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October 30, 2013

Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Federal Housing Finance Agency
Constitution Center
(OGC) Eighth Floor
400 7th Street NW
Washington, DC 20024

Department of Housing and Urban Development
451 7th Street NW
Room 10276
Washington, DC 20410-0500

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Mail Stop 9W-11
Washington, DC 20219

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Credit Risk Retention/RIN 1557-AD40; 7100-AD70; 3064-AD74; 2590-AA43; 3235-AK96; 2501-AD53

Ladies and Gentlemen:

At the request of certain of our clients that administer asset-backed commercial paper conduits, we are submitting this comment letter in response to the reproposed risk retention rules (the *"Proposed Rule"*) that the Department of the Treasury, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the Securities and Exchange Commission (the "*SEC*") and the Department of Housing and Urban Development (together, the *"Agencies"*) published in August 2013 to implement Section 15G of the Securities Exchange Act of 1934 (*"Section 15G"*). Subject to certain exceptions, Section 15G requires the applicable Agencies to adopt regulations requiring each "securitizer" to retain not less than five percent of the credit risk of any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells or conveys to a third party. As required by Section 15G(c)(2)(A), the Agencies have included in the Proposed Rule different rules for different asset classes including, among others, asset-backed commercial paper (*"ABCP"*). Our comments in this letter are addressed solely to the Proposed Rule's treatment of ABCP conduits and conduit sponsors.

INTRODUCTION / EXECUTIVE SUMMARY

We emphasize that, in presenting the points noted in this letter, we are not trying to exempt from risk retention assets financed through a securitization structure or a class of asset managers whose activities implicate the dangers that Section 15G is intended to address. Instead, under existing market practice, the Proposed Rule's underlying policies are fully satisfied in connection with ABCP because the sellers/pledgors/transferors of assets into ABCP conduits routinely retain credit risk in the financed assets in amounts equal to not less than five percent of the related ABCP notes. The retained credit risk is (in most cases) held through a horizontal interest. There is accordingly no need for the Proposed Rule to impose duplicative risk retention requirements on Conduit Managers (as defined below). ABCP further benefits from liquidity and/or credit enhancement facilities that the arranger/manager provides to the ABCP conduit or arranges for its benefit. These facilities require the support provider to absorb all (or, in the case of partially-supported conduits, a specified portion) of the credit risk on the conduit's assets together with all of the liquidity risk in the program and are intended to ensure the timely payment of all maturing ABCP.

ABCP conduits are fundamentally different from the types of securitization vehicles that failed in large numbers during the credit crisis. Assets are never aggregated for the purpose of transferring any related asset risk to unsuspecting ABCP investors but instead are only financed if (as described above) a highly-rated bank provides full or partial credit support for the ABCP notes and full liquidity support. The investors in turn make their investment decisions in reliance on the commitments provided by the credit and liquidity support providers. To the best of our knowledge, no ABCP conduit (as defined below) has ever defaulted on the payment of either principal or interest amounts due on its commercial paper notes.

In the context of the revolving pools of assets typically financed through ABCP conduits, any required risk retention amount should be calculated with reference to the principal balance rather than the fair value of the ABS interests. Calculating the fair value of such pools of assets will be difficult and expensive, and reporting the results of such calculations to ABCP investors is unnecessary and unwanted by such investors. We believe that the calculation and reporting requirements that the Proposed Rule imposes (including the reporting requirements that Section 6 of the Proposed Rule imposes in the event of an originator-seller's breach of the retention requirement) will deter borrowers from financing assets through ABCP conduits. In connection with comments that they submitted to the SEC in 2010 on proposed Regulation AB II, ABCP investors and ABCP conduit arrangers collectively considered and agreed on the asset disclosure which should be provided to ABCP investors -- this level of disclosure would serve the goals of Section 15G well, and it should be adopted as the standard required by Section 15G.

Each seller/pledgor/transferor of assets into ABCP conduits is effectively the "securitizer" of such assets and (as stated above) each such securitizer already retains at least five percent of the credit risk of such assets. As long as each such securitizer's ability to hedge its risk is limited, consistent with the provisions of the Proposed Rule, this is a basis on which the Agencies can, and should, conclude that the rule's purpose is already being satisfied with respect to assets financed through ABCP conduits.

There is no need to require arrangers/managers of ABCP conduits to additionally retain five or more percent of such risk (the Proposed Rule excuses arranger/managers from this retention requirement only if they arrange for a bank to retain one hundred percent of the risk and certain other conditions are satisfied). The approach taken in the Proposed Rule (i.e., requiring the sellers/pledgors/transferors, the arranger/managers and/or the related liquidity banks collectively to retain credit risk of between 10% (i.e., 5% by the seller/pledgor/transferor and an additional 5% by the Conduit Manager) and 105% (i.e., 5% by each seller/pledgor/transferor and an additional 100% unconditional support by a commercial bank) of the fair value of the ABS interests) is unnecessary, goes well beyond what is mandated by Section 15G, and will cause asset financings through ABCP conduits to be economically inefficient.

Arrangers/managers of ABCP conduits are not "sponsors" as defined in the Proposed Rule, and there is not a valid legislative basis for imposing risk retention requirements on such parties.

There are at least four distinct types of ABCP conduits. If the Agencies believe that it is not sufficient for sellers/pledgors/transferors of assets financed through ABCP conduits to retain credit risk with respect to such assets in an amount equal to or greater than five percent of the outstanding ABCP (as is currently the case with respect to all ABCP conduits we are aware of), any additional risk retention requirement should be applied to each of these types of conduits in a manner which is appropriate to the related substance and business of each such type.

Arranger Conduits (as defined below), including both bank and non-bank Arranger Conduits, never apply any asset collections to the payment of ABCP issued by such conduits but instead in the ordinary course pay their maturing notes directly from funds provided by their support providers. It follows that ABCP issued by Arranger Conduits is not an asset-backed security and that the Proposed Rule therefore should not apply to Arranger Conduits.

Fully-supported multiseller and single seller conduits issue ABCP which is fully supported by a highly-rated bank. Although it is possible that some asset collections may be used to pay the ABCP issued by such fully-supported conduits, investors invest in ABCP issued by such conduits on the basis of the credit and liquidity strength of the support provider(s), and the experience and capability of the party that administers the affairs of the ABCP conduit. Payments on ABCP issued by fully-supported conduits clearly do not "depend primarily on cash flow from the [financed] asset[s]." Fully-supported ABCP issued by multiseller or single seller conduits is therefore not an asset-backed security, and so (as in the case of Arranger Conduits) the Proposed Rule should not apply to such conduits. Even if the Agencies nonetheless choose to treat the ABCP of fully-supported multiseller conduits, single seller conduits and Arranger Conduits as asset-backed securities, such conduits (through the retention by each seller/pledgor/transferor of at least five percent of the credit risk of the financed assets and the additional one hundred percent liquidity and credit support provided by highly-rated bank(s)) already are in compliance with the Proposed Rule's underlying policies and no additional risk retention should be required.

Partially-supported multiseller and single seller conduits always have one hundred percent liquidity coverage provided by a highly-rated bank, and such liquidity may be drawn to pay ABCP issued by such conduits in full unless the losses on any pool of financed assets exceed the first loss risk retained by the seller/pledgor/transferor of such assets (as noted above, each such party always retains at least five percent of the credit risk of such assets), in which case the amount of liquidity which may be drawn will match the principal balance of the remaining non-defaulted assets. ABCP issued by these partially-supported ABCP conduits also always has the benefit of a letter of credit or other guarantee (in an amount not less than five percent of the ABCP issued by such conduits) provided by a highly-rated bank. Although it is possible investors in partially-supported ABCP could be exposed to the credit risk of assets financed by such conduits, this could only occur if losses exceed the sum of the credit risk retained by each seller/pledgor/transferor of assets AND the amount then available under the bank letter of credit/guarantee. The Agencies therefore could comfortably conclude that these partially-supported conduits already comply with the substance and intent of Section 15G, and such conduits should therefore be eligible for a safe harbor that accommodates their existing structure and operations.

It is quite clear that banks or other financial institutions that provide credit enhancement facilities to ABCP conduits have significant ongoing credit exposure to the conduit's assets and therefore already have (to quote the language of the Proposing Release) a strong "incentive to monitor the quality of the assets" that the conduit purchases. We therefore believe that, if (notwithstanding our arguments below) the Agencies continue to believe that arranger/managers (or, as more precisely defined below, Conduit Managers) are, or should be treated as, "sponsors" within the meaning of the Proposed Rule, they should ensure that the ABCP safe harbor in the Proposed Rule (i) acknowledges (and provides "credit" for) the asset credit risk already retained by each seller/pledgor/transferor of assets to ABCP conduits, and (ii) reflects the significant differences that exist between ABCP conduits and other types of securitization vehicles. In particular, notwithstanding the fact that all sellers/pledgors/transferors of assets to ABCP conduits already retain significant credit risk (five or more percent in the case of partially-supported ABCP conduits and one hundred percent in the case of Arranger Conduits, as described herein), (i) investors in ABCP issued by fully-supported ABCP conduits invest on the basis of the full credit and liquidity support provided by one or more highly-rated banks, and are not exposed to asset risk (credit or otherwise) unless the support bank(s) default, and (ii) investors in partially-supported ABCP conduits place great weight on the full liquidity and partial (always at least five percent on each issuance date) credit support provided by one or more highly-rated banks, and on the credit risk retained by each seller/pledgor/transferor of assets (also always at least five percent).

ABCP CONDUIT MANAGERS ARE NOT SUBJECT TO RISK RETENTION

Arrangers/managers of ABCP conduits are not "sponsors" as defined in the Proposed Rule and there is not a valid legislative basis for imposing risk retention requirements on them.

As stated above, Section 15G requires the Agencies to adopt regulations imposing a risk retention requirement on “securitizers”. Section 15G(a)(3) defines “securitizer” to mean “(A) an issuer of an asset-backed security, or (B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer.” The Proposed Rule follows Section 15G by imposing the retention requirement on “sponsors” and defining “sponsor” to mean “a person who organizes and initiates a securitization transaction *by selling or transferring assets*, either directly or indirectly, including through an affiliate, to the issuing entity” (emphasis supplied). It is readily apparent from the definition of “sponsor” that securitization participants who do not “sell or transfer” assets to the issuer should not be subject to risk retention. Limiting the scope of the retention requirement to asset transferors is, in fact, entirely consistent with the policies underlying Section 15G since only transferors, and not other transaction participants, are using the securitization process to transfer to third parties credit risks that they would otherwise be required to bear.

The Proposed Rule contains a safe harbor in Section 6 for “eligible ABCP conduits.” Specifically, the safe harbor exempts “ABCP conduit sponsors” from the risk retention requirement if certain criteria are satisfied. Although the Proposed Rule does not define the term “ABCP conduit sponsor”, it is clear from both the text of Section 6 and the Agencies’ related comments in the proposing release (SEC Release No. 34-70277 (the *“Proposing Release”*)) that the term is meant to refer to banks and/or other financial institutions or other entities that organize and administer ABCP conduits (*“Conduit Managers”*). The Agencies therefore appear, through the Proposed Rule, to be broadening the Section 15G(a) definition of “securitizer” to include Conduit Managers, and as a result such Conduit Managers will be required, unless they comply with Section 6, to retain credit risk in compliance with Sections 3 and 4 of the Proposed Rule.

We believe that Section 15G does not authorize the Agencies to expand the definition of securitizer to include Conduit Managers and so impose risk retention on Conduit Managers, and therefore the Proposed Rule — to the extent that it treats Conduit Managers as “sponsors” — is fundamentally flawed and should be revised. It appears from Agency releases that the Agencies are generally familiar with the structure, function and operation of ABCP conduits. We therefore will not repeat at this point background information on ABCP conduits that the Agencies have already received from other sources. Suffice it to say for present purposes that Conduit Managers (with few, if any, exceptions) do not sell or transfer assets into the ABCP conduits they manage, and if they do they would be "securitizers" or "sponsors" subject to the Proposed Rule. As Conduit Managers do not transfer assets to the issuing entity, and as the definitions of "securitizer" and "sponsor" in Section 15G and the Proposed Rule, respectively, extend only to asset transferors (and this limitation in each of the definitions is unambiguous), the Agencies should not purport to impose on Conduit Managers an obligation to retain credit risk that the Dodd-Frank Act neither requires nor permits[1]. We instead believe that the Agencies should revise the Proposed Rule to clarify that it applies only to those who do transfer assets, and not to those persons who merely manage/arrange conduits.

The Agencies did not explain in the Proposing Release why they have chosen to expand the definition of "sponsor" to include Conduit Managers. We are aware, however, that the Agencies have rejected the argument that open market CLO managers are not "securitizers". These CLO managers, like Conduit Managers, manage the issuer and select the assets it will acquire but do not themselves transfer any assets to the issuer. The Agencies stated in the Proposing Release that CLO managers should be viewed as "indirectly" transferring assets because their duties include "selecting the assets and directing the CLO issuing entity to purchase and sell those assets." The Agencies further stated that, regardless of any ambiguities in the statutory language, Congress intended Section 15G to apply to "collateral asset managers (such as CLO or CDO managers)" because such managers "determine the credit risk profile of securitized assets in many types of securitization transactions and therefore should be subject to a regulatory incentive to monitor the quality of the assets they cause to be transferred to the issuing entity." The Agencies have thus taken the position (at least in relation to open market CLO managers) that (i) selecting the assets that an issuer will purchase can fairly be characterized as "transferring" those assets to the issuer, and (ii) the Agencies are entitled to (and should) resolve any ambiguities in Section 15G in accordance with their understanding of legislative intent. As described below, we do not agree with the Agencies' conclusion or believe it is supportable. But perhaps more importantly (at least for purposes of this letter), as described above, the seller/transferor/pledgor of each pool of assets financed through ABCP conduits already retains credit risk in an amount that equals or exceeds the requirements of the Proposed Rule. For this reason, as well as the additional reasons set forth in this letter, we therefore do not believe it is necessary for the Agencies to attempt to extend the plain meaning of "sponsor", as defined in the

[1] In this regard, we endorse the views expressed on this issue by the Structured Finance Industry Group ("*SFIG*") in its comment letter to the Agencies. Using arguments similar to those expressed herein, SFIG notes at the outset of the discussion of ABCP in its comment letter that the base risk retention requirement set forth in the Proposed Rule does not on its face apply to most sponsors of ABCP conduits.

Proposed Rule, to cover Conduit Managers and impose additional risk retention requirements on Conduit Managers. To impose the proposed risk retention requirements in respect of assets financed through ABCP conduits (i.e., at least five percent asset risk retention by each seller/pledgor/transferor of assets to an ABCP conduit, and then a further, additional, five percent risk retention by the Conduit Manager (unless it claims the safe harbor)), is to effectively double the risk retention requirement imposed by Section 15G. Such rule-making does not appear to be supported by Section 15G or the policies underlying Section 15G.

As an initial matter, we do not believe that the word "transfer", as used in Section 15G and the Proposed Rule, is ambiguous or can reasonably be interpreted to include a Conduit Manager's selection of the assets that its conduit will purchase. Courts have held that where a statute or contract contains but does not define the term "transfer", the term may be defined by reference to its "commonly accepted meaning", *United States v. Cortes-Caban,* 691 F.3d 1, 17 (1st Cir. 2012) and that, in the absence of a controlling definition, "transfer" means" (1) any mode of *disposing of or parting with an asset* or an interest in an asset, including a gift, the payment of money, release, lease or creation of a lien or other encumbrance; (2) negotiation of an instrument according to the forms of law; [or] (3) a conveyance of property or title from one person to another." *Automation by Design, Inc. v. Raybestos Prods. Co.,* 463 F.3d 749, 758 (7th Cir. 2006) (citing Black's Law Dictionary (8th ed. 2004)) (emphasis in original). *Accord*, *Bus. Edge Group, Inc. v. Champion Mortg. Co.,* 519 F.3d 150, 155 (3rd Cir. 2008). Similarly, it has been held that "transfer" means "[t]o convey or take from one place, person, etc. to another, to transmit, transport; to give or hand over from one to another." *United States v. Cortes-Caban,* supra., 691 F.3d at 17 (citations omitted). A Conduit Manager that selects the assets that its conduit will purchase from unaffiliated sellers, but that does not itself sell, assign or deliver any assets to the conduit, clearly has not engaged in a "transfer" under these definitions. It instead remains the case that a person cannot "transfer" assets that it never owns or holds. Accordingly, the only persons who "transfer" assets to an ABCP conduit (and thus the only persons who should be subject to an associated risk retention obligation) are persons who actually sell or pledge and deliver assets to the conduit. In a typical ABCP financing, the transferor will be the asset originator who sells the assets (or interests therein) to the conduit either directly or indirectly through a special purpose company. These asset transferors will themselves be obligated to retain credit risk in connection with each such financing in accordance with Section 3 of the Proposed Rule. There is no need for the Agencies to apply an unreasonably broad interpretation of the word "transfer" to impose a duplicative risk retention obligation on Conduit Managers. This is not an attempt to assert form over function or to evade risk retention. Each securitizer (i.e., each seller/pledgor/transferor of assets to an ABCP conduit) remains subject to the risk retention rules; but attempting to also impose duplicative risk retention requirements on Conduit Managers is overly broad and would unnecessarily impair the economic efficiency of financing assets through ABCP conduits.

We further believe that the Agencies are not entitled to apply risk retention to Conduit Managers solely because they may believe that Congress intended it to apply. The Agencies have cited the legislative history of Section 15G to support their decision to apply risk retention to open market CLO managers. It is, however, well settled that "neither legislative history nor the reasonableness of [the regulator's determination]" can justify a regulatory decision that is inconsistent with the express terms of the enabling statute. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.,* 550 U.S. 81, 93 (2007). The Supreme Court has stated that a statute that "imposes a tariff on clothing does not impose a tariff on automobiles, no matter how strong the policy arguments for treating the two kinds of goods alike." *Id.* at 94. In the context of Section 15G, the Agencies similarly should not rely upon policy considerations to impose on Conduit Managers a risk retention obligation that the statute imposes only on asset transferors.[2] The Supreme Court has elsewhere stated that "courts must presume that a legislature says in a statute what it means" and that "[w]hen the words of a statute are unambiguous....[the] 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 461-462 (2002). We therefore believe that pursuant to the express language of Section 15G the Agencies should extend the risk retention requirement only to persons who engage in "selling or transferring assets....to the issuer."

We do recognize that in response to industry comments the Agencies have substantially revised the ABCP provisions included in the original rule proposal published in March 2011. We appreciate both the Agencies' willingness to consider industry concerns and the changes that the Agencies have made to date. We remain concerned, however, that Section 6 of the Proposed Rule continues to impose burdensome obligations on Conduit Managers and originator-sellers that are inconsistent with ABCP market practice and that are not needed to implement Section 15G's underlying policies.

Our specific comments on Section 6 are set forth in the remaining sections of this letter.

[2] Section 15G technically authorizes the Agencies to impose risk retention on "issuers" in addition to asset transferors. The Agencies have previously stated that they interpret "issuer" in this context to mean the depositor; i.e., the entity that transfers assets into the securitization vehicle. We agree with this interpretation. An ABS issuer necessarily owns 100% of the securitized assets and therefore, in the first instance, always holds 100% of the credit risk. The real task in imposing a retention requirement on "issuers" is to identify the particular class(es) of interest holders in the issuer to whom the retained risk will be assigned. As Section 15G does not address that question, it is logical to conclude that for purposes of Section 15G "issuer" means "depositor" so that the retention requirement will apply to the party that is transferring credit risk through the securitization. This conclusion is also consistent with the SEC's view that depositors of assets into term securitization issuers are themselves issuers for purposes of the registration requirements of the Securities Act of 1933.

Comments on the ABCP Safe Harbor

An Overview of ABCP Structures

In the Proposing Release, the Agencies summarized the policies underlying Section 15G as follows:

> Congress intended the risk retention requirements added by section 15G to help address problems in the securitization markets by requiring that securitizers, as a general matter, retain an economic interest in the credit risk of the assets they securitize. By requiring that the securitizer retain a portion of the credit risk of the assets being securitized, the requirements of section 15G provide securitizers an incentive to monitor and ensure the quality of the assets underlying a securitization transaction, and, thus, help align the interests of the securitizer with the interests of investors.

Section 15G therefore embodies a Congressional determination that the securitization markets can be strengthened by requiring securitizers to retain a meaningful financial interest in the securitized assets. This view clearly has merit; the conflicts of interest inherent in the "originate-to-distribute" model of asset securitization are apparent. In the case of ABCP conduits, however, the financial interests of Conduit Managers and investors are already aligned and the Proposed Rule is not needed to introduce additional risk retention. We can perhaps illustrate this point most clearly by summarizing the business and structure of the various types of ABCP conduits. Such conduits can usefully be divided into four categories:

1. ***Multiseller Conduits***. This category consists of ABCP conduits organized and managed by commercial banks (or, in certain cases, non-bank arrangers) that finance assets purchased from a number of different originator-sellers (hence, *"multiseller"*). The financed assets may consist of trade, credit card and/or lease receivables, auto, student and/or equipment loans, commercial loans, commercial mortgages, pools of residential mortgages and/or a number of other different types of financial instruments. The seller/pledgor/transferor of each pool of assets retains credit risk (typically in the form of a five percent or greater subordinated horizontal (i.e., "first loss") interest in such pool of assets). The Conduit Manager typically does not sell any of its own assets to the conduit. The maturities of the conduit's commercial paper notes are not match-funded to the maturities of the financed assets. In most instances, the conduit will pay maturing notes with the proceeds of newly-issued notes. Since, however, the conduit cannot be certain that it will be able to issue new notes whenever outstanding notes mature, the rating agencies that rate the conduit's notes (the *"Rating Agencies"*) will require the conduit to maintain at all times a liquidity facility on which the conduit can draw to pay maturing notes if new notes cannot be issued. The liquidity facility typically takes the form of a loan agreement or an asset purchase agreement provided by a commercial bank.

In most cases, the conduit will have a single liquidity provider (which typically will be the Conduit Manager) but multiple liquidity providers are also possible. The liquidity facility may contain no conditions precedent to the liquidity provider's funding obligation (other than, in certain programs, that the conduit not be in bankruptcy). In these programs (*"fully-supported"* programs), the liquidity facility constitutes a *de facto* guarantee of the commercial paper notes by the liquidity provider. The liquidity provider therefore retains through the liquidity facility 100% of the credit risk of the conduit's assets. In other programs (*"partially-supported"* programs), the liquidity provider may be excused from providing funding against defaulted assets (i.e., where credit losses in relation to any pool of financed assets exceed the amount of the horizontal risk retained by the related seller/pledgor/transferor of such assets) and/or assets whose credit ratings have fallen below specified levels. The liquidity funding conditions in partially-supported programs, however, are not expected to expose investors to any material risk of loss because the Conduit Manager or another financial institution will also provide the conduit with a credit enhancement facility (typically in the form of a stand-by letter of credit (*"LOC"*)). The LOC will be sized in an amount which the Rating Agencies expect to be more than sufficient, even under stressed conditions, to replace any portion of the liquidity facility that could reasonably be expected to become unavailable to the conduit because of credit deterioration in the conduit's assets. We are not aware of any partially-supported conduits in which the required credit enhancement level is less than 5% of the face amount of the outstanding commercial paper notes (*i.e.,* the credit enhancement provided by the support provider equals or exceeds the retention level that would be required under the Proposed Rule).

2. ***Single Seller Conduits***. These conduits are formed to purchase assets originated by a single originator-seller and/or its affiliates (*e.g.,* loans originated by a particular auto manufacturer). The single seller of assets transferred to the conduit retains credit risk (typically in the form of a five percent or greater subordinated horizontal (i.e., "first loss") interest in such pool of assets). A commercial bank or registered broker-dealer will typically take the lead in structuring the program and arranging a syndicated liquidity facility. The program may be partially or fully-supported and will have the benefit of liquidity and credit enhancement facilities as described above. The use of a bankruptcy-remote structure enables the originator-seller to finance its receivables through a broader group of investors.

3. ***Arranger Conduits (Non-Bank Arranger)***. These conduits are organized by an independent company that is not a bank. The organizer establishes and manages the conduit but does not transfer any of its own assets to the conduit. The conduit instead purchases assets from highly-rated counterparties (typically commercial banks regulated by the Federal banking regulators or broker-dealers regulated by the SEC) who provide the conduit with unconditional liquidity and credit support. These facilities most often

take the form of a repurchase agreement documented on standard industry forms (a "*Repurchase Agreement*"). Under the Repurchase Agreement, the conduit (i) purchases assets from the counterparty at an agreed purchase price, (ii) agrees to resell such assets to the counterparty on an agreed date (the "*Repurchase Date*") for an agreed price (the "*Repurchase Price*"), and (iii) promptly transfers to the counterparty all collections (both principal and interest) that the conduit receives on the purchased assets prior to the Repurchase Date. The Repurchase Dates will be matched to the maturity dates of the related commercial paper notes issued by the conduit and the Repurchase Prices payable by the counterparty will be sufficient to cover all principal and interest amounts due on such notes. The Arranger Conduit therefore relies solely on the counterparty's repurchase commitment to provide liquidity and credit support for the notes. It does not rely upon the performance or market value of the assets or on collections on such assets. The counterparty is not allowed to reduce the amount it funds under its Repurchase Agreement as a result of any defaults on the financed assets. Accordingly, under these programs the highly-rated counterparty retains 100% of the credit risk on the financed assets.

4. ***Arranger Conduits (Bank Arranger)***. These conduits are structured and operate in the same manner as Arranger Conduits (Non-Bank Arranger) except that (i) the organizer is a commercial bank, and (ii) the organizer itself transfers assets to the conduit under the Repurchase Agreement. The bank organizer therefore retains 100% credit risk on the transferred assets and investors look to the bank's repurchase commitment, rather than the financed assets, as the source of payment on their notes. As the organizers of Arranger Conduits (Bank Arranger) do sell assets into their conduits they would constitute "sponsors" for purposes of Section 15G and do not constitute "Conduit Managers" for purposes of this letter. We nonetheless believe (for the reasons discussed below) that these conduits are fundamentally different from the types of securitization arrangements to which the Proposed Rule should apply. Arranger Conduits (Bank Arranger) and Arranger Conduits (Non-Bank Arranger) are jointly called in this letter "Arranger Conduits".

Essentially all commercial paper issued by ABCP conduits is rated in the highest short-term rating category (A-1(sf), P-1(sf), R-1(sf) and/or F1sf) by each Rating Agency (i.e., Standard & Poor's, Moody's, DBRS and Fitch, respectively) that rates such commercial paper.[3] The Rating Agencies base their ratings of fully-supported ABCP conduits on (i) the financial strength of the liquidity and credit enhancement providers, (ii) the terms of the liquidity and credit enhancement facilities and the other program documents, and (iii) the Conduit Manager's

[3] A very limited amount of ABCP may be rated at issuance in the second highest rating category (A-2(sf), P-2(sf), R-2(sf) and F2sf). No market exists for ABCP rated lower than the second highest category.

expertise in managing conduit programs.[4] The Rating Agencies do not consider the content or credit quality of an ABCP conduit's assets (except, if applicable, in sizing the credit enhancement facility in partially-supported programs). Accordingly, the conduit's ratings are tied directly to the short-term ratings of the liquidity/credit enhancement providers and the performance of ABCP issued by fully-supported conduits is not affected by the performance of the financed assets. Investors in fully-supported ABCP similarly base their investment decisions on the financial strength of the liquidity/credit enhancement providers (and, if the organizer is not the liquidity/credit enhancement provider, the organizer's reputation) and do not consider the credit quality of the conduit's assets. Such investors typically do not receive (and do not want to receive) extensive asset-level information from the conduit.[5] The focus that the Rating Agencies and investors place on the conduit's support facilities is completely rational because it is those facilities, and not the performance of the assets or collections on the assets, that backstop the conduit's promise to timely pay all amounts due on its notes. In fact, because the notes issued by ABCP conduits typically have terms much shorter than the maturities of the conduit's assets (note maturities often range from one to sixty days while the asset maturities are typically measured in years), and because (in contrast to SIVs (as defined herein) and other market value vehicles) ABCP conduits will not sell their assets to raise the funds needed to pay maturing notes unless a support provider defaults, it would be impossible for a conduit to rely upon the cash flow and/or market value of its assets to provide for the timely payment of its notes and investors accordingly insist that each conduit have liquidity and credit support as we have described. It is therefore crucially important to remember that of fully-supported ABCP conduit noteholders - in contrast to the investors in almost all asset-backed securities – have no meaningful credit exposure to the conduit's assets, but are instead taking secured bank risk.[6] This is also generally true (although to a lesser extent) with respect to partially-supported ABCP conduits, due to the liquidity and credit support provided to such conduits (as described herein).

It is also crucial that the Agencies keep in mind the important role of ABCP conduits in providing short-term business financing. Approximately $285 billion of ABCP is currently outstanding. Asset originators/sellers/pledgors seek ABCP financing because it offers them both

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4 As used throughout this letter, the term "fully-supported conduit" includes any multiseller conduit, single seller conduit or Arranger Conduit that has the benefit of unconditional liquidity and/or credit enhancement facilities provided by one or more regulated liquidity providers that cover 100% of the conduit's notes.

5 Fully-supported ABCP conduits currently may provide limited asset-level information to investors (e.g., the industry categories of the asset originators) either through monthly reports or at an investor's request. As discussed below, the asset-level disclosure requirements in Section 6 don't conform to current market practice and would be very difficult for conduits to satisfy.

6 For the reasons discussed below, we believe that the notes of fully-supported ABCP conduits are not "asset-backed securities."

a cost-effective source of short-term funds and the flexibility to rapidly adjust issuance volumes and note maturities as business conditions change. Investors purchase ABCP because it is strongly (and in fact, with respect to fully-supported programs, fully) supported by highly-rated banks and because (particularly in the case of partially-supported conduits) the types of assets being financed are acceptable to such investors. The Federal Reserve has previously recognized the importance of commercial paper financing, and in particular of ABCP, to the overall health of the United States economy. In particular, at the height of the credit crisis the Federal Reserve undertook several initiatives to help maintain the viability of the corporate commercial paper and ABCP markets.[7] The regulatory actions then taken to maintain the smooth functioning of the ABCP market stand in sharp contrast to the role that certain other types of securitization vehicles are viewed to have played in the credit crisis. Congress intended the Dodd-Frank Act to address flaws in existing securitization practices that the credit crisis highlighted. At the same time, Congress certainly did not intend for the Act to impair the continued operation of financing markets that are important to the health of the economy and that did not contribute to the meltdown.[8] Accordingly, the Agencies should take great care not to apply the Proposed Rule in a manner that would prevent ABCP conduits from continuing to operate in the manner described above.[9]

<u>Arranger Conduits Should Be Completely Exempted From The Proposed Rule</u>

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7 The Federal Reserve Bank of New York sponsored the Commercial Paper Funding Facility and the Money Market Investor Funding Facility and the Federal Reserve Bank of Boston sponsored the ABCP Money Market Mutual Fund Liquidity Facility. Each of these programs was intended to help ensure that the commercial paper market (including the ABCP market) would remain liquid during the height of the credit crisis. All of the programs have now terminated.

8 As an example, Congress was careful in Section 619 of the Dodd-Frank Act (the "Volcker Rule") to continue to allow banks to sponsor securitization vehicles that finance "loans" notwithstanding the restrictions that the Volcker Rule otherwise imposes on bank transactions with "covered funds".

9 To the best of our knowledge, all existing ABCP conduits fall into one of the four categories that we have described above; i.e., each conduit is bankruptcy-remote special purpose vehicle whose notes are fully covered under partial or full support facilities extended to the conduit by banks or other highly-rated financial institutions. Prior to the credit crisis, certain securitization vehicles (including in particular structured investment vehicles ("SIVs") and certain CDOs) issued "commercial paper" that did not have the benefit of full liquidity support from highly-rated financial institutions. As a result, the vehicle's ability to pay its notes could be contingent upon its ability to realize the market value of its assets. To the best of our knowledge, no such vehicles are continuing to issue short-term notes. All references in this letter to "ABCP" refer only to commercial paper notes that are issued by fully or partially-supported ABCP conduits of the type described in this letter and do not include short-term notes issued by SIVs, CDOs or any similar vehicle.

The Section 6 safe harbor should set forth clear, workable criteria that don't unnecessarily disrupt existing market practices. We identify below some provisions of Section 6 that fail to satisfy that standard. Before setting forth those comments, however, we would like to emphasize that Arranger Conduits should be completely exempted from the Proposed Rule (i.e., no provisions of the Proposed Rule should apply to Arranger Conduits whether or not the Arranger Conduit satisfies Section 6). We believe that Arranger Conduits should, given their nature (which is very different from that of any issuer of asset-backed securities), be exempted even if the Agencies conclude that the Conduit Managers of other ABCP conduits are "sponsors" under the Proposed Rule.

We base our analysis of Arranger Conduits on the fact that Section 3 of the Proposed Rule imposes the retention requirement on the sponsor of a "securitization transaction" and that under Section 2 of the Proposed Rule a "securitization transaction" must involve an offer and sale of "asset-backed securities." The controlling definition of "asset-backed security" is provided by Section 2(a)(79) of the Securities Exchange Act. Section 2(a)(79) defines an "asset-backed security" as "a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments *that depend primarily on cash flow from the asset*…" (emphasis supplied). As we have previously described, Arranger Conduits apply the proceeds of their commercial paper notes to repay their maturing commercial paper notes or to purchase assets under Repurchase Agreements executed with highly-rated financial institutions. The counterparty's obligation to pay the Repurchase Price in each transaction provides 100% liquidity and credit support for the conduit's notes. The note maturity dates and the Repurchase Dates under the Repurchase Agreement are matched and, accordingly, when a note matures the Arranger Conduit will pay the investor using the proceeds of the related Repurchase Price paid to the Arranger Conduit by the counterparty. The Arranger Conduit will not use cash flow from the financed assets to pay its notes. In fact, the Arranger Conduit is *not permitted* to pay its notes from the asset cash flow because, under the Repurchase Agreement, it must promptly transfer to the counterparty all collections it receives on the financed assets.[10] The counterparty retains 100% credit risk as it is not permitted to reduce its payments to the Arranger

[10] Standard-form repurchase agreements may provide the repo purchaser with an option to retain collections and apply them against amounts otherwise due to the repo purchaser from the repo seller (the "*Setoff Option*"). In our experience, ABCP conduits that execute repurchase agreements disapply the Setoff Option and remain contractually obligated to transfer all collections to the repo seller upon receipt. Our discussion of Arranger Conduits in this section of our letter applies only to conduits that have permanently disapplied the Setoff Option as to all of their repo transactions. It could also be possible for Arranger Conduits to finance assets through other forms of documents (e.g., a secured loan agreement, possibly, along with another form of full support credit/liquidity agreement) whereby the commercial paper investors would never be paid from asset cash flow unless the highly-rated borrower or other full support provider defaults.

Conduit by reason of any defaults or delinquencies on the financed assets. In rating the conduit's notes, and in making investment decisions, both the Rating Agencies and investors focus on the financial capacity of the repo counterparty and place no reliance on either the expected cash flow or the market value of the financed assets. Accordingly, the payments made by the Arranger Conduit to its noteholders do *not* "depend primarily on cash flow from the [financed] asset." It follows that the commercial paper notes of Arranger Conduits are not "asset-backed securities" as defined in the Securities Exchange Act and that the Proposed Rule should not apply, in whole or in part, to Arranger Conduits.[11]

Arranger Conduits Are Distinct From Multiseller And Single Seller Conduits

We are aware that commenters have previously argued to the Agencies that ABCP is not an "asset-backed security" and that the Agencies have not to date accepted that argument. We think that the argument is correct, however, because even in relation to multiseller and single seller conduits investors look for payment (assuming that the maturing notes are not paid from the proceeds of newly-issued notes) *primarily* to the support facilities provided by the liquidity/credit enhancement providers and not to the cash flow from the conduit's assets. An important distinction nonetheless exists in this matter between Arranger Conduits, on the one hand, and multiseller and single seller conduits, on the other.

The structure of multiseller and single seller conduits allows for conduit notes to be paid, in whole or in part, with cash flow from the conduit assets. A multiseller conduit might, for example, use collections on its assets to pay down some portion of outstanding commercial paper notes from time to time. At least in this sense, the payments due on the notes of multiseller and single seller conduits could be said to "depend" on cash flow from the assets (even though, for the reasons stated, we do not believe the notes should or could reasonably be characterized as depending "primarily" on such cash flow). An Arranger Conduit, in contrast, *may not* apply cash flow from the financed assets in this manner because it must promptly transfer all such cash flow to the repo counterparty. There is no rational basis on which to treat the notes of Arranger Conduits as "asset-backed securities" even if other ABCP notes are so treated.[12]

[11] We do not think that the Repurchase Agreements can themselves be fairly characterized as "self-liquidating financial assets" that are being securitized by the Arranger Conduit. The Repurchase Agreements provide liquidity and credit support for the conduit's notes and should be viewed as the equivalent of a bank guarantee. Any such guarantee provided by a bank to ABS investors cannot logically be viewed as an asset that the ABS issuer is itself securitizing. In fact, the Proposed Rule expressly recognizes that eligible liquidity providers may provide 100% liquidity coverage to conduits through repurchase agreements. *See* clause (4) of the definition of "eligible liquidity provider" in Section 6(a) of the Proposed Rule.

[12] If a repo counterparty defaults in paying any Repurchase Price when due, the Arranger Conduit will be permitted under the Repurchase Agreement to liquidate the financed assets and apply the net proceeds to the payment of its commercial paper notes. Investors are willing to purchase the notes of Arranger

If, notwithstanding the considerations above, the Agencies conclude that Arranger Conduits are not exempt from the Proposed Rule, the Agencies nonetheless should revise the Proposed Rule to clarify that the repo counterparty's repurchase commitment constitutes risk retention that satisfies Section 3 of the rule. As previously discussed, through its repurchase commitment the counterparty retains all of the credit risk on the financed assets. There is no reason from a policy perspective not to recognize the repurchase commitment as valid risk retention. Although the Agencies have to date declined to recognize unfunded loan commitments to ABCP conduits as valid risk retention, it should be noted that a repo counterparty is contractually obligated from the outset of each transaction to repurchase the financed asset from the conduit, and it is expected to effect such repurchases in the ordinary course. The counterparty's situation therefore is distinct from that of a lender under a traditional liquidity facility under which the borrower may, or may not, eventually draw funds or sell assets. The counterparty also retains credit risk throughout the term of each transaction insofar as payment defaults on the financed assets will reduce amounts payable to it (rather than amounts due to either the conduit or investors). A repo counterparty has retained credit risk on the financed assets and the Proposed Rule should give appropriate credit for its commitment.

The Section 6 Criteria Do Not Conform To ABCP Market Practice; Some Provisions Of Section 6 Should Be Deleted Or Revised

The Agencies have drafted Section 6 of the Proposed Rule to provide a safe harbor for certain "eligible" ABCP conduits. Partially-supported conduits cannot rely upon Section 6 because they don't provide unconditional liquidity coverage for 100% of their notes. Arranger Conduits cannot use Section 6 because they typically purchase assets other than the eligible asset-backed securities listed in the rule or (in the case of non-bank arrangers) because they typically have more than one liquidity provider. Fully-supported conduits otherwise eligible to use Section 6 will be limited to financing the types of eligible asset-backed securities listed therein. Unfortunately, many of the criteria currently included in Section 6 do not conform to ABCP market practice and will make the safe harbor unworkable. In the remainder of this section we identify some of the key provisions in Section 6 that we believe should be deleted or revised.

Conduits, however, only because the counterparties are highly-rated financial institutions and they are confident that the counterparties *will not* default. The Arranger Conduit makes no representation to investors that liquidation of the financed assets following a counterparty default would generate all or even any significant portion of the funds required to pay the conduit's notes. Rating agency informational releases regarding Arranger Conduits also make it clear that rating agencies do not consider the credit quality of assets financed by such conduits in assigning ratings to the ABCP issued by such conduits. Accordingly, the remote possibility that the conduit will liquidate assets and use the proceeds to pay notes following a counterparty default should not lead to a conclusion that payments on the notes depend "primarily" on cash flow from the financed assets.

1. ***The List Of Authorized Investments Is Too Narrow***. Perhaps the most important issue in Section 6 is the significant restriction that it imposes on authorized conduit investments. As previously discussed, investors in the notes of fully-supported conduits base their investment decisions on the financial strength and reputation of the full support provider, rather than on the credit quality, performance or liquidity of the assets financed by the conduit. Investors have assurance that the support provider will absorb 100% of the credit risk on the financed assets and this remains the case even if the financed assets are themselves of poor credit quality. There is accordingly no need for Section 6 to limit the permitted investments of fully-supported conduits to the asset-backed securities, special units of beneficial interest and master trust interests listed in clause (2) of the definition of "eligible ABCP conduit". For example, many conduits make direct advances to borrowers under secured credit agreements. These advances are simply loans and not securities at all. Conduits also often finance receivables portfolios by purchasing the entire portfolio rather than securitized interests in the portfolio. Conduits also may enter into secured financing arrangements with bank customers under Repurchase Agreements (which, as described above in relation to Arranger Conduits, do not constitute securitization transactions).[13] Through these transactions and others fully-supported conduits conduct a broader range of business than Section 6 contemplates yet in all cases the unconditional credit and liquidity support provided or arranged by the Conduit Manager ensures that the financial interests of the Conduit Manager, the support providers and the investors remain fully aligned.

The requirement in Section 6 that conduits purchase only securities issued by "intermediate SPVs" similarly is too limiting for the business of the typical conduit. Asset-backed financings do not always utilize intermediate SPVs. Such SPVs are most often used when they aid in the ability of the asset originator/seller to achieve bankruptcy remoteness with respect to transferred/financed assets. There are, however, other methods to achieve bankruptcy remoteness (for example, bankruptcy remote safe-harbored repo transactions or guaranteed investment contracts), and in these circumstances intermediate SPVs are not needed or used. Also, in the transactions that do use intermediate SPVs, not all are wholly-owned by any of the originator-sellers. Many ABCP conduits finance a substantial amount of receivables generated by multinational businesses. Intermediate SPVs used in cross border securitization transactions often are established as "orphan" SPVs for non-US tax or other local law reasons. An orphan

[13] In addition, ABCP conduits typically reinvest available unutilized cash collections on a temporary basis in "permitted investments", which are high credit quality short-term investments with maturities consistent with the conduit's ability to pay outstanding ABCP in full as it comes due. These short-term investments of excess available cash are generally considered to be riskless investments which enable the conduit to utilize its cash on hand in an efficient manner. We have assumed that these short-term investments will be deemed to constitute "servicing assets" under the Proposed Rule and hence will remain eligible investments for conduits. If this is not the case, Section 6 should be revised to permit such investments as conduits would have to increase the interest rates they charge customers if they are not permitted to use their excess cash efficiently.

SPV has nominal equity owned by a charitable trust or company that specializes in providing independent ownership of SPVs.

The Agencies have stated that the investment restrictions in Section 6 are intended to prevent conduits from acting as "aggregators" who "use ABCP to finance assets acquired in the market." The Agencies in this regard are concerned that the safe harbor not be available to SIVs, CDOs or similar vehicles that prior to the credit crisis financed secondary market purchases of asset-backed securities by issuing "asset-backed commercial paper" that did not have 100% liquidity support from highly-rated financial institutions. ABCP issued by fully-supported multiseller conduits, single seller conduits and Arranger Conduits (as described in this letter) is fundamentally different from the short-term securities issued by SIVs or other market value constructs that failed during the credit crisis. The 100% unconditional support facility provided by either the Conduit Manager or other eligible support provider makes the type and/or source of assets funded by an ABCP conduit irrelevant. The Agencies should not impose investment restrictions on fully-supported multiseller conduits, single seller conduits and Arranger Conduits (as described in this letter).

2. ***Note Maturities Should Not Be Limited To 270 Days***. The definition of "ABCP" in Section 6 limits the term of commercial paper notes issued by conduits relying upon the safe harbor to nine months (i.e., 270 days). The Agencies state in the Proposing Release that "it would be inappropriate to expand the ABCP option to commercial paper that has a term of over nine months, because a duration of nine months accommodates almost all outstanding issuances and the bulk of those issuances have a significantly shorter term of 90 days or less." The Agencies' statement that most ABCP currently being issued is short-dated is correct, but the fact that relatively little long-dated paper is currently being issued does not explain why it would be "inappropriate" for the safe harbor to allow terms longer than 270 days. Many conduits are authorized to issue notes with maturities up to 397 days. The 397-day limit derives from the outside maturity permitted to most money market fund investments under Investment Company Act Rule 2a-7. Money market funds are the single largest category of ABCP investor. As the funding commitments of an eligible liquidity provider will apply to notes with terms of 397 days, no less than to notes of 270 days, there is no need to impose a 270-day limit that will prevent conduits from issuing longer-dated notes if investor demand for these notes returns. In addition, in response to the Liquidity Coverage Ratio ("LCR") test imposed by the Basel 3 Capital Accord, many Conduit Managers are developing structured commercial paper notes (including puttable, callable and extendible notes) that enhance their ability to manage their cash flows in compliance with the LCR test. In many cases, the Conduit Manager will derive the maximum LCR benefit by having its conduit issue structured notes with original and/or outside terms to maturity exceeding 270 days. The Agencies should not impose an unduly tight term limit that could prevent conduits from issuing notes that both facilitate LCR compliance and are attractive to investors.

3. ***The Day-To-Day Disclosure Requirements Are Too Broad***. Section 6(d)(2)(C) of the Proposed Rule requires the Conduit Manager to provide investors with a description of the "form, fair value…and nature" of the ABS interests held by the conduit. The disclosures must be made "in accordance with the disclosure obligations" in Section 4(d) and must be made (i) before or contemporaneously with the first sale of ABCP to any purchaser, and (ii) at least monthly thereafter. The scope of the required disclosures is somewhat unclear. The quoted language, however, suggests that the Agencies intend for the Conduit Manager to disclose to investors all of the fair value calculations and supporting information that each originator-seller provides to the conduit under Section 4(d). We do not think it is feasible to impose any such disclosure obligations on conduits.

First, ABCP conduits typically treat their extensions of credit to customers as loans for accounting purposes. The conduit therefore holds "banking/loan book assets" and (assuming no defaults or impairment) is not required to periodically revalue the assets. This would remain the case even if the regulated liquidity provider were to fund such assets directly on its balance sheet; i.e., the regulated liquidity provider would hold the assets in its loan book on an accrual basis and thus fair value accounting would not apply. The Proposed Rule, insofar as it requires the "sponsor" to disclose to investors the "fair value" of the conduit's assets, is therefore requiring disclosures that don't conform to existing accounting practices and may be confusing to investors.

In addition, for reasons we have previously discussed, investors in ABCP issued by fully-supported conduits do not rely upon the market value of the financed assets nor are they concerned with the type or amount of credit risk retained by the originator-seller. There is accordingly no need to require fully-supported conduits to provide asset-level disclosures. In addition, an ABCP conduit may finance assets for many different originator-sellers and the amount of financing it provides to any single originator-seller may change frequently and rapidly during the term of the financing transaction. Each originator-seller will be required under Section 4(d) to update its fair value disclosures whenever it obtains additional financing from the conduit (including new advances under revolving facilities). It would be unreasonable to require the conduit to make this information available to investors since the volume of disclosure would be substantial, updated disclosures would frequently be required and investors don't want the information. We think, in fact, that the Agencies should not require originator-sellers to update their fair value calculations whenever they obtain financing from an eligible ABCP conduit so long as the originator-seller has retained a risk position that, under the original transaction structure, is not expected to fall below the minimum retention requirement. Simply put, the Section 4(d) disclosure requirements appear to have been designed for term securitizations in which the balance of the financed assets and principal amount of the related asset-backed securities are fixed at the outset of the transaction (subject to subsequent amortization), or at most will change on a limited number of discrete future issuance dates, and are not well suited to the dynamic business of ABCP conduits in which the number of parties who obtain financing from the conduit, the amount of financing they obtain, and the interest rates that the conduit charges, are subject to change on a daily basis. As discussed below, the mismatch between the disclosure requirements and actual conduit operations will also make it very difficult and/or expensive for originator-sellers to comply and could discourage them from using ABCP financing.

The fact that the Conduit Manager would need to provide updated disclosures to existing investors only on a monthly basis does not alleviate the burden. The Proposed Rule requires that the conduit's disclosure be current at the time of the first sale of notes to any new investor. ABCP conduits market their commercial paper on a continuing basis and are always searching for investor interest. Conduit Managers will want to preserve their conduits' ability to sell notes to new investors without delay and therefore will find it necessary to make Section 4(d) information available to investors whenever it changes.

In view of these considerations, we strongly recommend that the Agencies substantially narrow the disclosure requirements applicable to fully-supported conduits and to originator-sellers who transfer assets to fully-supported conduits.[14]

4. ***Conduit Managers Should Not Be Required To Disclose To Investors An Originator-Seller's Failure To Maintain Compliance With The Rule***. Section 6(f)(2) requires any Conduit Manager who relies upon Section 6 promptly to disclose to investors, the SEC and its principal federal banking agency (if any) the name of any originator-seller that fails to retain credit risk in compliance with the Proposed Rule and the amount of asset-backed securities held by the conduit that have been issued by an intermediate SPV of such originator-seller. We don't think that investors in fully-supported ABCP need or want such disclosure (since they are not relying upon the performance, market value or collections of the financed assets as the source of repayment on their notes). At the same time, the disclosure requirement will discourage originators from financing assets through ABCP conduits. As previously discussed, the amount and terms of the financing provided by an ABCP conduit to its originator-sellers are constantly changing and originator-sellers consequently will need to re-run their fair value calculations on a frequent (if not daily) basis. The frequency and complexity of the fair value calculations applicable to originator-sellers increase the likelihood that an originator-seller will inadvertently breach the retention requirement. Any such violation – once disclosed by the Conduit Manager to both investors and applicable regulators – could have a significant adverse impact on the originator-seller's reputation and/or require it to spend substantial resources addressing investor

[14] For a description of disclosure practices which we believe could be workable and appropriate for ABCP conduits generally, please see the comment letter, dated August 2, 2010, provided by the American Securitization Forum to the SEC relating to proposed disclosure requirements for ABCP under Regulation AB II.

inquiries. The disclosure also could create significant market volatility in the conduit's notes even though the notes remain fully supported by a regulated support provider. These issues will exist even if the originator-seller's violation was both unintentional and quickly cured. Under these circumstances, an originator-seller might well opt to access alternative financing sources that may be more expensive than ABCP but that don't create the same risk of turning inconsequential calculation errors into significant public relations problems. We note further that the Proposed Rule does not generally require the sponsor of an asset-backed securitization to notify investors and/or regulators if it fails to comply with the retention requirements applicable to it and we question the need to impose that obligation in the context of the one class of security - fully-supported ABCP - in which the amount of the originator's risk retention has little importance to the investors.

If the Agencies do elect to retain this disclosure requirement for fully-supported conduits, we think that at a minimum they should reduce its overbreadth by allowing a 30 day cure period before disclosure is required.

5. ***The Safe Harbor Should Permit Conduits To Have Multiple Liquidity Providers***. The definition of "eligible ABCP conduit" appears to require the conduit to obtain its liquidity support from a single regulated liquidity provider. Neither syndicated nor multiple liquidity agreements would be permitted even if the facilities (taken together) cover 100% of the outstanding ABCP. We are not certain why the Agencies have imposed this limitation. It is true that, at present, 100% of the liquidity support for most fully-supported multiseller conduits is provided by the Conduit Manager. It is nonetheless possible that future market developments or regulatory changes will create incentives for Conduit Managers to arrange syndicated liquidity agreements. A multiseller conduit might also choose to execute liquidity/credit enhancement facilities with multiple support providers in the same manner as Arranger Conduits (Non-Bank Arranger). As described above, Arranger Conduits (Non-Bank Arranger) routinely enter into full support liquidity/credit enhancement facilities with multiple support providers. We therefore believe that Section 6 should be revised to permit conduits to have multiple liquidity facilities and/or liquidity providers as allowing such flexibility does not appear to contravene any policy underlying Section 15G. A regulated liquidity provider that takes unconditional credit risk on a pool of assets financed by a conduit (whether the balance of such assets constitutes 5%, 10%, 20% or 50% of the conduit's assets) is fully incentivized to ensure proper underwriting of those assets.

6. ***The Disclosure Requirements Applicable To Originator-Sellers Are Not Workable***. Originator-sellers who transfer assets into ABCP conduits will be subject to credit risk retention. Many if not most such originator-sellers will retain horizontal credit risk in accordance with Section 4 of the Proposed Rule. The disclosure requirements that would apply to the originator-seller under Section 4(d) of the Proposed Rule, however, are not workable in the context of ABCP financing. Section 4(d) appears to have been drafted with reference to term

securitizations in which the asset balance is fixed at a single closing or, in some cases, may adjust on a limited number of post-closing issuance dates. In these term securitizations it may not be unduly burdensome for the sponsor to prepare the fair value calculations and deliver the supporting data that Section 4(d) requires. It also should be possible for the sponsor in term securitizations to make the disclosures "a reasonable period of time prior to the sale of the asset-backed securities" since the sponsor will have substantial advance notice of each issuance date. Many ABCP financings, however, are revolving transactions in which the principal balance of, and the interest rates applicable to, the outstanding notes may change every business day. The conduit, in other words, may issue new notes to finance a customer's assets on a daily basis and each such issuance would require the customer to update its Section 4(d) disclosures. Under these circumstances we do not think that the securitizer/sponsor (i.e., the originator-seller of assets financed through an ABCP conduit) would be able to comply with its obligation to provide the updated fair value disclosures to the investor (i.e., the conduit) a "reasonable period of time prior to the sale of the [ABCP]." We believe that Section 4(d) should be revised to permit originator-sellers to provide disclosure on an initial closing date, and thereafter to update their disclosures on a monthly basis with the report being made as of a designated calendar day in the preceding calendar month. It also should be noted that even if originator-sellers had the capacity to recalculate fair value on the schedule that the Proposed Rule requires, the difficulty and expense of doing so would likely make ABCP financing less attractive to originator-sellers. The Agencies should not impose unnecessarily broad disclosure requirements that effectively will narrow the options available to businesses seeking short-term financing. In fact, as discussed immediately below, we recommend that the Agencies change the retention requirement applicable to originator-sellers in revolving transactions so that the required amount of risk retention is calculated against the principal balance rather than the fair value of the related ABS interests.

We also believe that originator-sellers in ABCP financings should be excused from the certification requirement in Section 4(b)(2)(ii). As above, the certification requirement imposes an undue burden on originator-sellers because the calculations would have to be prepared and the certification provided not only when an asset is first funded but also "at the time of any subsequent issuance of ABS interests." The originator-seller therefore would have to provide a new certification whenever the conduit rolls over the notes financing its assets. In addition, the cash flow test is not tailored to ABCP transactions and fails to consider that payments may be made to an intermediate SPV on assets financed by a conduit (e.g., trade receivables) before the related ABCP notes have matured. In other words, a portion of the principal payments received on the financed assets may be allocated to the originator-seller's residual interest before any principal payment is made on the related ABCP notes. These arrangements pose no risk to the ABCP investors (or to the regulated support provider who provides credit support for the notes) because the cash payments allocated to the residual interest are not released from the facility but are immediately reinvested in new receivables. The originator-seller's retained interest therefore is not reduced. The payments nonetheless would make it impossible for the originator-seller to provide the Section 4(b)(ii) certification.

7. ***The Risk Retention Requirement Imposed On Originator-Sellers In Revolving Transactions Should Be Based On The Principal Balance Of The Relevant ABS Interests***. Many if not most of the securitization transactions financed by ABCP conduits are revolving asset transactions but do not involve the use of a revolving master trust. In these transactions, the ABCP conduit extends credit periodically against asset pools to which assets are added periodically and from which maturing assets are removed. In addition, ABCP conduits may act as "warehouse" lenders for financial assets until the available asset amount is sufficient to warrant the issuance of a term securitization of such assets. In these transactions, the amount of the ABS interests held by the ABCP conduit will typically never be permitted to exceed 95% of the overall ABS interests.

We believe that in these transactions the required amount of retained risk should be based on the principal balance rather than the fair value of the outstanding ABS interests. As the Agencies have recognized in connection with revolving master trust transactions, requiring a fair value determination in these transactions "would create additional complexity and costs, especially given the frequency of the measures required." Interests issued to ABCP conduits and other investors and lenders in these transactions would not include senior interest-only securities or premium securities. Therefore, as the Agencies have recognized with respect to seller's interests in revolving master trust transactions, basing the required risk retention on the principal balance of outstanding ABS interests would be a conservative measure for determining the required amount of retained risk.

We note that this issue is not limited to revolving transactions that are funded through ABCP conduits but is also relevant in certain other securitization contexts. We refer the Agencies to the SFIG comment letter on the Proposed Rule for a further discussion of this issue.

8. ***The Safe Harbor Should Not Be Jeopardized By A Single Non-Compliant Asset***.

The Proposed Rule does not expressly state whether a Conduit Manager that would otherwise be eligible, or that currently relies upon, Section 6 would lose its right to claim the safe harbor if, in the most extreme example, a single asset held by its conduit were determined not to comply with the rules. In such a “cliff” scenario, there is significant risk to the Conduit Manager, the bank support providers and the ABCP investors that the conduit would be forced to unwind by drawing on all of its support facilities. Sections 6(f)(2)(ii)(A)(3) and 6(f)(2)(ii)(B) of the Proposed Rule suggest that a Conduit Manager does not immediately lose the safe harbor if an originator-seller fails to comply with its retention obligations but that the Conduit Manager is instead allowed some period of time to take appropriate “remedial actions”. These provisions are helpful but are not sufficient to address the issue. There need to be prescribed cure periods (not less than 30 days) and threshold amounts (perhaps 1% of the conduit's assets) that are workable for the dynamic, daily operations of ABCP conduits.

Status of Partially-Supported Conduits

Section 6 could not be used by partially-supported conduits because they do not provide 100% unconditional liquidity coverage for all of their notes. We believe that the complete exclusion of partially-supported conduits from the safe harbor is not justified and is, in fact, inconsistent with the express language of Section 15G and the remaining provisions of the Proposed Rule. Section 15G requires securitizers to retain not less than 5% credit risk on each securitized asset. As described above, sellers/pledgors/transferors of assets into ABCP conduits retain credit risk in such assets in an amount equal to at least five percent of the outstanding ABCP. The Proposed Rule would additionally require - except in the case of Conduit Managers relying upon Section 6 - that the Conduit Manager retain credit risk equal to not less than 5% of the fair value of all ABS interests issued in the securitization. Section 6 (through the definition of "eligible ABCP conduit") effectively requires 100% risk retention. We do not understand the rationale for these multiple risk retention requirements in respect of assets financed through ABCP programs (the total retention requirement would range between 10% (if Section 6 is not used) and 105% (if Section 6 is used and the eligible liquidity provider's funding commitment is properly recognized as a form of risk retention).

We do not think Section 6 should be available only to fully-supported programs. As previously discussed, the Conduit Managers of partially-supported conduits typically provide credit enhancement facilities to their conduits that cover not less than 5% of the associated credit risk. They also typically provide liquidity facilities that cover 100% of the outstanding notes subject to specified funding conditions. These funding conditions are narrowly drawn and, when considered in conjunction with the credit enhancement facility (and the facts that such facilities (i) are typically required to be "topped up" on each ABCP issuance date so that each new purchaser of ABCP is effectively supported by the full amount of required credit enhancement on the applicable purchase date, and (ii) have commitment termination dates that fall *after* the maturity date of the latest-maturing commercial paper note), are in the estimation of the Rating Agencies and investors very unlikely to result in the conduit making less than full payment on its notes. It follows that the commercial paper notes of partially-supported conduits ordinarily carry the highest short-term ratings. The credit exposure of the Conduit Manager or other support provider to the conduit assets through the support facilities it provides or arranges and its reputational exposure are more than sufficient to align its financial interest with that of the investors. We therefore believe that the Agencies should revise clause (4) of the definition of "eligible ABCP conduit" so that it is satisfied if (i) the conduit is a fully-supported conduit or (ii) the conduit is a partially-supported conduit and a regulated liquidity provider provides (A) one hundred percent liquidity coverage of the ABCP, and (B) unconditional support in an amount not less than five percent of the ABCP.

We also recommend that the Agencies revise clause (4) to clarify that eligible liquidity facilities may include facilities entered into by an affiliate of a regulated liquidity provider if the regulated liquidity provider "unconditionally guarantees" its affiliate's obligations under the applicable facility. This latter change recognizes the fact that in certain cases a bank may provide liquidity and credit enhancement support to an ABCP conduit by guaranteeing the obligations of a bank affiliate that is the actual counterparty to the conduit under the liquidity or credit enhancement agreement.

We discussed in previous sections the inability of Conduit Managers and originator-sellers to satisfy the disclosure requirements in Sections 4(d) and 6(d) of the Proposed Rule. As the liquidity facilities in partially-supported program may include funding conditions tied to the performance and/or the credit ratings of the financed assets, investors in partially-supported conduits do have an interest in asset-level disclosures. We therefore suggest that, in lieu of the disclosure requirements currently in the Proposed Rule, the Agencies apply to partially-supported conduits the proposed ABCP disclosure requirements that the American Securitization Forum set forth in its comment letter to the SEC, dated August 2, 2010, relating to proposed Regulation AB II. These disclosure requirements were intended to embody industry "best practices" and we think that they remain appropriate.

A "Grandfather" Clause Is Needed

ABCP conduits often enter into multi-year financing contracts with their customers. Many conduits will on the effective date of the final risk retention rule (the "*Effective Date")* be party to financing arrangements that don't satisfy the requirements of the final rule. The commitment termination dates under these facilities may fall many months or even years after the Effective Date. Conduits cannot unilaterally rewrite their customer agreements or require any customer to change the form or amount of credit risk that it retains. We therefore believe that the final rule should contain a grandfather clause pursuant to which conduits are not required to satisfy the rule in connection with customer facilities that are in place on the Effective Date unless and until any such facility is renewed or renegotiated on or after the Effective Date.

We appreciate having had this opportunity to comment on the Proposed Rule. If you would like to discuss any of our comments, please feel free to contact Jim Croke at (212) 655-2515, jcroke@chapman.com; Peter Manbeck at (212) 655-2525, manbeck@chapman.com; or Tim Mohan at (312) 845-2966, mohan@chapman.com.

Very truly yours,

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