an exhibit to the registration statement must confirm or adopt the statements in the prospectus discussion as counsel's opinion. It is not sufficient for the tax opinion to merely state that the disclosure in the prospectus is accurate in all material respects. Registrants and their counsel should take care in preparing and describing tax opinions consistent with practices required for Securities Act registration statements.[160]

b. Legal Proceedings

In lieu of Item 103 of Regulation S–K, we propose a more tailored disclosure item for material legal proceedings with respect to asset-backed securities. For example, under the proposed disclosure item, a brief description would be required regarding any legal proceedings pending or known to be threatened against the sponsor, depositor, trustee, issuing entity, any servicer or any enhancement provider, or of which any property of the foregoing is the subject, that is material to security holders. Similar information would be required as to any such proceedings known to be contemplated by governmental authorities.

c. Affiliations and Certain Relationships and Related Transactions

There often can be several affiliations between parties in an ABS transaction. For example, the servicer often is an affiliate of the sponsor. We propose to require a description of whether, and if so, how, the sponsor, depositor or issuing entity is an affiliate of any of the following parties: servicer, trustee, originator of at least 10% of the pool assets, significant obligor, significant enhancement provider, underwriter or other material party identified with respect to the transaction. Disclosure also would be required, to the extent known, of any affiliate relationships among any of the parties listed above. An ''affiliate'' of, or a person ''affiliated'' with, a specified person, is defined in Commission rules to mean ''a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.''[161]

We also propose disclosure regarding whether there is, and if so, the general character of, any business relationship, agreement, arrangement, transaction or understanding entered into outside the ordinary course of business or on terms other than would be obtained in an arm's length transaction with an unrelated third party, apart from the asset-backed securities transaction, between the sponsor, depositor or issuing entity and any of the above referenced parties that either currently exists or that existed during the past two years that is material to an investor's understanding of the asset-backed securities. An instruction to the proposed item would clarify that what would be required is information material to an investor's understanding of the asset-backed securities. A detailed description or

[159] See also note 85.

[160] See Item 601(b)(8) of Regulation S–K.

[161] See, *e.g.*, Securities Act Rule 405 and Exchange Act Rule 12b–2. The term ''control'' also is defined in those rules as ''the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.''

itemized listing of all commercial relationships among the parties would not be required. Instead, the disclosure should indicate whether any relationships outside of the asset-backed securities transaction do exist that meet the specified standard, including materiality to an understanding of the asset-backed securities, and the general character of those relationships. However, disclosure of specific relationships involving or related to the ABS transaction and the pool assets, including the material terms and approximate dollar amount involved, would be required to the extent material. For example, material credit arrangements relating to the pool assets provided by an underwriter or promoter for the asset-backed securities, such as providing a warehouse line of credit to fund originations or acquisitions pending securitization, would need to be described.

d. Ratings

We propose to codify current industry practice by requiring disclosure of whether the issuance or sale of any class of the offered securities is conditioned on the assignment of a rating by one or more rating agencies, whether or not NRSROs.[162] If so, each rating agency must be identified as well as the minimum rating that must be assigned. A description regarding any arrangements to have such rating monitored while the securities are outstanding also would be required.

e. Reports and Additional Information

Post-issuance reporting of information regarding an ABS transaction is important to an understanding of transaction performance and, hence, investment decisions, including whether existing holders should sell their securities and whether prospective buyers should purchase them. Such disclosures in the ABS context generally involve both updated information about pool performance as well as information on allocations and distributions of cash flows to holders of the securities and other third parties according to the flow of funds. Investors necessarily consider the availability and quality of transaction reporting in determining whether, and at what level, to invest in such securities.

In addition to disclosure regarding reports to be filed with the Commission, we propose to require disclosure, which is often provided today, of the reporting investors can expect to receive and be able to access. This disclosure would need to include a description of the reports or other documents required under the transaction agreements, including the information to be included in the reports, the schedule and manner of their distribution or availability and who will prepare the reports.

We also propose to require disclosure of whether website access will be provided to Commission and transaction reports.[163] Disclosure would be required in the prospectus regarding whether the issuing entity's annual reports on Form 10–K, distribution reports on Form 10–D, current reports on Form 8–K and amendments to those reports filed or furnished with the Commission will be made available on the website of a specified transaction party (*e.g.*, sponsor, depositor, servicer, issuing entity or trustee) as soon as reasonably practicable after such material is electronically filed with, or furnished to, the Commission. As the Commission specified in its release adopting similar disclosure for accelerated filers, we interpret the ''as soon as reasonably practicable'' standard to mean that the report would be available, barring unforeseen circumstances, on the same day as filing.[164] In addition, disclosure would be required regarding:

- Whether other reports to security holders or information about the asset-backed securities will be made available in this manner;
- If filings will be made available in this manner, the Web site address where such filings may be found; and
- If filings and other reports will not be made available in this manner, the reasons why they will not and whether an identified transaction party voluntarily will provide electronic or paper copies of those filings free of charge upon request.

The guidance provided in the Commission's release adopting similar disclosure for accelerated filers, such as how the Web site access can be provided, would be equally applicable to this disclosure.[165] In addition, the inclusion of the Web site address in response to the disclosure requirement would not, by itself, include or incorporate by reference the information on the site into the prospectus or registration statement, unless the registrant otherwise acts to incorporate the information by reference.[166] Similarly, the proposed disclosure is not designed to create new duties under the antifraud provisions of the federal securities laws or in private rights of action or to alter any existing liability provisions. For example, the new disclosure would not separately create or otherwise affect any duty to update prior statements.

Questions regarding other proposed basic disclosure items:

- We request comment on these other basic disclosure items. Are there any modifications that should be made to these items? For example, is additional specificity needed regarding the tax consequences that should be described?
- What should be the proper scope for disclosure of affiliations and relationships between transaction parties? Should any modifications be made to the proposed disclosure item? Are all of the proposed related party transaction disclosures useful, or should the disclosure be limited from what is proposed? Should disclosure be required regarding any relationships at an individual level, such as with an executive officer or director of the sponsor, depositor or issuing entity, if applicable, that exists in connection with or apart from the asset-backed securities transaction?
- Should additional disclosure regarding ratings or the rating process be required? For example, should disclosure of fees paid to rating agencies be required? Should we require an explanation of what an NRSRO rating addresses and the characteristics the rating does not address?
- With regard to the content of reports that will be provided to investors, should a copy of the form of the report to be used be included with the registration statement or filed as an exhibit?
- We request comment on the proposed disclosure regarding Web site access to reports. Should disclosure also be required on an ongoing basis in the Form 10–K or in distribution reports? Is additional guidance necessary in how to comply with the proposal? Should alternative methods be considered in promoting the availability of transaction reporting to investors and market participants?
- Are there additional areas of disclosure that should be separately identified? For example, should there be a separate disclosure item for legal investment considerations, such as ERISA qualifications?

9. Alternatives to Present Third Party Financial Information

As discussed in Sections III.B.6. and 7., there are instances both today and under our proposals when additional financial information regarding third parties would be required in ABS filings, including financial information about significant obligors and significant providers of enhancement or other support. Over time, through several no-action letters and interpretations, the staff has permitted alternative methods to present or refer to this information if it exists in other Commission filings of the third party. The first alternative allows incorporation by reference of the third party's financial information into the ABS filing. The second alternative, available only with respect to significant obligors, allows an ABS filing to reference the significant obligor's Exchange Act reports on file with the Commission in lieu of providing the information.

We propose to codify both of these alternatives and clarify the conditions

[162] We are not proposing to codify one of the items specified for disclosure in the 1992 Release, which was an explanation of what an NRSRO rating addresses and the characteristics the rating does not address. We believe this issue no longer requires general clarification with respect to the ABS market.

[163] ''Accelerated filers,'' as defined in 17 CFR 240.12b–2, already are required to include similar disclosure in their annual reports on Form 10–K. See Item 101(e)(4) of Regulation S–K.

[164] See Release No. 33–8128 (Sep. 5, 2002) [67 FR 58480].

[165] *Id.*

[166] In Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843], we provided interpretive guidance on the effect of including a Web site address in other situations. We are not changing that guidance for those other situations.

for their use. Both alternatives would relate only to the presentation of financial information regarding the third party. Information specific to the asset-backed securities transaction, such as the material terms of the pool assets in the case of significant obligors or the enhancement in the case of an enhancement provider, would still be required as is the case today.

a. Incorporation by Reference

The first alternative is derived from several staff no-action letters that permit the incorporation by reference of financial information regarding certain bond insurers from their or their affiliated entities' Exchange Act reports.[167] We propose to codify the expansion of these positions by the staff to permit incorporation by reference (by means of a statement in the ABS filing to that effect) of the required financial information of any enhancement provider from its Exchange Act reports (or the reports of the entity that consolidates such party), if the following conditions were met:[168]

- The third party or entity that consolidates the third party in its financial statements is subject to the Exchange Act reporting requirements and is current with its reporting for the past twelve months (or such shorter period that it has been required to file reports);
- The reports to be incorporated by reference include (or properly incorporate by reference) the financial statements of the third party or such information is consolidated into the financial statements of the entity that consolidates the third party;
- The filing incorporating the information by reference describes any and all material changes to the incorporated information which have occurred subsequent to the filing of the incorporated information; and
- If included in a prospectus or registration statement, the prospectus also states that all documents subsequently filed by such third party, or the entity that consolidates the third party, prior to the termination of the offering also will be deemed to be incorporated by reference into the prospectus.

This option also could be used to include the information required of any significant obligor.

As we propose to expand the basic definition of asset-backed security to registered offerings on Form S–1, we also are proposing to permit incorporation by reference of third party financial information for ABS offerings registered on that form. In addition, several amendments to our existing incorporation by reference and updating rules are necessary to reflect incorporation by reference of information of third party filings in Securities Act registration statements.[169] For example, if the registrant was relying on the incorporation by reference alternative for third party financial information, it would need to make an undertaking in its registration statement, similar to that required for existing registration statements that rely on incorporation of subsequent Exchange Act reports of the registrant,[170] that, for purposes of determining any liability under the Securities Act, each filing of the annual report of the third party that is incorporated by reference in the registration statement will be deemed to be a new registration statement relating to the securities offered by that registration statement, and the offering of such securities at that time will be deemed to be the initial bona fide offering thereof.

We also propose to add three instructions that would remind registrants of our other existing incorporation by reference and updating requirements. The first instruction would remind ABS issuers that in addition to the proposed conditions above, any information incorporated by reference must comply with any other applicable Commission rules pertaining to incorporation by reference.[171] The second instruction would remind issuers that any applicable requirements under the Securities Act or our rules and regulations regarding the filing of a written consent for the use of incorporated material also would apply to the material incorporated by reference.[172] For example, if a subsequent Form 10–K of a third party was being used to update the ABS registration statement under Section 10(a)(3) of the Securities Act,[173] any required consents would need to be filed under a filing by the ABS issuer, such as in a Form 10–K, 10–D or 8–K with respect to registered offerings on Form S–3. The third instruction reminds issuers that any undertakings set forth in Item 512 of Regulation S–K would apply to any material incorporated by reference in a registration statement or prospectus.

Request for comment on the incorporation by reference alternative:

- We request comment on the alternative that permits incorporation by reference of required third party financial information. Should any of the conditions to the proposal be modified? Should the proposal be allowed for all significant obligors and enhancement providers that meet the proposed conditions?
- Is it appropriate to extend incorporation by reference for third parties to registered ABS offerings on Form S–1? Would it be appropriate to extend it to all parties?
- We also request comment on our proposed amendments to the incorporation by reference and updating rules to accommodate the proposal. In particular, we request comment on the proposed undertaking for incorporation by reference of third party information. Is additional guidance necessary regarding updating requirements?

b. Reference Information

The second alternative to presenting third party financial information is derived from several staff no-action letters and interpretive positions that permit reference to the Exchange Act reports of a significant obligor in lieu of inclusion of the obligor's financial information in the filing or incorporating them by reference.[174] In particular, these positions recognize the practical difficulties that may be involved in obtaining the required information or the necessary consent to use the information, or the ability to evaluate the information, from an unaffiliated significant obligor whose securities have been securitized without any obligor involvement in the ABS transaction. A common example of such a situation is a sponsor that acquires outstanding corporate debt securities of other issuers in purely secondary market transactions (*i.e.*, there is no relationship to the issuer or the issuer's distribution) and securitizes them in a transaction where one or more of these issuers is a significant obligor.

Under our proposal, an ABS filing may include a reference to a significant obligor's Exchange Act reports (which would include a statement of how those reports may be accessed, including the third party's name and Commission reporting number) in lieu of providing the required financial information in the

[167] See *Financial Security Assurance, Inc.* (Jul. 16, 1993); *MBIA Insurance Corp.* (Sep. 6, 1996); and *AMBAC Indemnity Corp.* (Dec. 19, 1996).

[168] If the conditions were not met, the required information would need to be provided in the filing.

[169] See, *e.g.*, proposed amendments to Items 10 and 512 of Regulation S–K and Securities Act Rule 411.

[170] See, *e.g.*, Item 512(c) of Regulation S–K.

[171] Other such rules include Rule 10(d) of Regulation S–K; Rule 303 of Regulation S–T (17 CFR 232.303); Rule 411 of Regulation C; and Exchange Act Rules 12b–23 and 12b–32 (17 CFR 240.12b–23 and 17 CFR 240.12b–32).

[172] See, *e.g.*, Securities Act Rule 439 (17 CFR 230.439).

[173] 15 U.S.C. 77j(a)(3).

[174] See, *e.g.*, *Morgan Stanley & Co., Inc.* (Jun. 24, 1996). This letter related to exchangeable securities rather than ABS, but the concept has been subsequently extended to ABS by the staff. See Section VIII.B.3.b.i. of the Division of Corporation Finance's ''Current Issues and Rulemaking Projects'' (Nov. 14, 2000).

filing, if the following conditions were met:[175]

- Neither the significant obligor nor any of its affiliates has had a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the asset-backed securities transaction, and neither the third party nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction;[176]
- The significant obligor meets at least one of the eligibility categories discussed below; and
- An undertaking is included that if the significant obligor ceases to meet any of the eligibility conditions, either the required information will be provided or the transaction, or that portion of the transaction, will terminate.

The first condition would clarify that the significant obligor must be unaffiliated and otherwise not involved with the ABS transaction. If the obligor was affiliated or involved with or participating in the ABS transaction, the policy argument to permit reference to the third party's reports in lieu of presenting the information or incorporating it by reference because of the potential impracticality in obtaining it is not present. As a result, the proposed reference alternative would not be available for financial information regarding a significant enhancement provider due to its involvement in the transaction and the information would have to be included in the filing or, if the conditions in Section III.B.9.a. are met, incorporated by reference.

The second condition refers to the categories of significant obligors that would be eligible for the reference alternative. Consistent with existing staff positions and market practice, the proposed eligible categories relate to the existing Form S–3 eligibility of the significant obligor. For example, the first category would be a significant obligor eligible to use Form S–3 or F–3 for a primary offering of non-investment grade securities pursuant to General Instruction I.B.1 of such forms, which requires a $75 million public float.[177] A second category would be a significant obligor that would be eligible to register the related pool assets under General Instruction I.B.2 of Form S–3 or F–3 (*i.e.*, the pool assets relating to the significant obligor are non-convertible investment grade securities). A third and fourth category would relate to pool assets guaranteed by a parent or subsidiary of the significant obligor where both the information requirements under Rule 3–10 of Regulation S–X[178] and applicable Form S–3 or Form F–3 eligibility requirements (such as General Instruction I.C.3 of Form S–3) are met.

A fifth category would relate to significant obligors that are U.S. government-sponsored enterprises. Several GSE's historically have not been subject to Exchange Act reporting requirements. The staff has made accommodations for several of these entities so long as they have outstanding securities held by non-affiliates with a market value of $75 million or more and publicly make available audited financial statements prepared in accordance with generally accepted accounting principles and extensive business information. Our proposal would clarify the meaning of this requirement by permitting reference if the GSE had $75 million outstanding of securities held by non-affiliates and the GSE makes information publicly available on an annual and quarterly basis, including audited financial statements prepared in accordance with generally accepted accounting principles covering the same periods that would be required for audited financial statements under Regulation S–X and non-financial information consistent with that required by Regulation S–K.

A final category relates to significant obligors where the pool assets in question are themselves asset-backed securities. We would permit reference in this instance if the significant obligor was filing Exchange Act reports and was current in such reporting for at least twelve calendar months and any portion of a month immediately preceding the filing referencing the obligor's reports (or such shorter period that the obligor was required to file such materials). We do not propose to include an additional existing staff condition that the significant obligor has outstanding securities in excess of $75 million because we do not believe a market capitalization condition is relevant in the context of underlying ABS.

Because of the possibility that corporate debt issuers could suspend their reporting requirements, the staff has permitted ABS issuers securitizing such debt to include a provision that, if a significant obligor's financial information is not available, the transaction, or a portion of the transaction, would terminate, such as by distributing the pool assets to investors or selling the pool assets and liquidating the asset-backed securities. This option to terminate the transaction has developed through market practice where it is believed that the alternative of including the information in the ABS filing might become impractical or impossible. Our proposal addresses this problem and allows termination as an option. However, if the termination option was elected, the transaction, or that portion of the transaction, must terminate before updated information regarding the third party would be required. Provisions that the transaction would terminate ''in a reasonable time'' or after a given period of time would not be an alternative to providing information regarding a third party that otherwise would be required.

Request for comment on the reference alternative:

- We request comment on the alternative that permits reference to a third party's Exchange Act reports on file with the Commission in lieu of providing that information. Should any of the conditions to the proposal be modified? Should a termination option be recognized? We also request comment on the limitation of the proposal to only unaffiliated and uninvolved significant obligors. What are the reasons that would justify reference to reports by affiliated obligors, others involved in the transaction or an enhancement provider even though that entity is involved with the ABS transaction?
- We request comment on the proposed codification of the eligible categories of significant obligors for which reference information would be permitted. Given the size of most ABS transactions, would a $75 million requirement for outstanding securities add value for the ABS category?

C. Communications During the Offering Process

1. ABS Informational and Computational Material

a. Current Requirements

The Securities Act restricts the types of offering communications that a registrant or those acting on its behalf (such as an underwriter) may use during a registered public offering.[179] The level of restriction depends on the period during which the communications are to occur. Before the registration statement is filed, all offers, in whatever

[175] Like the incorporation by reference alternative, the reference alternative would be available to ABS offerings registered on Form S–1.

[176] See Section III.A.6. as to registration and resulting disclosure issues if the ABS transaction also comprises a distribution of underlying securities. These registration and disclosure issues are not dependent on whether the issuer of the underlying securities is a significant obligor.

[177] Public float is the aggregate market value of a company's outstanding voting and non-voting common equity (*i.e.*, market capitalization) minus the value of common equity held by affiliates of the company. See General Instruction I.B.1 to Form S–3.

[178] 17 CFR 210.3–10.

[179] *See* Section 5 of the Securities Act (15 U.S.C. 77e).

form, are prohibited.[180] After the registration statement is filed until it is declared effective, offers made in writing (including by e-mail or Internet), by radio or by television must conform to the information requirements of Section 10 of the Securities Act.[181] Thus, the only written material that may be used in connection with the offering of the securities during this period is a preliminary prospectus meeting the requirements of Section 10, which must be filed with the Commission.[182] After the registration statement is declared effective, the registrant may use additional materials to offer the securities, but only if it delivers a final prospectus that meets the requirements of Section 10(a) of the Securities Act before or with those materials.[183]

The structuring of various classes of ABS can be quite complex involving a detailed analysis of the asset pool and a complicated allocation of pool asset cash flows. Given the important focus on tranching and pool characteristics, including potential cash flow patterns, sponsors or underwriters often wish to provide to potential investors computational materials and term sheets identifying the structure and underlying assets prior to finalizing the deal structure and printing the final prospectus. These materials may help investors understand the proposed transaction and analyze prepayment assumptions and other issues affecting yield and flow of funds. This information, which often includes detailed statistical and tabular data, would be impractical to provide orally. Historically, few investors have had the computer resources to prepare these analytics themselves.

Following a series of staff no-action letters from the mid-1990's, ABS issuers are permitted to use term sheets and computational material after the effectiveness of a registration statement but before availability and delivery of a final Section 10(a) prospectus.[184] Under these no-action letters, three basic types of materials can be used: Structural term sheets; collateral term sheets; and computational materials. Structural term sheets identify the proposed structure of the securities being offered, such as the parameters of the various types of classes offered. Collateral term sheets provide information regarding the proposed underlying assets. Computational materials contain statistical data displaying for a particular class of asset-backed securities the yield, average life, expected maturity, interest rate sensitivity, cash flow characteristics or other such information under specified prepayment, interest rate, loss or related scenarios.

The existing staff no-action letters contain filing requirements for the use of these materials, and provide that no confirmations of sale can be sent until the filing requirements are met. The filing requirements vary depending upon the type of material used and how it is used. Subject to various conditions, any collateral term sheet used before the final prospectus is delivered that represents a substantive change from a prior collateral term sheet must be filed on Form 8–K within two business days of first use and incorporated by reference into the registration statement for the offering.

Under slightly more complex conditions, structural term sheets and computational materials used before the final prospectus is available must be filed on Form 8–K prior to or with the filing of the final prospectus and incorporated by reference into the registration statement. If the materials are provided after the final prospectus is available but before it is delivered, they must be filed as soon as possible but not later than two business days of first use. Materials that relate to abandoned structures or that are furnished before the structure of the entire issue is finalized to investors which have not indicated their intention to purchase the ABS need not be filed.

We understand that where they are used, term sheets and computational material often represent the primary, if not the only, written materials that are used to offer asset-backed securities. We also understand that advances in technology over the ten years since the first no-action action letter was issued have raised several interpretive issues regarding the scope and application of the letters. For example, an increasing number of investors possess or have access to the analytical capacity to perform their own models and scenarios on pool data and therefore may request data at the individual pool asset level, or ''loan level'' data, instead of summarized charts and tables.[185] There has been some concern over whether the existing no-action letters would permit disclosure at this level of granularity. In addition, various third party services have developed over the past decade that allow issuers and underwriters to import collateral and structural data about a proposed transaction into a format that allows investors to conduct their own analytics and computations with self-selected assumptions and estimates in lieu of relying on underwriters to perform these functions for them. This has raised questions over what information should be filed with the Commission under the no-action letters where such services are used.

b. Proposed Exemptive Rule

We are proposing to codify the concept in the staff no-action letters that permits the use of ABS informational and computational material after the effectiveness of a registration statement for an offering of asset-backed securities registered on Form S–3 but before delivery of the final Section 10(a) prospectus. Recognizing the current use of these materials in providing an increased flow of information to investors, the flexibility to tailor materials to specifically identified investor needs, and the liability for false and misleading statements or omissions, we believe permitting the use of ABS informational and computational material for Form S–3 ABS after effectiveness of the registration statement would be appropriate in the public interest and consistent with the protection of investors under the proposed conditions discussed below, including the proposed filing conditions. Accordingly, we propose to exempt from Section 5(b)(1) of the Securities Act the use of these materials during that period if certain specified conditions are met, including filing requirements.[186] In doing so, we propose to streamline the conditions in the no-action letters for how the materials can be used and when they must be filed. The proposed rule would make clear, however, that similar to our existing communications exemptions regarding business combination transactions, the exemption would not be available to communications that may technically comply with the rule,

[180] *See* Section 5(c) of the Securities Act (15 U.S.C. 77e(c)).

[181] 15 U.S.C. 77j. *See* Section 5(b)(1) of the Securities Act (15 U.S.C. 77e(b)(1)).

[182] Person-to-person oral offers are allowed during this period and do not have to satisfy the informational requirements of Section 10. *See* note 179 above.

[183] 15 U.S.C. 77j(a).

[184] *See* note 28 above.

[185] See, *e.g.*, ''Investors Gain Clout, Urge Specifics,'' Asset-Backed Alert, Jun. 6, 2003.

[186] See proposed Securities Act Rule 167. Similar to our existing rules that allow communications in business combination transactions outside of the Section 10 prospectus, for ABS informational and computational material we propose a general Securities Act Rule that sets forth the basic exemption and its conditions (proposed Securities Act Rule 167) and a rule under Regulation C (17 CFR 230.401 through 230.498) that sets forth the filing requirements for such communications (proposed Securities Act Rule 426). For more on our exemptive rules in the business combination context, see Release No. 33–7760 (Oct. 22, 1999) [64 FR 61408].

but have the primary purpose or effect of conditioning the market for another transaction or are part of a plan or scheme to evade the requirements of Section 5 of the Securities Act.[187]

The proposed exemption only would be available with respect to registered offerings of investment grade asset-backed securities that meet the requirements of General Instruction I.B.5 of Form S–3. We believe this is consistent with the intent of the existing staff no-action letters. We also believe offerings of asset-backed securities meeting the additional requirements for Form S–3 registration represent the appropriate categories of offerings that should be permitted to use ABS informational and computational material outside of the registration statement prospectus. The proposed rule, like the existing staff no-action letters, would not be available to offerings that meet the definition of asset-backed security but are registered on Form S–1.

Similar to requests we have received regarding non-ABS offerings, the Commission and the staff have received requests over the past several years with respect to ABS to liberalize the use of communications in and around the registered offering process beyond those allowed by the existing staff no-action letters and our proposed exemptive rule.[188] The existing staff no-action letters already permit ABS offerings on Form S–3 to use significantly more material outside of the Section 10 prospectus than non-ABS offerings. Requests for further relaxation of the communications restrictions, including the type of materials that can be used, when they can be used and filing and liability requirements, raise broad issues that also are implicated by requests we have received to relax communication restrictions for non-ABS offerings. Staff in our Division of Corporation Finance is currently developing recommendations to the Commission on potential reforms to the registration process under the Securities Act, including potential reforms to the communications restrictions. We plan to address the issue of whether additional accommodations to the communications restrictions would be appropriate, including for ABS offerings, in connection with any recommendations on broader reforms. Therefore, our approach here involves the existing allowance for additional materials in the ABS context.

Questions regarding the proposed exemptive rule:

- We request comment on the proposed exemptive rule. What is the use of these materials in today's market? Is the proposed exemption consistent with the use of these materials? Does the use of these materials provide investors with enough time and information to make informed investment decisions?
- We do not propose to limit eligibility for the exemption on any variables such as transaction size or asset type. However, under the existing no-action letters we see few filings related to the use of term sheets or computational material outside of MBS. Should we limit eligibility by size, asset type or other variable? Is the use of these materials not necessary for other asset classes? Is there a reason why more of these materials are not filed?
- Should the exemption not be available to ABS targeted to non-institutional investors? For example, should the exemption not be available to ABS expected to have low minimum investment denominations (*e.g.*, less than $1,000) or ABS that are to be listed?
- Is the proposed limitation to registered offerings on Form S–3 still appropriate? If not, under what circumstances should the proposal be extended to offerings on Form S–1? The existing letters and our proposals require filing of material on Form 8–K that is incorporated by reference into the registration statement. They also only apply to the use of materials after the effective date of the registration statement (*e.g.*, before a takedown off of an effective shelf registration statement). How would this procedure work with respect to non-shelf registered offerings on Form S–1?
- Are any clarifying amendments necessary for ABS with respect to Securities Act Rule 134?[189] This rule deems certain limited communications announcing an offering (often called a ''tombstone'' announcement) not a prospectus so long as the communication is limited to the items specified in that rule. What items would be appropriate for ABS (*e.g.*, announcing the asset type being securitized, asset concentrations, sponsor, servicer or weighted average life, maturity or coupon), and why should they be included?

c. Proposed Definition of ABS Informational and Computational Material

In the existing no-action letters, there is an overlap between the descriptions of structural term sheets, collateral term sheets and computational materials. There also are differences regarding which and how materials are to be filed depending on the type of materials used. These differences can create uncertainty as to when material needs to be filed given the overlapping descriptions. We propose to consolidate the descriptions of the materials that may be used under a single definition of ''ABS informational and computational material.'' ABS informational and computational material would be defined as a written communication consisting solely of one or some combination of the following:

- A brief summary of the structure of an offering of asset-backed securities that sets forth the name of the issuer, the size of the offering and the structure of the offering (such as the number of classes, seniority and priority and other terms of payment);
- Descriptive factual information regarding the pool assets underlying an offering of asset-backed securities, typically including data regarding the contractual and related characteristics of the underlying pool assets, such as weighted average coupon, weighted average maturity and other factual information regarding the type of assets comprising the pool;
- Static pool data, as discussed previously, for the sponsor's portfolio, prior transactions or the asset pool itself; or
- Statistical information displaying for a particular class of asset-backed securities the yield, average life, expected maturity, interest rate sensitivity, cash flow characteristics, total rate of return, option adjusted spread or other financial or statistical information relating to the class or classes under specified prepayment, interest rate, loss or other hypothetical scenarios. Examples of such information under the definition would include:
  - Statistical results of interest rate sensitivity analyses regarding the impact on yield or other financial characteristics of a class of securities from changes in interest rates at one or more assumed prepayment speeds;
  - Statistical information showing the cash flows that would be associated with a particular class of asset-backed securities at a specified prepayment speed; and
  - Statistical information reflecting the financial impact of losses based on a variety of loss or default experience, prepayment, interest rate and related assumptions.

These proposed items are intended to include existing structural term sheets, collateral term sheets and computational materials and also to clarify that static pool data would be permitted. Consistent with our proposal discussed below for one unified filing

[187] For similar provisions, see Securities Act Rules 165 and 166 (17 CFR 230.165 and 17 CFR 230.166).

[188] See, *e.g.*, Letter from BMA to Brian J. Lane, Director, Division of Corporation Finance, ''Response to Staff Request for Suggestions Concerning Possible Reforms of Disclosure and Reporting Rules for Mortgage and Asset-Backed Securities'' (Nov. 5, 1996); Letter from BMA to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''Securities Acts Concepts and Their Effects on Capital Formation (Release No. 33–7314) (File No. S7–19–96)'' (Nov. 8, 1996); Letter from MBA to Jonathan G. Katz, Secretary, Securities and Exchange Commission, ''The Regulation of Securities Offerings (File No. S7–30–98)'' (June 30, 1999); Letter from Residential Funding Corporation to Securities and Exchange Commission, ''File No. S7–30–98—The 'Aircraft Carrier Release' '' (June 30, 1999); Letter from BMA to David B.H. Martin, Director, Division of Corporation Finance, ''Securities Act Reform'' (Nov. 30, 2001); and Letter from BMA to Alan L. Beller, Director, Division of Corporation Finance, ''Prior Correspondence Regarding Asset-Backed Securities Reform'' (Apr. 23, 2002).

[189] 17 CFR 230.134.

rule for these materials, ABS informational and computational material may be used that includes one or more of these basic types of materials in one set of materials without concern over the characterization of the material or differing standards regarding when it must be filed.[190]

While we do not intend to change the general scope of the materials that may be used, we do wish to clarify several interpretive issues regarding the no-action letters. First, and as noted above, some have been concerned whether the existing no-action letters would permit ''loan level'' information to be provided. We believe providing data at the individual pool asset level is permitted under the no-action letters and would continue to be permitted under our proposal. In providing such detail, however, issuers and underwriters should be mindful of any privacy, consumer protection or other regulatory requirements regarding the disclosure of individual information, such as including Social Security Numbers, especially given that in most cases the data must be publicly filed with the Commission.

Second, questions have arisen over what information should be considered ABS informational and computational material and filed with the Commission under the no-action letters, and by extension our proposal, regarding investor analytics or other third party services that allow issuers and underwriters to import into a system or otherwise provide data regarding structure or underlying assets that investors can then use to conduct their own analytics and computations. In the case of third party services, a particular relationship with the individual third party service may affect the analysis, such as whether the issuer or the underwriter are affiliates with the service provider or how the compensation is structured with the third party. Otherwise, if the investor analytics or third party service simply allow an investor to perform its own calculations based on collateral and structural inputs and models provided by the issuer or underwriter, only the inputs, models and other information provided by the issuer or underwriter would constitute ABS informational and computational material for purposes of the existing no-action letters and our proposal.[191]

Some also have questioned the format in which the material must be filed, as the third party service may employ a unique file format for the data inputs. Consistent with an allowance already in the no-action letters and in our proposed filing rule discussed below, issuers and underwriters may aggregate data presented in ABS informational and computational material that are to be filed and file such data in consolidated form, so long as any such aggregation does not result in the omission of any information that should have been filed or makes the information misleading. Presentation of the information should be in an understandable form. While the preference is to file material using the same presentation used for investors, just as with other documents that contain computer instructions or formatting code, executable code used by a program to read the information is not to be filed.[192]

Questions regarding the proposed definition of ABS informational and computational material:

- We request comment on the proposed definition of ABS informational and computational material, including the proposed addition of static pool data to the types of materials that may be used. Does the definition reflect the scope of materials that are used under the existing no-action letters?
- Consistent with the no-action letters, we do not propose content restrictions for the material so long as it meets the definition of ABS informational and computational material. Is this still an appropriate approach? Of course, even without content restrictions, the antifraud rules and other liability provisions applicable to the material would continue to apply.
- Are additional interpretive clarifications necessary regarding loan level detail or third party analytics providers? Is any additional clarification needed regarding other uses of ABS informational and computational material?

d. Proposed Conditions for Use

Under our proposed rule, two conditions would be required for ABS informational and computational material:

- The communications would need to be filed to the extent required under our proposed filing rule (discussed in Section III.C.1.e.);[193] and
- The communication must include prominently on the cover page:
  - The issuing entity's name and depositor's name;
  - The Commission file number for the related registration statement;
  - A statement that the communication is ABS informational and computational material used in reliance on our proposed rule; and
  - A legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also must explain to investors that they can get the documents for free at the Commission's website and describe which documents are available free from the issuer or an underwriter.

These proposed conditions are consistent with the requirements of the existing staff no-action letters. We do not propose to require additional legends from the no-action letters that the information contained in the material supercedes all prior ABS informational and computational material for the offering or will be superseded by the description of the offering contained in the Section 10(a) prospectus.[194] Instead, we propose the legend indicated above alerting investors of the documents filed or to be filed with the Commission. We also do not propose to require the condition in the letters that any required filings must be made before an Exchange Act Rule 10b–10 confirmation of sale may be sent.[195] The filing requirement discussed below would be a separate requirement under Commission rules, and thus conditioning the exemption on when a Rule 10b–10 confirmation could be sent does not appear to be warranted as an additional incentive for filing.

While the existing no-action letters require, and our proposal would require, a limited legend, we understand that today issuers or other users of these materials sometimes include additional legends or disclaimers in the materials. Several of these additional legends or disclaimers are inappropriate. As discussed more fully below, the materials are considered prospectuses and in many instances also must be

[190] As a result, the proposed definition would subsume the concept of ''Series Term Sheets'' addressed in the Greenwood Trust Company no-action letter where a Series Term Sheet was defined as a combined collateral and structural term sheet. See note 28 above.

[191] Any subsequent modification or updates to the information provided by the issuer or an underwriter would be considered new ABS informational and computational material no different than if a separate set of materials were prepared. As provided for in the no-action letters and our proposed rule, data presented in ABS informational and computational material that are to be filed may be aggregated and filed in consolidated form, so long as any such aggregation does not result in the omission of any information that should have been filed or makes the information misleading.

[192] See, *e.g.*, Rule 106 of Regulation S–T (17 CFR 232.106).

[193] Consistent with the no-action letters, failure by a particular underwriter to cause the filing of materials in connection with an offering would not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption.

[194] Such statements do not appear applicable considering that not all of the information—particularly the computational material—is included or updated in subsequent materials or the final prospectus.

[195] See 17 CFR 240.10b–10.

filed with the Commission and incorporated by reference into the registration statement. Thus, disclaimers of responsibility or liability that would be inappropriate for a prospectus or registration statement also are inappropriate for these materials.

Examples of inappropriate legends or disclaimers include disclaimers regarding accuracy or completeness and statements requiring investors to read or acknowledge that they have read any disclaimers or legends or the registration statement.[196] Language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy also would be inappropriate. Finally, as the information in many instances must be publicly filed, statements that the information is privileged, confidential or otherwise restricted as to use or reliance also are inappropriate.

Consistent with a similar provision in our communications exemptions for business combination transactions,[197] we propose to clarify that the exemption for ABS informational and computational material is applicable not only to the offeror of the asset-backed securities, but also to any other party to the asset-backed securities transaction and any persons authorized to act on their behalf that may need to rely on and complies with the rule in communicating about the transaction. This ensures that affiliates, underwriters, dealers and others acting on behalf of the parties to the transaction would be permitted to rely on the exemption. While we realize that in many circumstances the exemptions would not be necessary for persons other than the parties to the transaction or the parties making the offer, we do not want to chill the appropriate free flow of the information where it would be helpful to investors and efficient capital formation.

However, we do not propose another provision that currently exists in the communications exemptions for business combination transactions that a good faith immaterial or unintentional failure to file or delay in meeting the filing requirements would not result in a loss of protection under the exemption, primarily because an analogous provision does not exist in the current staff no-action letters for ABS term sheets and computational materials.[198] This provision was added to the business combination rule to address concerns raised by commenters on its proposal regarding the potential chilling of communications and that people would not use the new rule as a result. The ABS market has been operating for almost a full decade under the existing staff no-action letters without such a provision, and the lack of such a provision does not appear to have chilled the use of such materials. However, we do request comment below on whether, and if so why, such a provision would be justified now.

Questions regarding the proposed conditions to the exemption:

- We request comment on our proposed conditions to the exemption, including whether any additional conditions would be appropriate. For example, we request comment on the basic information and legend we propose to require for the materials. Should any additional information be required? Is any of the proposed information not necessary? Is any additional clarification about inappropriate disclaimers or legends necessary?
- Is the proposed clarification that the exemption also is applicable to any other party to the asset-backed securities transaction and any persons authorized to act on their behalf appropriate? Is any additional clarification needed?
- While the ABS market has operated under the no-action letters for nearly a decade without it, should the rule include an exception for a good faith immaterial or unintentional failure to file or delay in meeting the filing requirements? Has the absence of this exception chilled communications? Why would such an exception be appropriate now?

e. Proposed Filing Requirements

As noted above, under the staff no-action letters, there are currently multiple filing requirements depending on the type of materials used and the circumstances in which they are used. We propose to streamline these requirements into a unified filing rule that would apply regardless of the type of materials used. We believe this proposal will result in a more consistent approach and ease compliance without a significant drop in investor protection.

Under our proposal, the following ABS informational and computational material would need to be filed:

- For each prospective investor that had indicated to the underwriter that it would purchase all or a portion of the class of asset-backed securities to which such materials relate, all materials relating to such class that were provided to such prospective investor;[199] and
- For any other prospective investor, all materials provided to that prospective investor after the final terms have been established for all classes of the offering.

If the materials met the conditions above, they would need to be filed on Form 8–K (under proposed Item 6.01 of that Form), and thereby incorporated by reference into the registration statement, by the later of the due date for filing the final prospectus or two business days of first use.

The cover page of Form 8–K would need to disclose the Commission file number of the related registration statement for the asset-backed securities. Consistent with the no-action letters, ABS informational and computational material that relate to abandoned structures or that are furnished to a prospective investor prior to the time the final terms have been established for all classes of the offering where such prospective investor has not indicated to the underwriter its intention to purchase the asset-backed securities need not be filed.

The proposed rule clarifies, as do the letters, that ABS informational and computational material that does not contain new or different information from that which was previously filed need not be filed. In addition, the issuer may aggregate data presented in ABS informational and computational material that are to be filed and file such data in consolidated form, so long as any such aggregation does not result in the omission of any information that should have been filed or makes the information misleading. Finally, the filing rule clarifies that certain communications allowed under other Commission rules, though they may technically fall into the definition of ABS informational and computational material, need not be filed under this filing rule, such as limited notices of the offering meeting the requirements of Securities Act Rules 134, 135 and 135c,[200] Exchange Act Rule 10b–10[201] confirmations, prospectuses filed under Securities Act Rule 424 and research

[196] Such disclaimers of responsibility by the issuer are also inappropriate.

[197] See, *e.g.*, Securities Act Rule 165(d) (17 CFR 230.165(d)).

[198] See, *e.g.*, Securities Act Rule 165(e) (17 CFR 230.165(e)). As noted in the adopting release for Rule 165, this provision is similar to the good faith standard in Rule 508(a) of Regulation D (17 CFR 230.508(a)). In addition, although an immaterial or unintentional failure to file or delay in filing does not render the exemption in Rule 165 unavailable, it is a violation of the filing requirement in Securities Act Rule 425 (17 CFR 230.425). Factors identified in the adopting release to be considered in determining whether a delay in filing is immaterial or unintentional include: the nature of the information, the length of the delay, and the surrounding circumstances, including whether a bona fide effort was made to file timely. See Release No. 33–7760.

[199] This provision would apply regardless of whether the indication to purchase is given before or after the final terms have been established for all classes of the offering.

[200] 17 CFR 230.134; 17 CFR 230.135; and 17 CFR 230.135c.

[201] 17 CFR 240.10b–10.

reports relying on one of our safe harbors discussed below.[202]

Under the existing no-action letters and our proposal, multiple ABS informational and computational material for an offering may need to be filed. For example, if an underwriter provides a set of materials to an investor, and the investor then asks for and the underwriter provides an additional set of materials with the same pool and structure but with different modeling assumptions (*e.g.*, different expectations of future interest rates or prepayment speeds), then both sets of materials would need to be filed if the offering was completed with that same structure or the investor had indicated an intention to purchase. Similarly, if multiple investors requested different analytics on the same structure but with different assumptions, each set of materials would need to be filed under the same circumstances.

Consistent with the no-action letters, ABS informational and computational material would not be excluded from the definition of ''offer,'' ''offer to sell,'' ''offer for sale'' or ''prospectus'' under the Securities Act.[203] To the extent these communications constitute offers, they currently would be subject to liability under Section 12(a)(2) of the Securities Act.[204] The proposed rule would specify that material used in reliance on the proposed exemption would be considered ''prospectuses'' and thus subject to Section 12(a)(2) liability, even if not filed. In addition, the materials that are filed on Form 8–K would be incorporated by reference into the registration statement, which is subject to liability under Section 11 of the Securities Act,[205] consistent with the existing staff no-action letters.

The staff no-action letters were issued when electronic filing on EDGAR was still in its relative infancy. At that time, EDGAR only accepted submissions in ASCII format. Participants argued that data included in computational material, which could be extensive, were in formats that were impractical to convert into ASCII format for electronic filing. In response, we amended our EDGAR filing rules to exempt computational materials filed as an exhibit to Form 8–K from electronic filing.[206] Instead, such materials can currently be filed in paper under cover of a Form SE.[207]

There have been several advances to EDGAR since the original staff no-action letters. In particular, EDGAR now accepts HTML documents in addition to ASCII documents and also accepts filings made over the Internet. Even non-ABS registrants now routinely include detailed statistical and tabular data in their EDGAR filings. We no longer believe that the filing of ABS informational and computational material needs an electronic filing exemption. Filing in paper form is of little practical use to investors as the material cannot be retrieved electronically.

Accordingly, we propose to eliminate the electronic filing exemption for these materials.[208] By treating these materials consistently with nearly all other material filed with the Commission, we hope to realize the same investor benefits and efficiencies in information transmission, dissemination, retrieval and analysis achieved since we began mandating EDGAR filing in 1993.

Questions regarding the proposed filing requirements:

- We believe our proposed unified filing rule will result in better administration and compliance with the filing requirements. However, it is possible that under the proposal some collateral term sheets that are required to be filed today under the no-action letters would no longer be filed. For example, the current no-action letters require all collateral term sheets to be filed. However, the existing letters use overlapping definitions and it is thus difficult to distinguish what truly is a ''collateral term sheet'' versus what is acceptable ''background information'' that can be included in computational material, which is not always required to be filed. We also understand that current practice is to call such materials ''computational material.'' We are thus proposing to codify current practice and treat all ABS informational and computational material the same. However, is it common practice to prepare multiple collateral term sheets separate from computational materials? Would the lack of filing each collateral term sheet result in substantial harm due to a reduction in materials filed?
- Under the no-action letters and our proposals, not all materials need be filed. Should all material related to the offering be filed? Are the conditions for the material that is to be filed appropriate? Should filing requirements distinguish between material provided or containing information provided by the issuer, on the one hand, and materials provided by underwriters or dealers not containing such issuer information, on the other? If so, why, and how should the two be differentiated?
- The filing requirement does not require filing until the later of the filing of the final prospectus or two business days of first use. Should there be an earlier filing requirement, such as always two business days of first use, even if the deadline is before filing of the final prospectus? Conversely, while the proposed deadlines are consistent with the no-action letters, is there any reason to shorten or extend the deadlines, and if so, to what period?
- Are any additional clarifications or modifications needed on when or how such materials need to be filed?
- We request comment on liability requirements for ABS informational and computational material. While the existing liability framework does not appear to have chilled the use of such materials, is there any reason to re-evaluate the liability framework for them? If so, how and why?
- Should we not remove the EDGAR filing exemption for ABS informational and computational material? Are there particular difficulties or unreasonable expenses that would be associated with electronic filing of such material that would still exist under EDGAR? If so, please explain and quantify any such expenses in relation to other electronic filings.

2. Research Reports

a. Current Requirements

The publication or distribution by a broker or dealer of information, opinions or recommendations with respect to an issuer or its securities around the time of a registered offering can present issues under the communications restrictions of the Securities Act, especially if the broker is or will be a participant in the distribution of the securities.[209] In particular, such a report may constitute an offer to sell the securities and would thus constitute an illegal offer if published or distributed before a

[202] Similar clarifying provisions exist in our existing communications exemptions for business combination transactions.

[203] See 15 U.S.C. 77b(a)(3) and 15 U.S.C. 77b(a)(10).

[204] 15 U.S.C. 77*l*(a)(2).

[205] 15 U.S.C. 77k.

[206] See Rule 311(j) of Regulation S–T (17 CFR 232.311(j)).

[207] 17 CFR 239.64.

[208] As electronically filed documents, ABS informational and computational material would be eligible for any applicable hardship exemptions similar to other filings that must be made electronically, such as the temporary hardship exemption in Rule 201 of Regulation S–T (17 CFR 232.201). However, the practice that existed prior to adoption of the electronic filing exemption in Rule 311(j) of Regulation S–T of seeking a continued hardship exemption for the filing of these materials would not be appropriate except in the rarest of circumstances. See Rule 202 of Regulation S–T (17 CFR 232.202). We do not believe that the routine filing of such material would qualify for a continued hardship exemption.

[209] The Commission's Securities Act safe harbors in this area (Rules 137, 138 and 139) refer to the publication by a broker or dealer of information, an opinion or a recommendation with respect to a registrant's securities or in some instances the registrant itself. For sake of simplicity, we refer to these publications in this release as ''research reports.'' By using this convention, we do not mean necessarily to encompass the separate definition of ''research report'' in Section 15D of the Exchange Act (15 U.S.C. 78o–6) added by the Sarbanes-Oxley Act. Nor do our proposals affect in any way the applicability of that Section, any of our other rules with respect to research reports or any applicable SRO rules or other requirements regarding research reports.

registration statement is filed, or it may constitute an illegal written offer to sell securities that does not meet the information requirements of Section 10 of the Securities Act if published or distributed after the registration statement is filed.

To recognize the potential benefits of research reports while limiting their potential misuse to promote a securities offering, the Commission has previously issued Securities Act Rules 137, 138 and 139. These rules create safe harbors that describe circumstances under which brokers or dealers may publish or distribute research reports in and around a registered offering without fear of violating Section 5 of the Securities Act through making an illegal offer or using a non-conforming prospectus. The existing rules look to the broker's participation in an offering, differences between the securities offered and those covered in the research report and the size and reporting history of the issuer.

However, the conditions in those rules do not correspond well to ABS offerings. For example, several of the requirements in the research rules, particularly Rule 139 (the applicable rule where the broker also is participating in the registered offering), require issuer size and reporting history requirements, neither of which are applicable to most asset-backed securities.

In response, the staff of the Division of Corporation Finance issued a no-action letter in 1997 to provide a separate safe harbor for the publication of research reports by brokers or dealers in and around offerings of asset-backed securities registered or to be registered on Form S–3.[210] The no-action letter contained conditions for the safe harbor adapted from Rules 137, 138 and 139 and modified to address asset-backed securities. We now propose to codify this safe harbor with several minor adjustments to add it to our existing research report safe harbors.[211]

b. Proposed ABS Research Report Safe Harbor

As with the existing no-action letter, the proposed safe harbor would be available only with respect to ABS offerings registered on Form S–3. That is, it would only be available with respect to offerings of investment grade asset-backed securities that meet the requirements of General Instruction I.B.5 of Form S–3. Similar to our proposals for ABS informational and computational material and existing Rule 139, we believe offerings of securities meeting the additional requirements for Form S–3 registration represent the appropriate categories of offerings for the safe harbor.

Under our proposal, the publication or distribution by a broker or dealer of a research report with respect to investment grade asset-backed securities meeting the criteria of General Instruction I.B.5 of Form S–3 will not be deemed to constitute an offer for sale or offer to sell such asset-backed securities registered or proposed to be registered, even if the broker or dealer is or will be a participant in the registered offering, if the following conditions are met:[212]

- The broker or dealer must have previously published or distributed with reasonable regularity information, opinions or recommendations relating to Form S–3 ABS backed directly (or, with respect to securitizations of other securities, indirectly) by substantially similar collateral as that directly or indirectly backing Form S–3 ABS that is the subject of the information, opinion or recommendation that is proposed to be published or distributed.
- If the securities for the registered offering are proposed to be offered, offered or part of an unsold allotment or subscription, the information, opinion or recommendation must not:
  - Identify those securities;
  - Give greater prominence to specific structural or collateral-related attributes of those securities than it gives to the same attributes of other ABS that it mentions;[213] and
  - Contain any ABS informational and computational material relating to those securities.
- If the material identifies specific ABS of a specific issuer and specifically recommends that such ABS be purchased, sold or held by persons receiving such material, then a recommendation as favorable or more favorable as to such ABS must have been published by the broker or dealer in the last publication of such broker or dealer addressing such ABS prior to the commencement of its participation in the distribution of the securities whose offering is being registered.
- Sufficient information is available from one or more public sources to provide a reasonable basis for the view expressed by the broker or dealer with respect to the ABS that are the subject of the information, opinion or recommendation.
- If the material published by the broker or dealer identifies other ABS backed directly or indirectly by substantially similar collateral as that directly or indirectly backing the securities whose offering is being registered and specifically recommends that such ABS be preferred over other ABS backed by different types of collateral, then the material must explain in reasonable detail the reasons for such preference.

Not included in the above list of proposed conditions is a condition in the existing no-action letter that the research material must refer as required by law or applicable rules to any relationship that may exist between the issuer of the information, opinion or recommendation and any participant of the offering. A footnote in the incoming request for the no-action letter stated that the condition ''contemplates statutory provisions such as Section 17(b) of the [Securities] Act or relevant SRO standards requiring disclosure of possible sources of bias.'' Because the types of disclosures contemplated already are themselves separate regulatory requirements, we do not believe this additional condition is necessary for the safe harbor. Further, no similar condition exists in Rules 137, 138 or 139 even though the situation is analogous. However, our decision not to propose this condition here does not otherwise affect any requirement that would require disclosure of such relationships.

As with our proposal for the use of ABS informational and computational material, the staff has received several requests to liberalize the ABS research report safe harbor beyond the staff no-action letter.[214] In 1998, the Commission proposed an extensive revision of Rules 137, 138 and 139.[215] Those proposals would have removed or altered several conditions in those rules that were adapted for use in the no-action letter for the ABS research report safe harbor. As with communications restrictions, staff in our Division of Corporation Finance is reviewing those 1998 proposals and the comments received in possibly developing new recommendations to the Commission on potential reforms to the research report safe harbors. To the extent the existing safe harbors are modified, we also would consider similar modifications to the ABS safe harbor. Therefore, our

[210] See note 29 above.

[211] See proposed Securities Act Rule 139a (17 CFR 230.139a). Note that the proposed safe harbor would be a non-exclusive safe-harbor the same as existing Rules 137, 138 and 139. Each of the existing safe harbors in Rules 137, 138 and 139 would remain available with respect to asset-backed securities if the conditions for the particular safe harbor were met.

[212] Consistent with the existing no-action letter, in the case of a multi-tranche registered offering of asset-backed securities, each tranche would be treated as a different security.

[213] Consistent with the staff no-action letter, this condition would not by itself prevent the dissemination of research material that focuses on a single topic (*e.g.*, a single collateral attribute, asset type (but not a particular obligor), structural attribute or market sector).

[214] See, *e.g.*, Letter from BMA to David B.H. Martin, Director, Division of Corporation Finance, ''Securities Act Reform'' (Nov. 30, 2001); and Letter to Alan L. Beller, Director, Division of Corporation Finance, ''Prior Correspondence Regarding Asset-Backed Securities Reform'' (Apr. 23, 2002).

[215] See Release No. 33–7606A (Nov. 13, 1998) [63 FR 67174].

approach here, like our proposal for ABS informational and computational material, is consistent with the existing safe harbor in the staff no-action letter, with the few alterations discussed above.

Questions regarding the proposed ABS research report safe harbor:

- We request comment on the proposed safe harbor. We have reorganized and reordered the conditions from the staff no-action letter and altered the wording slightly to make them easier to read and consistent with terms used in our other proposals. We otherwise did not mean to change the intent or scope of the original no-action letter. Are any additional revisions necessary or would any additional clarifications be appropriate?
- We also request comment on the continued applicability of any of the conditions or whether any additional conditions are necessary. For example, should the condition regarding disclosures of additional relationships be retained?
- Our proposal, like the 1997 no-action letter, does not contain any instructions. Are any instructions or clarifications necessary for a codification of the ABS research report safe harbor?
- Is the limitation to offerings on Form S–3 still appropriate? If not, under what circumstances should the proposal be extended to offerings on Form S–1? In particular, are there any additional conditions that should be required for extending the safe harbor to Form S–1 offerings?

D. Ongoing Reporting Under the Exchange Act

1. Current Requirements

As discussed previously, post-issuance reporting regarding an asset-backed security is important to monitoring and understanding the performance of both the asset pool and transaction parties.[216] Issuers of asset-backed securities are not exempt from Exchange Act reporting requirements. In particular, if asset-backed securities are to be listed on a national securities exchange, they must be registered pursuant to Section 12 of the Exchange Act[217] and file reports pursuant to Section 13(a) of the Exchange Act.[218] Even without a listing, an offering of asset-backed securities pursuant to an effective Securities Act registration statement triggers a reporting obligation under Section 15(d) of the Exchange Act with respect to those securities, at least for a period of time. This obligation automatically suspends as to any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than 300 persons.[219]

As most asset-backed securities are not presently listed and are held by less than three hundred record holders, most publicly offered asset-backed securities cease reporting with the Commission once they qualify for the automatic suspension. In the context of shelf registration statements where a new issuing entity is used for the issuance of each separate series of securities, a new reporting obligation is incurred with respect to those securities. Reporting regarding the asset-backed securities by that issuing entity may stop if those securities subsequently meet the suspension requirements of Section 15(d) of the Exchange Act (*e.g.*, held of record by less than 300 persons at the beginning of any fiscal year other than the fiscal year in which the takedown occurred), notwithstanding that separate issuing entities of the same sponsor may issue additional asset-backed securities during the fiscal year.

Regardless of an ability to suspend reporting under the Exchange Act, ABS transaction agreements often require continued reporting of information to security holders. More and more issuers also are making such information available through their websites. Third party services continue to evolve to provide post-issuance performance data, although coverage may not be uniform.

Even though asset-backed securities are subject to an Exchange Act reporting obligation, the type and frequency of disclosure required under the Exchange Act with respect to operating companies generally is not relevant with respect to asset-backed securities. As a result, issuers of asset-backed securities have requested and received, first through Commission exemptive orders under the Exchange Act and later through scores of staff no-action letters, permission to modify the reports they may file to fulfill their reporting obligation.[220]

Under the modified reporting system, in lieu of quarterly reports on Form 10–Q, reports on Form 8–K typically are filed based on the frequency of distributions on the asset-backed securities (predominantly monthly), which in turn generally match the payment frequency of the underlying pool assets. These filings include a copy of the servicing or distribution report required by the ABS transaction agreements that contains unaudited information about the performance of the assets, payments on the asset-backed securities and any other material developments that affect the transaction. Disclosure that otherwise would be required by certain items of Form 10–Q, such as legal proceedings, material uncured defaults and matters submitted to a vote of security holders, also are required for the Form 8–K distribution report for the period in which such events occurred.

In addition to these ''periodic'' filings on Form 8–K, current reports on Form 8–K also are required, but only for a narrow list of events. Insider reporting under Section 16 also is generally not required.

An annual report on Form 10–K is still required, but the information required is reduced and modified. Audited financial statements for the issuing entity are not generally required. In lieu of audited financial statements, the ABS issuer must file as exhibits to the Form 10–K a servicer compliance statement and a report by an independent public accountant. The servicer compliance statement addresses compliance by the servicer with its obligations under the servicing agreement for the reporting period. The accountant's report generally relates to the report required under the transaction agreements from an independent public accountant attesting to an assertion of compliance regarding particular servicing criteria.

As a result of implementation of the Sarbanes-Oxley Act, and in

[1] See Section III.B.8.e.

[217] 15 U.S.C. 78*l*.

[218] See Section 12(b) of the Exchange Act (15 U.S.C. 78*l*(b)). In addition, asset-backed securities that constitute equity securities also may need to register under Section 12(g) of the Exchange Act (15 U.S.C. 78*l*(g)) if they meet certain size and ownership requirements. Voluntarily registration of such securities also is permitted under Section 12(g). Whether registered under Section 12(b) or 12(g), reporting under Section 13(a) is required.

[219] If the duty to report is suspended, a Form 15 is required to be filed 30 days after the beginning of the first fiscal year it is suspended. See Exchange Act Rule 15d–6 (17 CFR 240.15d–6). See also Exchange Act Rule 12h–3 (17 CFR 240.12h–3). The term ''held of record'' is defined in Exchange Act Rule 12g5–1 (17 CFR 240.12g5–1).

[220] As representative examples of the many actions in this area, see, *e.g.*, Release No. 34–16520 (Jan. 23, 1980) (order granting application pursuant to Section 12(h) of Home Savings and Loan Association); Release No. 34–14446 (Feb. 6, 1978) (order granting application pursuant to Section 12(h) of Bank of America National Trust and Savings Association); *CWMBS, Inc.* (Feb. 3, 1994); and *Bank One Auto Trust 1995–A* (Aug. 16, 1995). Such relief generally includes language stating that similar relief will apply to subsequent issuances of substantially similar securities representing ownership interests in a trust whose principal assets are substantially similar to the assets covered by the no-action letter. After many years of issuing modified reporting no-action letters, the staff ceased requiring each new registrant to obtain a new no-action letter and has instead instructed new ABS issuers they could look to an existing modified reporting no-action letter granted with respect to another issuer which has substantially similar characteristics to the new asset-backed securities for requirements of Exchange Act reporting. If the specified requirements in a particular exemptive order or no-action letter are not satisfied, the relief is not available.

consideration of the existing requirement in the modified reporting system that accountant's attest as to compliance with servicing criteria, the Commission exempted asset-backed issuers from the reporting requirements regarding internal control over financial reporting.[221] They must, however, include a certification required by Section 302 of that Act with their annual report on Form 10–K. In a staff statement originally published on August 29, 2002 and subsequently revised on February 21, 2003, the staff provided a tailored form of certification for use with ABS annual reports to address the realities of their structure as well as to address the information included in their reports under the modified reporting system.[222] In addition, the staff statement provided alternatives with respect to who can sign the certification given the lack of a traditional CEO or CFO. Under the staff statement, a designated officer of the depositor, servicer or trustee may sign the certification, and alternate language for the certification is permitted depending on which entity's officer is making the certification.

2. Determining the ''Issuer'' and Operation of the Section 15(d) Reporting Obligation

We propose to codify the basic modified reporting system for asset-backed securities, including the forms to use and how they are to be prepared. As noted in Section III.A.4., we do not propose a separate Exchange Act reporting system for foreign ABS. Foreign ABS would report on Forms 10–K, 10–D and 8–K, the same as domestic ABS.

First we propose to clarify the definition of ''issuer'' with respect to the reporting obligation and the nature and operation of the Section 15(d) reporting obligation with respect to asset-backed securities. The relevant aspects of the definition of ''issuer'' under the Exchange Act are identical to the Securities Act definition.[223] The modified reporting no-action letters generally have allowed Exchange Act reports to be signed and filed ''on behalf of the trust'' by either the depositor, servicer or trustee.

Similar to our proposal for the Securities Act, we propose to clarify that the depositor for the asset-backed securities, acting solely in its capacity as depositor to the issuing entity, is the ''issuer'' for purposes of the asset-backed securities of that issuing entity.[224] Like our proposal for the Securities Act, our proposal specifies that the person acting in its capacity as depositor for the issuing entity of an asset-backed security is a different ''issuer'' from that same person acting as a depositor for any other issuing entity or for purposes of that person's own securities. For example, the depositor for a particular issuing entity created for the first takedown under a shelf registration statement would be deemed to be a different ''issuer'' than that depositor acting as depositor for a subsequent issuing entity created for a subsequent takedown under the same registration statement.[225] Like our proposed Securities Act rule, our proposed Exchange Act rule would apply regardless of the issuing entity's form of organization.

This approach addresses the reality of ABS offerings by different issuing entities registered on the same shelf registration statement are not related. Furthermore, it places responsibility for Exchange Act reporting with the party most able to oversee the reporting requirements. Finally, this approach differentiates reporting with respect to each issuing entity, and thus each ABS transaction, and does not require continuous reporting with respect to transactions that would otherwise be able to suspend reporting.

Consistent with this proposal, we propose to identify who must sign Exchange Act reports. The particular requirements we propose are presented along with our other proposals for each report discussed below. The principle is that the depositor would be required to sign Exchange Act reports, although we would permit an authorized representative of the servicer to sign on behalf of the issuing entity as an alternative.

As discussed in more detail in the next section, a takedown of asset-backed securities by a new issuing entity triggers a new reporting obligation under Exchange Act Section 15(d). Separate EDGAR filing codes need to be established for the new issuing entity created at the time of each takedown to ensure that Exchange Act reports related to these ABS are filed under a separate file number from other ABS or from the depositor's or sponsor's own securities. Issuers should not ''combine'' reporting regarding multiple transactions in one report or with a report for the depositor's or sponsor's own securities.

In addition to clarifying who is the ''issuer,'' we propose to clarify several interpretive positions regarding the operation of the Section 15(d) reporting obligation with respect to asset-backed securities.[226] The first position relates to the time when any reporting obligation begins. Where an aggregate amount of asset-backed securities to be offered on a delayed basis is registered on Form S–3, until the first takedown of securities under the registration statement, there is no asset pool or securities to report about and no Exchange Act reporting requirement. It is only when the first takedown occurs and ABS are issued that ongoing reporting becomes relevant. Accordingly, we propose to codify a longstanding interpretive position that no annual or other reports need be filed pursuant to Section 15(d) until the first bona fide sale in a takedown of securities under the registration statement.[227] For example, if a Form S–3 shelf registration statement was declared effective on October 1, 2004 but no takedown occurred until February 1, 2005, no reports would need to be filed until after the first takedown. The first reporting obligation would be triggered by the first takedown of asset-backed securities.[228]

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[221] See note 35 above.

[222] See Division of Corporation Finance, ''Statement: Compliance by Asset-Backed Issuers with Exchange Act Rules 13a–14 and 15d–14'' (Aug. 29, 2002); and Division of Corporation Finance, ''Revised Statement: Compliance by Asset-Backed Issuers with Exchange Act Rules 13a–14 and 15d–14'' (Feb. 21, 2003). In addition, the staff subsequently issued two no-action letters to address resecuritizations (*Merrill Lynch Depositor, Inc.* (Mar. 28, 2003)) and auto lease and similar securitizations (*Mitsubishi Motors Credit of America, Inc.* (Mar. 27, 2003)).

[223] See Section 3(a)(8) of the Exchange Act (15 U.S.C. 77c(a)(8)).

[224] See proposed Exchange Act Rule 3b–19 (17 CFR 240.3b–19). The proposed rule in the Exchange Act is identical to the proposed rule for the Securities Act. See proposed Securities Act Rule 191 (17 CFR 230.191) and Section III.A.3.d. We propose to define the term ''asset-backed issuer'' as an issuer whose reporting obligation results from either the registration of an offering of asset-backed securities under the Securities Act, or the registration of a class of asset-backed securities under Section 12 of the Exchange Act.

[225] Likewise, any applicable exemptions from reporting that the personacting as depositor may have with respect to its own securities would not be applicable to the asset-backed securities.

[226] These proposals only would be applicable to reporting obligations under Section 15(d). They are not meant to affect any reporting obligation that may exist as to any class of asset-backed securities registered under Section 12 of the Exchange Act. For example, a Section 15(d) reporting obligation is automatically suspended while a class of securities is registered under Section 12 and reporting pursuant to Section 13(a) of the Exchange Act. See Exchange Act Section 15(d). Hence, any discussion regarding suspension of the Section 15(d) reporting obligation would not be applicable while a class of securities is reporting pursuant to Section 13(a).

[227] See proposed Exchange Act Rule 15d–22(a).

[228] A few modified reporting no-action letters permitted the filing of no reports, including a Form 10–K, if the takedown occurred near the end of a fiscal year and no distribution had occurred prior to the end of the fiscal year. See, *e.g., Fleet Finance Home Equity Trust 1990–1* (Apr. 9, 1991); *AIC*

We also propose to codify the current position that the starting and suspension dates for any reporting obligation with respect to a takedown of asset-backed securities is determined separately for each takedown.[229] For example, if takedowns involving different issuing entities occurred in 2004 and 2005, the reporting obligation related to the issuing entity created with respect to the 2004 takedown would be separate from the reporting obligation related to a different issuing entity created with respect to the 2005 takedown. If at the beginning of the 2005 fiscal year the securities in the 2004 takedown were held of record by less than 300 holders, the reporting obligation related to the issuing entity for the 2004 takedown would be suspended.[230] Of course, the suspension of that reporting obligation would have no effect on any separate reporting obligation related to the issuing entity with respect to the 2005 takedown or related to issuing entities created with respect to any other takedown.

Finally, we propose a separate rule to address the separate Section 15(d) reporting obligation that may be involved in ABS transactions where the issuing entity holds a pool asset that represents the interest in or the right to the payments or cash flows of another asset pool.[231] As discussed in Section III.A., some credit card and auto lease ABS transactions are structured such that the issuing entity's asset pool consists of one or more of such intermediate financial assets. For example, in an issuance trust structure, the asset pool of the issuing entity for the ABS consists of a collateral certificate representing an interest in the asset pool of the credit card master trust. In many instances, the deposit of the collateral certificate into the issuing entity's asset pool must be separately registered along with the registration of the offering of the issuing entity's asset-backed securities, thereby triggering a separate reporting obligation under Section 15(d) with respect to the collateral certificate.

Recognizing that these structures are designed solely to facilitate the structuring of the transaction, separate reports regarding the intermediate financial asset would provide no additional information to investors. Accordingly, we propose that no separate annual and other reports need be filed with respect to the intermediate financial asset's reporting obligation, if the following conditions were met: [232]

- Both the issuing entity for the asset-backed securities and the entity that issued the financial asset were established under the direction of the same sponsor or depositor;
- The financial asset was created solely to satisfy legal requirements or otherwise facilitate the structuring of the ABS transaction;
- The financial asset is not part of a scheme to avoid registration or reporting requirements of the Act;
- The financial asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities; and
- The offering of the asset-backed securities and the offering of the financial asset were both registered under the Securities Act.

The proposed rule would not affect any reporting obligation applicable with respect to the asset-backed securities, nor would it affect any obligation to provide information regarding the financial asset or the underlying asset pool in the ABS reports.[233]

Questions regarding proposed definition of ''issuer'' and operation of the Section 15(d) reporting obligation:

- We request comment on our proposed rule clarifying the ''issuer'' of asset-backed securities for purposes of the Exchange Act. In addition to or in lieu of the depositor, should another entity be considered the ''issuer,'' such as the sponsor, the servicer, the trustee or the issuing entity? What would be the bases for requiring the servicer to be the reporting entity?
- Should the ability to suspend reporting under Section 15(d) be revisited? For example, should it be a condition or required undertaking for registration statement form eligibility or for any of our other proposals that Exchange Act reporting will continue for the life of the asset-backed security? What would be the relative costs and benefits of such a requirement?
- We request comment on our proposed interpretive rules regarding the operation of the Section 15(d) reporting obligation. Should any of these positions be revised? Are additional interpretations or accommodations necessary?
- Should there be an accommodation for separate Section 15(d) reporting obligations that may exist as a result of the registration of an intermediate financial asset, such as in an issuance trust/SUBI structure? Does our proposed list of conditions adequately identify the relevant structures?

3. Reporting Under EDGAR

We do not propose to change how documents regarding asset-backed securities are to be filed on EDGAR. However, there have been inconsistencies by ABS issuers with respect to the filing of registration statements and annual and periodic reports on EDGAR, thus making it difficult and time-consuming for investors and others to locate documents related to particular asset-backed securities. As such, we are providing the following guidance on how to submit documents on EDGAR that will enable investors and others to locate material information about particular asset-backed securities more efficiently. This guidance clarifies existing practice regarding how documents are to be submitted on EDGAR.

Registration statements and annual and other periodic reports are filed in electronic format on EDGAR. Each entity that makes an EDGAR submission is assigned a Central Index Key code, or ''CIK'' code. For submissions to appear under the correct entity, the correct CIK code must be included in the EDGAR submission header.

Because typically no issuing entity exists at the time of filing, the depositor initially submits the registration statement registering the offering of an aggregate amount of asset-backed securities on EDGAR under its own CIK code. With each takedown of asset-backed securities by a new entity off the registration statement, a new reporting obligation under Exchange Act Section 15(d) is created. The EDGAR system will automatically generate a new CIK code and an Exchange Act reporting file number for the new entity when the depositor includes a ''serial'' tag in the header of the prospectus filed under Securities Act Rule 424(b) to report the takedown.[234] The depositor must

Premium Finance Loan Master Trust (Apr. 3, 1995); and *Toyota Auto Receivables 1995–A Grantor Trust* (Dec. 19, 1995). Even if the period was short, we believe that information regarding the servicing of the asset pool for the period (particularly the servicer compliance statement and assessment of compliance with servicing criteria) would still be important information to provide to investors in an annual report, even if no distributions were made to investors prior to the fiscal year end. Accordingly, the accommodation in those letters would no longer be available.

[229] See proposed Exchange Act Rule 15d–22(b).

[230] An annual report on Form 10–K for the 2004 fiscal period with respect to the classes in the 2004 takedown would be required although the report is not required until 90 days after the end of the 2004 fiscal period.

[231] See proposed Exchange Act Rule 15d–23. This proposed rule would not be applicable with respect to underlying securities that do not meet its proposed conditions, such as the securitization of outstanding corporate debt securities or other ABS the offering of which must be separately registered under the Securities Act.

[232] As with note 226 above, these proposals would only be applicable with respect to the reports filed pursuant to Section 15(d) for the intermediate financial asset. They would not affect any other reporting obligation that may exist with respect to the issuer of the intermediate financial asset, such as other securities by that entity.

[233] See proposed Item 1100(d) of Regulation AB.

[234] There are instances when materials relating to a particular ABS transaction may be filed before the filing of the final Rule 424 prospectus that generates the new CIK code and Exchange Act reporting file number for the new issuing entity. For example, with respect to one or more classes of asset-backed

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include the complete name of the new entity as part of the serial tag.[235] Subsequent takedowns from the same registration statement that create new reporting entities should follow the same approach for obtaining separate CIK codes and file numbers through serial tags.[236]

When these procedures are followed, the Rule 424(b) prospectus will appear under both the depositor's and the new issuing entity's CIK codes. The issuer in its capacity as depositor for newly created entities should prepare separate annual, periodic and other reports for each issuing entity and file such reports under the separate CIK code for each issuing entity.[237] To make these subsequent filings under the newly created issuing entities, the sponsor will have to obtain additional access codes by creating and submitting Form IDs to the SEC using the SEC's website.

The creation of new issuing entities by identifying the serial tag in the Rule 424 filing header effectively separates the reporting obligation of the depositor from that of the new entities. Filing separate annual, periodic and other reports for each issuing entity provides easier access to information on a particular issuing entity and its asset-backed securities, which will increase transparency of such information for investors as well as the market for these securities. Also, submitting separate Exchange Act reports under the issuing entity's CIK code will facilitate tracking of the respective issuing entity's reporting obligation, as well as when such reporting obligation may be suspended under Section 15(d) of the Exchange Act, if applicable.

Conversely, we do not believe providing required information for multiple issuing entities in a ''combined'' annual or periodic report containing information regarding multiple issuing entities of a single sponsor or depositor is consistent with these objectives.[238] Combined reporting contributes to confusion on the part of investors attempting to locate a report on EDGAR relating to the securities that are relevant to that investor. Combined reporting forces investors and other users to wade through superfluous information in order to retrieve information that is relevant to them. Further, combined reports create inefficiencies in the storage, retrieval, and analysis of information on EDGAR, which impedes market access and staff review.

Questions regarding reporting on EDGAR:

• We request comment on any additional ways to make reporting on EDGAR less time-consuming or costly for ABS issuers while still providing an efficient and usable retrieval system for investors and the marketplace. For example, under the current system a filer must affirmatively indicate through a serial tag that a new issuing entity is being created when a prospectus is filed pursuant to Rule 424(b) to generate the new issuing entity's separate CIK code. Would it be more effective to require a mandatory serial tag for such filings or establish an ''opt-out'' system for the serial tag (in lieu of the current ''opt-in'' system)?

4. Distribution Reports on Proposed Form 10–D

Under the modified reporting system, periodic distribution and pool performance information is generally filed on Form 8–K in lieu of filing quarterly reports on Form 10–Q. However, investors are not able to easily distinguish these Form 8–K reports from other reporting on Form 8–K, such as the reporting of extraordinary events or the filing of transaction agreements.

Form 8–K is not designed to be a report filed on a periodic basis. Accordingly, we propose one new form type for asset-backed securities, Form 10–D, to act as the report for the periodic distribution and pool performance information.[239] To codify this type of reporting, we propose to require that every asset-backed issuer subject to Exchange Act reporting requirements must make reports on Form 10–D.[240] Consistent with the existing modified reporting system, these reports would be required to be filed within 15 days after each required distribution date on the asset-backed securities, as specified in the governing documents for such securities, although we request comment on this proposed deadline. A report would be required regardless of whether the required distribution was actually made or whether a distribution report was in fact prepared or delivered under the governing documents.

It is our understanding that in most ABS transactions, the trustee is the recipient and not necessarily the preparer of this information, and the depositor or the servicer is thus in a better position with respect to possession, responsibility and awareness of the information that would need to be reported. Our proposed

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securities that are to be listed on a national securities exchange, an Exchange Act registration statement, such as a Form 8–A (referenced in 17 CFR 249.208a), often must be filed before the final Rule 424(b) prospectus is filed. In addition, under the existing no-action letters and our proposals regarding ABS informational and computational material, such material could be voluntarily filed on Form 8–K before the final Rule 424(b) prospectus is filed.

We are considering programming changes to the EDGAR system to permit the generation of a new CIK code and an Exchange Act reporting file number for a new issuing entity before the Securities Act Rule 424(b) prospectus is filed. Until these programming changes are made, such materials should be filed under the CIK code for which the Securities Act registration statement was filed, which is usually the depositor's CIK code. Note that if a new CIK code and Exchange Act reporting file number for the new issuing entity had been previously generated (*e.g.*, a preliminary prospectus with respect to the offering had been filed), these materials should be filed under the CIK code of the issuing entity. In either case, to insure increased efficiencies in the filing and processing of such material, we encourage the depositor to list the name of the issuing entity on the cover page of the material. For example, to ensure that the certifications that we receive from the exchanges may be properly matched against the Form 8–A's on file, the Form 8–A should identify the specific issuing entity. Where the Form 8–A calls for the name of the registrant, depositors should list their name but include a notation that they are filing on behalf of the issuing entity and name the issuing entity.

[235] In the past, issuing entity names have been truncated in order to comply with EDGAR requirements regarding the permissible length of a company name. These abbreviations, historically assigned by SEC staff, sometimes were not consistently applied. A recent upgrade to the EDGAR system now permits company names of up to 150 characters in length. See Release No. 33–8409 (Apr. 19, 2004). The staff believes this revision will alleviate many of the problems we have seen in the past regarding inconsistent abbreviation of names.

[236] For example, if a depositor completes five takedowns from a shelf registration statement and creates five separate issuing entities, then each separate issuing entity should have its own CIK code. After obtaining a CIK code for the issuing entity, the depositor must obtain additional EDGAR codes from the Commission for the issuing entity to enable it to file additional documents under the CIK code. The Commission recently adopted rules to change this process. See Release No. 33–8410 (Apr. 21, 2004).

[237] Once the issuing entity's CIK code is generated, subsequent filings relating to the transaction relating to that issuing entity should be filed under that CIK code. The filing of documents under the issuing entity's CIK code under cover of Form 8–K, such as unqualified legality and tax opinions, would not affect the incorporation by reference of these documents into the registration statement originally filed under the depositor's CIK code.

[238] We understand the staff in a few isolated instances has previously allowed combined reporting on a limited basis. See, *e.g., TMS Home Equity Trust 1992–D–I; TMS Home Equity Trust 1992–D–II* (Mar. 22, 1993) and *The Money Story, Inc.; TMS Home Equity Trust 1993–A–I* (Aug. 4, 1993) (allowing combined reporting with respect to two trusts). The staff believes these rare exceptions have led to the current practice of a few registrants combining in some instances information on dozens of issuing entities into a lengthy combined report. The result is filings that can run for hundreds of pages that are unfriendly to the user.

[239] See proposed 17 CFR 249.312. Like our other Exchange Act reports, the proposed form would be subject to all applicable requirements of the general rules and regulations under the Exchange Act for the preparation, signing and filing of Exchange Act reports, including Regulation 12B (17 CFR 240.12b–1 *et seq.*); Regulation 13A (17 CFR 240.13a–1 *et seq.*); and Regulation 15D (17 CFR 240.15d–1 *et seq.*). In addition, the report would be required to be submitted in electronic form in accordance with the EDGAR rules set forth in Regulation S–T.

[240] See proposed Exchange Act Rules 13a–17 and 15d–17.

signature requirements for Form 10–D reflect this understanding by proposing that the report must be signed by either the depositor, or in the alternative, on behalf of the issuing entity by a duly authorized representative of the servicer. If multiple servicers were involved in the servicing of the pool assets, a duly authorized representative of the master servicer (or entity performing the equivalent functions) would need to sign if a representative of the servicer was to sign the report on behalf of the issuing entity. These signature proposals are consistent with our proposals for who must sign the annual report on Form 10–K, the Section 302 certification and the proposed report on an assessment of compliance with servicing criteria. We do not propose to permit the trustee to sign the report as an alternative to the depositor or the servicer.

Consistent with the modified reporting system, the proposed disclosure content for Form 10–D would consist of the distribution and pool performance information for the distribution period as well as certain non-financial disclosures, similar to those required by Part II of Form 10–Q, that occurred during the period. The proposed menu of disclosure items for Form 10–D is presented in the following table:

PROPOSED DISCLOSURE FOR FORM 10–D

Form items and source of disclosure required
Item 1. Distribution and Pool Performance Information (proposed Item 1119 of Regulation AB).
Item 2. Legal Proceedings (proposed Item 1115 of Regulation AB).
Item 3. Sales of Securities and Use of Proceeds (Item 2 of Part II of Form 10–Q).
Item 4. Defaults Upon Senior Securities (Item 3 of Part II of Form 10–Q).
Item 5. Submission of Matters to a Vote of Security Holders (Item 4 of Part II of Form 10–Q).
Item 6. Significant Obligors of Pool Assets (proposed Item 1111(b) of Regulation AB).
Item 7. Significant Enhancement Provider Information (proposed Item 1113(b)(2) of Regulation AB).
Item 8. Other Information.
Item 9. Exhibits (Item 601 of Regulation S–K).

The requirement with respect to distribution and pool performance information would require the registrant to provide the information required by proposed Item 1119 of Regulation AB and to attach as an exhibit to the Form 10–D the distribution report delivered to the trustee or security holders, as the case may be, pursuant to the transaction agreements for the related distribution date. Recognizing that the distribution report specified under the transaction agreements will likely contain most, if not all, of the disclosures about the distribution and pool performance that would be required by proposed Item 1119 of Regulation AB, any information required by that Item that was included in the attached distribution report would not need to be repeated in the Form 10–D. As a result, and as is typically the case today with distribution reports filed under Form 8–K, no additional information may be required in the Form 10–D with respect to distribution or pool performance if all of the required information was included in the attached distribution report. However, taken together, the attached distribution report and the information provided in the Form 10–D would need to contain all of the information required by Item 1119 of Regulation AB.

Proposed Item 1119 of Regulation AB would require a description of the distribution and the performance of the asset pool during the distribution period. Recognizing the variety of asset types that can be securitized and the variety of transaction structures that can be used, we do not propose a standardized format for the presentation of either the information required by Item 1119 of Regulation AB or the distribution report prepared under the transaction agreements. However, while the material characteristics will vary depending on the nature of the transaction, we believe there are certain broad categories of disclosure and examples of common characteristics that can be identified as representative of the material disclosure that should be provided and that is often provided today. Proposed Item 1119 of Regulation AB would set forth examples of such information based on the disclosures currently provided under the modified reporting system. The actual disclosure to be provided would need to be tailored to the asset pool and transaction involved. In addition, appropriate introductory and explanatory information should be provided to introduce material terms, parties and abbreviations used, and statistical information should be presented in tabular and graphical formats, if such presentations will aid understanding.

Examples of material characteristics in proposed Item 1119 of Regulation AB, which are based upon disclosures commonly provided today, include:

- Applicable record dates, accrual dates, determination dates and distribution dates.
- Cash flows received and their sources (including portfolio yield, if applicable).
- Calculated amounts and distribution of the flow of funds for the period itemized by type and priority of payment, including fees and expenses, payments with respect to enhancement, distributions to security holders and excess cash flow.
- Beginning and ending principal balances of the asset backed securities.
- Beginning and ending balances of transaction accounts, such as reserve accounts, and account activity during the period.
- Amounts drawn on any credit enhancement or other support and amounts still available.
- Updated pool composition information for the period, such as the number and amount of pool assets at the beginning and ending of each period, weighted average coupon, weighted average life, weighted average remaining term, pool factors, prepayment amounts, current payment/prepayment speeds and other prepayment or interest rate sensitivity information.[241]
- Delinquency and loss information for the period.
- The amount, terms and purpose of any advances made or reimbursed during the period.
- Material modifications, extensions or waivers to pool asset terms, fees, penalties or payments.
- Breaches of material pool asset representations or warranties or transaction covenants.
- Information on ratio, coverage or other tests used for determining any early amortization, liquidation or other performance trigger and whether the trigger was met.

Because we are proposing to expand the availability of prefunding periods, revolving periods and master trusts, we also propose to expand the related periodic disclosure regarding these structures to include information regarding any new issuance of asset-backed securities backed by the same asset pool and any pool asset additions, removals, substitutions and repurchases, such as through a prefunding or revolving period. Such information would include any material changes in solicitation, credit-granting, underwriting, origination, acquisition or pool selection procedures.

Further, if the addition, removal or substitution of pool assets had materially changed the composition of the asset pool as a whole, updated pool composition information would be required to the extent such information had not been provided previously. Such information would include information required by proposed Items 1107, 1109, 1110 and 1111 of Regulation AB applied

[241] For asset-backed securities backed by leases where a portion of the cash flow to repay the asset-backed securities is anticipated to come from the residual value of the physical property underlying the leases, this information also would include turn-in rates and residual value realization rates.

taking the revised pool composition into account. No information would be required, however, if substantially the same information had been provided previously in an effective registration statement under the Securities Act or a prospectus timely filed pursuant to Securities Act Rule 424 under the same CIK code regarding a subsequent issuance of asset-backed securities backed by the same pool.

Regarding the other proposed disclosure items for Form 10–D, the information regarding legal proceedings, sales of securities, use of proceeds, submission of matters to a vote of security holders, defaults on senior securities and other information is consistent with the non-financial disclosures in Form 10–Q that are required under the modified reporting system.[242] For legal proceedings, we would reference the tailored ABS disclosure in proposed Item 1115 of Regulation AB. As with legal proceedings disclosure in Form 10–Q, a proceeding only would need to be reported for the distribution period in which it first became a reportable event and in subsequent periods where there had been material developments. The other proposed disclosure items would contain cross-references to similar items in Form 10–Q.

Proposed Items 6 and 7 of Form 10–D would require updated financial information about significant obligors and providers of enhancement, to the extent updated information was required. Such information only would need to be included in the first distribution report filed after updated financial information regarding the third party would be required under Regulation S–X. Reports for periods in which updated information would not be required would reference the previous filing that included the most recent information. As discussed in Section III.B.9., alternative methods may be available, subject to conditions, to present information regarding the third party, such as through incorporation by reference or by including a reference to the third party's Commission filings.

Similar to recent revisions to Form 10–Q, we propose to provide that if any event occurs that required the filing of a Form 8–K during the period covered by the particular distribution report, but was not disclosed on Form 8–K, the Form 10–D must include the disclosure prescribed by the relevant Form 8–K item for the period during which that event occurred. Like Form 10–Q, this would apply to all Form 8–K items, including those covered by the recently enacted Form 8–K safe harbor from liability under Exchange Act Section 10(b) or Rule 10b–5 for failure to timely file certain Form 8–K reports.[243] With respect to the Form 8–K items covered by the safe harbor, the safe harbor extends only until the due date of the next report of the issuer for the relevant periodic period in which the Form 8–K was not timely filed. As with similar disclosure now required in Forms 10–Q and 10–K, failure to make such disclosure would subject the issuer to potential liability under Section 10(b) and Rule 10b–5, in addition to potential liability under Section 13(a) or 15(d).

Request for comment on proposed Form 10–D:

- We request comment on proposed Form 10–D. Would a separate form type for distribution reports be beneficial? Should additional parties be permitted to sign the report? Is there any additional identifying information that should be provided on the cover page?
- What should be the appropriate deadline for Form 10–D reports? Given that the Form 10–D will in most cases consist only of the distribution report and also given advancements in technology, should the proposed 15-day deadline be shorter (*e.g.*, 2 business days, 5 days, 10 days)? Should the deadline be tied to the delivery of the distribution report to the trustee? If so, what would be the effect of such a deadline if there was a failure to send a report to the trustee? Should the deadline be tied to the end of the distribution period?
- As an alternative to the current system, should it be required (*e.g.*, through a condition to an exemption to filing with the SEC or for continued Form S–3 eligibility) that distribution reports are posted on a specified party's website within a certain time period (*e.g.*, same day or 2 business days after the distribution date) and not filed with the Commission until the Form 10–K (*e.g.*, so that it is filed and subject to the Section 302 certification)? What would be the advantages and disadvantages of such a system? Under such a system, should non-financial disclosures, such as those incorporated from Part II of Form 10–Q, still be required to be filed during the distribution period in which the events occurred?
- Should the frequency of the Form 10–D report be based on the payment or collection frequency of the underlying pool assets, regardless of the distribution frequency of the asset-backed securities, so that updated pool performance information is included? How often do payments on the asset-backed securities not match payments on the underlying pool assets?
- The modified reporting system did not clearly contemplate any filing extensions for distribution information, such as those available under Exchange Act Rule 12b–25.[244] Under that rule, registrants that face extenuating circumstances have the ability to gain a one-time filing extension for five calendar days for quarterly reports and fifteen calendar days for annual reports, if certain conditions are met. Is there a reason to provide a comparable filing extension for proposed Form 10–D? If so, what would be the length of such an extension (*e.g.*, 2, 5 or 10 days)? Under what circumstances or conditions should such an extension be available?
- We request comment on the manner of presenting distribution and pool performance information. Should the distribution report required by the transaction agreements still serve as the primary method for presentation of this information? Are there better alternatives to our proposal regarding the interaction between Form 10–D and that report? Should the presentation of any information be standardized?
- Are there any modifications that should be made to the list of representative items that should be disclosed regarding the distribution or asset performance? In particular, are there additional items that should be added or should any proposed items be deleted? For example, what amount of detail regarding updated pool composition information should be specified? Should there be a requirement to update all or some part of the information required by proposed Item 1110 of Regulation AB? Should any of the representative items be specifically mandated for disclosure and not just as examples of representative material disclosure?
- Our proposed disclosure regarding changes to the asset pool, such as those that involve a master trust or a prefunding or revolving period, could result in additional disclosures from those that are currently provided today, particularly regarding material changes to the composition of the asset pool. Are these disclosures desirable? Are there alternatives to provide this information to investors? Should some or all of this information instead be filed on a more current basis on Form 8–K? Is the exception for providing this information if it is provided in a Rule 424 prospectus filed under the same CIK code appropriate? Should disclosures only be required if the pool differs materially by a certain percentage from the original pool? Should there instead be an express limitation in the definition of asset-backed security that pool changes may not materially alter the characteristics of the asset pool or alter the characteristics by some set percentage (*e.g.*, 2%, 5%)? How should such changes be measured?
- If a previous filing, including the registration statement or ABS informational and computational material, included the

[242] See Release No. 33–8400 (Mar. 16, 2004) [69 FR 15594] (the ''Form 8–K Release'') regarding recent changes to these items of Form 10–Q that would be incorporated into the similar disclosure that would be required under proposed Form 10–D.

[243] As discussed more fully in Section III.D.8., this safe harbor only applies to a failure to file a report on Form 8–K for certain specified items. Material misstatements or omissions in a Form 8–K will continue to be subject to Section 10(b) and Rule 10b–5 liability. In addition, the safe harbor does not apply to liability under Section 13(a) or 15(d) or with respect to any failure to satisfy any other separate disclosure obligation that may exist.

[244] 17 CFR 240.12b–25.

results of any payment or sensitivity analyses, models or estimates or projections regarding items such as expected yield, maturity or pool performance, should there be a requirement to disclose any material changes between the previously disclosed information and the actual performance of the pool assets or the asset-backed securities? Should any such information appear in the annual report on Form 10–K as well as, or in lieu of, Form 10–D?

• We also request comment regarding the proposed other disclosure items for Form 10–D. Should any additional disclosures be required (*e.g.*, quantitative and qualitative disclosures about market risk required by Item 305 of Regulation S–K)? [245] Should any of the proposed disclosures codifying the principles of the existing modified reporting system now be omitted?

5. Annual Reports on Form 10–K

Similar to our proposed general instructions for Forms S–1 and S–3, we propose a separate general instruction for Form 10–K to specify how that form is to be used for an annual report with respect to asset-backed securities.[246] Under the proposed instruction, the depositor's name and sponsor's name also would need to be listed on the cover page of the Form 10–K.[247]

The proposed instruction would clarify who is to sign the Form 10–K. Consistent with the existing requirements for who must sign the Sarbanes-Oxley Section 302 certification, the report would need to be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor, or on behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer. If a servicer was to sign the report on behalf of the issuing entity and multiple servicers were involved in the servicing of the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent functions) would sign. For the same reasons as the Form 10–D, we do not propose to permit the trustee to sign the report as an alternative to the depositor or the servicer.

The proposed general instruction would identify the existing items in the form that may be omitted as well as substitute items from proposed Regulation AB that would be required. Any other applicable items specified in Form 10–K would continue to be required.[248] The requirements specified are consistent with the modified reporting system. The proposed application of the disclosure items for Form 10–K is presented in the following table:

PROPOSED DISCLOSURE FOR FORM 10–K FOR ABS

Existing form items	Required if applicable	May be omitted
Item 1. Business		•
Item 2. Properties		•
Item 3. Legal Proceedings		•
Item 4. Submission of Matters to a Vote of Security Holders	•	
Item 5. Market for Registrant's Common Equity and Related Stockholder Matters	•	
Item 6. Selected Financial Data		•
Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations		•
Item 7A. Quantitative and Qualitative Disclosure About Market Risk		•
Item 8. Financial Statements and Supplementary Data		•
Item 9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure	•	
Item 9A. Controls and Procedures		•
Item 9B. Other Information	•	
Item 10. Directors and Executive Officers of the Registrant		• [1]
Item 11. Executive Compensation		• [1]
Item 12. Security Ownership of Certain Beneficial Owners and Management		• [2]
Item 13. Certain Relationships and Related Transactions		• [1]
Item 14. Principal Accountant Fees and Services		•
Item 15. Exhibits and Financial Statement Schedules	•	
Additional disclosure items from Regulation AB		
Item 1111(b) of Regulation AB, Significant Obligor Financial Information	•	
Item 1113(b)(2) of Regulation AB, Significant Enhancement Provider Financial Information	•	
Item 1115 of Regulation AB, Legal Proceedings	•	
Item 1117 of Regulation AB, Affiliations and Certain Relationships and Related Transactions	•	
Item 1120 of Regulation AB, Compliance with Applicable Servicing Criteria	•	
Item 1121 of Regulation AB, Servicer Compliance Statement	•	

[1] If the issuing entity does not have any executive officers or directors.
[2] Except for Item 403(a) of Regulation S–K and if the issuing entity does not have any executive officers or directors.

As noted in the table above, security ownership information required by Item 403(a) of Regulation S–K would be required. In addition, if the issuing entity had its own executive officers, board of directors or persons performing similar functions, all of Item 403 of Regulation S–K, as well as Items 401, 402 and 404 of Regulation S–K, would be required. As discussed in Section III.B.1., we do not propose to require audited financial statements for the issuing entity, nor do we propose to add reporting requirements regarding internal control over financial reporting.

Regarding the proposed items to be included from Regulation AB, information about legal proceedings

[245] 17 CFR 229.305.

[246] See proposed General Instruction J. to Form 10–K. We also propose to codify existing staff position that General Instruction I. to Form 10–K (Omission of Information by Certain Wholly-Owned Subsidiaries) is not applicable with respect to asset-backed issuers.

[247] While we propose to include the identification of these additional parties on the cover page, the report should still be filed on EDGAR only under the issuing entity's CIK code. See Section III.D.3.

[248] As is generally the case today, if any item is inapplicable or the answer thereto is in the negative, an appropriate statement to that effect shall be made. See Exchange Act Rule 12b–13 (17 CFR 240.12b–13).

required by proposed Item 1115 of Regulation AB would need to be provided, as well as information on affiliate relationships and related party transactions required by proposed Item 1117 of Regulation AB. Updated financial information regarding significant obligors and enhancement providers also would be required, although alternative methods may be available, subject to conditions, to present the information, such as through incorporation by reference or by including a reference to their Commission filings. Our proposed reporting requirement regarding an assessment of compliance with servicing criteria is discussed in Section III.D.7.

We propose to codify the requirement in the modified reporting system that a servicer compliance statement must be filed as an exhibit to the Form 10–K.[249] The servicer compliance statement requires a statement of compliance regarding the servicer's obligations under the particular servicing agreement for the ABS transaction. This is different from both our proposed assessment of compliance with servicing criteria, which is an assessment against a single set of criteria applicable to all ABS transactions, and the Section 302 certification, which is related to disclosure in Commission reports.

Like the existing requirement under the modified reporting system, the proposed servicer compliance statement would be a statement, signed by an authorized officer of the servicer, to the effect that a review of the activities of the servicer and its performance under the servicing agreement had been made under the officer's supervision, and that to the best of the officer's knowledge and except as otherwise disclosed, the servicer has fulfilled its obligations under the agreement in all material respects throughout the reporting period. If multiple servicers were involved in servicing the pool assets, a separate compliance statement would be required from each servicer that meets the criteria in proposed Item 1107(a) of Regulation AB (*i.e.*, master servicer, each affiliated servicer, each unaffiliated servicer that services 10% or more of the pool assets and any other servicer that performs a material aspect of the servicing of the pool assets). We believe this is consistent with general practice and should result in coverage of the material aspects of the servicing function.

[249] See proposed Item 1121 of Regulation AB. Proposed amendments to Item 601 of Regulation S–K would specify that the servicer compliance statement would be filed as Exhibit 35 to the Form 10–K.

Questions regarding proposed Form 10–K disclosure:

- We request comment on the proposed general instruction to Form 10–K. Should additional or different parties be permitted to sign the report? Should the designated person to sign be someone else, such as the entity's principal executive officer?
- Is the proposed menu of disclosure items appropriate? Should any additional items be included or omitted? Is the proposed presentation of this menu clear? Are there any additional instructions that should be included for ABS offerings?
- Should updated pool composition information be required for the Form 10–K? For example, several modified reporting no-action letters require aggregate distribution and pool performance information for the reporting period. Should such disclosure be required for the Form 10–K? Should there be a requirement to update and restate all or some part of the information required by proposed Item 1110 of Regulation AB, such as static pool information?
- Should specific financial information be required regarding any transaction parties, such as the sponsor, servicer or issuing entity? If so, for which parties should information be required? What information should be required (*e.g.*, audited financial statements)? Under what circumstances should such information be required? Should any such information also be provided in distribution reports on Form 10–D?
- We request comment on the proposed servicer compliance statement. Would such a statement still be beneficial? In particular, would this compliance statement still be necessary given the Sarbanes-Oxley Section 302 certification and the proposed assessment of compliance with servicing criteria?
- If multiple servicers are involved, should additional statements be required by servicers other than the master servicer? Is the proposal to require each Item 1107(a) servicer to submit a compliance statement appropriate? Should compliance statements be limited to only the master servicer? Should servicer compliance statements be required for Form 10–D's as well?

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

In June, 2003, the Commission adopted amendments to its general rules relating to certifications required by the Sarbanes-Oxley Act, including providing the form of the Section 302 certification in the exhibit requirements in Item 601 of Regulation S–K.[250] We propose to amend Item 601 of Regulation S–K to add also the specific form and content of the required ABS Section 302 certification to the exhibit filing requirements.[251]

[250] See Release No. 33–8238 (Jun. 5, 2003) [68 FR 36636].

[251] See proposed amendments to Item 601 of Regulation S–K and Exchange Act Rules 13a–14 and 15d–14. Under Exchange Act Rules 13a–14 and 15d–14, the requirements relating to the ABS Section 302 certification are specified in paragraph (d) of those Rules. The proposed amendments to Item 601 of Regulation S–K would segregate the separate forms of Section 302 certifications for non-ABS issuers (required by paragraph (a) of Exchange Act Rules 13a–14 and 15d–14) from those for ABS filings (paragraph (d) of Exchange Act Rules 13a–14 and 15d–14). In both instances, Section 302 certifications would still be filed under Exhibit 31. We also are proposing to revise Exchange Act Rules 13a–14(d) and 15d–14(d) to delete from those paragraphs the detailed description of the contents of the ABS Section 302 certifications. We propose several other technical amendments to the rules regarding certifications, including amendments to Exchange Act Rule 12b–15 and paragraph (c) of Exchange Act Rules 13a–14 and 15d–14 to confirm the Commission's intention that those provisions also apply with respect to ABS Section 302 certifications required by paragraph (d) of Exchange Act Rules 13a–14 and 15d–14.

In specifying the form of the ABS Section 302 certification, we propose several amendments to the form provided in the revised staff statement to reflect our other substantive Exchange Act proposals.[252] Other changes reflect the approach that the language of the certification must not be revised in providing the certification apart from the alternatives specified. Instead, any issues should be addressed through disclosure in the reports. The proposed form of certification would be as follows:[253]

CERTIFICATION

I, [identify the certifying individual], certify that:

1. I have reviewed this report on Form 10–K and all reports on Form 10–D required to be filed in respect of the period covered by this report on Form 10–K of [identify the issuing entity];

2. Based on my knowledge, the information in these reports, taken as a whole, does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading as of the last day of the period covered by this report;

3. Based on my knowledge, all of the distribution, servicing and other information required to be provided under Form 10–D for the period covered by this report is included in those reports;

4. [I am responsible for reviewing the activities performed by the servicer(s) and based on my knowledge and the compliance review conducted in preparing the servicer compliance statement required in this report under Item 1121 of Regulation AB, and

[252] We believe the combination of these and other proposed amendments would render the two staff no-action letters issued subsequent to the revised staff statement no longer necessary. See *Merrill Lynch Depositor, Inc.* (Mar. 28, 2003) and *Mitsubishi Motors Credit of America, Inc.* (Mar. 27, 2003).

[253] Unlike Section 302 certifications, certifications required by Section 906 of the Sarbanes-Oxley Act are required only in periodic reports that contain financial statements filed by the issuer. See 15 U.S.C. 1350. We do not propose to require reports on Form 10–K to contain the ABS issuer's financial statements, and thus a Section 906 certification requirement would not be triggered.

except as disclosed in the reports, the servicer has fulfilled its obligations under the servicing agreement; and]

[Based on my knowledge and the servicer compliance statement required in this report under Item 1121 of Regulation AB, and except as disclosed in the reports, the servicer has fulfilled its obligations under the servicing agreement; and]

5. This report discloses all material instances of noncompliance with the servicing criteria as provided in Item 1120 of Regulation AB based on an assessment of compliance with such criteria.

[In giving the certifications above, I have reasonably relied on information provided to me by the following unaffiliated parties [name of servicer, sub-servicer, co-servicer, depositor or trustee].]

Date: _____

_____

[Signature]

[Title]

Compared to the revised staff statement, paragraphs 1 and 3 would be revised to reflect the addition of proposed Form 10–D and the fact that the certification covers the information filed in those distribution reports rather than Form 8–K. Paragraph 4 would refer to the servicer compliance statement that would be explicitly required by our rules. In addition and consistent with the revised staff statement, two alternatives would be provided for paragraph 4 depending on who was signing the Form 10–K report. The first version would be used when the servicer was signing the report on behalf of the issuing entity. The second version would be used when the depositor was signing the report. Paragraph 5 of the certification would be revised to refer specifically to our proposed assessment of compliance with servicing criteria. Consistent with the nature of that proposal and consistent with our recent amendments to our certification requirements,[254] the paragraph also would reference ''material instances of noncompliance'' in lieu of language in the revised staff statement that refers to ''significant deficiencies.''

Because asset-backed issuers do not typically have a principal executive officer or principal financial officer, the signature requirements for the ABS certifications differ from other issuers. Consistent with the revised staff statement, our proposed amendments would specify who must sign the certification. We propose that the certification must be signed by either the senior officer in charge of securitization of the depositor if the depositor is signing the Form 10–K report, or the senior officer in charge of the servicing function of the servicer if the servicer is signing the Form 10–K report on behalf of the issuing entity.[255] If multiple servicers were involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent functions) must sign if a representative of the servicer is to sign, and references in the certification would relate to the master servicer. As is the case today for all Section 302 certifications, a natural person must sign the certification in his or her individual capacity, although the title of that person in the organization of which he or she is an officer may be included under the title.

These signature requirements are consistent with our proposal for who must sign the Form 10–K and who must make the assessment of compliance with servicing criteria. The same person that signs the Form 10–K must sign the Section 302 certification. As we are not proposing to permit the trustee to sign the annual report, we do not propose the third alternative in the revised staff statement of allowing a representative of the trustee to sign the Section 302 certification.

Consistent with the revised staff statement, we propose to include an instruction to the certification to clarify that because the signer of the certification must rely in certain circumstances on information provided by unaffiliated parties outside of the signer's control, the signer in such situation may reasonably rely on information that unaffiliated trustees, depositors, servicers, sub-servicers or co-servicers have provided. As is the case today, if the signer does so, it would need to provide an additional statement in the certification identifying the unaffiliated parties on which the signer reasonably relied. Like the revised staff statement, we do not propose to specify the manner in which reasonable reliance may be established. The reasonable reliance instruction for the Section 302 certification would not be applicable with respect to affiliated parties, nor would it be applicable with respect to information from the registered public accounting firm performing the attestation on the assessment of compliance with servicing criteria.

Questions regarding certifications:

- We request comment on the certification requirements for ABS filings. Are any modifications needed to the form of certification? For example, is paragraph 5 necessary if the proposed assessment of compliance with servicing criteria is adopted? Are any modifications necessary for particular types of ABS transactions?
- Should additional or different persons be permitted to sign the proposed certification? For example, should we permit the trustee to sign the certification? Should both the depositor and the servicer sign a certification? Should the designated person to sign for an entity be someone else, such as the entity's principal executive officer?
- Because they would be filing Form10–D distribution reports, ABS issuers would be exempt from filing Form 10–Q quarterly reports. Should each Form 10–D be certified directly rather than at the end of the fiscal period?
- Is the reasonable reliance instruction necessary?

7. Report of Compliance With Servicing Criteria and Accountant's Attestation

a. Current Requirements

i. Requirements Under the Modified Reporting System

As noted above, the modified reporting system does not require audited financial statements for the issuing entity in the annual report on Form 10–K, but instead requires a report by an independent public accountant regarding servicing. This framework was developed based on the recognition that one of the most important elements affecting an investor's assessment of a particular asset-backed security is the performance of the servicer and that an independent third party checking some aspect of the servicing function provides a certain level of assurance and transparency regarding the servicer's performance.

The form of reporting and accountant involvement varies based on the no-action letter relied upon in preparing the Form 10–K. The most common example involves an assessment and assertion by the servicer of compliance with standard servicing criteria and an examination-level attestation of the servicer's assertion by an independent public accountant. This disclosure-based system identifies for investors those aspects of the standard servicing criteria with which the transaction is in material compliance.

Another form of reporting that is used more rarely to fulfill the modified reporting requirement involves the performance of certain detailed agreed-upon procedures by an independent public accountant.[256] The procedures that are generally agreed to by the servicer and the investors, or the trustee on the investors' behalf, generally

[254] See note 250 above.

[255] See proposed amendments to paragraph (e) of Exchange Act Rules 13a–14 and 15d–14.

[256] Given the multitude of modified reporting no-action letters, other isolated alternatives also exist. For example, a small minority of transactions will specify alternate servicing standards that may be used, such as criteria specifically in or attached as an exhibit to the pooling and servicing agreement.

involve the independent public accountant re-performing certain accounting procedures performed by the servicer relating to the servicing of the transaction and the underlying pool assets. The accountant then prepares a report describing the agreed-upon procedures performed and the results of such procedures.[257]

ii. Uniform Single Attestation Program for Mortgage Bankers (USAP)

Most assertions on and disclosure regarding compliance with servicing criteria are based on criteria set forth in the Uniform Single Attestation Program for Mortgage Bankers, or USAP, developed by the Mortgage Bankers Association of America (MBA).[258] The accountant's report attesting to the assertion under the USAP is prepared in accordance with SSAE No. 10.[259] The servicer's assertion as to compliance and the accompanying accountant's report are commonly referred to as a ''USAP Report.''

A task force of the MBA created the USAP during the early stages of development of securitization as a mortgage financing technique to provide uniform minimum criteria against which the servicing of mortgage-backed securities could be assessed. It was created at a time when most securitizations consisted of either simple pass-through or pay-through structures of simple pools of residential mortgages. As new, more-complex ABS transactions were introduced into the marketplace and additional asset types were securitized, the USAP, in the absence of any other well-recognized criteria, continued to be used as the default criteria for assessment and disclosure of servicer performance.

The USAP describes uniform minimum servicing criteria against which a servicing entity is to assess material compliance. In general, the servicer's management will make a written assertion about compliance with the USAP minimum criteria for a particular period (usually a year). The accountant engaged to perform the examination engagement will evaluate the servicer's assertion regarding compliance with the minimum servicing criteria.[260]

In an examination of an assertion on compliance with the USAP's minimum servicing criteria, an accountant seeks to obtain reasonable assurance regarding the assertion that there has been compliance, in all material respects, with those minimum criteria. Unlike an agreed-upon procedures engagement, specific findings (or exceptions) are not reported under a USAP Report unless the accountant concludes that the assertion is not fairly stated in all material respects.[261]

iii. Limitations of USAP in Context of ABS Reporting

While the USAP has by default become the dominant criteria to assess servicing compliance for purposes of fulfilling the accountant report requirement of the modified reporting system, it has significant limitations in the context of ABS reporting. The USAP was originally written to address compliance criteria related to residential mortgage loan servicing. Over time, it has been extended to other ABS transactions, such as those involving auto loans. However, the USAP's minimum servicing criteria may not adequately capture the needs of investors in ABS transactions other than mortgage-backed securities. Some of the USAP criteria may not be applicable to these other asset types (*e.g.*, criteria regarding property tax escrow accounts), and are often specifically excluded from the assertion of compliance and the related accountant's report. There does not appear to be any consistency as to which USAP criteria are applied to a particular asset type outside of residential mortgage loans, so the list of exceptions varies from issuer to issuer, even in the same asset class. In addition, rarely are substitute criteria included that would be relevant to that asset class, further diminishing the scope and relevance of the final report for other asset classes.

Another difficulty with the current criteria is that they do not clearly address the totality of activities and parties involved in servicing an ABS transaction, even for mortgage-backed securities. The USAP does not completely address the full spectrum of servicing functions, including allocation and distribution functions, that are important in an ABS transaction, particularly as the complexity of flow of funds calculations has increased. In addition, the current system does not contemplate the fact that multiple unaffiliated parties may be involved in servicing an asset-backed security. Accordingly, the current system does not place responsibility for assessing compliance for all aspects of the servicing function with a single party to help assure that they are addressed, which is especially important if multiple parties are involved. As a result, the current system potentially leaves gaps in servicing compliance reporting.

b. Proposed Assessment and Attestation of Servicing Compliance

We have previously noted the need to focus attention on the role of the servicer in the performance of an ABS transaction.[262] The performance of the servicer and compliance with its responsibilities is of material importance to the performance of an ABS transaction. Recent events in both the ABS and non-ABS markets have highlighted the need for appropriate controls and processes and mechanisms

[257] Specifically, Chapters 1 and 2 of Statements on Standards for Attestation Engagements No. 10 (SSAE No. 10), *Attestation Standards: Revision and Recodification* (Jan. 2001) (codified in AT section 601), set forth the standards that accountants are required to follow in performing agreed-upon procedure engagements. Paragraph 2.06 of SSAE No. 10 specifies the conditions for engagement performance which includes, among other things, a requirement that the accountant ascertain that the criteria have been agreed upon with the specified parties (in this case, the servicer and the investors requesting the report). Paragraph 2.07 sets forth that this can be accomplished in one of three ways: comparing the procedures to be applied to written requirements of the specified parties, discussing the procedures to be applied with appropriate representatives of the specified parties involved, or reviewing relevant contracts with correspondence from the specified parties. Further, paragraph 2.06(e) requires that the specific subject matter to which the procedures are to be applied is subject to reasonably consistent measurement.

[258] Mortgage Bankers Association of America, *Uniform Single Attestation Program for Mortgage Bankers* (last rev. 1995).

[259] Specifically, Chapters 1 and 6 of SSAE No. 10 set forth the standards that accountants are required to follow in attesting to an entity's compliance with specified requirements. As set forth in paragraph 1.23, ''the practitioner shall perform the engagement only if he or she has reason to believe that the subject matter is capable of evaluation against criteria that are suitable and available to users.'' The USAP has generally been accepted by practitioners as meeting that requirement. See paragraphs 1.24 through 1.34 of SSAE No. 10.

[260] SSAE No. 10, paragraph 6.54, provides two methods of reporting: (a) Directly on an entity's compliance or (b) on a responsible party's written assertion regarding compliance. However, SSAE No. 10, paragraph 6.64, states that ''when an examination of an entity's compliance with specified requirements discloses noncompliance with the applicable requirements that the practitioner believes have a material effect on the entity's compliance, the practitioner should modify the report and, to most effectively communicate with the reader of the report, should state his or her opinion on the entity's specified compliance requirements, not on the responsible party's assertion.''

[261] Paragraph 6.36 of SSAE No. 10 states, ''In an examination of an entity's compliance with specified requirements, the practitioner's consideration of materiality differs from that of an audit of financial statements in accordance with GAAS. In an examination of an entity's compliance with specified requirements, the practitioner's consideration of materiality is affected by (a) the nature of the compliance requirements, which may or may not be quantifiable in monetary terms, (b) the nature and frequency of noncompliance identified with appropriate consideration of sampling risk, and (c) qualitative considerations, including the needs and expectations of the report's users.''

[262] See, *e.g.*, notes 120 and 139 above.

to assess compliance with controls and processes.[263]

Similarly, we believe a meaningful assessment and assertion of compliance with a single set of transparent and comprehensive servicing criteria, attested to by an independent third party under recognized professional standards, would provide material information to investors in monitoring the transaction and thus their investments. Investors will be better able to evaluate servicing responsibilities and performance and the reliability of the information they receive. Additionally, the assessment should help to identify potential weaknesses that may adversely affect security holders. We believe that an assessment and attestation regarding servicing compliance achieves these objectives more directly and efficiently than an audit of financial statements or reporting on internal control over financial reporting.

The current modified reporting system does not provide complete transparency as to what is expected of issuers, servicers, accountants and other parties. While the varying no-action letters on this subject need uniform codification, the principal weakness in the current system is the lack of suitable servicing criteria on which reporting can be based. The result has been vast inconsistencies in the type of reporting provided, diminishing its usefulness, relevance and comparability.[264] We also are concerned that the lack of clarity in this area has resulted in inconsistencies and a lack of understanding of what the appropriate scope of this function is intended to be.

As a result, we are proposing to enhance the current framework for reporting on compliance with servicing criteria. Specifically, we are proposing to require an assertion by a ''responsible party,'' which we define in Section III.D.7.b.ii. to be the same entity whose officer signs the report on Form 10–K and makes the Section 302 certification, on compliance with specified servicing criteria in a report filed as an exhibit to the ABS issuer's report on Form 10–K. Further, this proposal contemplates that a registered public accounting firm will issue a report on the responsible party's assertion of compliance with the servicing criteria, and such report will be filed along with the responsible party's assertion as an exhibit to the report on Form 10–K.

As discussed in Section III.D.7.b.vi., we are initially proposing to put forward a single set of servicing criteria for the responsible party and the registered public accounting firm to use in assessing and reporting on servicing compliance, although we request comment on alternative approaches. In particular, as discussed below, we are interested in whether there could be other sources of suitable servicing criteria that could be developed with appropriately objective inputs and appropriate due process that could be alternatives to our proposal. Our proposed disclosure-based criteria are designed to be incrementally broader than the servicing criteria that are generally used today for reporting on servicing compliance, such as those contained in the USAP. We propose that this reporting framework would apply to all ABS issuers. Accordingly, ABS transactions that have historically used other forms of reporting to fulfill the accountant's report requirement pursuant to no-action letters, such as those that use USAP Reports or engage an accountant to perform certain agreed-upon procedures, would use the proposed disclosure-based criteria to satisfy Exchange Act reporting requirements.

If a material instance of noncompliance exists, the proposal would provide investors with information of that fact to assist them in making their investment decisions. We do not propose that material instances of noncompliance with the proposed criteria would have regulatory restrictions on market access, such as an effect on continued form eligibility under the Securities Act for additional ABS transactions.[265] Rather, the assessment and reporting on the criteria would operate within a disclosure-based framework.

i. Responsible Party's Report on Compliance With Servicing Criteria

We propose Item 1120 of Regulation AB to require as an exhibit to the Form 10–K report a report of the responsible party on an assessment of compliance with the proposed servicing criteria, discussed more fully in Section III.D.7.b.vi.[266] Such report would be expected to contain:

- A statement of the responsible party's responsibility for assessing compliance with the servicing criteria.
- A statement that the responsible party used the servicing criteria to assess compliance with the servicing criteria.
- The responsible party's assessment of compliance with the servicing criteria as of and for the period ending the end of the fiscal year covered by the Form 10–K report. The report must include disclosure of any material instance of noncompliance identified by the responsible party.
- A statement that a registered public accounting firm has issued an attestation report on the responsible party's assessment of compliance with the servicing criteria as of and for the period ending the end of the fiscal year covered by the Form 10–K report.

As discussed in Section III.D.7.c., our proposal also would require the attestation report of the registered public accounting firm to be filed as an exhibit to the Form 10–K report.[267]

ii. Proposed Definition of ''Responsible Party''

New Exchange Act Rules 13a–18 and 15d–18 would require that a ''responsible party'' must perform an assessment of compliance with the servicing criteria.[268] We propose to define the ''responsible party'' as either the depositor if the depositor signs the report on Form 10–K, or the servicer if the servicer signs the report on behalf of the issuing entity. If multiple servicers were involved in servicing the pool assets and a representative of the servicer is to sign the report on behalf of the issuing entity, the master servicer (or entity performing the equivalent functions) would be the ''responsible party.'' Consistent with our proposals for who must sign the report on Form 10–K and make the Sarbanes-Oxley Section 302 certification, we believe that depending on the particular transaction, one or the other of these

[263] *Id.* See also note 53 above; ''If Issuers Can Steal, Where's the Deal Cop,'' Asset Securitization Report, Feb. 17, 2003, at 6; and Christine Richard, ''Moody's Trustees Don't See Eye-to-Eye on Trustee Role,'' Dow Jones Newswires, Feb. 4, 2003.

[264] See, *e.g.*, ''SEC Filings Reveal Little ABS Reporting Consistency,'' Asset Securitization Report, Sep. 23, 2002, at 10.

[265] Note, however, that one of the proposed criteria relates to reporting with the Commission. If there was a violation of Commission reporting rules, this may have an effect on continued form eligibility. See Section III.A.3.

[266] See proposed Item 1120(a) of Regulation AB. Proposed amendments to Item 601 of Regulation S–K would specify that the report on the assessment of compliance would be filed as Exhibit 33 to the Form 10–K. Note that this proposal differs from our rules regarding the reporting required by Section 404 of the Sarbanes-Oxley Act where management's report and the accountant's attestation report would appear in the Form 10–K and not as an exhibit. We believe that requiring the ABS reports to appear as exhibits to the report, where they have traditionally appeared under the modified reporting system, will facilitate easy location and access to these reports.

[267] See proposed Item 1120(b) of Regulation AB. Proposed amendments to Item 601 of Regulation S–K would specify that the attestation report of the registered public accounting firm would be filed as Exhibit 34 to the Form 10–K. If the proposal is adopted, the substitution of another type of accountant's report or opinion, such as a USAP report or an agreed-upon procedures report, would not satisfy the reporting requirement. Of course, ABS transaction agreements may continue to require a separate accountant engagement, such as a USAP engagement or an agreed-upon procedures engagement, in addition to our proposal.

[268] See paragraphs (b) and (c) of proposed Exchange Act Rule 13a–18 and 15d–18.

parties would be best suited to be in a position to be responsible for assessing compliance with the proposed criteria regarding the overall servicing function.

iii. Proposed Scope: Period to be Covered

The report contemplated by this proposal would include an assessment of the servicing function for a full fiscal period, rather than just at a point in time. This approach is consistent with the current requirements set forth in the USAP and in other attestation examinations filed with the Commission following the modified reporting system.

iv. Proposed Scope: Level of Reporting

Under the modified reporting no-action letters, different practices have developed regarding the type and scope of the assessment of compliance with servicing criteria. While an assessment of compliance on a transaction-by-transaction basis would provide the most particularized information, current practice appears to lean towards assessment of a given servicer's compliance with servicing criteria in respect of the ''platform'' through which it carries out its servicing activities for all transactions (or all transactions involving a particular asset class). In light of current practice and servicers' focus on overall compliance with standards at the platform level, we are proposing to accept a ''platform'' level assessment for purposes of this requirement.

As such, the proposal contemplates an assessment of compliance with respect to all asset-backed securities transactions involving the responsible party that are backed by assets of the type backing the asset-backed securities covered by the Form 10–K report. This ''platform'' level assessment would permit a single assessment and assertion regarding compliance as compared to requiring separate assessments for each individual transaction involving the responsible party, which would be more costly and might be administratively burdensome. The responsible party, as well as the registered public accounting firm with respect to the attestation engagement, would need to determine the amount of work that would need to be performed to be able to assess compliance with the servicing criteria for the responsible party's servicing of ABS transactions for the same asset class taken as a whole.

We do not propose to specify how a responsible party should determine whether there is a material instance of noncompliance with the servicing criteria. In particular, we do not propose to specify the particular controls, policies or procedures that would be required in order to assert that material compliance with the servicing criteria had been achieved. We believe that each responsible party should be afforded the flexibility to design controls, policies and procedures to fit its particular circumstances.[269]

v. Proposed Scope: Entire Servicing Function

As discussed in Section III.B.2., the servicing of an asset-backed security consists of many functions, including collecting principal, interest and other payments from obligors; paying taxes and insurance from escrowed funds; monitoring and accounting for delinquencies; executing foreclosure if necessary; temporarily investing funds pending distribution; remitting fees and payments to enhancement providers, trustees and others providing services; and allocating and remitting distributions to security holders. Each of these functions can represent a material element of ABS performance.

In addition, the servicing function may be performed by a single party or by multiple parties (*e.g.*, primary servicers, master servicers, trustees, etc.). For example, in some instances, one party may perform the servicing functions that relate to administration of the pool assets while another party may perform the servicing functions that relate to payments to security holders. Currently, when multiple parties are involved in the servicing function, sometimes only one report on servicing compliance by one servicer is filed with the Form 10–K covering only a limited subset of the servicing function. This approach provides no assurance with respect to other aspects of the servicing function. In other instances, multiple reports may be filed, one from each party involved in the servicing function covering only those steps that are applicable for the standards impacted by their work. This approach leads to fragmented reporting that potentially results in certain aspects of the servicing function not being addressed by the reports at all or requiring an investor to ascertain if all aspects have been covered.

To address this issue, we propose that the responsible party would assess material compliance with all of the servicing criteria. The responsible party would be required to use reasonable means to assess whether the parties performing the servicing functions that are material to the servicing function as a whole (*e.g.*, servicers, master servicer, trustee, paying agent) are complying with the servicing criteria in all material respects. A single report approach may necessitate reliance upon unaffiliated third parties. Like the proposed Section 302 certification, our proposal would permit the responsible party to reasonably rely on information provided to the responsible party by unaffiliated parties in making its assessment. This could include examination reports on compliance with particular servicing criteria, SAS 70 reports[270] or other information from unaffiliated parties appropriate on which to base reasonable reliance.

Like the responsible party's own assessment, the information from the unaffiliated party also could be at a ''platform'' level of assessment with respect to ABS or pool assets serviced by that party, thereby facilitating a single assessment and report or other information that could be delivered to multiple responsible parties for purposes of their assessments. For example, if a trustee is responsible for disbursing cash to investors, the trustee could assess compliance with the appropriate servicing criteria and then send a single examination report as to its material compliance with those criteria to multiple responsible parties. Those responsible parties could reasonably rely on such report to assess and assert material compliance as to those criteria with respect to the responsible party's own platform level assessment.

vi. Proposed Servicing Criteria

Currently, the only generally used criteria for assessing and reporting on servicing compliance is the USAP. However, as previously discussed, the USAP was not designed for the breadth of asset classes included in ABS offerings. It also does not address aspects of the servicing function that may be important in servicing asset-backed securities.

The Commission staff is not aware of another framework currently available for use in the ABS market. However, we believe an assessment of and reporting regarding compliance with a single set of transparent and comprehensive servicing criteria and the involvement of an independent third party to attest to

[269] Accountants would be guided in analyzing whether an instance of non-compliance was material by SSAE 10, paragraph 6.36, that focuses on the nature of the compliance requirements, the nature and frequency of noncompliance and qualitative considerations, including the needs and expectations of the report's users.

[270] See Statement on Auditing Standards (SAS) No. 70, Service Organizations, as amended by SAS No. 88, Service Organizations and Reporting on Consistency (AICPA, *Professional Standards,* Vol. 1, AU section 324).

that assessment is an important component of both the existing modified reporting system and the system we propose to adopt. As a result, in the absence of other suitable criteria, we are proposing to establish disclosure-based servicing criteria to be used by the responsible party and the registered public accounting firm in assessing servicing compliance. We believe a single set of servicing criteria that is publicly available would enhance the quality of the assessment of compliance and promote the comparability of reports of different issuers. We also believe such servicing criteria would provide value in establishing market-wide benchmarks with respect to assessing the servicing function.

If other suitable criteria were to be developed for use in assessing servicing compliance, we would consider such criteria for purposes of the proposed requirement. A suitable framework would need to: Be established by a group or body that has followed due process procedures; be free from bias; permit reasonably consistent qualitative and quantitative measurements; be sufficiently complete so that relevant factors that would alter a conclusion about the subject matter were not omitted; and be relevant to the subject matter.[271] This would include criteria that address all material aspects of the servicing function with respect to an asset-backed securities transaction.

We invite comment on whether suitable criteria could be developed by others to meet the objectives of our proposal. Who would develop such criteria? What would be the process in developing such criteria? What would be the timeframe to develop such criteria? Should we provide flexibility in any final requirement that would allow for substitution of alternate suitable criteria that meet certain requirements? What requirements would be appropriate?

The disclosure-based servicing criteria we propose are designed to be incremental to the current criteria in the USAP. Accordingly, many of the proposed servicing criteria are not new. Criteria noting specific timeframes, such as two business days, mirror for the most part the current criteria in the USAP. Those servicing criteria that are incremental to the USAP criteria were developed based on staff study and experience with ABS transactions, including experience gained through the filing review process and the 2003 MBS Disclosure Report.

[1] See AT § 101, paragraph 24.

The servicing criteria we propose consist of four broad categories: General servicing considerations; cash collection and administration; investor remittances and reporting; and pool asset administration. These categories describe major components of the servicing function. Each category contains servicing criteria that have been designed to have general applicability to the servicing of all asset-backed securities. The complete criteria are set forth in the text of paragraph (d) of proposed Item 1120 of Regulation AB. We are seeking comment on the specific criteria set out in the proposed regulatory text. As noted above, some servicing criteria may be more or less applicable depending on the type of asset underlying the ABS transactions. Further, certain servicing criteria have been designed to rely upon the transaction agreements to set forth how certain aspects of the servicing function should operate. As such, the servicing criteria do not necessarily set forth specific details of the servicing function that must exist (*e.g.*, timeframes for foreclosures), but rather rely upon the details set forth in the transaction agreements. We believe the proposed criteria thus appropriately leave the responsibility for determining the details of the servicing functions with investors and ABS issuers. As ABS transaction agreements are required to be filed with the Commission, disclosure of these details for individual transactions would be readily available.

The proposed servicing criteria are summarized as follows:

General servicing considerations. The general servicing considerations are designed to provide disclosure on whether the servicer or other relevant party has instituted policies and procedures for structural monitoring of the ABS securities (*e.g.*, triggers or events of default) and performed other general administrative tasks during the period covered by the report as set forth in the transaction agreements, such as monitoring the activities of third parties to which material servicing activities have been outsourced, maintaining a back-up servicer and maintaining certain insurance coverages in force, if applicable. With the exception of the criterion regarding the maintenance of certain insurance coverages in force, these criteria are not addressed in the current USAP. We believe they are appropriately included given their importance to an ABS transaction.

Cash collection and administration. These servicing criteria are designed to provide disclosure on whether the servicer or other relevant party has administered the collection of cash from obligors, segregated and reconciled such cash for investors and maintained transaction accounts as set forth in the transaction agreements. The servicing criteria included within this section are comparable to those set forth in the USAP, although the current USAP does not have specific criteria to address the maintenance of transaction accounts. We believe disclosure of whether the servicer complies with maintenance of transaction accounts is information investors may need to confirm the ABS transaction is functioning as originally planned.

Investor remittances and reporting. These servicing criteria are designed to provide disclosure on whether the servicer or other relevant party is calculating amounts due to investors and reporting such amounts to investors in accordance with the flow of funds in the transaction agreements. The servicing criteria also are designed to provide disclosure on whether the servicer or other relevant party has allocated and remitted distributions to investors in accordance with the transaction agreements and filed information with the Commission as required by its rules and regulations. While certain elements of these criteria are presently included in the USAP, an explicit assessment of compliance with the flow of funds calculations may be incremental to what is currently performed in satisfying the current USAP criteria. It is our understanding that flow of funds calculations sometimes are extremely complicated and oversight of this function may be critical for proper distributions to investors.

Pool asset administration. These servicing criteria are designed to provide disclosure on whether the servicer or other relevant party is maintaining the pool assets as set forth in the transaction agreements, including:

- Maintaining specified collateral;
- Administering changes to the asset pool;
- Posting payments and other changes regarding pool assets;
- Instituting loss mitigation or recovery actions;
- Administering funds held in trust for an obligor, if required for the pool assets; and
- Maintaining external credit enhancement or other support.

These servicing criteria, mostly included within the USAP, have been incrementally enhanced to encompass more aspects of pool asset maintenance. For example, the USAP does not address external credit enhancement or other support.

vii. Identification of Inapplicable Criteria

Because of the unique and fluid nature of the ABS market, our proposal provides discretion to the responsible party to exclude those servicing criteria that are inapplicable to the servicing of a particular asset class. If certain servicing criteria are not applicable in the context of the asset class backing the asset-backed securities, the inapplicability of the criteria would need to be disclosed in the responsible party's and the registered public accounting firm's reports. This flexibility should not be used to voluntarily exclude otherwise applicable criteria from an assessment of compliance.

viii. Disclosure of Material Instances of Noncompliance

If the responsible party's report on compliance with servicing criteria identified any material instance of noncompliance with the criteria, disclosure would be required in the Form 10–K report of any material impacts or effects that have affected or that may reasonably be likely to affect pool asset performance, servicing of the pool assets or payments or expected payments on the asset-backed securities. As noted above, the period to be covered by the report is consistent with the current practices of assessing compliance as of and for the period ending on a particular date. This is different from reporting regarding internal control over financial reporting under Section 404 of the Sarbanes-Oxley Act, which speaks as of a particular date only. Thus, under our proposal and consistent with general practice today, disclosure would be required of material instances of noncompliance during the reporting period, even if such noncompliance was subsequently corrected in the period. We believe this approach is consistent with our proposal not to require interim evaluations and reporting of compliance or disclosures of changes in reports (*i.e.*, Form 10–D reports) during the Form 10–K reporting period.

c. Attestation Report on Assessment of Compliance

Under the proposal, a registered public accounting firm would be required to attest to, and report on, the assessment of compliance made by the responsible party through performance of an examination engagement.[272] As our proposal would be in lieu of audited financial statements and Sarbanes-Oxley Section 404 reporting, we believe requiring a registered public accounting firm to provide the attestation is important to help assure independence and objectivity for the attestation function, similar to that required with respect to an audit of financial statements. This should increase investor confidence in the reliability of the assessment of compliance. We also remind issuers that a responsible party could not delegate its responsibility to assess compliance with the servicing criteria to the registered public accounting firm.

As noted above, the registered public accounting firm's report would need to be filed as an exhibit to the report on Form 10–K.[273] The attestation examination would need to be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board (PCAOB). On April 25, 2003, the Commission approved the PCAOB's adoption of the auditing and attestation standards in existence as of April 16, 2003 as interim auditing and attestation standards.[274] The Attestation Standards for Compliance Attestation (AT § 601) in those interim auditing and attestation standards would currently be used in performing this examination engagement.

We are proposing conforming amendments to Regulation S–X to reflect the attestation report that will be prepared by a registered public accounting firm and to require an ABS issuer to file the attestation report with the report on Form 10–K. Under these proposed amendments, a new ''Attestation report on assessment of compliance with servicing criteria for asset-backed securities'' would be defined as a report in which a registered public accounting firm expresses an opinion, or states that an opinion cannot be expressed, concerning the proposed assessment of compliance by a responsible party with servicing criteria, in accordance with standards on attestation engagements.[275] When an overall opinion cannot be expressed, the registered public accounting firm would need to state why it was unable to express such an opinion. The report would need to be dated, signed manually, identify the period covered by the report and clearly state the opinion of the accountant as to whether the responsible party's assessment of compliance with the servicing criteria was fairly stated in all material respects, or must include an opinion to the effect that an overall opinion cannot be expressed.[276]

This proposal contemplates that the report issued by the registered public accounting firm will be available for general use and will not contain restricted use language. We believe that the proposed servicing criteria would be suitable criteria, as that term is defined in SSAE No. 10, and are available to enable a registered public accounting firm to issue a report on the responsible party's assertion without restricted use language.

Questions regarding proposed assessment of compliance with servicing criteria:

- We request comment on our proposal. Should the Commission specify the form of reporting required in ABS annual reports? For instance, should certain ABS transactions be allowed to use a form of agreed-upon procedures to fulfill the accountant report requirement of the modified reporting system? If so, why? If any additional reporting by an accountant is required by the transaction agreements, should we allow or require it to be filed as an exhibit to the Form 10–K or otherwise described?
- Would audited financial statements of the ABS issuer or servicer be more useful to an ABS investor than a report on servicing compliance and related attestation report by a registered public accounting firm?
- Should there be any revisions to the proposed requirements for the responsible party's report or the accountant's report?
- We request comment on our proposed definition of ''responsible party.'' Should any other entities ever be the ''responsible party'' (*e.g.*, the trustee)? Should one party be required to assess and report on the entire servicing function?
- In lieu of a single assessment of compliance at the servicing ''platform'' level, should separate assessments of compliance be required with respect to each transaction? Does a ''platform'' level assessment provide adequate assurance even if no testing was performed at the individual trust level for the particular Form 10–K report? What would be the relative costs of a ''transaction'' level requirement in relation to the incremental benefits?
- How should unaffiliated parties be treated with respect to the assessment of compliance? Is the proposed approach of having a single responsible party assess material compliance with all of the servicing criteria, regardless of the actual party that performs the criteria, appropriate? Is it appropriate to allow the responsible party to reasonably rely on information from unaffiliated parties to make its own assessment? Is more guidance necessary on

[272] 272 See paragraph (d) of proposed Exchange Act Rules 13a–18 and 15d–18.

[273] As is currently the case under the modified reporting system, to the extent the Form 10–K is incorporated by reference into a Securities Act registration statement, a consent would need to be filed with respect to the accountant's report. See Securities Act Rule 439.

[274] See Release No. 33–8222 (Apr. 25, 2003) [68 FR 23335].

[275] See proposed Rule 1–02(a)(3) of Regulation S–X.

[276] See proposed Rule 2–02(g) of Regulation S–X.

the ability to reasonably rely on information received from unaffiliated parties? Should disclosure be required in the Form 10–K or in the responsible party's report identifying unaffiliated parties upon which the responsible party reasonably relied?

• What alternative approaches would be preferable to the proposed single party approach and why? For example, should separate reports be required for all parties that perform the respective criteria? If so, how will an investor have confidence that all criteria have been assessed? Instead, should the responsible party only assess compliance against the criteria it or an affiliate performs and assess compliance with an additional criterion that it has received reports from unaffiliated parties that perform the other criteria? How should exceptions noted in the unaffiliated parties' reports or the inability to obtain reports be treated? Should the Commission specify the type of reporting that unaffiliated parties must use?

• Is reporting by the accountant on the responsible party's assertion of compliance that covers the entire servicing function feasible? Should an approach be considered that would enable an accountant to make reference to the attestation or other procedures performed by another accountant performing procedures on parts of the servicing function, similar to the approach considered by AU § 543, ''Part of Audit Performed by Other Independent Auditors?'' Would additional guidance be required to make such an approach operational outside the context of a financial statement audit? Do other analogous instances of such reporting already exist?

• Should material instances of noncompliance have regulatory ramifications, such as on Securities Act form eligibility?

• Is the period to be covered by the report appropriate? Should disclosure be required of material instances of noncompliance during the period, even if subsequently cured? Should there be a requirement to make an assessment and report on compliance regarding any interim periods?

• Has the Commission considered all of the servicing criteria in its proposed framework that are important to ABS servicing? If not, what additional criteria should be included in the framework? Answers should provide specific language relating to specific criteria.

• Are some of the servicing criteria included in the Commission's proposed framework more costly than the benefit they provide to investors? Should any of the criteria be modified? Any suggested modifications should provide specific language. We request particular comment on quantification of the costs that would be involved in the proposal.

• Are any of the servicing criteria not subject to objective evaluation for purposes of the responsible party's assertion regarding compliance and the registered public accounting firm's attestation on the assertion regarding compliance? If so, how could they be revised?

• Are there some asset classes or transaction structures where the proposal would not be operational? What alternatives would be appropriate?

• Should additional guidance be given regarding how a responsible party is to determine whether there is a material instance of noncompliance?

• Should disclosure regarding the effects of material instances of noncompliance be required in the Form 10–K report? Should we specify a particular place where this disclosure should appear? Is there any additional information that would be material? For example, should there be disclosure of any identified instances of noncompliance that would be material to the transaction but were not material to the responsible party's overall ''platform'' such that the instances of noncompliance were not noted in the responsible party's overall assertion?

• Should the attestation report be required to be by a registered public accounting firm? What alternatives would be appropriate? Should a non-accountant be permitted to perform the attestation? If so, what would be the professional standards such an entity would use to attest to the assertion of compliance?

d. Alternative Proposal

As discussed in Section III.D.7.b.vii., under our proposal a responsible party may determine that a servicing criterion is inapplicable in the context of servicing a particular ABS transaction and exclude that servicing criterion from its assessment. Otherwise, there would not be flexibility to voluntarily exclude servicing criteria from the assessment. However, we do seek comment on an alternative approach that would permit a responsible party to voluntarily determine which specific servicing criteria to exclude from its assessment (even if they were otherwise applicable to the particular asset class), so long as any excluded criteria were disclosed and the reason for their exclusion was also disclosed. Under this alternate approach, it would be up to the market to decide the weight to attach to any particular criterion in evaluating a transaction where that criterion was excluded.

Questions regarding alternative proposal:

• In exploring such an approach, we seek comment on whether such an approach would be operational and result in useful information to investors.

• Should disclosure of the reasons for the exclusion be required? How could we avoid boilerplate disclosures?

• How should the list of excluded items be presented? Would a list of what was included be better? Should a table or checklist be required clearly indicating what was included or excluded?

• Should it be a requirement that the original registration statement or base or preliminary prospectus for the particular offering identifies the particular servicing criteria that will be excluded?

8. Current Reporting on Form 8–K

On March 11, 2004, the Commission adopted amendments to expand the number of events that are reportable on Form 8–K.[277] The amendments also shorten the Form 8–K filing deadline for most items to four business days after the occurrence of an event requiring disclosure under the form. These amendments are responsive to the ''real time disclosure'' mandate in Section 409 of the Sarbanes-Oxley Act and are intended to provide investors with better and faster disclosure of important events.[278] We believe the objectives of those amendments are equally applicable with respect to asset-backed securities. We propose to clarify application of the Form 8–K reporting items for asset-backed securities. The result of the existing amendments and our proposals will mean that the number of reportable events under Form 8–K with respect to asset-backed securities will increase from current modified reporting requirements.

a. Items Requiring Current Disclosure

Similar to Form 10–K, we propose a general instruction to Form 8–K to specify how the form is to be used with respect to asset-backed securities. Like the Form 10–D, the proposed instruction would permit either the depositor or the servicer to sign Form 8–K reports. The depositor's name and sponsor's name would need to be listed on the cover page of the Form 8–K. The instruction also would identify which of the existing items may be omitted. Any other applicable items specified in Form 8–K would continue to be applicable under existing reporting deadlines. We also propose several ABS-specific items under Section 6 of Form 8–K, discussed below. The resulting application of the Form 8–K items for ABS is presented in the following table:

[277] See the Form 8–K Release.

[278] Section 409 of the Sarbanes-Oxley Act added paragraph (*l*) to Section 13 of the Exchange Act (15 U.S.C. 78m(*l*)), which provides that ''each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.''

PROPOSED DISCLOSURE FOR FORM 8–K FOR ABS

Existing form items	Required if applicable	May be omitted
Item 1.01. Entry into a Material Definitive Agreement	•	
Item 1.02. Termination of a Material Definitive Agreement	•	
Item 1.03. Bankruptcy or Receivership	•	
Item 2.01. Completion of Acquisition or Disposition of Assets		•
Item 2.02. Results of Operations and Financial Condition	•	
Item 2.03. Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant		•
Item 2.04. Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement	•	
Item 2.05. Costs Associated with Exit or Disposal Activities		•
Item 2.06. Material Impairments		•
Item 3.01. Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing		•
Item 3.02. Unregistered Sales of Equity Securities		•
Item 3.03. Material Modifications to Rights of Security Holders	•	
Item 4.01. Changes in Registrant's Certifying Accountant	•	
Item 4.02. Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review		•
Item 5.01. Changes in Control of Registrant		•
Item 5.02. Departure of Directors or Principal Officers. Election of Directors Appointment of Principal Officers		•
Item 5.03. Amendments to Articles of Incorporation or Bylaws Change in Fiscal Year.	•	
Item 5.04. Temporary Suspension of Trading Under Registrant's Employee Benefit Plans		•
Item 5.05. Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics		•
Item 7.01. Regulation FD Disclosure	•	
Item 8.01. Other Events	•	
Item 9.01. Financial Statements and Exhibits	•	
Additional items to be added to form 8–K for ABS		
Item 6.01. ABS Informational and Computational Material	•	
Item 6.02. Change of Servicer or Trustee	•	
Item 6.03. Change in Credit Enhancement or Other External Support	•	
Item 6.04. Failure to Make a Required Distribution	•	
Item 6.05. Sales of Additional Securities	•	
Item 6.06. Securities Act Updating Disclosure	•	

b. Clarifying Amendments to Existing Items

We propose several clarifying instructions to the existing items that would remain applicable for ABS. For example, we propose to clarify that a reportable event under Items 1.01 and 1.02 also would include the entry into, modification of or termination of a material transaction agreement, even if the issuing entity was not a party to the transaction, such as a servicing agreement. A proposed instruction to Item 1.03 would clarify that disclosure also would be required under that item if the depositor (or servicer if the servicer signs the report on Form 10–K on behalf of the issuing entity) becomes aware of the entry of bankruptcy or receivership of the sponsor, depositor, servicer, trustee, significant obligor, significant enhancement provider or other material party involved in the ABS transaction. A proposed instruction to Item 2.02 would reference that disclosure made in a distribution report filed with the Commission on proposed Form 10–D would not trigger disclosure under that item. A proposed instruction to Item 2.04 would clarify that a reportable event also would include the occurrence of an early amortization, performance trigger or other event, including an event of default, that would materially alter the payment priority or distribution of cash flows regarding the asset-backed securities or the amortization schedule for the asset-backed securities. We would clarify that the applicable accountant to which Item 4.01 relates would be the accountant engaged to provide the attestation report on assessment of compliance with servicing criteria. Finally, for Item 5.03 regarding amendments to governing documents, an instruction would clarify that regardless of the basis of reporting (Section 13 or 15(d)), any amendment to the governing documents of the issuing entity of the asset-backed securities would trigger disclosure under that Item.

c. Proposed New Items

We propose to add several new ABS-specific reportable events to Form 8–K. These new items would be grouped under Section 6 to the Form. As with the existing Form 8–K items, we believe that, with the exception of the proposed Item regarding ABS informational and computational material, which is designed to facilitate the categorization of Form 8–K disclosures, these proposed items represent events that unquestionably or presumptively have such significance that timely disclosure should be required. All of the proposed items, except for proposed Item 6.01, would have a four business day reporting deadline similar to other Form 8–K reportable events. Filing deadlines with respect to proposed Item 6.01 would be pursuant to our proposals for filing ABS informational and computational material discussed in Section III.C.1.

The following is a discussion of the proposed new items.[279]

Item 6.01. ABS Informational and Computational Material.

This proposed Item would set forth a Form 8–K item to report any ABS informational and computational material filed in connection with our

[279] In the release for the March amendments, the Commission recognized that a registrant may need to report a given event under multiple items. General Instruction D to Form 8–K permits a registrant to file a single Form 8–K that sets forth the required disclosure once as long as the number and captions for all applicable items are included.

ABS communications proposals.[280] It would not otherwise create an obligation to file such material.

Item 6.02. Change of Servicer or Trustee.

If a servicer that met the proposed thresholds for disclosure in Item 1107 of Regulation AB or a trustee had resigned or had been removed, replaced or substituted, or if a new servicer or trustee had been appointed, disclosure would be required of the date the event occurred and the circumstances surrounding the change. In addition, information relating to the transition, such as that required by proposed Item 1107(c) of Regulation AB, would be required. If a new servicer or trustee had been appointed, a description required by the applicable item of Regulation AB relating to that party would be required.

Item 6.03. Change in Credit Enhancement or Other External Support.

This item would require disclosure of the loss, addition or material modification of any material credit enhancement or other support provided by a third party.[281] If any such enhancement was terminated other than by expiration of the contract on its stated termination date or as a result of all parties completing their obligations, disclosure would be required of the date of termination, identity of the parties to the agreement, a brief description of the terms of the enhancement, a brief description of the material circumstances surrounding the termination and any material early termination penalties paid or to be paid out of cash flows. If any new enhancement was added, disclosure specified in proposed Item 1113 of Regulation AB would be required regarding the new enhancement. If any existing material enhancement had been materially modified, a brief description of the material terms and conditions of the amendments would be required. An instruction would specify that disclosure under this Form 8–K item would be required whether or not the issuing entity was a party to any agreement regarding the enhancement if the loss, addition or modification of such enhancement materially affects, directly or indirectly, the asset-backed securities, the pool assets or the cash flows underlying the asset-backed securities.

Item 6.04. Failure to Make a Required Distribution.

If a required distribution to holders of the asset-backed securities was not made as of the required distribution date under the transaction documents, disclosure would be required of the failure and the nature of the failure. Accelerated disclosure under this item would not replace the requirement to file a report on proposed Form 10–D with respect to the related distribution period (*e.g.*, to include pool performance information).

Item 6.05. Sales of Additional Securities.

In lieu of Items 2.03 and 3.02 of Form 8–K, this new item would require disclosure of the information specified in paragraphs (a) through (e) of Item 701 [282] and paragraph (e) of proposed Item 1112 of Regulation AB regarding any sale of securities that are either backed by the same asset pool or are otherwise issued by the issuing entity, whether or not registered under the Securities Act.[283] Consistent with Item 3.02 of Form 8–K, for purposes of determining the filing date for the Form 8–K under this proposed Item 6.05, the registrant would have no obligation to disclose information under this Item until an enforceable agreement, whether or not subject to conditions, had been entered into under which the securities were to be sold. If there was no such agreement, the registrant must provide disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the securities were to be sold. An instruction to the proposed Item would provide that no information would be required at all under the Item if substantially the same information had been provided previously in an effective registration statement under the Securities Act or a prospectus timely filed pursuant to Securities Act Rule 424 under the same CIK code regarding a subsequent issuance of asset-backed securities backed by the same pool.

Item 6.06. Securities Act Updating Disclosure.

The last proposed Item is intended to address instances where the composition of the actual asset pool at the time of issuance of the asset-backed securities differs from the composition of the pool described in the final prospectus for the offering. Reflecting a current staff position, if, with respect to a takedown off of a shelf registration statement on Form S–3, the composition of the asset pool at the time of issuance of the asset-backed securities differed by 5% or more from the description of the asset pool in the final prospectus filed for the takedown pursuant to Securities Act Rule 424, disclosure about the actual asset pool would be required, including disclosure regarding any new significant obligors, servicers or significant originators.[284] No report would be required if substantially the same information was provided in a post-effective amendment to the Securities Act registration statement or in a subsequent Rule 424 prospectus.

d. Safe Harbor and Eligibility To Use Form S–3

In the March amendments, the Commission addressed concerns raised by commenters over the effect of failure to file Form 8–K reports on liability under Exchange Act Section 10(b) and Exchange Act Rule 10b–5. The Commission adopted a limited safe harbor for a defined subset of Form 8–K items that provides that no failure to file a Form 8–K that is required to be filed solely by reason of the provisions of the Form shall be deemed to be a violation of Section 10(b) and Rule 10b–5.[285] The limited safe harbor was granted only to a subset of Form 8–K items premised on the recognition that those items may require quick assessments of the materiality of the event, adding difficulty to the determination of whether a triggering event has occurred. The existing Form 8–K safe harbor extends only until the due date of the periodic report for the relevant period in which the Form 8–K was not timely filed.

[280] See Section III.C.1.

[281] An instruction to the proposed item would clarify that disclosure regarding changes to material enhancements would be reported under proposed Item 6.03 in lieu of Items 1.01 and 1.02 of Form 8–K.

[282] 17 CFR 229.701. Of course, information required by Item 701(d) regarding the exemption from registration claimed would not be applicable with respect to disclosure of a registered offering of securities.

[283] This proposed item would provide initial disclosure of the sale. As discussed in Section VIII.D.4., material changes to pool composition that resulted from the sale would be required in the distribution report on Form 10–D for the applicable period, unless previously disclosed in an effective registration statement or Rule 424 prospectus regarding a subsequent issuance of asset-backed securities backed by the same asset pool.

[284] This reportable event only would be applicable with respect to offerings registered on Form S–3. For registered offerings on Form S–1, due to restrictions on incorporation by reference, if the final asset pool likewise differed from the final Rule 424 prospectus, a post-effective amendment to the registration statement would be required as is the case today. Of course, for Form S–3 registered offerings, some changes in pool composition or other features of a transaction not reflected in previous disclosure would be so significant that a filing on Form 8–K would not be the appropriate means to address the changes.

[285] See paragraph (c) of Exchange Act Rules 13a–11 and 15d–11. The safe harbor only applies to a failure to file a report on Form 8–K. Material misstatements or omissions in a Form 8–K continue to be subject to Section 10(b) and Rule 10b–5. In addition, if a duty to disclose exists for some reason other than the Form 8–K requirement, the safe harbor is not available.

Given the nature of the proposed ABS-specific reportable events, we preliminarily propose to extend the safe harbor to proposed Item 6.03, Change in Credit Enhancement or Other External Support. This Item appears to meet the criteria of the existing subset of Form 8–K items to which the safe harbor applies. As discussed in Section III.D.4., because we propose that asset-backed securities would be excluded from quarterly reporting on Form 10–Q, we propose to provide in Form 10–D that disclosure prescribed by a required but not filed item of Form 8–K would need to be included in the Form 10–D report for the period during which that event occurred. Consistent with similar requirements in Forms 10–K and 10–Q, failure to make such disclosure in the Form 10–D report would subject a company to potential liability under Section 10(b) and Rule 10b–5 regarding any of the covered items in the safe harbor, in addition to potential liability under Section 13(a) or 15(d).

In the March amendments, the Commission also addressed concerns over the effect of failure to file Form 8–K reports with respect to Form S–3 eligibility.[286] The Commission clarified that an untimely filing on Form 8–K of the items covered by the Section 10(b) and Rule 10b–5 safe harbor would not result in loss of Form S–3 eligibility, so long as Form 8–K reporting is current at the time of filing. As noted in Section III.A.3., we propose that reporting obligations regarding other asset-backed securities transactions established by the sponsor or the depositor must be complied with for continued Form S–3 eligibility for new transactions. Consistent with the March amendments, we would clarify that an untimely filing on Form 8–K regarding one of the items covered by the Section 10(b) and Rule 10b–5 safe harbor for another ABS transaction would not result in loss of Form S–3 for new transactions, so long as the Form 8–K reporting obligations for the prior obligations are current at the time of filing.

Questions regarding proposed Form 8–K reporting:

- We request comment on our proposed amendments to Form 8–K for asset-backed securities. Should additional or different parties be permitted to sign the report?
- Should any additional reportable events be included or omitted? For example, current Item 3.01 with regard to delistings is limited only to common equity securities and thus may be omitted for most ABS issuers. Should the Item be made applicable with respect to any listing with respect to a class of asset-backed securities? Should Item 4.02 regarding non-reliance on a previously issued audit report apply with respect to the proposed attestation report on an assessment of compliance with servicing criteria? Should Item 5.02 apply if the issuing entity has executive officers or directors?
- Are any other clarifying instructions needed regarding Items that would remain applicable? Are the proposed new Items sufficiently clear and detailed? Are any modifications necessary? For example, should we clarify how differences in pool composition in proposed Item 6.06 should be measured? Should disclosure of additional issuances of securities be required on Form 8–K even if disclosed in an effective registration statement or Rule 424 prospectus?
- Given that most ABS transactions report distributions monthly, should any Form 8–K items be reported in the Form 10–D instead? Would this create too long of a delay? Should such an approach not be permitted for transactions that report distributions quarterly or semi-annually? Would differences between the reporting requirements for different ABS transactions be confusing? Should any of the items be revised in the case of a master trust?
- Which Form 8–K items for asset-backed securities should be included in the safe harbor? Should the safe harbor extend only until the next required Form 10–D? Are there any additional accommodations that should be made with respect to Form 8–K reporting with respect to ABS transactions?

9. Other Exchange Act Proposals

a. Proposed Exclusion From Form 10–Q

As noted above, we propose to codify the requirement to file reports tied to distributions on asset-backed securities in lieu of quarterly reporting on Form 10–Q. The non-financial items that are in Form 10–Q would be required in proposed Form 10–D. As with our proposals for Form 10–K, we do not believe that the financial item requirements of Form 10–Q would be meaningful with respect to issuing entities. Accordingly, we are proposing to exclude asset-backed securities from quarterly reporting on Form 10–Q.[287]

b. Proposed Exemptions From Section 16

Under the modified reporting system, issuers of asset-backed securities are not subject to the disclosure requirements under Section 16(a) of the Exchange Act to report transactions and holdings of directors, officers and principal shareholders. In arguing for no-action relief, incoming requests to the staff indicated that the issuing entity often does not have directors and officers. In addition, the requesters advocate that any holders of asset-backed securities representing more than a ten percent interest in the issuing entity would not have access to more information concerning the trust than any other certificate holder, which would alleviate any risk of short-term profits based on inside information proscribed by Section 16.

We are proposing to exempt asset-backed securities from Section 16 in its entirety.[288] In addition to the reporting requirements in Section 16(a), we believe the other subparts of Section 16 are equally inapplicable to asset-backed issuers given the passive nature of the issuing entity, including the restrictive activities of the issuing entity in connection with the ABS transaction. We believe such an exemption for asset-backed securities would be appropriate in the public interest and consistent with the protection of investors.

c. Proposals Regarding Transition Reports

Current Exchange Act Rules 13a–10 and 15d–10 set forth reporting requirements that may be applicable when an issuer changes its fiscal year end. Transition reports are required to assure a continuous flow of information to investors and the marketplace. Although financial and business information normally required in transition reports may not be relevant to ABS transactions, information on the performance of the asset pool during the transition period is relevant to investors of asset-backed securities.

We are proposing amendments to our transition report rules that would clarify their application to asset-backed issuers.[289] Under the proposed amendments, an asset-backed issuer that changed its fiscal year end would be required to file a transition report on Form 10–K covering the transition period between the closing date of the issuer's most recent fiscal year and the opening date of its new fiscal year.[290] The asset-backed issuer must provide all information required in response to

[286] Similar amendments were made with respect to Form S–2 and Securities Act Rule 144 (17 CFR 230.144).

[287] See proposed amendments to Exchange Act Rule 13a–13 and Rule 15d–13.

[288] See proposed amendment to Exchange Act Rule 3a12–12.

[289] See proposed amendments to Exchange Act Rules 13a–10 and 15d–10.

[290] For example, if an issuer whose most recent fiscal year ended on December 31, 2003 decided to change its fiscal closing date to June 30, 2004, the transition period for which a transition report must be filed under either Rule 13a–10 or 15d–10 would be January 1, 2004 through June 30, 2004. A current report on Form 8–K also would be required announcing the change in fiscal year. See Item 5.03 of Form 8–K. A transition report on Form 10–K would not be required if the transition period covers one month or less and the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year. Section 302 certifications would be applicable to transition reports on Form 10–K.

proposed General Instruction J. of Form 10–K, including filing the servicer compliance statement and the assessment of compliance and attestation report regarding compliance with servicing criteria. The servicer compliance statement and assessment reports would reflect the same transition period covered by the transition report. Of course, any obligation to file distribution reports under proposed Form 10–D would continue to apply regardless of a change in fiscal year.

Questions regarding other Exchange Act proposals:

• Should we codify the exclusion from quarterly reporting on Form 10–Q for asset-backed issuers? Should we exempt asset-backed securities from Section 16? Should the non-reporting provisions of Section 16 remain applicable with respect to asset-backed issuers or other participants in an ABS transaction? Should the result be different if the issuing entity has officers or directors?

• Should all of the applicable Form 10–K items be required for a transition report? For example, are there any item requirements under proposed General Instruction J. of Form 10–K that would not be important to investors with respect to the transition period? Should we require a separate report even if the transition period is one month or less?

E. Other Miscellaneous Proposals

In addition to our more substantive proposals, we also are proposing several minor and technical amendments to our rules and forms to address the regulatory treatment of ABS. These proposals include:

• Updating references to reflect proposed new definitions and references; [291]

• Removing instructions and references that would no longer be applicable; [292]

• Including cross-references for certain disclosure items in Regulation S–K to items in proposed Regulation AB that clarify their application for asset-backed securities; [293]

• Clarifying that an ABS issuer could not be eligible for the disclosure system for ''small business issuers'' because that disclosure system, like most of the basic Regulation S–K disclosure system, is not applicable to asset-backed securities; [294] and

• Clarifying that Regulation BTR [295] is not applicable to any acquisition or disposition of an asset-backed security.[296]

Questions regarding these miscellaneous proposals:

• We request comment on these proposed changes. Are any additional clarifying amendments needed to reflect our proposals?

• We request comment on the proposed exclusion of ABS issuers from the definition of ''small business issuer.'' Is there anything analogous to a ''small business issuer'' in the ABS context, and if so, is there a need to create different regulatory requirements for ABS by smaller issuers? If so, what accommodations should be made and why? By what level should a ''small ABS issuer'' be determined (*e.g.*, size of sponsor, size of offering, etc.)

• We request comment on any additional areas that should be addressed regarding the registration, disclosure or reporting requirements for asset-backed securities under the Securities Act or the Exchange Act.

F. Transition Period

While most of our proposals codify existing staff and market practice, we also are proposing several changes that may require implementation time. We are considering appropriate timing for implementation of the proposals, if adopted, and how best to allow for an orderly transition as a result of the new requirements imposed by the proposals. We are initially considering compliance with the proposals for new registration statements or takedowns off of shelf registration statements beginning three months after the effective date. This would include both the Securities Act and Exchange Act proposals with respect to such newly offered ABS. For outstanding ABS, we are initially considering compliance with the Exchange Act proposals beginning with fiscal years ending six months after the effective date. Of course, registrants could voluntarily comply with any adopted proposals before the compliance dates.

Questions regarding implementation and a transition period:

• Should we provide a transition period with respect to the implementation of all or some portion of our proposals? If so, what proposals should be subject to any transition period and would be an appropriate length for any transition period (*e.g.*, 3 months, 6 months)?

• Should there be different transition periods for different proposals? In particular, should there be an extended transition period for the proposed assessment and attestation of compliance with servicing criteria?

• Are there special considerations we should take into account in providing a transition period with respect to certain issuers, such as foreign ABS, certain asset classes or existing transactions? Should transactions before a certain point be ''grandfathered'' from the proposals? How should any remaining capacity under existing shelf registration statements be treated?

G. General Request for Comment

We request and encourage any interested person to submit comments regarding:

• The proposals that are the subject of this release;

• Specific interpretive guidance under the Investment Company Act concerning issues that may arise in connection with asset-backed issuers' compliance with the proposals set forth in this release;

• Additional or different changes regarding asset-backed securities; or

• Other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of investors in asset-backed securities on their views of the proposals and any possible changes to the proposals. We also request comment from the point of view of issuers that would be subject to the requirements that would result from the proposals. We request comment from the view of underwriters or other participants in asset-backed securities transactions. With regard to any comments, we note that such comments are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. Paperwork Reduction Act

A. Background

Our proposals contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[297] We are submitting our proposals to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[298] The titles for the collection of information are:

(1) ''Form S–1'' (OMB Control No. 3235–0065);
(2) ''Form S–3'' (OMB Control No. 3235–0073);
(3) ''Form S–11'' (OMB Control No. 3235–0067);
(4) ''Form 10–K'' (OMB Control No. 3235–0063);
(5) ''Form 8–K'' (OMB Control No. 3235–0288);

[291] See, *e.g.*, proposed amendments to Rules 2–01(c)(7) and 2–07(a) of Regulation S–X; Items 401 and 701 of Regulation S–K; Securities Act Rules 424 and 434; Exchange Act Rules 10A–3, 13a–15 and 15d–15; and Rule 100 of Regulation M.

[292] See, *e.g.*, proposed amendments to Items 308 and 406 of Regulation S–B and Items 308 and 406 of Regulation S–K. The forms required for ABS under our proposals would clarify that these items are no longer applicable to ABS, thus rendering the instructions unnecessary.

[293] See, *e.g.*, proposed amendments to Items 202, 501 and 503 of Regulation S–K.

[294] See, *e.g.*, proposed amendments to Item 10 of Regulation S–B and Exchange Act Rule 12b–2. The term ''small business issuer'' is defined in Item 10 of Regulation S–B and Exchange Act Rule 12b–2 as a U.S. or Canadian issuer with less than $25 million in revenues and public float that is not an investment company. Such issuers are eligible to use Form 10–KSB (17 CFR 249.310b) for their annual reports and Form 10–QSB (17 CFR 249.308b) for their quarterly reports, both of which are keyed off of disclosure items required by Regulation S–B.

[295] 17 CFR 245.101 through 245.104.

[296] See proposed amendment to 17 CFR 245.101.

[297] 44 U.S.C. 3501 *et seq.*

[298] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

(6) ''Regulation S–K'' (OMB Control No. 3235–0071); and
(7) ''Form 10–D'' (a proposed new collection of information).

The regulations and forms listed as Items (1)–(6) were adopted pursuant to the Securities Act and the Exchange Act and set forth the disclosure requirements for registration statements, periodic reports and current reports filed with respect to asset-backed securities and other types of securities to ensure that investors are informed. Form 10–D, if adopted, would represent a new form type for distribution reports currently filed under cover of Form 8–K under the modified reporting system for asset-backed securities, or ABS. The hours and costs associated with preparing, filing and sending these forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

We are proposing to address comprehensively the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act and the Exchange Act. This includes providing tailored disclosure requirements and guidance for Securities Act and Exchange Act filings involving asset-backed securities. This information is needed so that security holders can make informed investment decisions regarding asset-backed securities. ABS issuers and ABS differ from operating companies and their securities. Many of the Commission's existing disclosure and reporting requirements applicable to operating companies generally do not elicit information that is relevant for ABS transactions. Through the staff filing review process and, where necessary, through staff no-action letters and interpretive statements, an informal disclosure and reporting scheme has developed taking into account evolving industry practices.

With some exceptions noted below, our proposals consolidate and codify current staff positions and industry practice. We propose a new principles-based set of disclosure items, ''Regulation AB,'' as a sub-part of Regulation S–K that would form the basis for disclosure in both Securities Act registration statements and Exchange Act reports. Amendments to the forms referenced above (other than Form S–11) would specify the menu of disclosure items that apply to asset-backed securities, including items contained in new Regulation AB and a limited number of pre-existing disclosure requirements identified in the forms.[299]

These disclosure changes are designed to establish a tailored disclosure system for asset-backed securities offerings. Compliance with the revised disclosure requirements would be mandatory. There would be no mandatory retention period for the information disclosed, and responses to the disclosure requirements would not be kept confidential.

B. Revisions to PRA Reporting and Cost Burden Estimates

Our existing PRA burden estimates for each of the affected collections of information are based on an average of the time and cost incurred by all types of public companies, not just ABS issuers, to prepare a particular information collection. As noted above, however, the existing disclosure and reporting system with respect to ABS that we propose to codify recognizes that information relevant to ABS differs substantially from that relevant to other securities. For each information collection discussed below, we first estimate the average number of hours that an ABS issuer currently spends to complete one of the listed forms. We then estimate the incremental burden change that would result if the Commission adopted the proposed changes. The staff estimated the average number of hours each ABS issuer currently spends completing the form by contacting a number of issuers and other persons regularly involved in completing the forms.

Each entity that files reports with the Commission is assigned a Standard Industrial Classification (SIC) code to indicate the entity's type of business. SIC Code 6189 is used with respect to asset-backed securities. Entities assigned this SIC Code were used as a proxy for estimating the number of responses with respect to ABS issuers. In addition, unless otherwise specified below, all estimates of the number of responses are based on filings made during the Commission's 2003 fiscal year: October 1, 2002 through September 30, 2003.

1. Form S–3

Our current PRA burden estimate for Form S–3 is 398 hours per response. This estimate is based on the assumption that most disclosure regarding the issuer is incorporated by reference from separately required Exchange Act reports. However, because an Exchange Act reporting history is not an ABS condition for Form S–3 eligibility, ABS issuers using Form S–3 often must present all of their disclosure in the registration statement in lieu of incorporating it by reference. As a result, our burden estimate for ABS issuers using Form S–3 under existing requirements is similar to our Form S–1 burden estimate for asset-backed securities, given that all Form S–1 disclosure also must be provided in the form itself.

During our 2003 fiscal year, we received 168 Form S–3 filings related to asset-backed securities compared to 1,695 Form S–3 filings overall. We estimate that currently it takes an ABS issuer an average of 1,000 hours to prepare a Form S–3 for an ABS offering. We estimate that 25% of the burden is borne by the ABS issuer and that 75% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour.[300]

We propose to add a separate general instruction to Form S–3 to specify the disclosure to be provided with respect to ABS offerings. Our proposed disclosure requirements are based to a large extent on the disclosures that appear in ABS Form S–3 filings today. We do, however, propose to require a few additional items that may not appear in all ABS Form S–3 filings today. We preliminarily believe this information already should be readily available to issuers even if not currently disclosed, although some information would require additional attention and diligence before its use in a registration statement. For example, we propose to require delinquency and loss information to be provided on a static pool basis. While the information is, we believe, available, additional time and expense will be involved in including it in registration statements. Our proposals also are designed to elicit more disclosure regarding the background, experience, performance and roles of various transaction parties, including the sponsor, the servicer and the trustee. Other examples of disclosure that may be incremental include:

- How delinquencies and charge-offs are defined and determined;
- The use of prefunding periods, revolving periods and master trust structures;

[299] We are proposing to move all Securities Act registrations of ABS offerings to Form S–1 or Form S–3. Correspondingly, we are reducing our estimate of responses on Form S–11.

[300] This estimate is consistent with the estimate of the allocation of the burden for non-ABS issuers on Form S–1 where all of the required information must be included in the form. The staff estimated the average hourly rate for outside professionals by contacting a number of issuers and other persons regularly involved in completing the forms.

• The realization of residual values in lease-backed ABS;

• The impact of differing legal and regulatory requirements in foreign ABS; and

• Fees and expenses, including a fee and expense table.

We estimate that completing and filing a Form S–3 if the new disclosure requirements are adopted would result in an average increase of approximately 25% to our estimate of the current Form S–3 reporting burden imposed on ABS issuers. As a result, we estimate that, on average, completing and filing a Form S–3 to register ABS if the new disclosure requirements were adopted would result in a burden of 1,250 hours, an increase of 250 hours per response over the current burden. Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimate that the proposals would result in an added annual burden of 10,500 hours (168 filings × 250 additional hours × .25) and an added annual cost of $9,450,000 (168 filings x 250 additional hours × .75 × $300 per hour).

2. Form S–1 and Form S–11

Our current PRA burden estimate for Form S–1 is 1,749 hours per response. Unlike Form S–3, this estimate is based on the assumption that all required disclosure is presented in the form. However, as noted above, like Form S–3, the disclosure provided with respect to a registered ABS offering currently differs from that provided with respect to operating companies.

During our 2003 fiscal year, we received 7 Form S–1 filings related to asset-backed securities compared to 247 Form S–1 filings overall. In addition, we received 18 filings on Form S–11 related to asset-backed securities. We are proposing to move all Securities Act registrations of ABS offerings to Form S–1 or Form S–3. Assuming that the filings on Form S–11 could not otherwise be conducted on Form S–3, we estimate that these filings would instead be made on Form S–1. Thus, we estimate that there would be 25 ABS offerings registered on Form S–1. We are correspondingly reducing our estimate of responses on Form S–11 by 18 responses.

For ABS filings on Form S–1, we are using the same estimate as for ABS filings on Form S–3, given that the disclosures in both filings are substantially similar.[301] Thus, we estimate that an ABS Form S–1 filing currently imposes a reporting burden of an average 1,000 hours per response. As with Form S–3, we estimate that 25% of the burden is borne by the ABS issuer and that 75% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour.

As with Form S–3, we propose to add a separate general instruction to Form S–1 to specify the disclosure to be provided with respect to ABS offerings. These disclosures would be substantially similar to those required for Form S–3 filings. As a result, we estimate that completing and filing a Form S–1 if the new disclosure requirements were adopted would result in an increase of approximately 25% over the amount of time currently spent by ABS issuers to complete and file the form. This results in a revised estimate of 1,250 hours per response, an increase of 250 hours per response over the current reporting burden. Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimate that the proposals would result in an added annual burden of 1,563 hours (25 filings × 250 additional hours × .25) and an added annual cost of $1,406,250 (25 filings × 250 additional hours × .75 × $300 per hour).

3. Form 10–K

Our current PRA burden estimate for Form 10–K is 2,196 hours per response. Similar to Securities Act registration statements, however, the ongoing periodic and current reporting requirements applicable to operating companies under the Exchange Act differ substantially from the reporting that is most relevant to investors in asset-backed securities. The Commission staff has developed a system of modified Exchange Act reporting for ABS issuers. This includes a modified annual report on Form 10–K involving a reduced amount of disclosure than for operating companies. In addition to a limited menu of Form 10–K disclosure items, the ABS issuer must file as exhibits to the Form 10–K a servicer compliance statement and a report by an independent public accountant. Asset-backed issuers are required to include a certification required by Section 302 of the Sarbanes-Oxley Act in their Form 10–K reports. The staff has provided a tailored form of certification for use with ABS annual reports that we now propose to codify, with minor revisions.

Based on filings in our 2003 fiscal year, we estimate 1,200 Form 10–K filings related to asset-backed securities.[302] Under the modified reporting system, we estimate that currently it takes an ABS issuer an average of 90 hours to prepare a Form 10–K. We estimate that 25% of the burden is borne by the ABS issuer and that 75% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour.

We propose to add a separate general instruction to Form 10–K to specify the disclosure to be provided with respect to ABS offerings. As with Securities Act registration statements, our proposed disclosure requirements are based on the disclosures that appear in ABS Form 10–K filings today. While the proposed disclosures are generally consistent with the disclosures provided today, the most significant difference between our proposed disclosure requirements and the average disclosure that appears today is with respect to the assessment of compliance with servicing criteria. The most common compliance framework being used today is the Mortgage Bankers Association of America's Uniform Single Attestation Program, or USAP. Our proposed criteria are intended to be incrementally broader than the USAP criteria to cover the full spectrum of servicing activities. Our proposals also would require additional disclosure in the Form 10–K report if any material instances of noncompliance were identified.

Under these assumptions, we estimate that completing and filing a Form 10–K if the new disclosure requirements were adopted would result in an average increase of approximately 33% over the amount of time currently spent by entities completing the form. In deriving this estimate, we believe that many issuers will experience costs in excess of this average in the first year of compliance with the proposals. We believe that costs will decrease in subsequent years. This burden also will vary among issuers based on the complexity of the ABS transaction, the

[301] The presentation of the disclosure may be somewhat different if the offering on Form S–3 is to be conducted on a delayed, or ''shelf,'' basis. In that case, the Form S–3 will typically consist of a base prospectus and prospectus supplement in lieu of a single document. However, the content of the disclosures should be substantially similar.

[302] This estimate is based on the number of final prospectuses filed pursuant to Securities Act Rule 424(b) during this period with respect to asset-backed securities. For most ABS offerings, the filing of the prospectus under Rule 424(b) for a takedown of securities results in a new issuing entity and a separate Exchange Act reporting obligation. However, some issuers had been filing ''combined'' reports of filing one Form 10–K covering multiple issuing entities. We are using this estimate to reflect the approximate number of Form 10–K filings that would have been made by ABS issuers in the absence of combined reporting.

number of parties involved, especially servicers, and the nature and level of initial development of their compliance procedures. We have considered all of these factors in formulating our proposed estimates.

As a result, we estimate that, on average, completing and filing a Form 10–K if the new disclosure requirements are adopted would impose a reporting burden on ABS issuers of 120 hours, an increase of 30 hours over the current Form 10–K reporting burden for ABS issuers. Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimate that the proposals would result in an added annual burden of 9,000 hours (1,200 filings × 30 additional hours × .25) and an added annual cost of $8,100,000 (1,200 filings × 30 additional hours × .75 × $300 per hour).

We do not believe that the proposed amendments with respect to the Section 302 certification result in a need to alter the burden estimates. These amendments merely reflect conforming amendments already incorporated in the OMB burden estimates (*e.g.*, relocating the certifications from the text of annual report to the ''Exhibits'' section of the report) and minor changes to the wording of the Section 302 certification that do not alter the burden estimates that we previously submitted to OMB.

4. Form 8–K

Our current PRA burden estimate for Form 8–K is 5 hours per response. This is based on the use of that report to disclose the occurrence of certain defined reportable events, some of which are applicable to asset-backed securities. However, under the existing modified reporting system, ABS issuers also use Form 8–K to file periodic distribution and pool performance information. To separate this reporting from the disclosure of current events, we propose one new form type for asset-backed securities, Form 10–D, to act as the report for the periodic distribution and pool performance information. Form 8–K would continue to prescribe certain reportable events that would require current disclosure by ABS issuers. Form 8–K also would continue to be available to report any events that an ABS issuer deems to be of importance to security holders.

During our 2003 fiscal year, we received 12,633 Form 8–K filings related to asset-backed securities compared to 58,421 Form 8–K filings overall. Based on filings in our 2003 fiscal year, we estimate 9,500 filings that would include distribution and pool performance information that would instead appear in Form 10–D under our proposals.[303] Accordingly, assuming that our proposals are adopted, we estimate that there would be a decrease of 9,500 in the total number of Form 8–K filings.

We estimate that the time it takes to prepare a Form 8–K for a reportable event does not vary between an ABS and a non-ABS issuer. Thus, we estimate that an ABS issuer spends, on average, approximately 5 hours completing the form. As with our estimates for non-ABS issuers, we estimate that 75% of the burden is borne by the ABS issuer and that 25% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour.

We propose to add a separate general instruction to Form 8–K to specify the events that would require disclosure under that form. Several reportable events would be excluded with respect to ABS issuers, and a few additional events specific to asset-backed securities would be added. We also propose clarifying amendments to several existing reportable events to identify how they should apply to asset-backed securities.

We estimate that, on average, completing and filing a Form 8–K if the proposals were adopted would require the same amount of time currently spent by entities to complete the form-approximately 5 hours. We do estimate that the number of reportable events on Form 8–K would increase with respect to asset-backed securities as a result of the proposals. For purposes of the PRA, we estimate that the proposals would cause, on average, an increase of two reports on Form 8–K per ABS issuer per year. Based on our estimate of 1,200 ABS issuers, we estimate an increase of 2,400 Form 8–K filings per year. Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimate that the proposals would result in an added annual burden of 9,000 hours (2,400 filings x 5 hours x .75) and an added annual cost of $900,000 (2,400 filings x 5 hours x .25 x $300 per hour).

5. Proposed Form 10–D

As discussed above, proposed Form 10–D would be the new form type under which ABS issuers would file their periodic distribution and pool performance information. As discussed above, we estimate that there would be 9,500 Form 10–D filings per year. The proposed disclosure content for Form 10–D would consist of the distribution and pool performance information for the distribution period as well as certain non-financial disclosures, similar to those required by Part II of Form 10–Q, that occurred during the period. The requirement with respect to distribution and pool performance information would require the registrant to provide the information required by proposed Item 1119 of Regulation AB and to attach as an exhibit to the Form 10–D the distribution report delivered to the trustee or security holders, as the case may be, pursuant to the transaction agreements for the related distribution date. However, any information required by Item 1119 of Regulation AB that was included in the attached distribution report would not need to be repeated in the Form 10–D. As a result, and as is typically the case today with distribution reports filed under Form 8–K, we estimate that on average no additional information is likely to be required in the Form 10–D with respect to distribution or pool performance.

Accordingly, we are not including preparation of the distribution report in our burden hour estimates for preparing Form 10–D. We do estimate that it would take approximately 6 hours to assemble the distribution report with the Form 10–D for filing. We also propose a few incremental disclosures regarding distribution and pool performance information, such as those relating to the changes to the asset pool, that may not be required in the average distribution report today. We estimate that these disclosures would result in an average of 10 hours per filing. Finally, we estimate the remaining disclosures for the Form 10–D, such as the disclosures required by Part II of Form 10–Q, would result in an average of 14 hours per filing.

As a result, we estimate that, on average, completing and filing a Form 10–D if the new proposals were adopted would impose a burden of 30 hours per filing. As with our other estimates for Exchange Act reports by non-ABS issuers, we estimate that 75% of the burden is borne by the ABS issuer and that 25% of the burden is borne by outside professionals retained by the issuer at an average cost of $300 per hour. We thus estimate that proposed Form 10–D would result in a total annual burden of 213,750 hours (9,500 filings × 30 hours × .75) and an added annual cost of $21,375,000 (9,500 filings × 30 hours × .25 × $300 per hour). It should be noted, however, that this reflection of the burden predominantly consists of codifying the already existing requirements applicable under

[303] This estimate also reflects the approximate number of distribution report filings that would have been made by ABS issuers in the absence of combined reporting.

the modified reporting system where such filings appear under cover of Form 8–K and are offset by our corresponding reduction in our estimated number of Form 8-K's that would be filed.

6. Regulation S–K

Regulation S–K includes the requirements that an issuer must provide in filings under both the Securities Act and the Exchange Act. Our proposed disclosure changes would include changes to items under Regulation S–K and the addition of a new subpart to Regulation S–K—Regulation AB—that would provide disclosure items particularly tailored to asset-backed securities.[304] However, as noted above, the filing requirements themselves are included in Forms S–1, S–3, 10–K and 8–K and proposed Form 10–D. We have reflected the burden for the new requirements in the burden estimates for those forms. The items in Regulation S–K, including proposed Regulation AB, do not impose any separate burden. We assign one burden hour to Regulation S–K for administrative convenience to reflect the fact that the regulation does not impose any direct burden on companies.

C. Request for Comment

We request comment in order to (a) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) evaluate the accuracy of our estimates of the burden of the proposed collections of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (d) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and (e) evaluate whether the proposals will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–21–04. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–21–04, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

V. Cost-Benefit Analysis

The proposed rules and Regulation AB codify staff and industry practice for public offerings of asset-backed securities with incremental changes. They would provide definitive rules for these offerings registered under the Securities Act as well as ongoing reporting by asset-backed issuers under the Exchange Act. In this section, we examine the benefits and costs of our proposed rules. We request that commenters provide views along with supporting data as to the benefits and costs associated with the proposals.

The Commission's corporate offering and disclosure rules were not designed to accommodate some of the special characteristics of ABS offerings. The current offering and disclosure process for ABS has developed through no-action letters, staff comment, market practice and informal staff interpretations. This current informal regulatory regime for asset-backed offerings is sub-optimal for a well-developed market that represents a large portion of the U.S. capital markets. The accumulated informal guidance has diminished the transparency of applicable requirements, potentially decreasing efficiency and leading to uncertainty and common problems. Many issuers, investors and other market participants have requested a defined set of regulatory requirements.[305] Many compliance issues may be mitigated and potential issues avoided through clearer and more transparent regulatory requirements. Establishing clear and transparent requirements also could reduce costs to entry into the market. As a result, the proposals to codify staff position and industry practice with incremental changes would clarify and simplify the process of registering an ABS offering. This should lower the overall costs of complying with the federal securities laws.

In order to improve an investor's understanding of an ABS offering, we propose incremental enhancements to disclosure regarding the participants involved in the ABS transaction and of historical data regarding the performance of the assets backing the current and prior comparable asset-backed offerings, known as static pool data. We propose to improve the current framework for reporting on compliance with servicing criteria that would operate within a disclosure-based framework and cover the entire spectrum of the servicing function in an ABS transaction. An independent public accountant would attest under recognized professional standards for attestation to the responsible party's assertion of compliance with the servicing criteria. We also propose incremental changes to current staff and industry practice to allow certain lease-backed and other ABS immediate access to shelf registration through Form S–3 eligibility, along with incremental disclosure to address the different nature of these offerings. In addition, we are proposing to allow additional asset types to be securitized through master trusts or through transactions using a revolving period, again with incremental disclosure to add transparency to the use of these structures and potential changes to the asset pool over time. We are relaxing restrictions on incorporation by reference. We also are proposing to give foreign issuers access to shelf offerings and Form S–3. Finally, we are providing interpretive guidance in a number of areas in addition to proposed rule changes, such as guidance regarding the preparation of base prospectuses and prospectus supplements and EDGAR reporting, to establish more clear and uniform practices across the ABS market.

[304] We also are proposing technical changes to Regulation S–B, which includes the requirements that a small business issuer must provide in the Securities Act and the Exchange Act similar to Regulation S–K. These technical changes are designed to clarify that Regulation S–B is inapplicable to asset-backed securities. Like, Regulation S–K, Regulation S–B does not impose any separate burden. We previously have assigned one burden hour to Regulation S–B for administrative convenience to reflect the fact that the regulation does not impose any direct burden on companies.

[305] See note 55 above.

A. Parties Eligible To Use the New Regulatory Structure

The definition of asset-backed security would no longer be limited to those issuers eligible to register securities on Form S–3 but expanded to any type of security that meets the proposed definition of an asset-backed security. This would bring all ABS transactions and issuers into an appropriate disclosure system regardless of what Securities Act form they were eligible to use.

Our proposals would codify several clarifying interpretations of existing staff positions to recognize and build upon the operational and structural distinctions between ABS and non-ABS transactions. The current staff position regarding non-performing assets and delinquent assets would be incorporated into the definition of an asset-backed security with clarifying guidance as to how these concepts are to be determined. However, in codifying staff positions, we also are proposing to expand some of them to allow additional asset types and transaction features to be included. For example, the definition of asset-backed security would be expanded so that additional lease-backed ABS would be included. The proposals would allow structures such as master trusts and revolving periods, currently allowed by the staff for only certain asset classes, to be used by all asset-backed issuers. Therefore, if the market found these structures attractive for other asset classes, asset-backed issuers could effectively utilize the structures in their ABS offerings. We propose to increase disclosure to provide greater transparency of changes to pool composition.

The proposed definition and interpretations are intended to establish parameters for the types of securities that are appropriate for our proposed alternative regulatory regime for ABS. The proposals would not mean or imply that public offerings of securities outside of these parameters may not be registered, but only that the disclosure and other requirements in the ABS regime are not designed for those securities. Such securities would need to rely on non-ABS form eligibility for registration, and additional disclosures would be required. This may mean that on the margins the proposed requirements may influence market practice. However, we have taken an expansive approach to the concept of what is an ''asset-backed security'' to minimize such instances and to allow flexibility in market developments.

B. Securities Act Registration

We propose to allow domestic and foreign issuers to use either Form S–1 or Form S–3 to register an offering of asset-backed securities. Transactions backed by additional lease pools also would be allowed to use Form S–3 under the proposal. This will provide the benefit of delayed offerings to foreign issuers and some issuers of ABS backed by lease pools. We believe this will make the offering process less costly for these issuers. We propose to require additional disclosure for these two types of offerings to provide investors with a clear understanding of the unique issues these offerings raise. To remove regulatory uncertainty for issuers, we propose to codify a number of current staff positions, including clarifying and streamlining the conditions when a distribution of underlying pool assets must be concurrently registered with the distribution of ABS. We also propose to codify current staff position that the depositor should sign the registration statement and who is considered the issuer for Securities Act purposes. In very limited situations, the staff required the issuing entity to sign the registration statement. As this did not appear to provide any significant benefit to investors, and in some cases, may have added costs to issuers, we have not codified this position. We believe the proposed rules for Securities Act registration would increase transparency of the current informal regulatory regime for issuers of asset-backed securities, provide increased flexibility for additional ABS transactions and help the asset-backed securities market function more efficiently.

The proposals would revise the instructions for Form S–1 and Form S–3 for registered asset-backed offerings to clarify those items under Regulation S–K that an issuer would be required to disclose, if applicable, and list the items that an issuer would not be required to disclose due to the different nature of the ABS transactions. The instructions for Form S–1 and Form S–3 would include additional disclosure items under Regulation AB, a proposed set of principles-based disclosure requirements for ABS discussed in the next section. We believe the proposed instructions integrate disclosure items for the respective forms, which will reduce compliance costs and provide certainty about the disclosure requirements for issuers while promoting relevant disclosure for investors. We request comment on the type and amount of any potential costs the proposed rules for an asset-backed offering would place on issuers or investors.

The proposals for Form S–3 eligibility would remain essentially the same as under existing practice. We do propose codifying that reporting obligations regarding other ABS transactions established by the depositor have been complied with for the prior 12 months for continued Form S–3 eligibility for new transactions, which is consistent with existing staff policy. We propose to expand this requirement to also cover the reporting history of transactions by the sponsor. This is in order to avoid a sponsor merely setting up a new special purpose entity to obtain Form S–3 eligibility when prior transactions have not complied with Exchange Act reporting. While we believe the instances when this requirement would not be met should be rare, it could have the effect of foreclosing certain issuers from Form S–3 eligibility if they violate reporting requirements for other transactions. However, we do not believe it would be appropriate to continue to allow the benefits of shelf registration to new transactions established by the same market participants that have not complied with ongoing reporting obligations involving previous transactions.

We propose to codify an existing no-action position that broker-dealers involved in Form S–3 ABS transactions do not need to deliver a copy of the preliminary prospectus 48 hours prior to sending a confirmation of sale. The proposal would de-link this exclusion from the current requirement that the ABS transaction not include a prefunding account larger than 25% of the pool. We propose to put the 25% prefunding limitation in Form S–3 eligibility, but allow prefunding accounts up to 50% to be used in transactions registered on Form S–1, which is consistent with the treatment of revolving periods. We believe codifying this position will benefit issuers in the distribution process, but we request comment from investors as to whether this will increase their burden by significantly increasing the number of transactions that are sold within compressed timeframes. We also request comment from issuers if moving transactions with prefunding levels between 25% to 50% of the pool to Form S–1 causes any material burden.

C. Disclosure

The proposed disclosure items under Regulation AB would provide a disclosure structure tailored to the different nature of ABS. We anticipate the proposals would assist issuers and

investors by clarifying the disclosure requirements. In addition, the proposal:

- Confirms that financial statements of the issuing entity are not required for ABS transactions;
- Clarifies when third party financial information is required; and
- Codifies when third party financial information may be incorporated by reference or referred to in registration statements.

The proposed disclosure required under Regulation AB is largely based on current market practices and therefore the increase in costs to issuers should be measured. Recognizing that it would be impractical to provide an exhaustive list of disclosure items for each asset class, the proposed disclosure requirements are principles-based and thus provide flexibility for issuers where doing so would yield more focused and descriptive disclosure for investors and reduce the burden for issuers. We believe the proposal attempts to mitigate the possibility that immaterial information may overwhelm the disclosure by keying many disclosure items to a materiality-based standard. Thus, the proposed disclosure gives registrants, underwriters and their advisors the opportunity to balance the need for registrants to have flexibility when drafting disclosure with investors' need for more transparency. Whether they will take advantage of this opportunity is largely their decision.

The proposals attempt to increase transparency regarding roles and qualification of parties involved in the offering and on-going activities of the ABS transaction. Various market participants have indicated there has been confusion over the roles of parties in particular transactions or types of transactions. Similarly, market participants have indicated the role of the servicer and its servicing practices can materially impact an ABS transaction. In addition, investors have repeatedly requested that we require static pool data. According to these investors, this proposed disclosure would assist investors in analyzing the origination trends of the sponsor's overall portfolio, which would provide material information on both the quality and experience of pool selection and asset performance. As with many other disclosure items, we believe it would be impractical to impose standardized requirements that would be applicable and efficient for all transactions regarding disclosure of this data. Accordingly, the static pool data required would be keyed to the data material to the transaction. We understand almost all issuers already have static pool information available, although it may have to be subjected to additional procedures and diligence before it is included in disclosure documents. We nonetheless believe preliminarily that it should not present a significant burden to issuers, while it will improve transparency for investors in ways that investors have indicated is important. As noted below, we request comment on the type and magnitude of the burden these disclosure requirements would represent to issuers.

The proposed expanded disclosure would offer a greater understanding of the background, previous experience, and specific role of the sponsor, depositor, servicer and trustee. The proposed disclosure on the asset underwriting criteria of the sponsor would provide a clear understanding of the type of assets investors should expect in the asset pool. Some discussion of underwriting criteria is currently included, although it is typically minimal. We do not believe the costs to prepare the proposed disclosure should substantially increase. The proposed disclosure on servicing practices of all servicers materially involved in the maintenance of the asset pool and the existence of contractual back-up servicing is indicative of the importance of the servicer to the ongoing performance of the ABS transaction. We believe the proposals would stimulate higher quality disclosures of key aspects of the ABS transaction and its participants, which would yield more relevant information available to investors and allow them to make better-informed investment choices and potentially reduce the likelihood that pool assets or an ABS transaction will perform dramatically different than anticipated by investors.

This proposed disclosure under Regulation AB may increase the costs to issuers of asset-backed securities. The proposed disclosure is intended to enhance the utility of the disclosure in registration statements and ongoing Exchange Act reports. Issuers may need to reevaluate current disclosure from prior registration statements to determine the scope of additional information. We also encourage issuers to evaluate whether they should eliminate immaterial boilerplate disclosure that is not required under Regulation AB and that does not aid understanding, but that they currently provide. Due to the informal nature of the current requirements, issuers may be unnecessarily including information that is not relevant or helpful to investors. Issuers may need to employ additional resources, including in-house personnel and outside legal counsel, to assist in this evaluation. We anticipate that most of these costs may be short-term or one-time costs in preparing the first registration statement under the proposed codified disclosure regime.

We also estimate that issuers may need extra time to prepare the proposed information or obtain such information from the respective parties to the ABS transaction. However, we believe that parties already provide much of this information to rating agencies during the process of obtaining a rating on the offering, and thus such information should be readily available. Therefore, we do not anticipate that issuers would incur significant costs in complying with the proposed disclosure regime.

For purposes of the Paperwork Reduction Act, we estimate that the incremental burden in preparing the additional Securities Act disclosures would be on average 250 hours per registration statement. Based on our estimated costs of in-house personnel time, we estimate the incremental PRA hour-burden would translate into an approximate cost of $12,967,275.[306] We request comment on the type, amount and duration of any additional costs to comply with the proposed disclosure regime. These additional compliance costs should result in consistent and more tailored information that may assist the capital markets in properly valuing asset-backed securities. These benefits are difficult to quantify.

D. Communications During the Offering Process

The proposals to codify the existing ability to use written communications outside of the registration statement prospectus recognize the current beneficial information these communications provide to potential investors in an ABS offering. The proposals would simplify the definitions of the written communications that an issuer may use and incrementally expand it by allowing the use of static pool data. The proposals also clarify that the scope of the written communications permits data at the individual pool asset level. Loan level data may in some cases assist investors in better understanding the nature of the individual loans included in the pool, which in turn may increase the quality of information available to investors.

[306] We estimate that the additional disclosures for Form S–1 and Form S–3 would result in 12,063 internal burden hours and $10,856,250 in external costs. Assuming a cost of $175/hour for in-house professional staff, the total cost for the internal burden hours would be $2,111,025. Hence the aggregate cost estimate is $12,967,275.

The proposals streamline the filing requirements for these communications by providing that all types of ABS informational and computational material be filed in the same timeframe, thus reducing the regulatory uncertainty for issuers as to when to file written communications. The proposals would eliminate the hardship exemption for filing these materials in paper rather than on EDGAR. Given the developments in our EDGAR system, we believe these materials can be filed easily on EDGAR. The proposals should increase the uniformity and timeliness of information received by investors as well as disseminated to the marketplace. Since all investors almost uniformly access Commission filings electronically, this proposal should significantly benefit them. We request comment on the cost to issuers of eliminating the EDGAR hardship exemption.

We do not propose to change the scope or liability requirements of the material that may be used, so our proposals should not result in incremental costs from existing requirements. Staff in the Division of Corporation Finance is developing recommendations to the Commission on additional potential reforms to the Securities Act registration process for all offerings. We plan to address the issue of whether additional accommodations to the communications restrictions would be appropriate, including for ABS offerings, in connection with any recommendations on broader reforms.

We also propose to codify an existing staff safe harbor regarding the use of research reports published or distributed by a broker or dealer involving ABS. Both the existing safe harbor and our proposal recognize the different nature of ABS by providing tailored conditions for ABS research reports. Given that the proposed safe harbor is consistent with the existing staff safe harbor, it too should not result in incremental costs.

E. Ongoing Reporting Under the Exchange Act

We propose to integrate and streamline the modified reporting structure currently permitted by scores of no-action letters for issuers of asset-backed securities to meet their reporting obligations under the Exchange Act. The proposal clarifies who has the reporting obligation under the Exchange Act and who must file and sign the annual, periodic and current reports. The proposal differs from current practice of allowing trustees to sign since we believe either the depositor or the servicer is the party most able to monitor the ongoing Exchange Act reporting requirements of the ABS transaction. The proposal explains when the reporting obligation begins and may be terminated by the issuer. This should provide certainty to issuers as to when their reporting obligation is suspended.

Our proposals would outline the required disclosure in the Exchange Act reports to ensure uniform reporting by issuers while reducing the information asymmetry between issuers and investors. We propose to codify the current requirements that periodic information be disclosed based on the periodicity of distributions on the securities. We believe most of the information we propose to require is typically disclosed in the current distribution reports. We request comment on the burden of any increased disclosure. Rather than filing these reports on Form 8–K, we propose that issuers use newly proposed Form 10–D for reporting periodic distributions to assist investors and the marketplace in distinguishing such distribution reports from the reporting of significant events relevant to the ABS transaction.

We do not believe the use of Form 10–D rather than Form 8–K for filing these reports would result in additional costs beyond minimal one-time transition costs. Regarding the content of the Form 10–D, we do propose a few incremental disclosures, such as those relating to the changes to the asset pool. For purposes of the Paperwork Reduction Act, we estimate that the burden in preparing these incremental disclosures for the Form 10–D would be on average 10 hours per Form 10–D. Based on our estimated costs of in-house staff time, we estimate the incremental PRA hour-burden would translate into an approximate cost of $17,943,750.[307]

We have reviewed our recently revised Form 8–K requirements and propose the item requirements we believe should be applicable to ABS issuers. In addition, we propose several ABS-specific reportable events for Form 8–K disclosure. The separate filing of reportable events on Form 8–K will accelerate the delivery of information to the capital markets, which should enable investors to better monitor reportable events affecting the asset-backed securities or the relevant parties involved in the ABS transaction. Issuers of asset-backed securities may incur additional costs to report these events under a shorter timeframe; however, these additional costs should be consistent with the costs incurred by corporate issuers of other securities. For purposes of the PRA, we estimate that the proposals would cause, on average, an increase of two reports on Form 8–K per ABS issuer per year. Based on our estimated costs of in-house staff time, we estimate the PRA hour-burden would translate into an approximate cost of $2,475,000.[308]

Under the modified reporting no-action letters, ABS issuers include with their annual report on Form 10–K a report by an independent public accountant attesting to a responsible party's assertion of compliance with servicing criteria. We propose to codify this approach. Under this approach, audited financial statements of the issuing entity and reporting regarding internal control over financial reporting are not required. We also would propose to codify this practice because we believe the costs to provide audited financial statements and reporting regarding internal control over financial reporting would greatly outweigh any minimal benefits obtained from these requirements. We believe our current approach is more cost-effective and beneficial in ABS transactions.

The current modified reporting system does not provide optimal transparency as to what is expected of issuers, servicers, accountants and other parties. We propose to enhance the current framework for reporting on compliance with a single set of transparent and comprehensive servicing criteria regarding an ABS transaction. The only framework generally used today is limited to a specific asset class, covers only limited servicing functions and represents minimum standards. Therefore, we believe the market would benefit by our proposed servicing criteria. We believe that the proposed disclosure-based criteria would improve the quality of the assessment of compliance and elicit disclosure that is comparable among different issuers. We do request comment on whether alternate suitable criteria could be developed for purposes of the proposals.

[307] We estimate that preparing the incremental disclosures would result in 71,250 internal burden hours and $7,125,000 in external costs. Assuming a cost of $175/hour for in-house professional staff, the total cost for the internal burden hours would be $12,468,750. Hence the aggregate cost estimate is $19,593,750. As Form 10–Q Part II information already is required under the modified reporting system, we do not estimate the codification of that reporting obligation would result in incremental costs.

[308] We estimate that the additional Form 8–K filings would result in 9,000 internal burden hours and $900,000 in external costs. Assuming a cost of $175/hour for in-house professional staff, the total cost for the internal burden hours would be $1,575,000. Hence the aggregate cost estimate is $2,475,000.

We propose that the responsible party and the registered public accounting firm would use the proposed servicing criteria in assessing and reporting on servicing compliance. We have attempted to provide flexibility by proposing servicing criteria that are principles-based and thus may be tailored to the servicing operations for ABS transactions of any asset class. In addition, we propose the assessment and reporting on the servicing criteria to operate within a disclosure-based framework. For example, we would allow the responsible party to exclude the particular servicing criteria that are inapplicable to the servicing of a specific asset class provided that the inapplicability of the criteria was disclosed. In addition, the proposal would require the responsible party to disclose if a material instance of noncompliance with the proposed criteria exists to alert investors of potential problems with the servicing function. The proposal would not result in regulatory restrictions on market access such as Form S–3 eligibility. This approach attempts to balance the need for responsible parties to have flexibility when drafting disclosure on the assessment of compliance with the proposed servicing criteria with investors' needs for more transparency.

The proposed criteria cover the full spectrum of servicing asset-backed securities thereby facilitating an evaluation of the servicing activities by the responsible party regardless of whether those servicing activities are conducted by the responsible party or other parties, such as sub-servicers. We believe one of the critical components is calculation of the payments on the securities, also referred to as the ''waterfall.'' Our proposal attempts to cover this part of the servicing function, which is not necessarily part of the scope of the current framework. This improved assessment would enable investors, other responsible parties to the transaction and ultimately the marketplace to analyze the operational quality of the entire servicing function, which should improve investor confidence in the overall performance of the asset-backed securities.

We estimate that the proposed servicing criteria may impose new disclosure requirements on compliance assessments that do not presently utilize the current framework. Since the proposed servicing criteria are designed to evaluate servicing compliance, including compliance related to the waterfall, we estimate that the scope of compliance assessments may need to be enhanced to address these new disclosure requirements. We also understand that additional time and cost may be required to help assure that appropriate parties are accountable for reporting the applicable servicing criteria to the responsible party, which may include an internal assessment of servicing compliance or obtaining reports on servicing compliance from other parties involved in servicing. One of the benefits of a single responsible party approach would be assurance that all aspects of the servicing function have been assessed. To the extent that the responsible party and other parties involved in servicing do not maintain compliance with the proposed criteria and do not wish to publicly disclose this fact, the proposed disclosure-based criteria could lead to these parties instituting appropriate procedures to comply with the criteria and thus incur implementation costs. We request comment on the type, amount and duration of these costs.

Consistent with the modified reporting system, we believe the requirement that a registered public accounting firm attest to the responsible party's assessment of compliance with a single set of servicing criteria is an important component of the proposal. The engagement of an independent accountant improves investor confidence by establishing an independent check on the responsible party's assessment of servicing compliance. In addition, the attestation by the independent accountant may detect material instances of noncompliance with the servicing criteria that may provide early warning signals of potential losses incurred by investors. The proposed attestation of the entire servicing function would increase the costs of preparing the annual report since the accounting costs would likely increase due to the increase in the breadth of servicing function covered. These costs should be mitigated since many of the proposed servicing criteria are based on the current framework and our criteria propose only incremental changes to the current framework.

In addition to the proposed assessment of compliance with servicing criteria, we propose to continue requiring issuers to file a servicer compliance statement regarding compliance with material aspects of the servicing agreement. This codifies current practice and should not by itself result in any additional costs. We also propose to specify the form and content of the Sarbanes-Oxley Section 302 certification for ABS issuers consistent with existing staff practice. We propose minimal changes to the form to reflect our other Exchange Act proposals and to reflect the approach that the language of the certification must not be revised in providing the certification apart from the alternatives specified. Instead, any issues should be addressed through disclosure in the reports. We do not believe these revisions will result in incremental costs and should result in a more uniform and consistent certification process.

For purposes of the Paperwork Reduction Act, we estimate that the incremental burden in preparing the Form 10–K, including the proposed assessment of compliance with servicing criteria, would be on average 30 hours per response. Based on our estimated costs, we estimate the PRA hour-burden would translate into an approximate cost of $9,675,000.[309] We request comment on the type, amount and duration of these costs. We believe this increased burden would result in benefits to the ABS market in terms of an enhanced assessment and disclosure regarding the servicing functions and increased assurance and investor confidence in these disclosures. These benefits are difficult to quantify.

We also reiterate existing staff view that the final prospectus and Exchange Act reports are to be separately filed under the CIK code and file number of the respective issuing entity on EDGAR. This facilitates access to information relevant to the particular securities involved. We anticipate that some issuers not following this existing practice may incur additional costs by preparing separate Exchange Act reports for each issuing entity because some issuers provide combined reports. However, we believe these costs will be limited since issuers are already reporting this information for a particular issuing entity, albeit in a combined report. Some of the issuers that combine reports do so for scores of issuers such that investors may have to sift through hundreds of pages that relate to securities they do not own. Further, combined reporting creates inefficiencies in the storage, retrieval and analysis of EDGAR information.

VI. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

For purposes of the Small Business Regulatory Enforcement Fairness Act of

[309] We estimate that the incremental burden would result in 9,000 internal burden hours and $8,100,000 in external costs. Assuming a cost of $175/hour for in-house professional staff, the total cost for the internal burden hours would be $1,575,000. Hence the aggregate cost estimate is $9,675,000.

1996 (''SBREFA''),[310] a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposals on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views if possible.

Section 23(a)(2) of the Exchange Act[311] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, Section 2(b) of the Securities Act[312] and Section 3(f) of the Exchange Act[313] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The proposals are intended to increase transparency by amending informal industry and staff practices into a formal regulatory regime for offerings of asset-backed securities under the Securities Act and ongoing reporting under the Exchange Act. We anticipate that these proposals would enhance capital formation by simplifying the process of registering an offering of asset-backed securities allowing parties not fully immersed in the ABS market to ascertain and understand the offering and disclosure requirements, thus promoting efficiency and competitiveness of the U.S. capital markets for asset-backed offerings.

Our specific proposals relate only to transactions that meet our proposed definition for an asset-backed security under the Securities Act. Although the definition for an asset-backed security captures most asset-backed structures, there may be transactions that are fundamentally different from the proposed definition. However, transactions that would not fit the parameters of the definition would still be able to access the capital markets. Instead, these transactions would be required to rely on non-ABS form eligibility for registration, and additional disclosures would be required.

In addition, the proposed principles-based disclosure requirements would allow great flexibility in implementation for all asset classes while enhancing the quality of disclosure for ABS transactions. Similarly, the proposed servicing criteria are intended to provide a comprehensive assessment to evaluate the overall servicing function for the ABS transaction. We anticipate these proposals should improve investors' ability to make informed investment decisions about asset-backed offerings as well as help increase investor confidence in the servicing of ABS transactions. We anticipate this would therefore lead to increased efficiency and competitiveness of the U.S. capital markets. Increased market efficiency and investor confidence also may encourage more efficient capital formation.

The proposals could have certain indirect negative effects. For example, the proposed incremental disclosures would increase transparency regarding a sponsor's or servicer's business practices. However, all such parties would be required to disclose such information equally, and the increased disclosures are designed to facilitate information to investors to improve their ability to make informed investment decisions. In addition, if transactions in the private market for ABS or foreign markets do not result in similar disclosures, issuers could, all things being equal, migrate to those markets to avoid such disclosures. However, there may be limitations on the ability to migrate to these markets given the large size of the U.S. ABS market and potential regulatory or investment restrictions on the ability of investors to purchase non-public ABS. In addition, competitors and markets not subject to the proposed requirements may suffer from decreased investor confidence if the asset-backed offerings lack the transparency of asset-backed offerings that do comply with the disclosure regime.

The proposals are designed to improve the current framework for reporting on compliance with servicing criteria that would operate within a disclosure-based framework and cover the entire spectrum of the servicing function. We believe the proposed servicing criteria will provide value to the ABS industry in establishing market-wide disclosure benchmarks and promote market efficiency by providing meaningful disclosure regarding the overall servicing function by a responsible party that is attested to by an independent public accountant. The disclosure-based framework of the servicing criteria would provide information about the entire servicing function to be publicly available for investors, as well as the marketplace, to monitor the performance of the ABS transaction. This should promote investor confidence and market efficiency by decreasing information asymmetries and promoting more efficient pricing and valuation of the securities. As a result, capital may be allocated more efficiently. In addition, the proposed servicing criteria would promote the comparability of reports of different issuers, thus promoting investor analysis as well as competition among such issuers.

We request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden competition. Commenters are requested to provide empirical data and other factual support for their views if possible.

VII. Regulatory Flexibility Analysis Certification

The Commission hereby certifies pursuant to 5 U.S.C. 605(b) that the proposals contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposals relate to the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act and the Exchange Act. Securities Act Rule 157[314] and Exchange Act Rule 0–10(a)[315] defines an issuer, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. As the depositor and issuing entity are most often limited purpose entities in an ABS transaction, we focused on the sponsor in analyzing the potential impact of the proposals under the Regulatory Flexibility Act. The staff analyzed sponsors that conducted registered public offerings of asset-backed securities transactions during 2003. No sponsor had total assets of $5 million or less. Accordingly, the Commission does not believe that the proposals, if adopted, would have a significant economic impact on a substantial number of small entities.

We solicit written comments regarding this certification. We request

[310] Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[311] 15 U.S.C. 78w(a)(2).

[312] 15 U.S.C. 77b(b).

[313] 15 U.S.C. 78c(f).

[314] 17 CFR 230.157.

[315] 17 CFR 240.0–10(a).

comment on whether the proposals could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

VIII. Statutory Authority and Text of Rule Amendments

The proposals contained in this document are being proposed under the authority set forth in Sections 2, 6, 7, 8, 10, 17, 19 and 28 of the Securities Act,[316] Sections 3, 10, 10A, 12, 13, 14, 15, 16, 23 and 36 of the Exchange Act,[317] and Sections 3, 302, 306, 404, 406 and 407 of the Sarbanes-Oxley Act.[318]

Text of Proposed Amendments

List of Subjects

17 CFR Part 210

Accountants, Accounting, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 228, 229, 232, 239, 242, 245 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 230

Advertising, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows.

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 78c, 78j–1, 78*l*, 78m, 78n, 78o(d), 78q, 78u–5, 78w(a), 78*ll*, 78mm, 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, unless otherwise noted.

[316] 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77q, 77s and 77z–3.

[317] 15 U.S.C. 78c, 78j, 78j–1, 78*l*, 78m, 78n, 78o, 78p, 78w and 78mm.

[318] 15 U.S.C. 7202, 7241, 7244, 7262, 7264 and 7265.

2. Section 210.1–02 is amended by adding paragraph (a)(3) to read as follows:

§ 210.1–02 Definition of terms used in Regulation S–X (17 CFR part 210).

* * * * *

(a)(1) * * *

(3) *Attestation report on assessment of compliance with servicing criteria for asset-backed securities.* The term *attestation report on assessment of compliance with servicing criteria for asset-backed securities* means a report in which a registered public accounting firm, in accordance with §§ 240.13a–18(d) or 240.15d–18(d) of this chapter, expresses an opinion, or states that an opinion cannot be expressed, concerning a responsible party's assessment of compliance with servicing criteria, as required by §§ 240.13a–18 or 240.15d–18 of this chapter, in accordance with standards on attestation engagements. When an overall opinion cannot be expressed, the registered public accounting firm must state why it is unable to express such an opinion.

* * * * *

3. In 17 CFR Part 210, remove the phrase ''as defined in § 240.13a–14(g) and § 240–15d–14(g) of this chapter'' and add, in its place, the phrase ''as defined in § 229.1101 of this chapter'' in the following places:

a. In the introductory text of § 210.2–01(c)(7); and

b. In the introductory text of § 210.2–07(a).

4. Amend § 210.2–02 by:

a. Revising the section heading; and

b. Adding paragraph (g).

The addition and revisions read as follows:

§ 210.2–02 Accountants' reports and attestation reports.

* * * * *

(g) *Attestation report on assessment of compliance with servicing criteria for asset-backed securities.* The attestation report on assessment of compliance with servicing criteria for asset-backed securities, as required by §§ 240.13a–18(d) or 240.15d–18(d) of this chapter, shall be dated, signed manually, identify the period covered by the report and clearly state the opinion of the registered public accounting firm as to whether the responsible party's assessment of compliance with the servicing criteria is fairly stated in all material respects, or must include an opinion to the effect that an overall opinion cannot be expressed. If an overall opinion cannot be expressed, explain why.

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

5. The authority citation for Part 228 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

6. Amend § 228.10 by revising paragraph (a)(1)(iii) to read as follows:

§ 228.10 (Item 10) General

(a) *Application of Regulation S–B.*

* * *

(1) *Definition of small business issuer.*

* * *

(iii) Is not an investment company and is not an asset-backed issuer (as defined in § 229.1101 of this chapter); and

* * * * *

7. Amend § 228.308 by revising the ''Instructions to Item 308'' to read as follows:

§ 228.308 (Item 308) Internal control over financial reporting.

* * * * *

Instruction to Item 308. The small business issuer must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the small business issuer's internal control over financial reporting.

§ 228.401 [Amended]

8. Amend § 228.401, ''Instructions to Item 401(e),'' by removing Instruction 4 and redesignating Instruction 5 as Instruction 4.

§ 228.406 [Amended]

9. Amend § 228.406, ''Instructions to Item 406,'' by removing Instruction 3.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

10. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 79e, 79j, 79n, 79t, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–

11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

11. Amend § 229.10, introductory text of paragraph (d), by revising the second sentence to read as follows:

§ 229.10 (Item 10) General.

* * * * *

(d) *Incorporation by reference.* * * * Except where a registrant or issuer is expressly required to incorporate a document or documents by reference (or for purposes of Item 1100(c) of Regulation AB (§ 229.1100(c)) with respect to an asset-backed issuer, as that term is defined in Item 1101 of Regulation AB (§ 229.1101)), reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. * * *

* * * * *

12. Amend § 229.202 by:

a. Removing the authority citation following the section; and

b. Adding Instruction 6 to the ''Instructions to Item 202''.

The addition reads as follows.

§ 229.202 (Item 202) Description of registrant's securities.

* * * * *

Instructions to Item 202: * * *

6. For asset-backed securities, see also Item 1112 of Regulation AB (§ 229.1112).

13. Amend § 229.308 by revising the ''Instructions to Item 308'' to read as follows:

§ 229.308 (Item 308) Internal control over financial reporting.

* * * * *

Instruction to Item 308. The registrant must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the registrant's internal control over financial reporting.

§ 229.401 [Amended]

14. Amend § 229.401 by removing the phrase ''(as defined in §240.13a–14(g) and § 6240.15d–14(g) of this chapter)'' from Instruction 4 of the Instructions to Item 401(h) and adding, in its place, the phrase ''(as defined in § 229.1101)''.

15. Amend § 229.406, ''Instructions to Item 406,'' by removing Instruction 3.

16. Amend § 229.501 by adding an Instruction to the end of § 229.501 to read as follows:

§ 229.501 (Item 501) Forepart of Registration Statement and Outside Front Cover Page of Prospectus.

* * * * *

Instruction to Item 501. For asset-backed securities, see also Item 1102 of Regulation AB (§ 229.1102).

17. Amend § 229.503 by adding an Instruction to the end of § 229.503 to read as follows:

§ 229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.

* * * * *

Instruction to Item 503. For asset-backed securities, see also Item 1103 of Regulation AB (§ 229.1103).

18. Amend § 229.512 by:

a. Adding a paragraph after the paragraph that begins ''*Provided, however,*'' after paragraph (a)(1)(iii); and

b. Adding paragraph (k).

The revisions read as follows:

§ 229.512 (Item 512) Undertakings.

* * * * *

(a) * * *

(1) * * *

(iii) * * *

Provided, however, * * *

Provided further, however, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the registration statement is for an offering of asset-backed securities on Form S–1 (§ 239.11 of this chapter) or Form S–3 (§ 239.13 of this chapter), and the information required to be included in a post-effective amendment is provided pursuant to Item 1100(c) of Regulation AB (§ 229.1100(c)).

* * * * *

(k) *Filings regarding asset-backed securities incorporating by reference subsequent Exchange Act documents by third parties.* Include the following if the registration statement incorporates by reference any Exchange Act document filed subsequent to the effective date of the registration statement pursuant to Item 1100(c) of Regulation AB (§ 229.1100(c)):

The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 of a third party that is incorporated by reference in the registration statement in accordance with Item 1100(c)(1) of Regulation AB (17 CFR 229.1100(c)(1)) shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

19. Amend § 229.601 by: a. Revising the exhibit table; b. Redesignating the text of paragraph (b)(31) as paragraph (b)(31)(i); c. Adding paragraph (b)(31)(ii); and d. Revising paragraphs (b)(33) through (b)(98).

The revisions read as follows.

§ 229.601 (Item 601) Exhibits.

(a) *Exhibits and index required.* * * *

* * * * *

Exhibit Table

Instructions to the Exhibit Table

* * * * *

EXHIBIT TABLE

	Securities act forms										Exchange act forms				
	S–1	*S–2*	*S–3*	*S–4*[3]	*S–8*	*S–11*	*F–1*	*F–2*	*F–3*	*F–4*[3]	*10*	*8–K*[5]	*10–D*	*10–Q*	*10–K*
(1) Underwriting agreement	X	X	X	X		X	X	X	X	X		X			
(2) Plan of acquisition, reorganization, arrangement, liquidation or succession	X	X	X	X		X	X	X	X	X	X	X		X	X
(3) (i) Articles of incorporation	X			X		X	X			X	X	X		X	X
(ii) By-laws	X			X		X	X			X	X	X		X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X	X	X	X		X	X
(5) Opinion re legality	X	X	X	X	X	X	X	X	X	X					
(6) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) Correspondence from an independent accountant regarding non-reliance on a previously issued audit report or completed interim review												X			

EXHIBIT TABLE

	Securities act forms										Exchange act forms				
	S–1	*S–2*	*S–3*	*S–4*[3]	*S–8*	*S–11*	*F–1*	*F–2*	*F–3*	*F–4*[3]	*10*	*8–K*[5]	*10–D*	*10–Q*	*10–K*
(8) Opinion re tax matters	X	X	X	X		X	X	X	X						
(9) Voting trust agreement	X			X		X	X			X	X				X
(10) Material contracts	X	X		X		X	X	X		X	X			X	X
(11) Statement re computation of per share earnings	X	X		X		X	X	X		X	X			X	X
(12) Statements re computation of ratios	X	X	X	X		X	X	X		X	X				X
(13) Annual report to security holders, Form 10–Q and 10–QSB, or quarterly report to security holders[1]		X		X											X
(14) Code of Ethics												X			X
(15) Letter re unaudited interim financial information	X	X	X	X	X	X	X	X	X	X				X	
(16) Letter re change in certifying accountant[4]	X	X		X		X					X	X			X
(17) Correspondence on departure of director											X				
(18) Letter re change in accounting principles														X	X
(19) Report furnished to security holders														X	
(20) Other documents or statements to security holders											X				
(21) Subsidiaries of the registrant	X			X		X	X			X	X				X
(22) Published report regarding matters submitted to vote of security holders													X	X	X
(23) Consents of experts and counsel	X	X	X	X	X	X	X	X	X	X		X[2]	X[2]	X[2]	X[2]
(24) Power of attorney	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(25) Statement of eligibility of trustee	X	X	X	X		X	X	X	X	X					
(26) Invitations for competitive bids	X	X	X	X			X	X	X	X					
(27) through (30) [Reserved]															
(31) (i) Rule 13a–14(a)/15d–14(a) Certifications														X	X
(ii) Rule 13a–14(d)/15d–14(d) Certifications[6]															X
(32) Section 1350 Certifications[6]														X	X
(33) Report of compliance with servicing criteria for asset-backed securities															X
(34) Attestation report on assessment of compliance with servicing criteria for asset-backed securities															X
(35) Servicer compliance statement															X
(36) through (98) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(99) Additional exhibits	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

[1] Where incorporated by reference into the text of the prospectus and delivered to security holders along with the prospectus as permitted by the registration statement; or, in the case of the Form 10–K, where the annual report to security holders is incorporated by reference into the text of the Form 10–K.

[2] Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

[3] An exhibit need not be provided about a company if: (1) with respect to such company an election has been made under Form S–4 or F–4 to provide information about such company at a level prescribed by Form S–2, S–3, F–2 or F–3; and (2) the form, the level of which has been elected under Form S–4 or F–4, would not require such company to provide such exhibit if it were registering a primary offering.

[4] If required pursuant to Item 304 of Regulation S–K.

[5] A Form 8–K Exhibit is required only if relevant to the subject matter reported on the Form 8–K report. For example, if the Form 8–K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

[6] Pursuant to §§ 240.13a–13(b)(3) and 240.15d–13(b)(3) of this chapter, asset-backed issuers are not required to file reports on Form 10–Q.

* * * * *

(b) *Description of exhibits.* * * *

(31)(i) * * *

(ii) *Rule 13a–14(d)/15d–14(d) Certifications.* If an asset-backed issuer, the certifications required by Rule 13a–14(d) (17 CFR 240.13a–14(d)) or Rule 15d–14(d) (17 CFR 240.15d–14(d)) exactly as set forth below:

CERTIFICATIONS [1]

I, [identify the certifying individual], certify that:

1. I have reviewed this report on Form 10–K and all reports on Form 10–D required to be filed in respect of the period covered by this report on Form 10–K of [identify the issuing entity];

2. Based on my knowledge, the information in these reports, taken as a whole, does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading as of the last day of the period covered by this report;

3. Based on my knowledge, all of the distribution, servicing and other information required to be provided under Form 10–D for the period covered by this report is included in those reports;

4. [I am responsible for reviewing the activities performed by the servicer(s) and based on my knowledge and the compliance review conducted in preparing the servicer compliance

[1] With respect to asset-backed issuers, the certification must be signed by either: (1) The senior officer in charge of securitization of the depositor if the depositor is signing the report on Form 10–K; or (2) The senior officer in charge of the servicing function of the servicer if the servicer is signing the report on Form 10–K on behalf of the issuing entity. See Rules 13a–14(e) and 15d–14(e) (§§ 240.13a–14(e) and 240.15d–14(e)). If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent functions) must sign if a representative of the servicer is to sign the certification. If there is a master servicer and one or more underlying servicers, the references in the certification relate to the master servicer. A natural person must sign the certification in his or her individual capacity, although the title of that person in the organization of which he or she is an officer may be included under the signature.

statement required in this report under Item 1121 of Regulation AB, and except as disclosed in the reports, the servicer has fulfilled its obligations under the servicing agreement; and]

[Based on my knowledge and the servicer compliance statement required in this report under Item 1121 of Regulation AB, and except as disclosed in the reports, the servicer has fulfilled its obligations under the servicing agreement; and] [2]

5. This report discloses all material instances of noncompliance with the servicing criteria as provided in Item 1120 of Regulation AB based on an assessment of compliance with such criteria.

[In giving the certifications above, I have reasonably relied on information provided to me by the following unaffiliated parties [name of servicer, sub-servicer, co-servicer, depositor or trustee].][3]

Date: _____

_____

[Signature]

[Title]

(33) *Report of compliance with servicing criteria for asset-backed securities.* The responsible party's report of compliance with servicing criteria required by § 229.1120(a).

(34) *Attestation report on assessment of compliance with servicing criteria for asset-backed securities.* The attestation report on assessment of compliance with servicing criteria for asset-backed securities required by § 229.1120(b).

(35) *Servicer compliance statement.* The servicer compliance statement required by § 229.1121.

(36) through (98) [Reserved]

* * * * *

§ 229.701 [Amended]

20. Amend paragraph § 229.701(e) by revising the phrase ''Form 10–KSB or Form 10–K (§§ 249.308, 249.308b, 249.308a, 249.310b or 249.310)'' to read ''Form 10–KSB, Form 10–K or Form 10–D (§§ 249.308, 249.308b, 249.308a, 249.310b, 249.310 or 249.312)''.

21. Add subpart 229.1100 consisting of §§ 229.1100 through 229.1121 to read as follows:

[2] The first version of paragraph 4 is to be used when the servicer is signing the report on behalf of the issuing entity. The second version of paragraph 4 is to be used when the depositor is signing the report.

[3] Because the signer of the certification must rely in certain circumstances on information provided by unaffiliated parties outside of the signer's control, this paragraph must be included if the signer is reasonably relying on information that unaffiliated trustees, depositors, servicers, sub-servicers or co-servicers have provided.

Subpart 229.1100—Asset-Backed Securities (Regulation AB)

Sec.

Subpart 229.1100—Asset-Backed Securities (Regulation AB)

§ 229.1100 (Item 1100) General.

(a) *Application of Regulation AB.* Regulation AB (§§ 229.1100 through 229.1121) is the source of various disclosure items for ''asset-backed securities'' filings under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (the ''Securities Act'') and the Securities Exchange Act of 1934 (the ''Exchange Act'') (15 U.S.C. 78a *et seq.*). Definitions to be used in this Regulation AB are set forth in Item 1101.

(b) *Presentation of historical delinquency and loss information.* Several Items in Regulation AB call for the presentation of historical information and data on delinquencies and loss information. In providing such information:

(1) Present delinquency experience in 30-day increments, beginning with assets 30–59 days delinquent, through the point that assets are written off or charged off as uncollectable. At a minimum, present such information by number of accounts and dollar amount. Present statistical information in a tabular or graphical format, if such presentation will aid understanding.

(2) Disclose the total amount of delinquent assets as a percentage of the aggregate asset pool.

(3) Present loss information, as applicable, regarding charge-offs, charge-off rate, gross losses, recoveries and net losses (with a description of how these terms are defined), the number and amount of assets experiencing a loss and the number and amount of assets with a recovery, the ratio of aggregate net losses to average portfolio balance and the average of net loss on all assets that have experienced a net loss.

(4) Categorize all delinquency and loss information by pool asset type.

(5) Describe how delinquencies, charge-offs and uncollectable accounts are defined or determined, addressing the effect of any grace period, re-aging, restructure or other practices on delinquency experience. In a registration statement under the Securities Act or the Exchange Act or otherwise if delinquency and loss information is being presented with respect to the sponsor, also provide such information with respect to the sponsor for assets of the type securitized.

(6) Describe any other material information regarding delinquencies and losses particular to the pool asset type(s), such as repossession information, foreclosure information and real estate owned (REO) or similar information.

(c) *Presentation of certain third party financial information.*

If financial information of a third party is required in a filing by Item 1111(b) of this Regulation AB (Information regarding significant obligors) or Item 1113(b)(2) of this Regulation AB (Information regarding significant enhancement providers), such information may be provided as follows:

(1) *Incorporation by reference.* If the following conditions are met, you may incorporate by reference (by means of a statement to that effect) the reports filed by the third party (or the entity that consolidates the third party) pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)):

(i) Such third party or the entity that consolidates the third party is required to file reports with the Commission pursuant to section 13(a) or 15(d) of the Exchange Act.

(ii) Such third party or the entity that consolidates the third party has filed all reports and other materials required to be filed by such requirements during the preceding 12 months (or such shorter period that such party was required to file such reports and materials).

(iii) The reports filed by such third party, or entity that consolidates the third party, include (or properly incorporate by reference) the financial statements of such third party or such information is consolidated into the financial statements of the entity that consolidates the third party.

(iv) The filing incorporating the information by reference describes any and all material changes to the incorporated information which have occurred subsequent to the filing of the incorporated information.

(v) If included in a prospectus or registration statement, the prospectus also states that all documents subsequently filed by such third party, or the entity that consolidates the third party, pursuant to section 13(a) or 15(d) of the Exchange Act prior to the termination of the offering also shall be deemed to be incorporated by reference into the prospectus.

Instructions to Item 1100(c)(1).

1. In addition to the conditions in paragraph (c)(1) of this section, any information incorporated by reference must comply with all applicable Commission rules pertaining to incorporation by reference, such as Item 10(d) of Regulation S–K (§ 229.10(d)), Rule 303 of Regulation S–T (§ 232.303 of this chapter), Rule 411 of Regulation C (§ 230.411 of this chapter), and Rules 12b–23 and 12b–32 under the Exchange Act (§§ 240.12b–23 and 240.12b–32 of this chapter).

2. In addition, any applicable requirements under the Securities Act or the rules and regulations of the Commission regarding the filing of a written consent for the use of incorporated material apply to the material incorporated by reference. See, for example, § 230.439 of this chapter.

3. Any undertakings set forth in Item 512 of Regulation S–K (§ 229.512) apply to any material incorporated by reference in a registration statement or prospectus.

(2) *Reference information for significant obligors.* If the third party information relates to a significant obligor and the following conditions are met, you may, rather than providing such information, include a reference to the third party's periodic reports (or the third party's parent with respect to paragraph (c)(2)(ii)(C) of this section) under section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) that are on file with the Commission (or otherwise publicly available with respect to paragraph (c)(2)(ii)(F) of this section), along with a statement of how those reports may be accessed, including the third party's name and Commission reporting number, if applicable (See, *e.g.*, Item 1116 of this Regulation AB):

(i) Neither the third party nor any of its affiliates has had a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the asset-backed securities transaction, and neither the third party nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction.

(ii) Any of the following is true:

(A) The third party is eligible to use Form S–3 or F–3 (§§ 239.13 or 239.33 of this chapter) for a primary offering of non-investment grade securities pursuant to General Instruction I.B.1 of such forms.

(B) The third party meets the requirements of General Instruction I.A. of Form S–3 or General Instructions 1.A.1, 2, 3, 4 and 6 of Form F–3 and the pool assets relating to such third party are non-convertible investment grade securities, as described in General Instruction 1.B.2 of Form S–3 or Form F–3.

(C) If the third party does not meet the conditions of paragraphs (c)(2)(ii)(A) or (c)(2)(ii)(B) of this section and the pool assets relating to the third party are fully and unconditionally guaranteed by a direct or indirect parent of the third party, General Instruction I.C.3 of Form S–3 or General Instruction I.A.5(iii) of Form F–3 is met with respect to the pool assets relating to such third party and the requirements of Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter) are satisfied regarding the information in the reports to be referenced.

(D) If the pool assets relating to the third party are guaranteed by a wholly owned subsidiary of the third party and the subsidiary does not meet the conditions of paragraphs (c)(2)(ii)(A) or (c)(2)(ii)(B) of this section, the criteria in either paragraph (c)(2)(ii)(A) or paragraph (c)(2)(ii)(B) of this section are met with respect to the third party and the requirements of Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter) are satisfied regarding the information in the reports to be referenced.

(E) The pool assets relating to such third party are asset-backed securities and the third party is filing reports pursuant to section 12 or 15(d) of the Exchange Act (15 U.S.C. 78*l* or 78o(d)) and has filed all the material that would be required to be filed pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for a period of at least twelve calendar months and any portion of a month immediately preceding the filing referencing the third party's reports (or such shorter period that such third party was required to file such materials).

(F) The third party is a U.S. government-sponsored enterprise, has outstanding securities held by non-affiliates with an aggregate market value of $75 million or more, and makes information publicly available on an annual and quarterly basis, including audited financial statements prepared in accordance with generally accepted accounting principles covering the same periods that would be required for audited financial statements under Regulation S–X (§§ 210.1–01 through 210.12–29 of this chapter) and non-financial information consistent with that required by Regulation S–K (§§ 229.10 through 229.1121).

(iii) You include an undertaking that if such third party ceases to meet the requirements of paragraphs (c)(2)(i) and (ii) of this section, you will either provide the information required by Item 1111(b) of this Regulation AB, as applicable, relating to such third party or terminate the transaction or that portion of the transaction.

(d) *Other participants to the transaction and pool assets representing interests in certain other asset pools.*

(1) If the asset-backed securities transaction involves additional or intermediate parties not specifically identified in this Regulation AB, the disclosure required by this Regulation AB includes information to the extent material regarding any such party and its role, function and experience in relation to the asset-backed securities and the asset pool. Describe the material terms of any agreement with such party regarding the transaction, and file such agreement as an exhibit.

(2) If the asset pool backing the asset-backed securities includes one or more pool assets representing an interest in or the right to the payments or cash flows of another asset pool, then for purposes of this Regulation AB and §§ 240.13a–18 and 240.15d–18 of this chapter, references to the asset pool and the pool assets of the issuing entity also include the other asset pool and its pool assets if the following conditions are met:

(i) Both the issuing entity for the asset-backed securities and the entity issuing the pool asset to be included in the issuing entity's asset pool were established under the direction of the same sponsor or depositor.

(ii) The pool asset was created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction.

Instruction to Item 1100(d)(2)

Reference to the underlying asset pool includes, without limitation, compliance with applicable servicing criteria referenced in §§ 240.13a–18 and 240.15d–18 of this chapter and the servicer compliance statement required by Item 1121 of this Regulation AB. In addition, provide clear and concise disclosure, including by flow chart or other illustration, of the transaction and the various parties involved.

(e) *Foreign asset-backed securities.* If the asset-backed securities are issued by a foreign issuer (as defined in § 230.405 of this chapter), backed by pool assets that are foreign assets, or affected by enhancement contemplated by Item 1113 of this Regulation AB provided by a foreign entity, then in providing the disclosure required by this Regulation AB (including, but not limited to, Items 1104 and 1109 of this Regulation AB regarding origination and securitization practices, Item 1106 of this Regulation AB regarding the sale or transfer of the pool assets, bankruptcy remoteness and collateral protection, Item 1107 of this Regulation AB regarding servicing, Item 1108 of this Regulation AB regarding the rights, duties and responsibilities of the trustee, Item 1110 of this Regulation AB regarding the terms, nature and treatment of the pool assets and Item 1113 of this Regulation AB regarding the enhancement provider), the filing must describe any pertinent governmental legal or regulatory or administrative matters and any pertinent tax matters, exchange controls, currency restrictions or other economic, fiscal, monetary or potential factors that could materially affect payments on the performance of, or other matters relating to, the assets contained in the pool or the asset-backed securities. See also Instruction 2 to Item 202 of Regulation S–K (§ 229.202). In addition, in a registration statement under the Securities Act, provide the information required by Item 101(g) of Regulation S–K (§ 229.101(g)). Disclosure also is required in Forms 10–D (§ 249.312 of this chapter) and 10–K (§ 249.310 of this chapter) with respect to the asset-backed securities regarding any material impact caused by foreign legal and regulatory developments during the period covered by the report which have not been previously described in a Form 10–D, 10–K or 8–K (§ 249.308 of this chapter) filed under the Exchange Act.

(f) *Filing of required exhibits.* Where agreements or other documents in this Regulation AB are specified to be filed as exhibits to a registration statement, such final agreements or other documents, if applicable, may be incorporated by reference as an exhibit to the registration statement, such as by filing a Form 8–K in the case of offerings registered on Form S–3 (§ 239.13 of this chapter).

§ 229.1101 (Item 1101) Definitions.

The following definitions apply to the terms used in Regulation AB (§§ 229.1100 through 229.1121), unless specified otherwise:

(a) *ABS informational and computational material* means a written communication consisting solely of one or some combination of the following:

(1) A brief summary of the structure of an offering of asset-backed securities that sets forth the name of the issuer, the estimated size of the offering and the proposed structure of the offering (such as the number of classes, seniority and priority and other terms of payment).

(2) Descriptive factual information regarding the pool assets underlying an offering of asset-backed securities, typically including data regarding the contractual and related characteristics of the underlying pool assets, such as weighted average coupon, weighted average maturity and other factual information regarding the type of assets comprising the pool.

(3) Static pool data, as referenced in Items 1104(e) and 1110(c) of this Regulation AB.

(4) Statistical information displaying for a particular class or classes of asset-backed securities the yield, average life, expected maturity, interest rate sensitivity, cash flow characteristics, total rate of return, option adjusted spread or other financial or statistical information relating to the class or classes under specified prepayment, interest rate, loss or other hypothetical scenarios. Examples of such information include:

(i) The statistical results of interest rate sensitivity analyses containing data regarding the impact on the yield or other financial characteristics of a class of securities resulting from changes in interest rates at one or more assumed prepayment speeds.

(ii) Statistical information showing the principal and interest cash flows that would be associated with a particular class of asset-backed securities at a specified prepayment speed.

(iii) Statistical information reflecting the financial impact of losses based on a variety of loss or default experience, prepayment, interest rate and related assumptions.

(b) *Asset-backed issuer* means an issuer whose reporting obligation results from either the registration of an offering of asset-backed securities under the Securities Act, or the registration of a class of asset-backed securities under section 12 of the Exchange Act (15 U.S.C. 78*l*).

(c)(1) *Asset-backed security* means a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders; provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases.

(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 for the asset-backed securities are limited to passively owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto.

(iii) No non-performing assets are part of the original asset pool at the time of issuance of the asset-backed securities.

(iv) Delinquent assets do not constitute 50% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities.

(v) With respect to securities that are backed by leases, the portion of the cash flow to repay the securities anticipated to come from the residual value of the physical property underlying the leases does not constitute:

(A) For automobile leases, 60% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities.

(B) For all other leases, 50% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities.

(3) Notwithstanding the requirement in paragraph (c)(1) of this section that the asset pool be a discrete pool of assets, the following are considered to be a discrete pool of assets for purposes of being considered an *asset-backed security*:

(i) *Master trusts.* The offering related to the securities contemplates adding additional assets to the pool that backs such securities in connection with

future issuances of asset-backed securities backed by such pool.

(ii) *Prefunding periods.* The offering related to the securities contemplates a prefunding account where a portion of the proceeds of that offering is to be used for the future acquisition of additional pool assets, if such prefunding account does not involve in excess of 50% of the proceeds of the offering and the duration of the prefunding period does not extend for more than one year from the initial date of issuance of securities backed by the asset pool.

(iii) *Revolving periods.* The offering related to the securities contemplates a revolving period where cash flows from the pool assets may be used to acquire additional pool assets, provided, that, for fixed receivables or other financial assets that do not revolve, the amount of additional receivables or financial assets to be acquired in the revolving period does not exceed 50% of the proceeds of the offering and the duration of the revolving period does not extend for more than one year from the initial date of issuance of securities backed by the asset pool.

(d) *Delinquent,* for purposes of determining if a pool asset is delinquent, means if any portion of a contractually required payment is 30 days or more past due. A pool asset that is more than one payment past due cannot be characterized as not delinquent if only partial payment on the total past due amount had been made unless the obligor had contractually agreed to restructure the obligation, such as part of a workout plan.

(e) *Depositor* means the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity. For asset-backed securities transactions where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term *depositor* refers to the sponsor. For asset-backed securities transactions where the person transferring or selling the pool assets is itself a trust, the *depositor* of the issuing entity is the depositor of that trust.

(f) *Issuing entity* means the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(g) *Non-performing,* for purposes of determining if a pool asset is non-performing, means a pool asset if any of the following is true: the pool asset meets the requirements in the transaction agreements for when a pool asset should be charged-off; or the pool asset meets the charge-off policies of the sponsor. A pool asset that is more than one payment past due cannot be characterized as not non-performing if only partial payment on the total past due amount had been made unless the obligor had contractually agreed to restructure the obligation, such as part of a workout plan.

(h) *NRSRO* has the same meaning as the term ''nationally recognized statistical rating organization'' as used in § 240.15c3–1(c)(2)(vi)(F) of this chapter.

(i) *Obligor* means any person who is directly or indirectly committed by contract or other arrangement to make payments on all or part of the obligations on a pool asset.

(j) *Servicer* means any person responsible for the management or collection of the pool assets or making allocations or distributions to holders of the asset-backed securities. The term *servicer* does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the asset-backed securities if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

(k) *Significant obligor* means any of the following:

(1) An obligor or a group of affiliated obligors on any pool asset or group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool.

(2) A single property or group of related properties securing a pool asset or a group of pool assets if such pool asset or group of pool assets represents 10% or more of the asset pool.

(3) A lessee or group of affiliated lessees if the related lease or group of leases represents 10% or more of the asset pool.

Instructions to Item 1101(k)

1. Regarding paragraph (k)(3) of this section, the calculation must focus on the leases whose cash flow supports the asset-backed securities directly or indirectly (including the residual value of the physical property underlying the leases if a portion of the cash flow to repay the asset-backed securities is anticipated to come from the residual value of such property), regardless of whether the asset pool contains the leases themselves, mortgages on properties that are the subject of the leases or other assets related to the leases.

2. If separate pool assets, or properties underlying pool assets, are cross-defaulted and/or cross-collateralized, such pool assets are to be aggregated and considered together in determining concentration levels.

3. If the pool asset is a mortgage or lease relating to real estate, the pool asset is non-recourse to the obligor, and the obligor does not manage the property or does not own other assets and has no other operations, then the obligor need not be considered a separate significant obligor from the real estate. Otherwise, the obligor is a separate significant obligor.

(l) *Sponsor* means the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.

§ 229.1102 (Item 1102) Forepart of registration statement and outside cover page of the prospectus.

In addition to the information required by Item 501 of Regulation S–K (§ 229.501), provide the following information on the outside front cover page of the prospectus. Present information regarding multiple classes in tables if doing so will aid understanding.

(a) Identify the sponsor, the depositor and the issuing entity (if known).

(b) In identifying the title of the securities, include the series number, if applicable. If there is more than one class of securities offered, state the class designations of the securities offered.

(c) Identify the asset type(s) being securitized.

(d) Include a statement, if applicable and appropriately modified to the transaction, that the securities represent the obligations of the issuing entity only and do not represent the obligations of or interest in the sponsor, depositor or any of their affiliates.

(e) Identify the aggregate principal amount of all securities offered and the principal amount, if any, of each class of securities offered. If a class has no principal amount, disclose that fact, and, if applicable, state the notional amount, clearly identifying that the amount is a notional one. If the amounts are approximate, disclose that fact.

(f) Indicate the interest rate or specified rate of return of each class of security offered. If a class of securities does not bear interest or a specified return, disclose that fact. If the rate is based on a formula or is calculated in reference to a generally recognized interest rate index, such as a U.S. Treasury securities index, either provide the formula on the cover, or indicate that the rate is variable, indicate the index upon which the rate is based and

indicate that further disclosure of how the rate is determined is included in the transaction summary.

(g) Identify the distribution frequency, by class or series where applicable, and the first expected distribution date for the asset-backed securities.

(h) Briefly describe any credit enhancement for the transaction and identify any enhancement provider referenced in Item 1113(b) of this Regulation AB.

Instruction to Item 1102. Also see Item 1112(g)(2) of this Regulation AB regarding the title of any class of securities with an optional or mandatory redemption or termination feature that may be exercised when 25% or more of the original principal balance of the pool assets are still outstanding.

§ 229.1103 (Item 1103) Transaction summary and risk factors.

(a) *Prospectus summary.* In providing the information required by Item 503(a) of Regulation S–K (§ 229.503(a)), provide the following information in the prospectus summary, as applicable. Present information regarding multiple classes in tables if doing so will aid understanding. Consider using diagrams to illustrate the relationships among the parties, the structure of the securities offered (including, for example, the flow of funds or any subordination features) and any other material features of the transaction.

(1) Identify the participants in the transaction, including the sponsor, depositor, issuing entity, servicers and trustee, and their respective roles. Describe the roles briefly if they are not apparent from the title of the role. Identify any originator referenced in Item 1109 of this Regulation AB and any significant obligor.

(2) Briefly identify the pool assets and summarize briefly the size and material characteristics of the asset pool. Identify the cut-off date or similar date for establishing the composition of the asset pool, if applicable.

(3) State briefly the basic terms of each class of securities offered. In particular:

(i) Identify the classes offered by the prospectus and any classes issued in the same transaction or residual or equity interests in the transaction that are not being offered by the prospectus.

(ii) State the interest rate or rate of return on each class of securities offered, to the extent that the rates on any class of securities were not disclosed in full on the prospectus cover page.

(iii) State the expected final and final scheduled maturity or principal distribution dates, if applicable, of each class of securities offered.

(iv) Identify the denominations in which the securities may be issued.

(v) Identify the distribution frequency on the securities.

(vi) Summarize the flow of funds, payment priorities and allocations among the classes of securities offered, the classes of securities that are not offered, and fees and expenses, to the extent necessary to understand the payment characteristics of the classes that are offered by the prospectus.

(vii) Identify any events in the transaction agreements that can trigger liquidation or amortization of the asset pool or other performance triggers that would alter the transaction structure or the flow of funds.

(viii) Identify any optional or mandatory redemption or termination features.

(ix) Identify any credit enhancement or other support for the transaction, as referenced in Item 1113(a) of this Regulation AB, and briefly describe what protection or support is provided by the enhancement. Identify any enhancement provider referenced in Item 1113(b) of this Regulation AB. Summarize how losses not covered by credit enhancement will be allocated to the securities.

(4) Identify any outstanding series or classes of securities that are backed by the same asset pool or otherwise have claims on the pool assets. In addition, state if additional series or classes of securities may be issued that are backed by the same asset pool and briefly identify the circumstances under which those additional securities may be issued. Specify if security holder approval is necessary for such issuances and if security holders will receive notice of such issuances.

(5) Identify if the transaction will include prefunding or revolving periods. If so, indicate:

(i) The term or duration of the prefunding or revolving period.

(ii) For prefunding periods, the amount of proceeds to be deposited in the prefunding account.

(iii) For revolving periods, the maximum amount of additional assets that may be acquired during the revolving period.

(iv) The percentage of the asset pool and any class or series of the asset-backed securities represented by the prefunding account or the revolving period.

(v) Any limitation on the ability to add pool assets.

(vi) The requirements for assets that may be added to the pool.

(6) If pool assets can otherwise be added, removed or substituted (for example, in the event of a breach in representations or warranties regarding pool assets), summarize briefly the circumstances under which such actions can occur.

(7) Summarize the amount or formula for calculating the fee that the servicer will receive for performing its duties, and identify from what source those fees will be paid and the distribution priority of those fees.

(8) Summarize the federal income tax issues material to investors of each class of securities offered.

(9) Indicate whether the issuance or sale of any class of offered securities is conditioned on the assignment of a rating by one or more rating agencies. If so, identify each rating agency and the minimum rating that must be assigned.

(b) *Risk factors.* In providing the information required by Item 503(c) of Regulation S–K (§ 229.503(c)), identify any risks that may be different for investors in any offered class of asset-backed securities, and if so, identify such classes and describe such difference(s).

§ 229.1104 (Item 1104) Sponsors.

Provide the following information about the sponsor:

(a) State the sponsor's name and describe the sponsor's form of organization.

(b) Describe the general character of the sponsor's business.

(c) Describe the sponsor's securitization program and state how long the sponsor has been engaged in the securitization of assets. The description must include a general discussion of the sponsor's experience in securitizing assets of any type as well as a more detailed discussion of the sponsor's experience in and overall procedures for originating or acquiring and securitizing assets of the type included in the current transaction. Information regarding the size, composition and growth of the sponsor's portfolio of assets of the type to be securitized and information or factors related to the sponsor that may be material to an analysis of the origination or performance of the pool assets, such as whether any prior securitizations organized by the sponsor have defaulted or experienced an early amortization triggering event, should be included to the extent material.

(d) Describe the sponsor's roles and responsibilities in its securitization program, including whether the sponsor or an affiliate is responsible for originating, acquiring, pooling or servicing the pool assets, and the

sponsor's participation in structuring the transaction.

(e) *Static pool data.* To the extent material, provide delinquency and loss information, including static pool data in periodic increments (*e.g.*, monthly or quarterly) regarding the delinquency and loss experience of static pools of periodic originations or purchases by the sponsor of assets of the type to be securitized. Provide such data for originations or purchases for the past three fiscal years, or for so long as the sponsor has been making such originations or purchases if less than three years, and the most recent interim period. If material, also provide such information on a pool level basis with respect to prior securitized pools involving the same asset type established by the sponsor during this period. In addition, to the extent material, present static pool data separately according to the factors listed in Item 1110(b) and (c) of this Regulation AB, such as by asset term, asset type, yield, payment rates, geography or ranges of credit scores or other applicable measures of obligor credit quality. Selection of factors should result in disclosure of material information. Present statistical information in tabular or graphical format, such as by loss curves, if such presentation will aid understanding.

§ 229.1105 (Item 1105) Depositors.

If the depositor is not the same entity as the sponsor, provide separately the information regarding the depositor called for by paragraphs (a) and (b) and, to the extent information would be materially different, paragraph (c) of Item 1104 of this Regulation AB. In addition, provide the following information:

(a) Describe the ownership structure of the depositor.

(b) Describe the general character of any activities the depositor is engaged in other than securitizing assets and the time period during which it has been so engaged.

(c) Describe any continuing duties of the depositor after issuance of the asset-backed securities being registered regarding the asset-backed securities or the pool assets.

§ 229.1106 (Item 1106) Issuing entities.

Provide the following information about the issuing entity:

(a) State the issuing entity's name and describe the issuing entity's form of organization, including the State or other jurisdiction under whose laws the issuing entity is organized. File the issuing entity's governing documents as an exhibit.

(b) Describe the permissible activities or any restrictions on the activities of the issuing entity under its governing documents, including any restrictions on the ability to issue or invest in additional securities, to borrow money or to make loans to other persons. Describe any provisions in the issuing entity's governing documents providing for modification of the issuing entity's governing documents, including its permissible activities.

(c) Describe any specific discretionary activities with regard to the administration of the asset pool or the asset-backed securities, and identify the person or persons who will be authorized to exercise such discretion.

(d) Describe any assets owned or to be owned by the issuing entity, apart from the pool assets, as well as any liabilities of the issuing entity, apart from the asset-backed securities. Disclose the fiscal year end of the issuing entity.

(e) If the issuing entity has executive officers, a board of directors or persons performing similar functions, provide the information required by Items 401, 402 and 404 of Regulation S–K (§§ 229.401, 402 and 404) for the issuing entity.

(f) Describe the terms of any management or administration agreement regarding the issuing entity. File any such agreement as an exhibit.

(g) Describe the capitalization of the issuing entity and the amount or nature of any equity contribution to the issuing entity by the sponsor, depositor or other party.

(h) Describe the sale or transfer of the pool assets to the issuing entity as well as the creation (and perfection and priority status) of any security interest in favor of the issuing entity, the trustee, the asset-backed security holders or others, including the material terms of any agreement providing for such sale, transfer or creation of a security interest. File any such agreements as an exhibit. In addition to an appropriate narrative description, also provide this information graphically or in a flow chart if it will aid understanding.

(i) State the amount paid or to be paid for the pool assets, the principles followed or to be followed in determining such amount and identify the persons making the determination and their relationship, if any, with the issuing entity, the depositor, the sponsor, originator identified pursuant to Item 1109 of this Regulation AB, or any underwriter.

(j) If expenses incurred in connection with the selection and acquisition of the pool assets are to be payable from offering proceeds, disclose the amount of such expenses. If such expenses are to be paid to the sponsor, servicer, depositor, issuing entity, originator identified pursuant to Item 1109 of this Regulation AB, any underwriter or any affiliate of the foregoing, separately identify the type and amount of expenses paid to each such party.

(k) Describe to the extent material any provisions or arrangements included to address any one or more of the following issues:

(1) Whether any security interests granted in connection with the transaction are perfected, maintained and enforced.

(2) Whether declaration of bankruptcy, receivership or similar proceeding with respect to the issuing entity can occur.

(3) Whether in the event of a bankruptcy, receivership or similar proceeding with respect to the sponsor, originator, depositor or other seller of the pool assets, the issuing entity's assets will become part of the bankruptcy estate or subject to the bankruptcy control of a third party.

(4) Whether in the event of a bankruptcy, receivership or similar proceeding with respect to the issuing entity, the issuing entity's assets will become subject to the bankruptcy control of a third party.

(l) If applicable law prohibits the issuing entity from holding the pool assets directly (for example, an ''eligible lender'' trustee must hold student loans originated under the Federal Family Education Loan Program of the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*)), describe the arrangements instituted to hold the pool assets on behalf of the issuing entity. Include disclosure regarding the arrangements taken, as applicable, regarding the items in paragraph (k) of this section with respect to any such additional entity that holds such assets on behalf of the issuing entity.

§ 229.1107 (Item 1107) Servicers.

Provide the following information for the servicer. Where servicing of the pool assets utilizes multiple servicers, such as master servicers that oversee the actions of other servicers, primary servicers that have primary contact with the obligor, or special servicers for specific servicing functions, provide the information for the master servicer, each affiliated servicer, each unaffiliated servicer that services 10% or more of the pool assets and any other servicer that performs work-outs, foreclosures or other material aspect of the servicing of the pool assets upon which the performance of the pool assets or the asset-backed securities is materially dependent. In addition, provide clear

introductory description of the roles, responsibilities and oversight requirements of the entire servicing structure and the parties involved.

(a) *Servicer information and experience.* (1) State the servicer's name and describe the servicer's form of organization.

(2) Describe the general character of the servicer's business and state how long the servicer has been servicing assets. The description must include a general discussion of the servicer's experience in servicing assets of any type as well as a more detailed discussion of the servicer's experience in, and procedures for, servicing assets of the type included in the current transaction. Information regarding the size, composition and growth of the servicer's portfolio of serviced assets of the type to be securitized and information on factors related to the servicer that may be material to an analysis of the servicing of the pool assets, such as collection processes, billing processes, computer systems and back-up systems, should be included to the extent material.

(3) Describe any material changes to the servicer's policies or procedures in servicing assets of the same type as the pool assets during the past three years.

(4) Provide information regarding the servicer's financial condition where it could have a material impact on one or more aspects of servicing of the pool assets and where those aspects could materially impact pool performance on the asset-backed securities.

(b) *Servicing agreements and servicing practices.* (1) Describe the material terms of the servicing agreement and the servicer's duties regarding the asset-backed securities transaction. File the servicing agreement as an exhibit.

(2) Describe the manner in which collections on the pool assets will be collected and maintained, such as through a segregated collection account, and the extent of commingling of funds that occurs or may occur from the pool assets with other funds, serviced assets or other assets of the servicer.

(3) Describe to the extent material any special or unique factors involved in servicing the particular type of assets included in the asset pool, such as subprime assets, and the servicer's processes and procedures designed to address such factors.

(4) Describe the terms of any arrangements whereby the servicer is required or permitted to provide advances of funds regarding collections, cash flows or distributions, including interest or other fees charged for such advances and terms of recovery by the servicer of such advances. To the extent material, provide statistical information regarding servicer advances on the pool assets and the servicer's overall servicing portfolio for the past three years.

(5) Describe the servicer's process for handling delinquencies, losses, bankruptcies and recoveries, such as through liquidation of the underlying collateral, note sale by a special servicer or borrower negotiation or workouts.

(6) Describe any ability of the servicer to waive or modify any terms, fees, penalties or payments on the pool assets and the effect of any such ability, if material, on the potential cash flows from the pool assets.

(7) If the servicer has custodial responsibility for the pool assets, describe arrangements regarding the safekeeping and preservation of the assets, such as the physical promissory notes, and procedures to reflect the segregation of the pool assets from other serviced assets. If the servicer does not have custodial responsibility for the pool assets, disclose that fact, identify the party that has such responsibility and provide the information called for by this paragraph for such party.

(8) Describe any material minimum servicing requirements the servicer must meet not specified in Item 1120(d) of this Regulation AB.

(9) Describe any limitations on the servicer's liability regarding the asset-backed securities transaction.

(c) *Back-up servicing.* Describe the terms regarding the servicer's removal, replacement, resignation or transfer, including:

(1) Provisions for selection of a successor servicer and financial or other requirements that must be met by a successor servicer.

(2) The process for transferring servicing to a successor servicer.

(3) Provisions for payment of expenses associated with a servicing transfer and any additional fees charged by a successor servicer. Specify the amount of any funds set aside for a servicing transfer.

(4) Arrangements, if any, regarding a back-up servicer for the pool assets and the identity of any such back-up servicer.

§ 229.1108 (Item 1108) Trustees.

Provide the following information for each trustee:

(a) State the trustee's name and describe the trustee's form of organization.

(b) Describe the general character of the trustee's business and to what extent the trustee has had prior experience serving as a trustee for asset-backed securities transactions involving similar pool assets.

(c) Describe the trustee's duties and responsibilities regarding the asset-backed securities under the governing documents and under applicable law. In addition, describe any actions required by the trustee, including whether notices are required to investors, rating agencies or other third parties, upon an event of default, potential event of default (and how defined) or other breach of a transaction covenant and any required percentage of a class or classes of asset-backed securities that is needed to require the trustee to take action.

(d) Describe any limitations on the trustee's liability regarding the asset-backed securities transaction.

(e) Describe any indemnification provisions that entitle the trustee to be indemnified from the cash flow that otherwise would be used to pay the asset-backed securities.

(f) Describe any contractual provisions or understandings regarding the trustee's removal, replacement or resignation, as well as how the expenses associated with changing from one trustee to another trustee will be paid.

§ 229.1109 (Item 1109) Originators.

Provide the following information for any originator or group of affiliated originators, apart from the sponsor, that originated, or is expected to originate, 10% or more of the pool assets:

(a) The originator's name and form of organization.

(b) To the extent material, a description of the originator's origination program and how long the originator has been engaged in originating assets. The description must include a discussion of the originator's experience in originating assets of the type included in the current transaction. In providing the description, include, if material, information regarding the size and composition of the originator's origination portfolio as well as information material to an analysis of the performance of the pool assets, such as the originator's credit-granting or underwriting criteria for the asset types being securitized.

§ 229.1110 (Item 1110) Pool assets.

Describe the pool assets, including the information described in this Item 1110. Present statistical information in tabular or graphical format, if such presentation will aid understanding. Present statistical information in appropriate distributional groups or incremental ranges in addition to presenting appropriate overall pool totals, averages and weighted averages, if such presentation will aid in the understanding of the data. In addition to

presenting the number, amount and percentage of pool assets by distributional group or range, also provide statistical information for each group or range by variables such as average balance, weighted average coupon, average age and remaining term, average loan-to-value or similar ratio and weighted average credit score or other applicable measure of obligor credit quality. These variables are just examples and should be tailored to the particular asset class backing the asset-backed securities. Consider providing minimums and maximums when presenting averages on an aggregate basis and within each group or range. In addition, provide historical data on the pool assets as appropriate (*e.g.*, the lesser of three years or the time such assets have existed) to allow material evaluation of the pool data. In making any calculations regarding overall pool balances, disregard any funds set aside for a prefunding account.

(a) *General formation regarding pool asset types and selection criteria.* Provide the following information:

(1) A brief description of the type or types of pool assets to be securitized.

(2) A general description of the material terms of the pool assets.

(3) A description of the solicitation, credit-granting or underwriting criteria used to originate or purchase the pool assets, including, to the extent known, any changes in such criteria and the extent to which such policies and criteria are or could be overridden.

(4) The method and criteria by which the pool assets were selected for the transaction.

(5) The cut-off date or similar date for establishing the composition of the asset pool, if applicable.

(6) If legal or regulatory provisions (such as bankruptcy, consumer protection, predatory lending, privacy, property rights or foreclosure laws or regulations) may materially affect pool asset performance or payments or expected payments on the asset-backed securities, briefly identify these provisions and their effects on such items.

Instruction to Item 1110(a)(6). Unless a material concentration of assets exists, it is not necessary to provide details of the laws in each jurisdiction apart from the material potential effects of these laws. A legalistic description or recitation of the laws or regulations in a particular jurisdiction is not required.

(b) *Pool characteristics.* Describe the material characteristics of the asset pool. Provide appropriate introductory and explanatory information to introduce the characteristics and any terms or abbreviations used. While the material characteristics will vary depending on the nature of the pool assets, examples of material characteristics that may be common for many asset types include:

(1) Number of each type of pool assets.

(2) Asset size, such as original balance and outstanding balance as of a designated cut-off date.

(3) Interest rate or rate of return, including type of interest rate if the pool includes different types, such as fixed and floating rates, and annual percentage rate.

(4) Capitalized or uncapitalized accrued interest.

(5) Age, maturity, remaining term, average life (based on different prepayment assumptions), current payment/prepayment speeds and pool factors, as applicable.

(6) Servicer, if different servicers service different pool assets.

(7) If a loan or similar receivable:

(i) Amortization period.

(ii) Loan purpose (*e.g.*, whether a purchase or refinance) and status, if applicable (*e.g.*, repayment or deferment).

(iii) Loan-to-value (LTV) ratios and debt service coverage ratios (DSCR), as applicable.

(iv) Type and/or use of underlying property, product or collateral (*e.g.*, occupancy type for residential mortgages or industry sector for commercial mortgages).

(v) Number of points or other origination charges paid on the pool assets.

(8) If a receivable or other financial asset with a revolving balance, such as a credit card receivable:

(i) Monthly payment rate.

(ii) Maximum credit lines.

(iii) Average account balance.

(iv) Yield percentages.

(v) Type of receivable account.

(vi) Finance charges, fees and other income earned.

(vii) Gross and net purchases and returns granted.

(viii) Percentage of full-balance and minimum payments made.

(9) If the asset pool includes commercial mortgages, the following information, to the extent material:

(i) Net cash flow information that will be generated from the pool assets and the components of net cash flow.

(ii) The location and general character of all materially important real properties underlying the pool assets, including information as to the present or proposed use of and insurance for such properties.

(iii) The nature and amount of all other material mortgages, liens or encumbrances against such properties and their priority.

(iv) Any proposed program for the renovation, improvement or development of such properties, including the estimated cost thereof and the method of financing to be used.

(v) The general competitive conditions to which such properties are or may be subject.

(vi) Management of such properties.

(vii) Occupancy rate expressed as a percentage for each of the last five years.

(viii) Principal business, occupations and professions carried on in, or from the building.

(ix) Number of tenants occupying 10% or more of the total rentable square footage of such properties and principal nature of business of such tenant, and the principal provisions of the leases with those tenants including, but not limited to: rental per annum, expiration date, and renewal options.

(x) The average effective annual rental per square foot or unit for each of the last three years prior to the date of filing.

(xi) Schedule of the lease expirations for each of the ten years starting with the year in which the registration statement is filed, stating:

(A) The number of tenants whose leases will expire.

(B) The total area in square feet covered by such leases.

(C) The annual rental represented by such leases.

(D) The percentage of gross annual rental represented by such leases.

Instruction to Item 1110(b)(9). What is required is information material to an investor's understanding of the asset-backed securities. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required.

(10) Whether the pool asset is secured or unsecured, and if secured, the type(s) of collateral.

(11) Ranges of standardized credit scores of obligors and other information regarding obligor credit quality.

(12) Billing and payment procedures, including frequency of payment, payment options, fees, charges and origination or payment incentives.

(13) Information about the origination channel and origination process for the pool assets, such as originator information (and how acquired) and the level of origination documentation required, as applicable.

(14) Geographic distribution, such as by state or other material geographic region. If 10% or more of the pool assets are or will be located in any one state or other geographic region, provide the following information:

(i) Any economic or other factors specific to such state or region that may

materially impact the pool assets or pool asset cash flows.

(ii) If material, statistical data referred to in this Item 1110(b) for each such geographic concentration.

Instruction to Item 1110(b)(14). For most assets, such as credit card accounts, automobile leases, trade receivables and student loans, the location of the asset is the underlying obligor's billing address. For assets involving real estate, such as mortgages, the location of the asset is where the physical property underlying the asset is located.

(15) Other concentrations material to the asset type (*e.g.*, school type for student loans). If material, provide information required by paragraph (b)(14) of this section regarding such concentrations, as applicable.

(c) *Delinquency and loss information.* Provide delinquency and loss information for the asset pool, including statistical information regarding delinquencies and losses. Also, present delinquency and loss data to the extent material about the asset pool on a static pool basis, such as by discrete origination periods (*e.g.*, monthly or quarterly) or other factors listed in paragraph (b) of this section, such as by asset term, asset type, yield, payment rates, geography or ranges of credit scores or other applicable measures of obligor credit quality. Selection of factors should result in disclosure of material information. Present statistical information in tabular or graphical format, such as by loss curves, if such presentation will aid understanding.

(d) *Sources of pool cash flow.* If the cash flows from the pool assets that are to be used to support the asset-backed securities are to come from more than one source (such as separate cash flows from lease payments and from the sale of the residual asset at the termination of the lease), provide the following information:

(1) Disclose the specific sources of funds that will be used to make the payments and distributions on the asset-backed securities, and, if applicable, provide information on the relative amount and percentage of funds that are to be derived from each source, including a description of any assumptions, data, models and methodology used to derive such amounts. If payments on different classes or different categories of payments on or related to the asset-backed securities (*e.g.*, principal, interest or expenses) are to come from different or segregated cash flows from the pool assets or other sources, disclose the source of funds that will be used for such payments.

(2) *Residual value information.* If the asset pool includes leases or other assets where a portion of the cash flow is anticipated to come from the residual value of an underlying physical asset, disclose the following:

(i) How the residual values used to structure the transaction were estimated, including an explanation of any material discount rates, models or assumptions used and who selected such rates, models or assumptions.

(ii) Any material procedures or requirements incorporated to preserve residual values during the term of the lease, such as lessee responsibilities, prohibitions on subletting, indemnification or required insurance or guarantees.

(iii) The procedures by which the residual values will be realized and by whom those procedures will be carried out, including information on the experience of such party, any affiliations with a party described in Item 1117(a) of this Regulation AB and the compensation arrangements with such party.

(iv) Whether the pool assets are open-end leases (*e.g.*, where the lessee is required to cover the shortfall between the residual value of the leased property and the sale proceeds) or closed-end leases (*e.g.*, where the lessor is responsible for such shortfalls), and where both types of leases are included in the asset pool, the percentage of each.

(v) Any lessor obligations that are required under the leases, and the effect or potential effect on the asset-backed securities from failure by the lessor to perform its obligations.

(vi) Statistical information regarding estimated residual values for the pool assets.

(vii) Summary historical statistics on turn-in rates, if applicable, and residual value realization rates by the party responsible for such process over the past three years, or such longer period as is material to an evaluation of the pool assets.

(viii) The effect on security holders if not enough cash flow is received from the realization of the residual values, whether there are any provisions to address this contingency, and how any cash flow greater than that necessary to pay security holders will be allocated.

(e) *Representations and warranties and repurchase obligations regarding pool assets.* Summarize any representations and warranties made concerning the pool assets by the sponsor, transferor, originator or other party to the transaction, and describe briefly the remedies available if those representations and warranties are breached, such as repurchase obligations.

(f) *Claims on pool assets.* Describe any material direct or contingent claim that parties other than the holders of the asset-backed securities have on any pool assets. Also, describe any material cross-collateralization or cross-default provisions relating to the pool assets.

(g) *Revolving periods, prefunding accounts and other changes to the asset pool.* If the transaction contemplates a prefunding or revolving period, provide the following information. Provide similar information regarding any other circumstances where pool assets may be added, substituted or removed from the asset pool, such as in the event of additional issuances of asset-backed securities in a master trust:

(1) The term or duration of any prefunding or revolving period.

(2) For prefunding periods, the amount of proceeds to be deposited in the prefunding account.

(3) For revolving periods, the maximum amount of additional assets that may be acquired during the revolving period.

(4) The percentage of the asset pool and any class or series of the asset-backed securities represented by the prefunding account or the revolving account.

(5) Triggers or events that would trigger limits on or terminate the prefunding or revolving period and the effects of such triggers. In particular for a revolving period, describe the operation of the revolving period and the amortization period.

(6) When and how new pool assets may be acquired during the prefunding or revolving period, and if, when and how pool assets can be removed or substituted. Describe any limits on the amount, type or speed with which pool assets may be acquired, substituted or removed.

(7) The acquisition or underwriting criteria for additional pool assets to be acquired during the prefunding or revolving period, including a description of any differences from the criteria used to select the current asset pool.

(8) Which party has the authority to add, remove or substitute assets from the asset pool or determine if such pool assets meet the acquisition or underwriting criteria for additional pool assets. In addition, disclose if there will be any independent verification of such person's exercise of authority or determinations.

(9) Any requirements to add or remove minimum amounts of pool assets and any effects of not meeting those requirements.

(10) If applicable, the procedures and standards for the temporary investment of funds in a prefunding or revolving account pending use (including the disposition of gains and losses on pending funds) and a description of the financial products or instruments eligible for such accounts.

(11) The circumstances under which funds in a prefunding or revolving account will be returned to investors or otherwise disposed of.

(12) A statement of how investors will be notified of changes to the asset pool.

§ 229.1111 (Item 1111) Significant obligors of pool assets.

(a) *Descriptive information.* Provide the following information for each significant obligor:

(1) The name of the obligor.

(2) The organizational form and general character of the business of the obligor.

(3) The nature of the concentration of the pool assets with the obligor.

(4) The material terms of the pool assets or the agreements with the obligor involving the pool assets.

(b) *Financial information.* (1) If the pool assets relating to a significant obligor represent 10% or more, but less than 20%, of the asset pool, provide selected financial data required by Item 301 of Regulation S–K (§ 229.301) for the significant obligor.

(2) If pool assets relating to a significant obligor represent 20% or more of the asset pool, provide financial statements meeting the requirements of Regulation S–X (§§ 210.1–01 through 210.12–29 of this chapter), except § 210.3–05 of this chapter and Article 11 of Regulation S–X (§§ 210.11–01 through 210.11–03 of this chapter), of the significant obligor. Financial statements of such obligor and its subsidiaries consolidated (as required by § 240.14a–3(b) of this chapter) shall be filed under this item.

Instructions to Item 1111(b).

1. No information need be provided pursuant to paragraph (b) of this section if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of the United States.

2. No information need be provided pursuant to paragraph (b) of this section if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of a foreign government (as defined in § 240.3b–4(a) of this chapter) if the pool assets are investment grade securities as defined in Item I.B.2 of Form S–3 (§ 239.13 of this chapter). If the pool assets are not investment grade securities, information required by paragraph (5) of Schedule B of the Securities Act (15 U.S.C. 77aa) regarding the foreign government may be incorporated by reference in lieu of providing the financial information required pursuant to paragraph (b) of this section.

3. If the significant obligor is an asset-backed issuer and the pool assets relating to the significant obligor are asset-backed securities, provide the information required by Items 1104 through 1113 and Item 1117 of this Regulation AB regarding such asset-backed securities in lieu of the information required by paragraph (b) of this section.

§ 229.1112 (Item 1112) Structure of the transaction.

(a) *Description of the securities and transaction structure.* In providing the information required by Item 202 of Regulation S–K (§ 229.202), address the following specific factors relating to the asset-backed securities, as applicable:

(1) The types or categories of securities that may be offered, such as interest-weighted or principal-weighted classes (including IO (interest only) or PO (principal only) securities), planned amortization or companion classes or residual or subordinated interests.

(2) The flow of funds for the transaction, including the payment allocations, rights and distribution priorities among all classes of the issuing entity's securities, and within each class, with respect to cash flows, credit enhancement or other support and any other structural features designed to enhance credit, facilitate the timely payment of monies due on the pool assets or owing to security holders, adjust the rate of return on the asset-backed securities, or preserve monies that will or might be distributed to security holders. In addition to an appropriate narrative discussion of the allocation and priority structure of pool cash flows, present the flow of funds graphically if doing so will aid understanding. In the flow of funds discussion, provide information regarding any requirements directing cash flows from the pool assets (such as to reserve accounts, cash collateral accounts or expenses) and the purpose and operation of such requirements.

(3) In describing the interest rate or rate of return on the asset-backed securities and how such amounts are payable, explain how the rate is determined and how frequently it will be determined. If the rate to be paid can be a combination of two or more rates (such as the lesser of a variable rate or the actual weighted average net coupon on the pool assets), provide sufficiently clear information regarding each rate and when each rate applies.

(4) How principal, if any, will be paid on the asset-backed securities, including maturity dates, amortization or principal distribution schedules, principal distribution dates, formulas for calculating principal distributions from the cash flows and other factors that will affect the timing or amount of principal payments for each class of securities.

(5) The denominations in which the asset-backed securities may be issued.

(6) Any specified changes to the transaction structure that would be triggered upon a default or event of default (such as a change in distribution priority among classes).

(7) Any liquidation, amortization, performance or similar triggers or events, and the rights of investors or changes to the transaction structure or flow of funds if such events were to occur.

(8) Whether the servicer or other party is required to provide periodic evidence of the absence of a default or of compliance with the terms of the transaction agreements.

(9) If applicable, the extent, expressed as a percentage, the transaction is overcollateralized or undercollateralized as measured by comparing the principal balance of the asset-backed securities to the original asset pool.

(10) Any provisions contained in other securities that could result in a cross-default or cross-collateralization.

(11) Any minimum standards, restrictions or suitability requirements regarding potential investors in purchasing the securities or any restrictions on ownership or transfer of the securities.

(12) Security holder vote required to amend the transaction documents and allocation of voting rights among security holders.

(b) *Distribution frequency and cash maintenance.* (1) Disclose the frequency of distribution dates for the asset-backed securities and the collection periods for the pool assets.

(2) Describe how cash held pending distribution or other uses is held and invested. Also describe the length of time cash will be held pending distributions to security holders. Identify the party or parties with access to cash balances and the authority to invest cash balances. Specify who determines any decisions regarding the deposit, transfer or disbursement of pool asset cash flows and whether there will be any independent verification of the transaction accounts or account activity.

(c) *Fees and expenses.* Provide in a separate table an itemized list of all fees

and expenses to be paid or payable out of the cash flows from the pool assets. In itemizing the fees and expenses, also indicate their general purpose, the party receiving such fees or expenses, the source of funds for such fees or expenses (if different from other fees or expenses or if such fees or expenses are to be paid from a specified portion of the cash flows) and the distribution priority of such expenses. If the amount of such fees or expenses is not fixed, provide the formula used to determine such fees or expenses. The tabular presentation may be accompanied by footnotes or other accompanying narrative disclosure to the extent necessary for an understanding of the timing or amount of such fees or expenses. In addition, through footnote or other accompanying narrative disclosure, describe if any, and if so how, such fees or expenses can be changed without notice to, or approval by, security holders.

(d) *Excess cash flow.* (1) Disclose who owns any residual or retained interests to the cash flows and the disposition of excess cash flow.

(2) Disclose any requirements in the transaction agreements to maintain a minimum amount of excess cash flow or spread from, or retained interest in, the transaction and any actions that would be required or changes to the transaction structure that would occur if such requirements were not met.

(3) To the extent material to an understanding of the asset-backed securities, disclose any features or arrangements to facilitate a securitization of the excess cash flow or retained interest from the transaction, including whether any material changes to the transaction structure may be made without the consent of asset-backed security holders in connection with these securitizations.

(e) *Master trusts.* If one or more additional series or classes have been or may be issued by the issuing entity that are backed by the same asset pool, provide information regarding the additional securities to the extent material to an understanding of their effect on the securities being offered, including the following:

(1) Relative priority of such additional securities to the securities being offered and rights to the underlying pool assets and their cash flows.

(2) Allocation of cash flow from the asset pool and any expenses or losses among the various series or classes.

(3) Terms under which such additional series or classes may be issued and pool assets increased or changed.

(4) The terms of any security holder approval or notification of such additional securities.

(f) *Optional or mandatory redemption or termination.* (1) If any class of the asset-backed securities includes an optional or mandatory redemption or termination feature, provide the following information:

(i) Terms for triggering the redemption or termination.

(ii) The source of funds and amount of the redemption or repurchase price or formula for determining such amount.

(iii) The procedures for redemption or termination, including any notices to security holders.

(iv) If the amount allocated to security holders is reduced by losses, the policy regarding any amounts recovered after redemption or termination.

(2) The title of any class of securities with an optional or mandatory redemption or termination feature that may be exercised when 25% or more of the original principal balance of the pool assets is still outstanding must include the word ''callable.''

(g) *Prepayment, maturity and yield considerations.* (1) Describe any models, including the related material assumptions and limitations, used as a means to identify cash flow patterns with respect to the pool assets.

(2) Describe to the extent material the degree to which each class of securities is sensitive to changes in the rate of payment on the pool assets (*e.g.*, prepayment or interest rate sensitivity), and describe the specific consequences of such changing rate of payment. Provide statistical information of such effects, such as the effect of prepayments on yield and weighted average life.

(3) Describe any special allocations of prepayment risks among the classes of securities, and whether any class protects other classes from the effects of the uncertain timing of cash flow.

§ 229.1113 (Item 1113) Credit enhancement and other support.

(a) *Descriptive information.* To the extent material, describe the following, including a clear discussion of the manner in which each potential item is designed to affect or ensure timely payment of the asset-backed securities:

(1) Any external credit enhancement designed to ensure that the asset-backed securities or pool assets will pay in accordance with their terms, such as bond insurance, letters of credit or guarantees.

(2) Any mechanisms to ensure that payments on the asset-backed securities are timely, such as liquidity facilities, lending facilities, guaranteed investment contracts and minimum principal payment agreements.

(3) Any derivatives that are used to reduce or alter risk resulting from financial assets in the asset pool and that provide payments in return for payments on such assets, such as interest rate or currency swaps, or that are used to provide credit enhancement related to assets in the pool.

(4) Any internal credit enhancement as a result of the structure of the transaction that increases the likelihood that payments will be made on one or more classes of the asset-backed securities in accordance with their terms, such as subordination provisions, overcollateralization, reserve accounts, cash collateral accounts or spread accounts.

Instruction to Item 1113(a). Include a description of the material terms of any enhancement described, including any limits on the timing or amount of the enhancement or any conditions that must be met before the enhancement can be accessed. Any agreement is to be filed as an exhibit. Also describe any provisions permitting the substitution of enhancement.

(b) *Information regarding significant enhancement providers.*

(1) *Descriptive information.* If an entity or group of affiliated entities providing enhancement or other support for the asset-backed securities is liable or contingently liable to provide payments representing 10% or more of the cash flow supporting any offered class of asset-backed securities, provide the following information:

(i) The name of such enhancement provider.

(ii) The organizational form of enhancement provider.

(iii) The general character of the business of such enhancement provider.

(2) *Financial information.* (i) If any entity or group of affiliated entities providing enhancement or other support for the asset-backed securities is liable or contingently liable to provide payments representing 10% or more, but less than 20%, of the cash flow supporting any class of the asset-backed securities, provide financial data required by Item 301 of Regulation S–K (§ 229.301) for such entity or group of affiliated entities.

(ii) If any entity or group of affiliated entities providing enhancement or other support for the asset-backed securities is liable or contingently liable to provide payments representing 20% or more of the cash flow supporting any class of the asset-backed securities, provide financial statements meeting the requirements of Regulation S–X (§§ 210.1–01 through 210.12–29 of this

chapter), except § 210.3–05 of this chapter and Article 11 of Regulation S–X (§§ 210.11–01 through 210.11–03 of this chapter), of each such entity or group of affiliated entities. Financial statements of such enhancement provider and its subsidiaries consolidated (as required by § 240.14a–3(b) of this chapter) shall be filed under this item.

Instructions to Item 1113.

1. The requirements in paragraph (b) of this section apply to all providers of external credit or liquidity enhancement, insurance or guarantees, counterparties to swap or hedging arrangements, interest rate exchange arrangements, interest rate cap or floor arrangements, currency exchange arrangements or similar arrangements, and any other parties providing external credit enhancement or other support for payments on the asset-backed securities. Enhancement may support payment on the pool assets or payments on the asset-backed securities themselves.

2. No information need be provided pursuant to paragraph (b)(2) of this section if the obligations of the enhancement provider are backed by the full faith and credit of the United States.

3. No information need be provided pursuant to paragraph (b)(2) of this section if the obligations of the enhancement provider are backed by the full faith and credit of a foreign government (as defined in § 240.3b–4(a) of this chapter) if the enhancement provider has an investment grade credit rating, as the term investment grade is used in Item I.B.2 of Form S–3 (§ 239.13 of this chapter). If the enhancement provider does not have an investment grade credit rating, information required by paragraph (5) of Schedule B of the Securities Act (15 U.S.C. 77aa) regarding the foreign government may be incorporated by reference in lieu of providing the financial information required pursuant to paragraph (b)(2) of this section.

§ 229.1114 (Item 1114) Tax matters.

Provide a brief, clear and understandable summary of:

(a) The tax treatment of the asset-backed securities transaction under federal income tax laws.

(b) The material federal income tax consequences of purchasing, owning and selling the asset-backed securities. If any of the material federal income tax consequences are not expected to be the same for investors in all classes offered by the registration statement, describe the material differences.

(c) The substance of counsel's tax opinion, including identification of the material consequences upon which counsel has not been asked, or is unable, to opine.

§ 229.1115 (Item 1115) Legal proceedings.

Describe briefly any legal proceedings pending or known to be threatened against the sponsor, depositor, trustee, issuing entity, servicer, enhancement provider, originator identified pursuant to Item 1109 of this Regulation AB, or other party identified pursuant to Item 1100(d)(1) of this Regulation AB, or of which any property of the foregoing is the subject, that is material to security holders. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

§ 229.1116 (Item 1116) Reports and additional information.

(a) *Reports required under the transaction documents.* Describe the reports or other documents to security holders required under the transaction agreements, including information included, schedule and manner of distribution or other availability, and the entity or entities that will prepare and provide the reports.

(b) *Reports to be filed with the Commission.* (1) Specify the names, and if available, the Commission file numbers of the entity or entities that will be filing reports with the Securities and Exchange Commission. Identify the reports and other information filed with the Commission.

(2) State that the public may read and copy any materials filed with the Commission at the Commission's Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the Securities and Exchange Commission at 1–800–SEC–0330. State that the Commission maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (*http://www.sec.gov*).

(c) *Web site access to Commission reports.* (1) State whether the issuing entity's annual reports on Form 10–K (§ 249.310 of this chapter), distribution reports on Form 10–D (§ 249.312 of this chapter), current reports on Form 8–K (§ 249.308 of this chapter), and amendments to those reports filed or furnished pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) will be made available on the Web site of a specified transaction party (*e.g.*, the sponsor, depositor, servicer, issuing entity or trustee) as soon as reasonably practicable after such material is electronically filed with, or furnished to, the Commission.

(2) Disclose whether other reports to security holders or information about the asset-backed securities will be made available in this manner.

(3) If filings will be made available in this manner, disclose the Web site address where such filings may be found.

(4) If filings and other reports will not be made available in this manner, describe the reasons why they will not and whether an identified transaction party voluntarily will provide electronic or paper copies of those filings free of charge upon request.

§ 229.1117 (Item 1117) Affiliations and certain relationships and related transactions.

(a) Describe if so, and how, the sponsor, depositor or issuing entity is an affiliate (as defined in § 240.405 of this chapter) of any of the following parties as well as, to the extent material, if so, and how, any of the following parties are affiliates of any of the other following parties:

(1) Servicer.

(2) Trustee.

(3) Originator identified pursuant to Item 1109 of this Regulation AB.

(4) Significant obligor identified pursuant to Item 1111 of this Regulation AB.

(5) Enhancement provider identified pursuant to Item 1113 of this Regulation AB.

(6) Underwriter or promoter for the asset-backed securities.

(7) Any other material parties related to the asset-backed securities described in Item 1101(d)(1) of this Regulation AB.

(b) Describe whether there is, and if so the general character of, any business relationship, agreement, arrangement, transaction or understanding that is entered into outside the ordinary course of business or is on terms other than would be obtained in an arm's length transaction with an unrelated third party, apart from the asset-backed securities transaction, between the sponsor, depositor or issuing entity and any of the parties in paragraphs (a)(1) through (a)(7) of this section, or any affiliates of such parties, that currently exists or that existed during the past two years and that is material to an investor's understanding of the asset-backed securities.

Instruction to Item 1117(b). What is required is information material to an investor's understanding of the asset-backed securities. A detailed description or itemized listing of all commercial relationships among the

parties is not required. Instead, the disclosure should indicate whether any relationships outside of the asset-backed securities transaction do exist that are outside the normal course and the general character of those relationships. Disclosure of specific relationships involving or relating to the asset-backed securities transaction and the pool assets, including the material terms and approximate dollar amount involved, is required to the extent material. For example, regarding relationships with an underwriter or promoter for the asset-backed securities, material credit arrangements relating to the pool assets, such as providing a warehouse line of credit to fund originations or acquisitions pending securitizations, are to be described.

§ 229.1118 (Item 1118) Ratings.

Disclose whether the issuance or sale of any class of offered securities is conditioned on the assignment of a rating by one or more rating agencies, whether or not NRSROs. If so, identify each rating agency and the minimum rating that must be assigned. Describe any arrangements to have such rating monitored while the asset-backed securities are outstanding.

§ 229.1119 (Item 1119) Distribution and pool performance information.

Describe the distribution for the related distribution period and the performance of the asset pool during the distribution period. Provide appropriate introductory and explanatory information to introduce any material terms, parties or abbreviations used. Present statistical information in tabular or graphical format, if such presentation will aid understanding. While the material information regarding the related distribution and pool performance will vary depending on the nature of the transaction, examples of material characteristics that may be common for many asset-backed securities transactions include:

(a) Any applicable record dates, accrual dates, determination dates for calculating distributions and actual distribution dates for the distribution period.

(b) Cash flows received and the sources thereof for distributions, fees and expenses (including portfolio yield, if applicable).

(c) Calculated amounts and distribution of the flow of funds for the period itemized by type and priority of payment, including:

(1) Fees or expenses accrued and paid, with an identification of the general purpose of such fees and the party receiving such fees or expenses.

(2) Payments accrued or paid with respect to enhancement or other support identified in Item 1113 of this Regulation AB (such as for outgoing swap payments, insurance premiums or other enhancement maintenance fees), with an identification of the general purpose of such payments and the party receiving such payments.

(3) Principal, interest and other distributions accrued and paid on the asset-backed securities by type and by class or series and any principal or interest shortfalls or carryovers.

(4) The amount of excess cash flow or excess spread and the disposition of excess cash flow.

(d) Beginning and ending principal balances of the asset backed securities.

(e) Interest rates applicable to the pool assets and the asset-backed securities, if variable.

(f) Beginning and ending balances of transaction accounts, such as reserve accounts, and account activity during the period.

(g) Any amounts drawn on any credit enhancement or other support identified in Item 1113 of this Regulation AB, the purpose, method of calculation and use of such draws, and the amount of coverage remaining under any such enhancement.

(h) Number and amount of pool assets at the beginning and ending of each period, and updated pool composition information, such as weighted average coupon, weighted average life, weighted average remaining term, pool factors, prepayment amounts, current payment/prepayment speeds and other prepayment or interest rate sensitivity information. For asset-backed securities backed by leases where a portion of the cash flow to repay the asset-backed securities is anticipated to come from the residual value of the physical property underlying the leases, this information also would include turn-in rates and residual value realization rates.

(i) Delinquency and loss information for the period (See, *e.g.*, Items 1100(b) and 1110(c) of this Regulation AB).

(j) Information on the amount, terms and purpose of any advances made or reimbursed during the period, including the use of funds advanced and the source of funds for reimbursements.

(k) Any material modifications, extensions or waivers to pool asset terms, fees, penalties or payments.

(l) Breaches of material pool asset representations or warranties or transaction covenants.

(m) Information on ratio, coverage or other tests used for determining any early amortization, liquidation or other performance trigger and whether the trigger was met.

(n) Information regarding any new issuance of asset-backed securities backed by the same asset pool, any pool asset additions, removals, substitutions and repurchases (and purchase rates, if applicable), such as through a prefunding or revolving period, and cash flows available for future purchases, such as the balances of any prefunding or revolving accounts, including:

(1) Any material changes in the solicitation, credit-granting, underwriting, origination, acquisition or pool selection procedures, as applicable, used to originate, acquire or select the new pool assets.

(2) If the addition, removal or substitution of pool assets has materially changed the composition of the asset pool taken as a whole, provide the information required by Items 1104, 1107, 1109, 1110 and 1111 of this Regulation AB applied taking the revised pool composition into account. However, no disclosure need be provided by this paragraph if substantially the same information was provided in an effective registration statement under the Securities Act or a prospectus timely filed pursuant to § 230.424 of this chapter under the same Central Index Key (CIK) code regarding a subsequent issuance of asset-backed securities backed by a pool of assets that includes the pool assets that are the subject of this paragraph.

§ 229.1120 (Item 1120) Compliance with applicable servicing criteria.

(a) *Report on compliance with servicing criteria.* Provide as an exhibit to the filing a report of the responsible party, as defined in §§ 240.13a–18 or 240.15d–18 of this chapter, on compliance with the servicing criteria set forth in paragraph (d) of this section that contains the following:

(1) A statement of the responsible party's responsibility for assessing compliance with the servicing criteria;

(2) A statement that the responsible party used the criteria in paragraph (d) of this section to assess compliance with the servicing criteria;

(3) The responsible party's assessment of compliance with the servicing criteria. This discussion must include disclosure of any material instance of noncompliance identified by the responsible party; and

(4) A statement that a registered public accounting firm has issued an attestation report on the responsible party's assessment of compliance with the servicing criteria in accordance with paragraph (d) of Rule 13a–18 or Rule

15d–18 under the Exchange Act (§§ 240.13a–18 or 240.15d–18 of this chapter).

(b) *Attestation report of the registered public accounting firm.* Provide the registered public accounting firm's attestation report required by paragraph (d) of Rule 13a–18 or Rule 15d–18 under the Exchange Act on the responsible party's assessment of compliance with the servicing criteria as an exhibit to the asset-backed issuer's report on Form 10–K containing the disclosure required by this item.

(c) *Additional disclosure for the Form 10–K report.* If the responsible party's report on compliance with servicing criteria required by paragraph (a) of this section identifies any material instance of noncompliance with the servicing criteria, describe in the report on Form 10–K any material impacts or effects that have affected or that may reasonably be likely to affect pool asset performance, servicing of the pool assets or payments or expected payments on the asset-backed securities.

(d) *Servicing criteria.*—(1) *General servicing considerations.*

(i) Policies and procedures are instituted to monitor any performance or other triggers and events of default in accordance with the transaction agreements.

(ii) If any material servicing activities are outsourced to third parties, policies and procedures are instituted to monitor the third party's performance and compliance with such servicing activities.

(iii) Any requirements in the transaction agreements to maintain a back-up servicer for the pool assets are maintained.

(iv) A fidelity bond and errors and omissions policy is in effect on the servicer throughout the reporting period in the amount of coverage required by and otherwise in accordance with the terms of the transaction agreements.

(2) *Cash collection and administration.*

(i) Payments on pool assets are deposited into the appropriate custodial bank accounts and related bank clearing accounts no more than two business days of receipt.

(ii) Disbursements made via wire transfer on behalf of an obligor or investor are made only by authorized personnel.

(iii) Advances of funds or guarantees regarding collections, cash flows or distributions, and any interest or other fees charged for such advances, are made, reviewed and approved as specified in the transaction agreements.

(iv) The related accounts for the transaction, such as cash reserve accounts or accounts established as a form of overcollateralization, are separately maintained (*e.g.*, with respect to commingling of cash) as set forth in the transaction agreements.

(v) Each custodial account is maintained at a federally insured depository institution as set forth in the transaction agreements. For purposes of this criterion, ''federally insured'' with respect to a foreign financial institution would mean that the laws or regulations of the foreign financial institution's home jurisdiction require the institution to insure its deposits.

(vi) Unissued checks are safeguarded so as to prevent unauthorized access.

(vii) Reconciliations are prepared on a monthly basis for all asset-backed securities related bank accounts, including custodial accounts and related bank clearing accounts. These reconciliations:

(A) Are mathematically accurate;

(B) Are prepared within 30 calendar days after the bank statement cutoff date;

(C) Are reviewed and approved by someone other than the person who prepared the reconciliation; and

(D) Contain explanations for reconciling items. These reconciling items are resolved within 90 calendar days of their original identification.

(3) *Investor remittances and reporting.*

(i) Reports to investors, including those to be filed with the Commission, are maintained in accordance with the transaction agreements and applicable Commission requirements. Specifically, such reports are:

(A) Prepared in accordance with timeframes and other terms set forth in the transaction agreements;

(B) Provide information calculated in accordance with the terms specified in the transaction agreements;

(C) Filed with the Commission as required by its rules and regulations; and

(D) Agree with investors' and/or the trustee's records as to the total unpaid principal balance and number of pool assets serviced by the servicer.

(ii) Amounts due to investors are allocated and remitted in accordance with timeframes, distribution priority and other terms set forth in the transaction agreements.

(iii) Disbursements made to an investor are posted within two business days to the investor's records maintained by the servicer.

(iv) Amounts remitted to investors per the investor reports agree with cancelled checks, or other form of payment, or custodial bank statements.

(4) *Pool asset administration.*

(i) Collateral or security on pool assets is maintained as required by the transaction agreements or related pool asset documents.

(ii) Pool assets and related documents are safeguarded as required by the transaction agreements.

(iii) Any additions, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements.

(iv) Payments on pool assets, including any payoffs, made in accordance with the related pool asset documents are posted to the applicable obligor's records no more than two business days after receipt and allocated to principal, interest or other items (*e.g.*, escrow) in accordance with the related pool asset documents.

(v) The servicer's records regarding the pool assets agree with the obligor's records with respect to the unpaid principal balance.

(vi) Changes with respect to the terms or status of an obligor's pool asset (*e.g.*, loan modifications or re-agings) are made, reviewed and approved by authorized personnel in accordance with the transaction agreements and related pool asset documents.

(vii) Loss mitigation or recovery actions (*e.g.*, foreclosures or repossessions) are initiated, conducted and concluded in accordance with the timeframes or other requirements established by the transaction agreements. Such programs include a hierarchy of workout procedures (*e.g.*, forbearance plans, modifications and deeds in lieu of foreclosure, as applicable).

(viii) Records documenting collection efforts are maintained during the period a pool asset is delinquent in accordance with the transaction agreements. Such records are maintained on at least a monthly basis and describe the entity's activities in monitoring delinquent pool assets including, for example, phone calls, letters and payment rescheduling plans in cases where delinquency is deemed temporary (*e.g.*, illness or unemployment).

(ix) Adjustments to interest rates or rates of return for pool assets with variable rates are computed based on the related pool asset documents.

(x) Regarding any funds held in trust for an obligor (such as escrow accounts):

(A) Such funds are analyzed, in accordance with the obligor's pool asset documents, on at least an annual basis;

(B) Interest on such funds is paid, or credited, to obligors in accordance with applicable pool asset documents and state laws; and

(C) Such funds are returned to the obligor within 30 calendar days of full repayment of the related pool asset.

(xi) Payments made on behalf of an obligor (such as tax or insurance payments) are made on or before the related penalty or expiration dates, as indicated on the appropriate bills or notices for such payments, provided that such support has been received by the servicer at least 30 calendar days prior to these dates.

(xii) Any late payment penalties in connection with any payment to be made on behalf of an obligor are paid from the servicer's funds and not charged to the obligor, unless the late payment was due to the obligor's error or omission.

(xiii) Disbursements made on behalf of an obligor are posted within two business days to the obligor's records maintained by the servicer.

(xiv) Delinquencies, charge-offs and uncollectable accounts are recognized and recorded in accordance with the transaction agreements.

(xv) Any external enhancement or other support, identified in Item 1113(a)(1) through (3) of this Regulation AB, is maintained as set forth in the transaction agreements.

Instructions to Item 1120.

1. If certain servicing criteria are not applicable in the context of the asset class backing the asset-backed securities, the inapplicability of the criteria should be disclosed in the responsible party's and the registered public accounting firm's reports.

2. If the asset pool backing the asset-backed securities includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool and both the issuing entity for the asset-backed securities and the entity issuing the asset to be included in the issuing entity's asset pool were established under the direction of the same sponsor or depositor, see also Item 1100(d)(2) of this Regulation AB.

§ 229.1121 (Item 1121) Servicer compliance statement.

Provide as a separate exhibit to the filing a statement of compliance from the servicer, signed by an authorized officer of such servicer, to the effect that:

(a) A review of the servicer's activities during the reporting period and of its performance under the applicable servicing agreement has been made under such officer's supervision.

(b) To the best of such officer's knowledge, based on such review, the servicer has fulfilled all of its obligations under the agreement in all material respects throughout the reporting period or, if there has been a default in the fulfillment of any such obligation in any material respect, specifying each such default known to such officer and the nature and status thereof.

Instructions to Item 1121.

1. If multiple servicers are involved in servicing the pool assets, a separate servicer compliance statement is required from each servicer that meets the criteria in Item 1107(a) of this Regulation AB.

2. The filing must include a statement of compliance even if the issuing entity has not existed for a full twelve months.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

22. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78ll(o), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

23. Add § 230.139a to read as follows:

§ 230.139a Publications by brokers or dealers distributing asset-backed securities.

The publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to asset-backed securities meeting the criteria of General Instruction I.B.5 of Form S–3 (§ 239.13 of this chapter)) (''S–3 ABS'') shall not be deemed to constitute an offer for sale or offer to sell S–3 ABS registered or proposed to be registered for purposes of sections 2(a)(10) and 5(c) of the Act (15 U.S.C. 77b(a)(10) and 77e(c)) (the ''registered securities''), even though such broker or dealer is or will be a participant in the distribution of the registered securities, if the following conditions are met:

(a) The broker or dealer must have previously published or distributed with reasonable regularity information, opinions or recommendations relating to S–3 ABS backed directly (or, with respect to securitizations of other securities, indirectly) by substantially similar collateral as that directly or indirectly backing S–3 ABS that is the subject of the information, opinion or recommendation that is proposed to be published or distributed.

(b) If the registered securities are proposed to be offered, offered or part of an unsold allotment or subscription, the information, opinion or recommendation must not:

(1) Identify the registered securities;

(2) Give greater prominence to specific structural or collateral-related attributes of the registered securities than it gives to the same attributes of other asset-backed securities that it mentions; and

(3) Contain any *ABS informational and computational material* (as defined in § 229.1101 of this chapter) relating to the registered securities.

(c) If the material published by the broker or dealer identifies a specific asset-backed security of a specific issuer and specifically recommends that such asset-backed security be purchased, sold or held by persons receiving such material, then a recommendation as favorable or more favorable as to such asset-backed security must have been published by the broker or dealer in the last publication of such broker or dealer addressing such asset-backed security prior to the commencement of its participation in the distribution of the registered securities.

(d) Sufficient information is available from one or more public sources to provide a reasonable basis for the view expressed by the broker or dealer with respect to the asset-backed securities that are the subject of the information, opinion or recommendation.

(e) If the material published by the broker or dealer identifies asset-backed securities backed directly or indirectly by substantially similar collateral as that directly or indirectly backing the registered securities and specifically recommends that such asset-backed securities be preferred over other asset-backed securities backed by different types of collateral, then the material must explain in reasonable detail the reasons for such preference.

24. Add § 230.167 to read as follows:

§ 230.167 Communications in connection with certain registered offerings of asset-backed securities.

Preliminary Note: This section is available only to communications in connection with certain offerings of asset-backed securities. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction or are part of a plan or scheme to evade the requirements of section 5 of the Act (15 U.S.C. 77e).

(a) In an offering of asset-backed securities meeting the requirements of General Instruction I.B.5 of Form S–3 (§ 239.13 of this chapter) and registered under the Act on Form S–3 pursuant to § 230.415, *ABS informational and computational material* regarding such securities used after the effective date of the registration statement and before the sending or giving to investors of a final prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C.

77j(a)) regarding such offering is exempt from section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), if the conditions in paragraph (b) of this section are met.

(b) *Conditions.* To rely on paragraph (a) of this section:

(1) The communications must be filed to the extent required pursuant to § 230.426.

(2) Every communication used pursuant to this section must include prominently on the cover page or otherwise at the beginning of such communication:

(i) The issuing entity's name and the depositor's name, if applicable;

(ii) The Commission file number for the related registration statement;

(iii) A statement that such communication is *ABS informational and computational material* used in reliance on Securities Act Rule 167 (§ 230.167); and

(iv) A legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also must explain to investors that they can get the documents for free at the Commission's Web site and describe which documents are available free from the issuer or an underwriter.

(c) This section is applicable not only to the offeror of the asset-backed securities, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction. A participant for purposes of this section is any person or entity that is a party to the asset-backed securities transaction and any persons authorized to act on their behalf.

(d) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

25. Add §§ 230.190 and 230.191 to read as follows:

§ 230.190 Registration of underlying securities in asset-backed securities transactions.

(a) In an offering of asset-backed securities where the asset pool includes securities of another issuer (''underlying securities''), unless the underlying securities are themselves exempt from registration under section 3 of the Act (15 U.S.C. 77c), the offering of the relevant underlying securities itself must be registered as a primary offering of such securities in accordance with paragraph (b) of this section unless all of the following are true. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(1) Neither the issuer of the underlying securities nor any of its affiliates has a direct or indirect agreement, arrangement, relationship or understanding, written or otherwise, relating to the underlying securities and the asset-backed securities transaction;

(2) Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction; and

(3) The depositor would be free to publicly resell the underlying securities without registration under the Act. For example:

(i) If the underlying securities are restricted securities, as defined in § 230.144(a)(3), the underlying securities must meet the conditions set forth in § 230.144(k) for the sale of restricted securities; and

(ii) The offering of the asset-backed security does not constitute part of a distribution of the underlying securities. An offering of asset-backed securities with an asset pool containing underlying securities that at the time of the purchase for the asset pool are part of a subscription or unsold allotment would be a distribution of the underlying securities. For purposes of this section, in an offering of asset-backed securities involving a sponsor, depositor or underwriter that was an underwriter or an affiliate of an underwriter in a registered offering of the underlying securities, the distribution of the asset-backed securities will not constitute part of a distribution of the underlying securities if the underlying securities were purchased at arm's length in the secondary market at least three months after the last sale of any unsold allotment or subscription by the affiliated underwriter that participated in the registered offering of the underlying securities.

(b) If all of the conditions in paragraph (a) of this section are not met, the offering of the relevant underlying securities itself must be registered as a primary offering of such securities in accordance with the following:

(1) If the offering of asset-backed securities is registered on Form S–3 (§ 239.13 of this chapter), the offering of the underlying securities itself must be eligible to be registered under Form S–3 or F–3 (§ 239.33 of this chapter) as a primary offering of such securities;

(2) The plan of distribution in the registration statement for the offering of the underlying securities contemplates this type of distribution at the time of the commencement of the offering of the asset-backed securities;

(3) The prospectus for the asset-backed securities offering describes the plan of distribution for both the underlying securities and the asset-backed securities;

(4) The prospectus relating to the offering of the underlying securities is delivered simultaneously with the delivery of the prospectus relating to the offering of the asset-backed securities, and the prospectus for the asset-backed securities includes disclosure that the prospectus for the offering of the underlying securities will be delivered along with, or is combined with, the prospectus for the offering of the asset-backed securities;

(5) The prospectus for the asset-backed securities offering identifies the issuing entity, depositor, sponsor and each underwriter for the offering of the asset-backed securities as an underwriter for the offering of the underlying securities;

(6) Neither prospectus disclaims or limits responsibility by the issuing entity, sponsor, depositor, trustee or any underwriter for information regarding the underlying securities; and

(7) If the offering of the asset-backed securities and the underlying securities is not made on a firm commitment basis, the issuing entity or the underwriters for the offering of the asset-backed securities must distribute a preliminary prospectus for both the underlying securities offering and the asset-backed securities offering that identifies the issuer of the underlying securities and the expected amount of the issuer's underlying securities that is to be included in the asset pool to any person who is expected to receive a confirmation of sale of the asset-backed securities at least 48 hours prior to sending such confirmation.

(c) Notwithstanding paragraphs (a) and (b) of this section, if the asset pool for the asset-backed securities includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool, then that pool asset is not considered an ''underlying security'' for purposes of this section (although its distribution in connection with the asset-backed securities transaction may need to be separately registered) if the following conditions are met:

(1) Both the issuing entity for the asset-backed securities and the entity issuing the pool asset were established under the direction of the same sponsor or depositor;

(2) The pool asset is created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction;

(3) The pool asset is not part of a scheme to avoid registration or the requirements of this section; and

(4) The pool asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities.

§ 230.191 Definition of ''issuer'' in section 2(a)(4) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the ''issuer'' for purposes of the asset-backed securities of that issuing entity.

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different ''issuer'' from that same person acting as a depositor for another issuing entity or for purposes of that person's own securities.

26. Amend § 230.411 by:

a. Removing the authority citation following the section; and

b. Revising the first sentence of paragraph (a).

The revision reads as follows:

§ 230.411 Incorporation by reference.

(a) *Prospectuses.* Except as provided by this section, Item 1100(c) of Regulation AB (§ 229.1100(c) of this chapter) for registered offerings of asset-backed securities, or unless otherwise provided in the appropriate form, information shall not be incorporated by reference in a prospectus. * * *

* * * * *

27. Add § 230.426 to read as follows:

§ 230.426 Filing of certain prospectuses under § 230.167 in connection with certain offerings of asset-backed securities.

(a) All written communications made in reliance on § 230.167 are prospectuses that must be filed with the Commission in accordance with paragraphs (b) and (c) of this section on Form 8–K (§ 249.308 of this chapter) and incorporated by reference to the related registration statement for the offering of asset-backed securities. Each prospectus filed under this section must identify the Commission file number of the related registration statement on the cover page of the related Form 8–K in addition to any other information required by that form. The information contained in any such prospectus shall be deemed to be a part of the registration statement as of the earlier of the time of filing of such information or the time of the filing of the final prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) relating to such offering pursuant to § 230.424(b).

(b) Except as specified in paragraph (c) of this section, *ABS informational and computational material* made in reliance on § 230.167 that meet the conditions in paragraph (b)(1) of this section must be filed within the time frame specified in paragraph (b)(2) of this section.

(1) *Conditions for which materials must be filed.* The materials are provided to prospective investors under the following conditions:

(i) For each prospective investor that has indicated to the underwriter that it will purchase all or a portion of the class of asset-backed securities to which such materials relate, all materials relating to such class that are provided to such prospective investor; and

(ii) For any other prospective investor, all materials that are provided to such prospective investor after the final terms have been established for all classes of the offering.

(2) *Time frame to file the materials.* The materials must be filed by the later of:

(i) The due date for filing the final prospectus relating to such offering that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) pursuant to § 230.424(b); or

(ii) Two business days of first use.

(c) Notwithstanding paragraphs (a) and (b) of this section, the following need not be filed under this section:

(1) *ABS informational and computational material* that relate to abandoned structures or that are furnished to a prospective investor prior to the time the final terms have been established for all classes of the offering where such prospective investor has not indicated to the underwriter its intention to purchase the asset-backed securities.

(2) Any *ABS informational and computational material* if a prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) relating to the offering of such asset-backed securities accompanies or precedes the use of such material.

(3) Any *ABS informational and computational material* that does not contain new or different information from that which was previously disclosed and filed under this section.

(4) Any written communication that is limited to the information specified in § 230.134, 230.135 or 230.135c.

(5) Any research report used in reliance on § 230.137, 230.138, 230.139 or 230.139a.

(6) Any confirmation described in § 240.10b–10 of this chapter.

(7) Any prospectus filed under § 230.424.

(d) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

Instruction to § 230.426.

The issuer may aggregate data presented in *ABS informational and computational material* that are to be filed and file such data in consolidated form. Any such aggregation, however, must not result in either the omission of any information contained in such material otherwise to be filed, or a presentation that makes the information misleading.

28. Amend § 230.434 by removing the phrase ''General Instruction I.B.5. of Form S–3 (§ 239.13 of this chapter)'' in paragraph (f) and adding, in its place, the phrase ''§ 229.1101 of this chapter''.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

29. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79t(a), 80a–8, 80a–29, 80a–30 and 80a–37.

* * * * *

30. Amend § 232.311 by removing paragraph (j).

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

31. The authority citation for Part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

32. Amend Form S–1 (referenced in § 239.11) by adding General Instruction VI. to read as follows:

Note: The text of Form S–1 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–1

* * * * *

GENERAL INSTRUCTIONS

* * * * *

VI. Offerings of Asset-Backed Securities

The following applies if a registration statement on this Form S–1 is being used to register an offering of asset-backed securities. Terms used in this General Instruction VI. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

A. *Items that May be Omitted.*

Such registrants may omit the information called for by the following otherwise required items:

1. Paragraphs (a), (b), (c), (e), (f), (g), (h), (i) and (j) of Item 11, Information with Respect to the Registrant.

2. If the issuing entity does not have any executive officers or directors, paragraphs (k), (*l*) and (n) of Item 11, Information with Respect to the Registrant.

3. Paragraph (m) of Item 11, Information with Respect to the Registrant, except for the information required by Item 403(a) of Regulation S–K (17 CFR 229.403(a)) and if the issuing entity does not have any executive officers or directors.

B. *Substitute Information to be Included.* In addition to the Items that are otherwise required by this Form, the registrant must furnish in the prospectus the information required by Items 1102 through 1118 of Regulation AB (17 CFR 229.1102 through 229.1118).

C. *Signatures.* The registration statement must be signed by the depositor, the depositor's principal executive officer or officers, principal financial officer and controller or principal accounting officer, and by at least a majority of the depositor's board of directors or persons performing similar functions.

* * * * *

33. Amend § 239.12 by adding paragraph (i) to read as follows:

§ 239.12 Form S–2, for registration under the Securities Act of 1933 of securities of certain issuers.

* * * * *

(i) *Asset-backed securities.* This form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

34. Amend Form S–2 (referenced in § 239.12) by adding paragraph I. to General Instruction I to read as follows:

Note: The text of Form S–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–2

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S–2

* * * * *

I. *Asset-backed securities.* This form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

* * * * *

35. Amend § 239.13 by:

a. Revising the phrase ''2.06 or 4.02(a) of Form 8–K'' in paragraph (a)(3)(ii) to read ''2.06, 4.02(a) or 6.03 of Form 8–K''; and

b. Revising paragraphs (a)(4) and (b)(5).

The revisions read as follows.

§ 239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(a) * * *

(4) The provisions of paragraphs (a)(2) and (a)(3)(i) of this section do not apply to any registered offerings of asset-backed securities described in paragraph (b)(5) of this section. However, for such offerings, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the sponsor or the depositor (as those terms are defined in § 229.1101 of this chapter) are or were subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78*l* or 78o(d)) with respect to a class of asset-backed securities at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). In addition, such material must have been filed in a timely manner, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 6.03 of Form 8–K (§ 249.308 of this chapter). If § 240.12b–25(b) of this chapter was used during such period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that section.

* * * * *

(b) * * *

(5) *Offerings of investment grade asset-backed securities.* Asset-backed securities (as defined in § 229.1101 of this chapter) to be offered for cash that meet the conditions in General Instruction I.B.5 of Form S–3.

* * * * *

36. Amend Form S–3 (referenced in § 239.13) by:

a. Revising the phrase ''2.06 or 4.02(a) of Form 8–K'' in General Instruction I.A.3.(b) to read ''2.06, 4.02(a) or 6.03 of Form 8–K'';

b. Revising General Instructions I.A.4. and I.B.5.; and

c. Adding General Instruction V.

The revisions and addition reads as follows.

Note: The text of Form S–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–3

* * * * *

GENERAL INSTRUCTIONS

* * * * *

I. Eligibility Requirements for Use of Form S–3

* * * * *

A. *Registrant Requirements.* * * *

4. The provisions in paragraphs A.2. and A.3.(a) above do not apply to any registered offerings of asset-backed securities described in I.B.5 below. However, for such offerings, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the sponsor or the depositor (as those terms are defined in § 229.1101 of this chapter) are or were subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78*l* or 78o(d)) with respect to a class of asset-backed securities at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). In addition, such material must have been filed in a timely manner, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 6.03 of Form 8–K (§ 249.308 of this chapter). If Rule 12b–25(b) (17 CFR 240.12b–25(b)) under the Exchange Act was used during such period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule.

* * * * *

B. *Transaction Requirements.* * * *

5. *Offerings of Investment grade Asset-backed Securities.* Asset-backed securities (as defined in 17 CFR 229.1101) to be offered for cash, provided:

(a) The securities are ''investment grade securities,'' as defined in I.B.2 above (Primary Offerings of Non-convertible Investment Grade Securities);

(b) Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities;

(c) With respect to securities that are backed by leases other than automobile leases, the portion of the cash flow to repay the securities anticipated to come from the residual value of the physical property underlying the leases does not constitute 20% or more, as measured by dollar volume, of the original asset pool at the time of issuance of the asset-backed securities;

(d) The offering related to the securities does not contemplate a prefunding period that involves in excess of 25% of the proceeds of the offering and the duration of the prefunding period does not extend for more than one year from the initial date of issuance of securities backed by the asset pool.

(e) With respect to securities that are backed by fixed receivables or other financial assets that do not revolve, the offering related to the securities does not contemplate a revolving period where the amount of additional receivables or financial assets to be acquired in the revolving period exceeds 25% of the proceeds of the offering and the duration of the revolving period does not extend for more than one year from the initial date of issuance of securities backed by the asset pool.

* * * * *

V. Offerings of Asset-Backed Securities

The following applies if a registration statement on this Form S–3 is being used to register an offering of asset-backed securities. Terms used in this General Instruction V. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

A. *Disclosure.* For a registration statement on this Form S–3 relating to an offering of asset-backed securities, in addition to the Items that are otherwise required by this Form, the registrant must furnish in the prospectus the information required by Items 1102 through 1118 of Regulation AB (17 CFR 229.1102 through 229.1118). For registered offerings pursuant to Securities Act Rule 415(a)(1)(x) (17 CFR 230.415(a)(1)(x)) that include a base prospectus and form of prospectus supplement, a separate base prospectus and form of prospectus supplement must be presented for each asset class that may be securitized in a discrete pool in a takedown of asset-backed securities under the registration statement. A separate base prospectus and form of prospectus supplement also must be presented for each country of origin or country of property securing pool assets that may be securitized in a discrete pool in a takedown of asset-backed securities under the registration statement.

B. *Signatures.* The registration statement must be signed by the depositor, the depositor's principal executive officer or officers, principal financial officer and controller or principal accounting officer, and by at least a majority of the depositor's board of directors or persons performing similar functions.

* * * * *

37. Amend § 239.18 by adding a sentence to the end of the section to read as follows:

§ 239.18 Form S–11, for registration under the Securities Act of 1933 of securities of certain real estate companies.

* * * In addition, this form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

38. Amend Form S–11 (referenced in § 239.18) by adding a sentence to the end of General Instruction A to read as follows:

Note: The text of Form S–11 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–11

* * * * *

GENERAL INSTRUCTIONS

A. Rules as to Use of Form S–11

* * * In addition, this form shall not be used for an offering of asset-backed securities, as defined in 17 CFR 229.1101.

* * * * *

39. Amend § 239.31 by adding a sentence to the end of paragraph (a) to read as follows:

§ 239.31 Form F–1, registration statement under the Securities Act of 1933 for securities of certain foreign private issuers.

(a) * * * In addition, this form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

* * * * *

40. Amend Form F–1 (referenced in § 239.31) by adding a sentence to the end of General Instruction I.A to read as follows:

Note: The text of Form F–1 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–1

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form F–1

A. * * * In addition, this form shall not be used for an offering of asset-backed securities, as defined in 17 CFR 229.1101.

* * * * *

41. Amend § 239.32 by adding paragraph (i) to read as follows:

§ 239.32 Form F–2, for registration under the Securities Act of 1933 for securities of certain foreign private issuers.

* * * * *

(i) *Asset-backed securities.* This form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

42. Amend Form F–2 (referenced in § 239.32) by adding paragraph I. to General Instruction I to read as follows:

Note: The text of Form F–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–2

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form F–2

* * * * *

I. *Asset-backed securities:* This form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

* * * * *

43. Add a sentence to the end of the introductory text of § 239.33 to read as follows:

§ 239.33 Form F–3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * In addition, this Form shall not be used for an offering of asset-backed securities, as defined in § 229.1101 of this chapter.

* * * * *

44. Amend Form F–3 (referenced in § 239.33) by adding a sentence to the end of the introductory text of General Instruction I to read as follows:

Note: The text of Form F–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–3

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form F–3

* * * In addition, this Form shall not be used for an offering of asset-backed

securities, as defined in 17 CFR 229.1101.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

45. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

46. Add § 240.3a12–12 to read as follows:

§ 240.3a12–12 Exemption from certain provisions of section 16 of the Act for asset-backed securities.

Asset-backed securities, as defined in § 229.1101 of this chapter, are exempt from section 16 of the Act (15 U.S.C. 78p).

47. Add § 240.3b–19 to read as follows:

§ 240.3b–19 Definition of ''issuer'' in section 3(a)(8) of the Act in relation to asset-backed securities.

The following applies with respect to asset-backed securities under the Act. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(a) The depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the ''issuer'' for purposes of the asset-backed securities of that issuing entity.

(b) The person acting in the capacity as the depositor specified in paragraph (a) of this section is a different ''issuer'' from that same person acting as a depositor for another issuing entity or for purposes of that person's own securities.

§ 240.10A–3 [Amended]

48. Amend § 240.10A–3 by removing the phrase ''(as defined in § 240.13a–14(g) and § 240.15d–14(g))'' from paragraph (c)(6)(i) and adding, in its place, the phrase ''(as defined in § 229.1101 of this chapter)''.

49. Amend § 240.12b–2 by revising paragraph (3) of the definition of *Small Business Issuer* to read as follows:

§ 240.12b-2 Definitions.

* * * * *

Small Business Issuer. * * *

(3) Is not an investment company and is not an asset-backed issuer (as defined in § 229.1101 of this chapter); and

* * * * *

50. Amend § 240.12b–15 by adding a sentence after the sixth sentence to read as follows:

§ 240.12b–15 Amendments.

* * * An amendment to any report required to include the certifications as specified in § 240.13a–14(d) or § 240.15d–14(d) must include a new certification by an individual specified in § 240.13a–14(e) or § 240.15d–14(e), as applicable. * * *

51. Amend § 240.13a–10 by adding paragraph (k) before the *Notes* to read as follows:

§ 240.13a–10 Transition reports.

* * * * *

(k)(1) Paragraphs (a) through (g) of this section shall not apply to asset-backed issuers.

(2) Every asset-backed issuer that changes its fiscal closing date shall file a report covering the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year. In no event shall a transition report cover a period longer than 12 months.

(3) The report for the transition period shall be filed on Form 10–K (§ 249.310 of this chapter) responding to all items to which such asset-backed issuer is required to respond pursuant to General Instruction J. of Form 10–K. Such report shall be filed within 90 days after the latter of either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date.

(4) Notwithstanding the foregoing in paragraphs (k)(2) and (k)(3) of this section, if the transition period covers a period of one month or less, an asset-backed issuer need not file a separate transition report if the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year.

(5) Any obligation of the asset-backed issuer to file distribution reports pursuant to § 240.13a–17 will continue to apply regardless of a change in the asset-backed issuer's fiscal closing date.

* * * * *

§ 240.13a–11 [Amended]

52. Amend § 240.13a–11 by revising the phrase ''2.06 or 4.02(a) of Form 8–K'' in paragraph (c) to read ''2.06, 4.02(a) or 6.03 of Form 8–K''.

53. Amend § 240.13a–13 by:

a. Removing the authority citation following § 240.13a–13;

b. Removing the period at the end of paragraph (b)(2) and adding, in its place, ''; and''; and

c. Adding paragraph (b)(3).

The addition reads as follows.

§ 240.13a–13 Quarterly reports on Form 10–Q and Form 10–QSB (§ 249.308a and § 249.308b of this chapter).

* * * * *

(b) * * *

(3) Asset-backed issuers required to file reports pursuant to § 240.13a–17.

* * * * *

54. Amend § 240.13a–14 by:

a. Removing the phrase ''(as defined in paragraph (g) of this section)'' in the first sentence of paragraph (a) and adding, in its place, the phrase ''(as defined in § 229.1101 of this chapter)'';

b. Revising the reference to ''paragraph (a) or (b)'' in paragraph (c) to read ''paragraph (a), (b) or (d)'';

c. Revising paragraphs (d) and (e); and

d. Removing paragraphs (f) and (g).

The revisions read as follows:

§ 240.13a–14 Certification of disclosure in annual and quarterly reports.

* * * * *

(d) Each annual report and transition report filed on Form 10–K (§ 249.310 of this chapter) by an asset-backed issuer (as defined in § 229.1101 of this chapter) under section 13(a) of the Act (15 U.S.C. 78m(a)) must include a certification in the form specified in the applicable exhibit filing requirements of such report and such certification must be filed as an exhibit to such report.

(e) With respect to asset-backed issuers, the certification required by paragraph (d) of this section must be signed by either:

(1) The senior officer in charge of securitization of the depositor if the depositor is signing the report; or

(2) The senior officer in charge of the servicing function of the servicer if the servicer is signing the report on behalf of the issuing entity. If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent functions) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

§ 240.13a–15 [Amended]

55. Amend § 240.13a–15 by removing the phrase ''(as defined in § 240.13a–14(g))'' and adding, in its place, the phrase ''(as defined in § 229.1101 of this chapter)'' in paragraph (a).

56. Amend § 240.13a–16 by:

a. Removing the word ''or'' at the end of paragraph (a)(2);

b. Removing the period at the end of paragraph (a)(3) and adding, in its place, ''; or''; and

c. Adding paragraph (a)(4).

The addition reads as follows.

§ 240.13a–16 Reports of foreign private issuers on Form 6–K (17 CFR 249.306).

(a) * * *

(4) Asset-backed issuers, as defined in § 229.1101 of this chapter.

* * * * *

57. Add §§ 240.13a–17 and 240.13a–18 to read as follows:

§ 240.13a–17 Reports of asset-backed issuers on Form 10–D (§ 249.312 of this chapter).

Every asset-backed issuer subject to § 240.13a–1 shall make reports on Form 10–D (§ 249.312 of this chapter). Such reports shall be filed within the period specified in Form 10–D.

§ 240.13a–18 Compliance with servicing criteria for asset-backed securities.

(a) This section applies to every class of asset-backed securities subject to the reporting requirements of section 13(a) or 15(d) of the Act (15 U.S.C. 78m(a) or 78o(d)). Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) *Assessment required.* With regard to a class of asset-backed securities subject to the reporting requirements of section 13(a) or 15(d) of the Act, the following person (the ''responsible party'') must assess compliance with the servicing criteria specified in paragraph (d) of Item 1120 of Regulation AB (§ 229.1120(d) of this chapter), as of and for the period ending the end of each fiscal year, with respect to asset-backed securities transactions taken as a whole involving the responsible party and that are backed by the same asset type backing the class of asset-backed securities (including the asset-backed securities transaction that is to be the subject of the report on Form 10–K for that fiscal year):

(1) The depositor if the depositor signs the report on Form 10–K with respect to that fiscal year; or

(2) The servicer if the servicer signs the report on Form 10–K on behalf of the issuing entity with respect to that fiscal year. If multiple servicers are involved in servicing the pool assets, the master servicer (or entity performing the equivalent functions) is the ''responsible party'' if a representative of the servicer is to sign the report on behalf of the issuing entity.

(c) *Unaffiliated parties that perform the servicing criteria.* (1) The responsible party must use reasonable means to assess whether the parties performing the servicing functions that are material to the servicing function as a whole (*e.g.*, servicers, master servicer, trustee, paying agent) are complying with the servicing criteria in all material respects.

(2) Because the responsible party must rely in certain circumstances on information provided by unaffiliated parties outside of the responsible party's control, the responsible party may reasonably rely on information provided to the responsible party by unaffiliated parties in making its assessment.

(d) *Attestation on assessment required.* With respect to the responsible party's compliance assessment required by paragraph (b) and (c) of this section, a registered public accounting firm must attest to, and report on, the assessment made by the responsible party. An attestation made under this paragraph must be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board.

58. Amend § 240.15c2–8 by adding a sentence to the end of paragraph (b) to read as follows.

§ 240.15c2–8 Delivery of prospectus.

* * * * *

(b) * * * This paragraph (b) does not apply with respect to asset-backed securities (as defined in § 229.1101 of this chapter) that meet the requirements of General Instruction I.B.5 of Form S–3 (§ 239.13 of this chapter).

* * * * *

59. Amend § 240.15d–10 by adding paragraph (k) before the *Notes* to read as follows:

§ 240.15d–10 Transition reports.

* * * * *

(k)(1) Paragraphs (a) through (g) of this section shall not apply to asset-backed issuers.

(2) Every asset-backed issuer that changes its fiscal closing date shall file a report covering the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year. In no event shall a transition report cover a period longer than 12 months.

(3) The report for the transition period shall be filed on Form 10–K (§ 249.310 of this chapter) responding to all items to which such asset-backed issuer is required to respond pursuant to General Instruction J. of Form 10–K. Such report shall be filed within 90 days after the later of either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date.

(4) Notwithstanding the foregoing in paragraphs (k)(2) and (k)(3) of this section, if the transition period covers a period of one month or less, an asset-backed issuer need not file a separate transition report if the first annual report for the newly adopted fiscal year covers the transition period as well as the fiscal year.

(5) Any obligation of the asset-backed issuer to file distribution reports pursuant to § 240.15d–17 will continue to apply regardless of a change in the asset-backed issuer's fiscal closing date.

* * * * *

§ 240.15d–11 [Amended]

60. Amend § 240.15d–11 by revising the phrase ''2.06 or 4.02(a) of Form 8–K'' in paragraph (c) to read ''2.06, 4.02(a) or 6.03 of Form 8–K''.

61. Amend § 240.15d–13 by:

a. Removing the authority citation following § 240.15d–13;

b. Removing the period at the end of paragraph (b)(2) and adding, in its place, ''; and''; and

c. Adding paragraph (b)(3).

The addition reads as follows.

§ 240.15d–13 Quarterly reports on Form 10–Q and Form 10–QSB (§ 249.308a and § 249.308b of this chapter).

* * * * *

(b) * * *

(3) Asset-backed issuers required to file reports pursuant to § 240.15d–17.

* * * * *

62. Amend § 240.15d–14 by:

a. Removing the phrase ''(as defined in paragraph (g) of this section)'' in the first sentence of paragraph (a) and adding, in its place, the phrase ''(as defined in § 229.1101 of this chapter)'';

b. Revising the reference to ''paragraph (a) or (b)'' in paragraph (c) to read ''paragraph (a), (b) or (d)'';

c. Revising paragraphs (d) and (e); and

d. Removing paragraphs (f) and (g).

The revisions read as follows:

§ 240.15d–14 Certification of disclosure in annual and quarterly reports.

* * * * *

(d) Each annual report and transition report filed on Form 10–K (§ 249.310 of this chapter) by an asset-backed issuer (as defined in § 229.1101 of this chapter) under section 15(d) of the Act (15 U.S.C. 78o(d)) must include a certification in the form specified in the applicable exhibit filing requirements of such report and such certification must be filed as an exhibit to such report.

(e) With respect to asset-backed issuers, the certification required by paragraph (d) of this section must be signed by either:

(1) The senior officer in charge of securitization of the depositor if the depositor is signing the report; or

(2) The senior officer in charge of the servicing function of the servicer if the servicer is signing the report on behalf of the issuing entity. If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent functions) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

§ 240.15d–15 [Amended]

63. Amend § 240.15d–15 by removing the phrase ''(as defined in § 240.15d–14(g)'' and adding, in its place, the phrase ''(as defined in § 229.1101'' in paragraph (a).

64. Amend § 240.15d–16 by:

a. Removing the period at the end of paragraph (a)(2) and adding, in its place, ''; or''; and

c. Adding paragraph (a)(3).

The addition reads as follows.

§ 240.15d–16 Reports of foreign private issuers on Form 6–K [17 CFR 249.306].

(a) * * *

(3) Asset-backed issuers, as defined in § 229.1101 of this chapter.

* * * * *

65. Add § 240.15d–17 to read as follows:

§ 240.15d–17 Reports of asset-backed issuers on Form 10–D (§ 249.312 of this chapter).

Every asset-backed issuer subject to § 240.15d–1 shall make reports on Form 10–D (§ 249.312 of this chapter). Such reports shall be filed within the period specified in Form 10–D.

66. Add § 240.15d–18 before the undesignated center heading to read as follows:

§ 240.15d–18 Compliance with servicing criteria for asset-backed securities.

(a) This section applies to every class of asset-backed securities subject to the reporting requirements of section 13(a) or 15(d) of the Act (15 U.S.C. 78m(a) or 78o(d)). Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) *Assessment required.* With regard to a class of asset-backed securities subject to the reporting requirements of section 13(a) or 15(d) of the Act, the following person (the ''responsible party'') must assess compliance with the servicing criteria specified in paragraph (d) of Item 1120 of Regulation AB (§ 229.1120(d) of this chapter), as of and for the period ending the end of each fiscal year, with respect to asset-backed securities transactions taken as a whole involving the responsible party and that are backed by the same asset type backing the class of asset-backed securities (including the asset-backed securities transaction that is to be the subject of the report on Form 10–K for that fiscal year):

(1) The depositor if the depositor signs the report on Form 10–K with respect to that fiscal year; or

(2) The servicer if the servicer signs the report on Form 10–K on behalf of the issuing entity with respect to that fiscal year. If multiple servicers are involved in servicing the pool assets, the master servicer (or entity performing the equivalent functions) is the ''responsible party'' if a representative of the servicer is to sign the report on behalf of the issuing entity.

(c) *Unaffiliated parties that perform the servicing criteria.*(1) The responsible party must use reasonable means to assess whether the parties performing the servicing functions that are material to the servicing function as a whole (*e.g.*, servicers, master servicer, trustee, paying agent) are complying with the servicing criteria in all material respects.

(2) Because the responsible party must rely in certain circumstances on information provided by unaffiliated parties outside of the responsible party's control, the responsible party may reasonably rely on information provided to the responsible party by unaffiliated parties in making its assessment.

(d) *Attestation on assessment required.* With respect to the responsible party's compliance assessment required by paragraph (b) and (c) of this section, a registered public accounting firm must attest to, and report on, the assessment made by the responsible party. An attestation made under this paragraph must be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board.

67. Add §§ 240.15d–22 and 240.15d–23 to read as follows:

§ 240.15d–22 Reporting regarding asset-backed securities under section 15(d) of the Act.

(a) With respect to an offering of asset-backed securities registered pursuant to § 230.415(a)(1)(x) of this chapter, annual and other reports need not be filed pursuant to section 15(d) of the Act (15 U.S.C. 78o(d)) regarding any class of securities to which such registration statement relates until the first bona fide sale in a takedown of securities under the registration statement.

(b) Regarding any class of asset-backed securities in a takedown off of a registration statement pursuant to § 230.415(a)(1)(x) of this chapter, no annual and other reports need be filed pursuant to section 15(d) of the Act regarding such class of securities as to any fiscal year, other than the fiscal year within which the takedown occurred, if at the beginning of such fiscal year the securities of each class in the takedown are held of record by less than three hundred persons.

(c) Paragraphs (a) or (b) of this section do not affect any other reporting obligation applicable with respect to any classes of securities from additional takedowns under the same or different registration statements or any reporting obligation that may be applicable pursuant to section 12 of the Act (15 U.S.C. 78*l*).

§ 240.15d–23 Reporting regarding certain securities underlying asset-backed securities under section 15(d) of the Act.

(a) Regarding a class of asset-backed securities, if the asset pool for the asset-backed securities includes a pool asset representing an interest in or the right to the payments or cash flows of another asset pool, then no separate annual and other reports need be filed pursuant to section 15(d) of the Act (15 U.S.C. 78o(d)) because of the separate registration of the distribution of the pool asset under the Securities Act (15 U.S.C. 77a *et seq.*), if the following conditions are met:

(1) Both the issuing entity for the asset-backed securities and the entity that issued the pool asset were established under the direction of the same sponsor or depositor;

(2) The pool asset was created solely to satisfy legal requirements or otherwise facilitate the structuring of the asset-backed securities transaction;

(3) The pool asset is not part of a scheme to avoid the registration or reporting requirements of the Act;

(4) The pool asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities; and

(5) The offering of the asset-backed securities and the offering of the pool asset were both registered under the Securities Act (15 U.S.C. 77a *et seq.*).

(b) Paragraph (a) of this section does not affect any reporting obligation applicable with respect to the asset-backed securities or any other reporting obligation that may be applicable with respect to the pool asset or any other securities by the issuer of that pool asset pursuant to section 12 or 15(d) of the Act (15 U.S.C. 78*l* or 78o(d)).

(c) This section does not affect any obligation to provide information

regarding the pool asset or the asset pool underlying the pool asset in a filing with respect to the asset-backed securities. See Item 1100(d) of Regulation AB (§ 229.1100(d) of this chapter).

(d) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

PART 242—REGULATIONS M, ATS, AND AC AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

68. The authority citation for part 242 is revised to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

69. Amend § 242.100 by revising the definition of *Asset-backed security* in paragraph (b) to read as follows:

§ 242.100 Preliminary note; definitions.

* * * * *

(b) * * *

Asset-backed security has the meaning contained in § 229.1101 of this chapter.

* * * * *

PART 245—REGULATION BLACKOUT TRADING RESTRICTION

70. The authority citation for part 245 continues to read in part as follows:

Authority: 15 U.S.C. 78w(a), unless otherwise noted.

* * * * *

71. Amend § 245.101 by:

a. Removing the period at the end of paragraph (c)(2) and in its place adding a semicolon;

b. Removing ''and'' at the end of paragraph (c)(9);

c. Removing the period at the end of paragraph (c)(10) and in its place adding ''; and''; and

d. Adding paragraph (c)(11).

The addition reads as follows:

§ 245.101 Prohibition of insider trading during pension fund blackout periods.

* * * * *

(c) * * *

(11) Any acquisition or disposition of an asset-backed security, as defined in § 229.1101 of this chapter.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

72. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

73. Amend Form 8–K (referenced in § 249.308) by:

a. Adding General Instruction G.;

b. Adding Instruction 3 to Item 1.01;

c. Adding Instruction 3 to Item 1.02;

d. Revising the phrase ''*Instruction*'' in Item 1.03 to read ''*Instructions*'', redesignating the existing Instruction as Instruction 1, and adding Instruction 2;

e. Revising Instruction 4 to Item 2.02;

f. Adding Instruction 5 to Item 2.04;

g. Revising the phrase ''Instruction'' in Item 4.01 to read ''Instructions'', redesignating the existing Instruction as Instruction 1, and adding Instruction 2;

h. Revising the phrase ''Instruction to Item 5.03'' in Item 5.03 to read ''Instructions'', redesignating the existing Instruction as Instruction 1, and adding Instruction 2; and

i. Adding Section 6.

The revisions and addition read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 8–k

* * * * *

GENERAL INSTRUCTIONS

* * * * *

G. Use of this Form by Asset-Backed Issuers

The following applies to registrants that are asset-backed issuers. Terms used in this General Instruction G. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

1. *Reportable Events That May Be Omitted.*

The registrant need not file a report on this Form upon the occurrence of any one or more of the events specified in the following:

(a) Item 2.01, Completion of Acquisition or Disposition of Assets;

(b) Item 2.03, Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant;

(c) Item 2.05, Costs Associated with Exit or Disposal Activities;

(d) Item 2.06, Material Impairments;

(e) Item 3.01, Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing;

(f) Item 3.02, Unregistered Sales of Equity Securities;

(g) Item 4.02, Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review;

(h) Item 5.01, Changes in Control of Registrant;

(i) Item 5.02, Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers;

(j) Item 5.04, Temporary Suspension of Trading Under Registrant's Employee Benefit Plans; and

(k) Item 5.05, Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.

2. *Additional Disclosure for the Form 8–K Cover Page.*

Immediately after the name of the issuing entity on the cover page of the Form 8–K, as separate line items, identify the exact name of the depositor as specified in its charter and the exact name of the sponsor as specified in its charter.

3. *Signatures.*

The Form 8–K must be signed by the depositor. In the alternative, the Form 8–K may be signed on behalf of the issuing entity by a duly authorized representative of the servicer. If multiple servicers are involved in servicing the pool assets, a duly authorized representative of the master servicer (or entity performing the equivalent functions) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

Information To Be Included in the Report

Item 1.01 Entry Into a Material Definitive Agreement

Instructions. * * *

3. With respect to asset-backed securities, as defined in Item 1101 of Regulation AB (17 CFR 229.1101), disclosure is required under this Item 1.01 regarding the entry into or an amendment to a definitive agreement that is material to the asset-backed securities transaction, even if the registrant is not a party to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1107(a) of Regulation AB (17 CFR 229.1107(a)).

Item 1.02 Termination of a Material Definitive Agreement

Instructions. * * *

3. With respect to asset-backed securities, as defined in Item 1101 of Regulation AB (17 CFR 229.1101), disclosure is required under this Item 1.02 regarding the termination of a definitive agreement that is material to the asset-backed securities transaction (otherwise than by expiration of the agreement on its stated termination date or as a result of all parties completing their obligations under such agreement), even if the registrant is not a party to such agreement (*e.g.*, a servicing

agreement with a servicer contemplated by Item 1107(a) of Regulation AB (17 CFR 229.1107(a)).

Item 1.03 Bankruptcy or Receivership

Instructions. * * *

2. With respect to asset-backed securities, disclosure also is required under this Item 1.03 if the depositor (or servicer if the servicer signs the report on Form 10–K (17 CFR 249.310) of the issuing entity) becomes aware that a receiver, fiscal agent or similar officer has been appointed for the sponsor, depositor, servicer, trustee, significant obligor, enhancement provider contemplated by Item 1113(b) of Regulation AB (17 CFR 229.1113(b)) or other material party contemplated by Item 1101(d)(1) of Regulation AB (17 CFR 1101(d)(1)) in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under State or Federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of such party, or if such jurisdiction has been assumed by leaving the existing directors and officers in possession but subject to the supervision and orders of a court or governmental authority. Terms used in this Instruction 2 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

* * * * *

Item 2.02 Results of Operations and Financial Condition

* * * * *

Instructions. * * *

4. This Item 2.02 does not apply in the case of a disclosure that is made in a quarterly report filed with the Commission on Form 10–Q (17 CFR 249.308a) (or Form 10–QSB (17 CFR 249.308b)), a distribution report filed with the Commission on Form 10–D (17 CFR 249.312) with respect to asset-backed securities, or an annual report filed with the Commission on Form 10–K (17 CFR 249.310) (or Form 10–KSB (17 CFR 249.310b)).

* * * * *

Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance-Sheet Arrangement

* * * * *

Instructions. * * *

5. With respect to asset-backed securities, as defined in 17 CFR 229.1101, disclosure also is required under this Item 2.04 if an early amortization, performance trigger or other event, including an event of default, has occurred under the transaction agreements for the asset-backed securities that would materially alter the payment priority or distribution of cash flows regarding the asset-backed securities or the amortization schedule for the asset-backed securities. In providing the disclosure required by this Item, identify the changes to the payment priorities, flow of funds or asset-backed securities as a result. Disclosure is required under this Item whether or not the registrant is a party to the transaction agreement that results in the occurrence identified.

* * * * *

Item 4.01 Changes in Registrant's Certifying Accountant

* * * * *

Instructions. * * *

2. With respect to asset-backed securities, as defined in 17 CFR 229.1101, the applicable accountant to which this Item 4.01 should relate is the accountant engaged to provide the attestation report on assessment of compliance with servicing criteria for asset-backed securities, as defined in 17 CFR 210.1–02(a)(3).

* * * * *

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year

* * * * *

Instructions. * * *

2. With respect to asset-backed securities, as defined in 17 CFR 229.1101, disclosure is required under this Item 5.03 regarding any amendment to the governing documents of the issuing entity, regardless of whether the class of asset-backed securities is reporting under Section 13 or 15(d) of the Exchange Act.

* * * * *

Section 6—Asset-Backed Securities

The Items in this Section 6 apply only to asset-backed securities. Terms used in this Section 6 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

Item 6.01 ABS Informational and Computational Material

Report under this Item any ABS informational and computational material filed in, or as an exhibit to, this report.

Item 6.02 Change of Servicer or Trustee

If a servicer contemplated by Item 1107(a) of Regulation AB (17 CFR 229.1107(a)) or the trustee has resigned or has been removed, replaced or substituted, or if a new servicer contemplated by Item 1107(a) of Regulation AB or trustee has been appointed, state the date the event occurred and the circumstances surrounding the change. In addition, provide the disclosure required by Item 1107(c) of Regulation AB (17 CFR 229.1107(c)), as applicable, regarding the servicer or trustee change. If a new servicer contemplated by Item 1107(a) of this Regulation AB or a new trustee has been appointed, provide the information required by Item 1107 of Regulation AB regarding such servicer or Item 1108 of Regulation AB (17 CFR 229.1108) regarding such trustee, as applicable.

Item 6.03 Change in Credit Enhancement or Other External Support

(a) *Loss of existing enhancement.* If the depositor (or servicer if the servicer signs the report on Form 10–K (17 CFR 249.310) of the issuing entity) becomes aware that any material enhancement specified in Item 1113(a)(1) through (3) of Regulation AB (17 CFR 229.1113(a)(1) through (3)) that was previously applicable regarding one or more classes of the asset-backed securities has terminated other than by expiration of the contract on its stated termination date or as a result of all parties completing their obligations under such agreement, then disclose:

(1) the date of the termination of the enhancement;

(2) the identity of the parties to the agreement relating to the enhancement;

(3) a brief description of the terms and conditions of the enhancement that are material to security holders;

(4) a brief description of the material circumstances surrounding the termination; and

(5) any material early termination penalties paid or to be paid out of the cash flows backing the asset-backed securities.

(b) *Addition of new enhancement.* If the depositor (or servicer if the servicer signs the report on Form 10–K (17 CFR 249.310) of the issuing entity) becomes aware that any material enhancement specified in Item 1113(a)(1) through (3) of Regulation AB (17 CFR 229.1113(a)(1) through (3)) has been added with respect to one or more classes of the asset-backed securities, then provide the date of addition of the new enhancement and the disclosure required by Item 1113 of Regulation AB with respect to such new enhancement.

(c) *Material change to enhancement.* If the depositor (or servicer if the servicer signs the report on Form 10–K (17 CFR 249.310) of the issuing entity) becomes aware that any existing material enhancement specified in Item

1113(a)(1) through (3) of Regulation AB (17 CFR 229.1113(a)(1) through (3)) with respect to one or more classes of the asset-backed securities has been materially amended or modified, disclose:

(1) the date on which the agreement or agreements relating to the enhancement was amended or modified;

(2) the identity of the parties to the agreement or agreements relating to the amendment or modification; and

(3) a brief description of the material terms and conditions of the amendment or modification.

Instructions. 1. Disclosure is required under this Item whether or not the registrant is a party to any agreement regarding the enhancement if the loss, addition or modification of such enhancement materially affects, directly or indirectly, the asset-backed securities, the pool assets or the cash flow underlying the asset-backed securities.

2. The instructions to Items 1.01 and 1.02 of this Form apply to this Item.

3. Notwithstanding Items 1.01 and 1.02 of this Form, disclosure regarding changes to material enhancements are to be reported under this Item 6.03 in lieu of those Items.

Item 6.04 Failure To Make a Required Distribution

If a required distribution to holders of the asset-backed securities is not made as of the required distribution date under the transaction documents, identify the failure and state the nature of the failure to make the timely distribution.

Item 6.05 Sales of Additional Securities

If additional securities that are either backed by the same asset pool or are otherwise issued by the issuing entity are sold, whether or not registered under the Securities Act, provide the applicable information set forth in paragraphs (a) through (e) of Item 701 of Regulation S–K (17 CFR 229.701(a) through (e)) and paragraph (e) of Item 1112 of Regulation AB (17 CFR 229.1112(e)). For purposes of determining the filing date for the Form 8–K under this Item 6.05, the registrant has no obligation to disclose information under this Item 6.05 until an enforceable agreement, whether or not subject to conditions, has been entered into under which the securities are to be sold. If there is no such agreement, the registrant must provide disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the securities are to be sold.

Instruction. No information is required by this Item if substantially the same information has been provided previously in an effective registration statement under the Securities Act or a prospectus timely filed pursuant to Securities Act Rule 424 (17 CFR 230.424) under the same CIK code regarding a subsequent issuance of asset-backed securities backed by the same pool.

Item 6.06 Securities Act Updating Disclosure

Regarding an offering of asset-backed securities registered on Form S–3 (17 CFR 239.13), if the actual asset pool at the time of issuance of the asset-backed securities differs by 5% or more from the description of the asset pool in the prospectus filed for the offering pursuant to Securities Act Rule 424 (17 CFR 230.424), disclose the information required by Items 1110 and 1111 of Regulation AB (17 CFR 229.1110 and 17 CFR 229.1111) regarding the characteristics of the actual asset pool. If applicable, also provide information required by Items 1107 and 1109 of Regulation AB (17 CFR 229.1107 and 17 CFR 229.1109) regarding any new servicers or originators that would be required to be disclosed under those items regarding the pool assets.

Instruction. No report is required under this Item if substantially the same information is provided in a post-effective amendment to the Securities Act registration statement or in a subsequent prospectus filed pursuant to 17 CFR 230.424.

* * * * *

74. Amend § 249.220f by revising paragraph (a) and (b) to read as follows:

§ 249.220f Form 20–F, registration of securities of foreign private issuers pursuant to section 12(b) or (g) and annual and transition reports pursuant to sections 13 and 15(d).

(a) Any foreign private issuer, other than an asset-backed issuer (as defined in § 229.1101 of this chapter), may use this form as a registration statement under section 12 of the Securities Exchange Act of 1934 (the ''Exchange Act'') or as an annual or transition report filed under section 13(a) or 15(d) of the Exchange Act.

(b) Except with respect to an asset-backed issuer, an annual report on this form shall be filed within six months after the end of the fiscal year covered by such report.

* * * * *

75. Amend Form 20–F (referenced in § 249.220f) by:

a. Adding the phrase '', other than an asset-backed issuer (as defined in 17 CFR 229.1101),'' after the phrase ''foreign private issuer'' in paragraphs (a) and (b) of General Instruction A;

b. Revising the heading ''Instructions to Item 15'' to read ''Instruction to Item 15'';

c. Removing Instruction 2 to Item 15;

d. Removing Instruction 4 to Item 16A;

e. Removing Instruction 4 to Item 16B;

f. Redesignating Instructions 5, 6 and 7 to Item 16B as Instructions 4, 5 and 6 to Item 16B;

g. Revising the heading ''Instructions to Item 16C'' to read ''Instruction to Item 16C''; and

h. Removing Instruction 2 to Item 16C.

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

76. Amend Form 10–K (referenced in § 249.310) by:

a. Removing ''and'' at the end of General Instruction I.(1)(b);

b. Removing the period at the end of General Instruction I.(1)(c) and in its place adding ''; and'';

c. Adding paragraph (d) to General Instruction I.(1);

b. Adding General Instruction J.;

c. Adding an Instruction to Item 9B; and

d. Removing the Instruction to Item 14.

The revisions read as follows.

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–K

* * * * *

GENERAL INSTRUCTIONS

* * * * *

I. Omission of Information by Certain Wholly-Owned Subsidiaries.

* * * * *

(1) * * *

(d) The registrant is not an asset-backed issuer, as defined in Item 1101 of Regulation AB (17 CFR 229.1101).

* * * * *

J. Use of This Form by Asset-Backed Issuers

The following applies to registrants that are asset-backed issuers. Terms used in this General Instruction J. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

(1) *Items that May be Omitted.* Such registrants may omit the information called for by the following otherwise required Items:

(a) Item 1, Business;
(b) Item 2, Properties;
(c) Item 3, Legal Proceedings;
(d) Item 6, Selected Financial Data;
(e) Item 7, Management's Discussion and Analysis of Financial Condition and Results of Operations;
(f) Item 7A, Quantitative and Qualitative Disclosures About Market Risk;
(g) Item 8, Financial Statements and Supplementary Data;
(h) Item 9A, Controls and Procedures;
(i) Item 10, Directors and Executive Officers of the Registrant, Item 11, Executive Compensation, and Item 13, Certain Relationships and Related Transactions, if the issuing entity does not have any officers or directors;
(j) Item 12, Security Ownership of Certain Beneficial Owners and Management, except for the information required by Item 403(a) of Regulation S–K (17 CFR 229.403(a)) and if the issuing entity does not have any executive officers or directors; and
(k) Item 14, Principal Accountant Fees and Services.

(2) *Substitute Information to be Included.* In addition to the Items that are otherwise required by this Form, the registrant must furnish in the Form 10–K the following information:
(a) Immediately after the name of the issuing entity on the cover page of the Form 10–K, as separate line items, the exact name of the depositor as specified in its charter and the exact name of the sponsor as specified in its charter.
(b) Item 1111(b) of Regulation AB;
(c) Item 1113(b)(2) of Regulation AB;
(d) Item 1115 of Regulation AB;
(e) Item 1117 of Regulation AB;
(f) Item 1120 of Regulation AB; and
(g) Item 1121 of Regulation AB.

(3) *Signatures.*
The Form 10–K must be signed either:
(a) On behalf of the depositor by the senior officer in charge of securitization of the depositor; or
(b) On behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer. If multiple servicers are involved in servicing the pool assets, the senior officer in charge of the servicing function of the master servicer (or entity performing the equivalent functions) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

* * * * *

FORM 10–K

* * * * *

Item 9B. Other Information

* * * * *

Instruction. With respect to a report on this Form regarding a class of asset-backed securities, the relevant period where disclosure is required is the period since the last required distribution report on Form 10–D (17 CFR 249.312).

* * * * *

77. Amend Form 10–KSB (referenced in § 249.310b) by removing the Instruction to Item 14.

Note: The text of Form 10–KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

78. Amend Form 40–F (referenced in § 249.240f) by:
a. Revising the heading ''Instructions to paragraphs (b), (c), (d) and (e) of General Instruction B.6.'' to read ''Instruction to paragraphs (b), (c), (d) and (e) of General Instruction B.(6).'' and removing Instruction 2;
b. Removing Note 4 of the Notes to Paragraph (8) of General Instruction B;
c. Removing Note 4 of the Notes to Paragraph (9) of General Instruction B;
d. Redesignating Notes 5, 6 and 7 of the Notes to Paragraph (9) of General Instruction B as Notes 4, 5 and 6 of the Notes to Paragraph (9) of General Instruction B; and
e. Revising ''Notes to Instruction B.(10)'' to read ''Note to Instruction B.(10)'' and removing Note 2.

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

79. Add § 249.312 and Form 10–D to read as follows:

§ 249.312 Form 10–D, periodic distribution reports by asset-backed issuers.

This form shall be used by asset-backed issuers to file periodic distribution reports pursuant to § 240.13a–17 or § 240.15d–17 of this chapter. A distribution report on this form pursuant to § 240.13a–17 or § 240.15d–17 of this chapter shall be filed within 15 days after each required distribution date on the asset-backed securities.

Note: The text of Form 10–D does not, and this addition will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10–D

ASSET-BACKED ISSUER DISTRIBUTION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS

A. Rule as to Use of Form 10–D

(1) This Form shall be used for distribution reports by asset-backed issuers pursuant to Rule 13a–17 or Rule 15d–17 (17 CFR 240.13a–17 or 17 CFR 240.15d–17) of the Securities Exchange Act of 1934 (the ''Act''). Such a report is required to be filed even though the sponsor or depositor also files reports pursuant to Section 13(a) or 15(d) of the Act (15 U.S.C. 78m(a) or 78o(d)) with respect to classes of securities other than the asset-backed securities. See Rule 3b–19 (17 CFR 240.3b–19). Terms used in this Form have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

(2) Reports on this Form shall be filed within 15 days after each required distribution date on the asset-backed securities, as specified in the governing documents for such securities.

B. Application of General Rules and Regulations

(1) The General Rules and Regulations under the Act contain certain general requirements which are applicable to reports on any form under the Act. These general requirements should be carefully read and observed in the preparation and filing of reports on this Form, except that any provision in this Form or in these instructions is controlling.

(2) Particular attention is directed to Regulation 12B (17 CFR 240.12b–1 *et seq.*), which contains general requirements regarding filing reports under the Act. The definitions contained in Rule 12b–2 should be especially noted. See also Regulations 13A (17 CFR 240.13a–1 *et seq.*) and 15D (17 CFR 240.15d–1 *et seq.*).

C. Preparation of Report.

(1) This Form is not to be used as a blank form to be filled in, but only as a guide in preparing the report in accordance with Rules 12b–11 (17 CFR 240.12b–11), 12b–12 (17 CFR 240.12b–12) and 12b–13 (17 CFR 240.12b–13). The Commission does not furnish blank copies of this Form to be filled in for filing.

(2) These general instructions are not to be filed with the report. The instructions to the various captions of the Form are also to be omitted from the report as filed.

(3) Any item which is inapplicable or to which the answer is negative may be omitted and no reference need be made in the report. If substantially the same information has been previously reported by the asset-backed issuer, an additional report of the information on this Form need not be made. The term ''previously reported'' is defined in Rule 12b–2 (17 CFR 240.12b–2).

(4) Attention is directed to Rule 12b–20 (17 CFR 240.12b–20), which states:

''In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.''

D. Incorporation by Reference

(1) If the asset-backed issuer makes available to the holders of its securities or otherwise publishes, within the period prescribed for filing the report on this Form, a press release or other document or statement containing information meeting some or all of the requirements of this Form, the information called for may be incorporated by reference to such published document or statement, in answer or partial answer to any item or items of this Form, provided copies thereof are filed as an exhibit to the report on this Form.

(2) All information incorporated by reference must comply with the requirements of this Form and the following rules on incorporation by reference:

(a) Item 10(d) of Regulation S–K (17 CFR 229.10(d)) (general rules on incorporation by reference, which, among other things, prohibit, unless specifically required by this Form, incorporating by reference a document that includes incorporation by reference to another document);

(b) Item 1100(c) of Regulation AB (17 CFR 229.1100(c)) (additional requirements for incorporating information by reference in filings by asset-backed issuers);

(c) Rule 303 of Regulation S–T (17 CFR 232.303) (specific requirements for electronically filed documents); and

(d) Exchange Act Rules 12b–23 and 12b–32 (17 CFR 240.12b–23 and 240.12b–32) (additional rules on incorporation by reference for reports filed pursuant to Sections 13 and 15(d) of the Act).

E. Signature and Filing of Report

(1) The report on this Form must be signed by the depositor. In the alternative, the report on this Form may be signed on behalf of the issuing entity by a duly authorized representative of the servicer. If multiple servicers are involved in servicing the pool assets, a duly authorized representative of the master servicer (or entity performing the equivalent functions) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

(2) The name and title of each person who signs the report shall be typed or printed beneath his or her signature. Attention is directed to Rule 12b–11 (17 CFR 240.12b–11) concerning manual signatures.

(3) An asset-backed issuer must submit the report on this Form in electronic format via the Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system in accordance with the EDGAR rules set forth in Regulation S–T (17 CFR Part 232), except as discussed below. An issuer submitting the report in electronic format must provide the signatures required for the report in accordance with Regulation S–T Rule 302 (17 CFR 232.302). For assistance with technical questions about EDGAR or to request an access code, call the EDGAR Filer Support Office at (202) 942–8900. For assistance with the EDGAR rules, call the Office of EDGAR and Information Analysis at (202) 942–2940.

(4) If the report is filed in paper pursuant to a hardship exemption from electronic filing provided by Regulation S–T Rule 201 or 202 (17 CFR 232.201 or 232.202), or as otherwise permitted by the Commission, eight copies of the report must be filed with the Commission. An issuer also must file at least one complete copy of the report with each national securities exchange on which any security of the issuer is listed and registered under Section 12(b) of the Exchange Act (15 U.S.C. 78*l*(b)). At least one complete copy of the report filed with the Commission and one such copy filed with each exchange must be manually signed. Copies not manually signed must bear typed or printed signatures. When submitting a report in paper under a hardship exemption, an issuer must provide the legend required by Regulation S–T Rule 201(a)(2) or 202(c) (17 CFR 232.201(a)(2) or 232.202(c)) on the cover page of the report. When submitting the report in electronic format to the Commission, an issuer may submit a paper copy containing typed signatures to each national securities exchange in accordance with Regulation S–T Rule 302(c) (17 CFR 232.302(c)).

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-D

ASSET-BACKED ISSUER
DISTRIBUTION REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the [identify distribution frequency (e.g., monthly/quarterly)] distribution period from _____, 20__ to _____, 20__

Commission File Number of issuing entity: _____

_____
(Exact name of issuing entity as specified in its charter)

Commission File Number of depositor: _____

_____
(Exact name of depositor as specified in its charter)

_____
(Exact name of sponsor as specified in its charter)

_____	_____
(State or other jurisdiction of incorporation or organization of the issuing entity)	(I.R.S. Employer Identification No.)
_____	_____
(Address of principal executive offices of the issuing entity)	(Zip Code)

_____
(Telephone number, including area code)

_____
(Former name, former address, if changed since last report)

Title of class	Registered/reporting pursuant to (check one) Section 12(b)	Section 12(g)	Section 15(d)	Name of exchange (If Section 12(b))
_____	[___]	[___]	[___]	_____
_____	[___]	[___]	[___]	_____

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ..... No .....

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PART I—DISTRIBUTION INFORMATION

Item 1. Distribution and Pool Performance Information

Provide the information required by Item 1119 of Regulation AB (17 CFR 229.1119), and attach as an exhibit to this report the distribution report delivered to the trustee or security holders, as the case may be, pursuant to the transaction agreements for the distribution period covered by this report. Any information required by Item 1119 of Regulation AB that is provided in the attached distribution report need not be repeated in this report. However, taken together, the attached distribution report and the information provided under this Item must contain all of the information required by Item 1119 of Regulation AB.

PART II—OTHER INFORMATION

Item 2. Legal Proceedings

Provide the information required by Item 1115 of Regulation AB (17 CFR 229.1115). As to such proceedings which have been terminated during the period covered by the report, provide similar information, including the date of termination and a description of the disposition thereof.

Instruction. A legal proceeding need only be reported in the report on this Form filed for the distribution period in which it first became a reportable event and in subsequent reports on this Form in which there have been material developments. Subsequent filings on this Form in the same fiscal year in which a legal proceeding or a material development is reported should reference any previous reports in that year.

Item 3. Sales of Securities and Use of Proceeds

Provide the information required by Item 2 of Part II of Form 10–Q (17 CFR 249.308a) with respect to the period covered by this report. With respect to the information required by Item 2(a) of Part II of Form 10–Q, provide this information regarding any sale of securities that are either backed by the same asset pool or are otherwise issued by the issuing entity, regardless of whether the transaction was registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) during the period covered by the report. Also provide the information required by paragraph (e) of Item 1112 of Regulation AB (17 CFR 229.1112(e)) regarding such securities. No information need be furnished in response to this Item if it has previously been included in a Current Report on Form 8–K (17 CFR 249.308).

Item 4. Defaults Upon Senior Securities

Provide the information required by Item 3 of Part II of Form 10–Q with respect to the period covered by this report.

Item 5. Submission of Matters to a Vote of Security Holders

Provide the information required by Item 4 of Part II of Form 10–Q with respect to the period covered by this report.

Item 6. Significant Obligors of Pool Assets

Provide the information required by Item 1111(b) of Regulation AB (17 CFR 229.1111(b)).

Instruction. Such information need only be reported in the report on this Form filed for the distribution period in which updated information regarding the significant obligor is required pursuant to Item 1111(b) of Regulation AB. Filings on this Form for distribution periods in which updated information is not required should reference the previous report on this Form or other filing by the asset-backed issuer that includes the most recent information. See also Item 1100(c) of Regulation AB (17 CFR 229.1100(c)) regarding the presentation of such information in certain instances.

Item 7. Significant Enhancement Provider Information

Provide the information required by Item 1113(b)(2) of Regulation AB (17 CFR 229.1113(b)(2)).

Instruction. Such information need only be reported in the report on this Form filed for the distribution period in which updated information regarding the enhancement provider is required pursuant to Item 1113(b)(2) of Regulation AB. Filings on this Form for distribution periods in which updated information is not required should reference the previous report on this Form or other filing by the asset-backed issuer that includes the most recent information. See also Item 1100(c) of Regulation AB (17 CFR 229.1100(c)) regarding the presentation of such information in certain instances.

Item 8. Other Information

The registrant must disclose under this Item any information required to be disclosed in a report on Form 8–K during the period covered by the report on this Form, but not reported, whether or not otherwise required by this Form. If disclosure of such information is made under this Item, it need not be repeated in a report on Form 8–K which would otherwise be required to be filed with respect to such information or in a subsequent report on this Form.

Item 9. Exhibits

(a) List the documents filed as a part of the report.

(b) File, as exhibits to this report, the exhibits required by this Form and Item 601 of Regulation S–K (17 CFR 229.601).

SIGNATURES*

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

Date:

(Depositor)

(Signature)**

[or]

Date:

By:

(Issuing entity)

(Servicer)

(Signature)**

*See General Instruction E to Form 10–D.

** Print the name and title of each signing officer under his or her signature.

Dated: May 3, 2004.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–10467 Filed 5–12–04; 8:45 am]

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