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17 CFR Parts 210, 228, et al.
Asset-Backed Securities; Final Rule

SECURITIES AND EXCHANGE COMMISSION

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

[Release Nos. 33–8518; 34–50905; File No. S7–21–04]

RIN 3235–AF74

Asset-Backed Securities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; request for comment.

SUMMARY: We are adopting 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. The final rules and forms accomplish the following: update and clarify the Securities Act registration requirements for asset-backed securities offerings, including expanding the types of asset-backed securities that may be offered in 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. We also request additional comment regarding the appropriate treatment of certain structured securities that do not meet our definition of ''asset-backed security.''

DATES: *Effective Date:* March 8, 2005.

Comment Date: Comments regarding the request for comment in Section III.A.2.a. of this document and the Form 12b–25 ''collection of information'' requirement, within the meaning of the Paperwork Reduction Act of 1995, should be received on or before March 8, 2005.

Compliance Dates: Any registered offering of asset-backed securities commencing with an initial bona fide offer after December 31, 2005, and the asset-backed securities that are the subject of that registered offering, must comply with the new rules and forms. For any such offerings that rely on Securities Act Rule 415(a)(1)(x), Securities Act registration statements filed after August 31, 2005 related to such offerings must be pre-effectively or post-effectively amended, as applicable, to make the prospectus included in Part I of the registration statement compliant and to make any required undertakings or other changes for Part II of the registration statement. For Securities Act registration statements that were filed on or before August 31, 2005, the prospectus and prospectus supplement, taken together, relating to such offerings that rely on Rule 415(a)(1)(x) must comply, provided, that, (1) the Securities Act registration statement will need to be post-effectively amended if any new undertakings are required to be made with respect to such offerings in Part II of the registration statement; and (2) the Securities Act registration statement will need to be post-effectively amended to make the prospectus included in Part I of the registration statement compliant, as well as to make changes, if any, to Part II of the registration statement with respect to any registered offering of asset-backed securities under such registration statement commencing with an initial bona fide offer after March 31, 2006.

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/final.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/final.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, at (202) 942–2910, in the Office of Rulemaking, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting: amendments to 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] amendments to Items 10, 308, 401 and 406 [4] of Regulation S–B [5] under the Securities Act; amendments to Items 10, 202, 308, 401, 406, 501, 503, 512, 601 and 701 [6] of Regulation S–K [7] under the Securities Act; a new subpart of Regulation S–K, the 1100 series (''Regulation AB''); [8] amendments to Rules 411 and 434 [9] under the Securities Act; new Rules 139a, 167, 190, 191 and 426 [10] under the Securities Act; amendments to Rule 311 [11] of Regulation S–T; [12] new Rule 312 [13] of Regulation S–T; amendments to Forms S–1, S–2, S–3, S–11, F–1, F–2 and F–3 [14] under the Securities Act; amendments to Rules 10A–3, 12b–2, 12b–15, 12b–25, 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 [15] under the Securities Exchange Act of 1934 (the ''Exchange Act''); [16] new Rules 3a12–12, 3b–19, 13a–17, 13a–18, 15d–17, 15d–18, 15d–22 and 15d–23 [17] under the Exchange

[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; 17 CFR 229.601; and 17 CFR 229.701.

[7] 17 CFR 229.10 *et seq.*

[8] 17 CFR 229.1100 through 1123.

[9] 17 CFR 230.411 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 232.312.

[14] 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.

[15] 17 CFR 240.10A–3; 17 CFR 240.12b–2; 17 CFR 240.12b–15; 17 CFR 240.12b–25; 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.

[16] 15 U.S.C. 78a *et seq.*

[17] 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.

Act; amendments to Rule 100 [18] of Regulation M [19] under the Exchange Act; amendments to Rule 101 [20] of Regulation BTR [21] under the Sarbanes-Oxley Act of 2002 (the ''Sarbanes-Oxley Act''); [22] amendments to Forms 20–F, 40–F, 8–K, 10–K, 10–KSB and 12b–25 [23] under the Exchange Act; and new Form 10–D [24] under the Exchange Act.

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I. Overview

A. What Are Asset-Backed Securities?

On May 3, 2004, we issued proposals to address comprehensively the registration, disclosure and reporting requirements for asset-backed securities, or ABS, under the Securities Act and the Exchange Act.[25] We received over 50 comments in response to our proposals.[26] Commenters expressed overall support for our proposals to establish a separate framework for the registration and reporting of asset-backed securities due to differences between asset-backed securities and other securities.[27] The final rule and form amendments we adopt today have been revised, as discussed in this

[18] 17 CFR 242.100.

[19] 17 CFR 242.100 through 105.

[20] 17 CFR 245.101.

[21] 17 CFR 245.101 through 104.

[22] 15 U.S.C. 7201 *et seq.*

[23] 17 CFR 249.220f; 17 CFR 249.240f; 17 CFR 249.308; 17 CFR 249.310; 17 CFR 249.310b; and 17 CFR 249.322.

[24] 17 CFR 249.312.

[25] See Release No. 33–8419 (May 3, 2004) [69 FR 26650] (the ''Proposing Release'').

[26] The public comments we received and a summary of the comments prepared by our staff (the ''Comment Summary'') are available for inspection in our Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549 in File No. S7–21–04, or may be viewed at *http://www.sec.gov/rules/proposed/s72104.shtml.*

[27] See, *e.g.*, Letters of AIG Credit Corp. (''AIG''); Allen & Overy (''A&O''); American Bar Association (''ABA''); American Financial Services Association (''AFSA''); American Institute of Certified Public Accountants (''AICPA''); American Bankers Association (''Am. Bankers''); American Society of Corporate Secretaries (''ASCS''); American Securitization Forum (''ASF''); Australian Securitisation Forum (''Aus. SF''); Joint letter of American Honda Finance Corporation, DaimlerChrysler Services North America LLC, Ford Motor Credit Company, General Motors Acceptance Corporation, and Navistar Financial Corporation (''Auto Group''); Bond Market Association (''BMA''); Bank of America Corporation (''BOA''); Capital One Financial Corporation (''Capital One''); CFA Institute (''CFAI''); Citigroup Global Markets, Inc. (''CGMI''); Citigroup Inc. (''Citigroup''); Commercial Mortgage Securities Association (''CMSA''); Ernst & Young LLP (''E&Y''); European Securisation Forum (''ESF''); Fidelity Management & Research Company (''FMR''); First Marblehead Corporation (''First Marblehead''); Financial Services Roundtable (''FSR''); Investment Company Institute (''ICI''); Jones Day; JPMorganChase & Co. (''JPMorganChase); Kutak Rock LLP (''Kutak''); Mortgage Bankers Association (''MBA''); MBNA Corporation (''MBNA''); Metropolitan Life Insurance Company (''MetLife''); Moody's Investors Service (''Moody's''); PriceWaterhouseCoopers LLP (''PWC''); Joint letter of Sallie Mae., Inc. and Nelnet, Inc. (''Sallie Mae''); State Street Global Advisors (''State Street''); Toyota Motor Credit Corporation (''TMCC''); UBS Securities LLC (''UBS''); U.S. Bank National Association (''US Bank''); and Wells Fargo Bank, National Association (''Wells Fargo'').

release, to incorporate a number of changes recommended by commenters.

Asset-backed securities 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 in the capital markets.[28] 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, either directly or through an affiliate. It then sells the financial assets, again either directly or through an affiliate, to a specially created investment vehicle that issues securities ''backed'' or supported by those financial assets, which securities 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 liquidity facilities, 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 non-agency ABS issuance grew from $46.8 billion in 1990 to $416 billion in 2003.[29] Another source estimates 2003 new issuance closer to $800 billion.[30] ABS issuance is on pace to exceed corporate debt issuance in 2004.[31] 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. Before the Proposing Release, the Commission had 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 ABS, there is generally no business or management to describe. Instead, information about the transaction structure and the characteristics and 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 and their securities, do not elicit relevant information for most asset-backed securities transactions. Over time, Commission staff, through no-action letters and the filing review process, have developed a framework to address the different nature of asset-backed securities while being cognizant of developments in market practice.

With a few exceptions, our proposals were designed to consolidate and codify current staff positions and industry practice. After carefully evaluating the public comment received, we are adopting new rules and amendments to address the four primary regulatory areas affecting asset-backed securities that were the subject of the proposal: Securities Act registration; disclosure; communications during the offering process; and ongoing reporting under the Exchange Act.

B. Securities Act Registration

We are adopting a principles-based definition of asset-backed security, substantially as proposed, to demarcate the securities and offerings to which the new rules apply. The definition consolidates several staff positions regarding the definition of asset-backed security, including those regarding delinquent and non-performing pool assets, with several revisions to the proposal in response to comment. The definition we are adopting today also allows more lease-backed transactions to be included in the definition of asset-backed security and permits the use of master trusts and revolving periods for more asset classes. As we explained in the Proposing Release, 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 ''shelf,'' basis.[32] As proposed, we are requiring that all registered offerings of asset-backed securities be registered either on Form S–1 or Form S–3, and we are specifying in those forms which disclosure items are required. In addition, we are expanding the types of investment grade asset-backed securities that qualify for shelf registration.

Consistent with existing staff positions and our proposal, we are not adding a reporting history requirement for Form S–3 eligibility. However, we are codifying a staff position, as modified from the Proposing Release in response to comment, that Exchange Act reporting obligations regarding other ABS of the same asset class established by the depositor or an affiliate of the depositor must have been satisfied to maintain Form S–3 eligibility for new registration statements. Also consistent with existing staff positions, and pending consideration of our broader proposals recently issued for all Securities Act offerings,[33] we are excluding 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 also are adopting proposals to alleviate impediments to the shelf registration of offerings of asset-backed securities by foreign issuers or backed by foreign financial assets. We are adopting proposals that consolidate and streamline existing staff positions regarding when and how the offering of underlying securities must be concurrently registered with an offering of asset-backed securities backed by those underlying securities. Finally, we are revisiting staff interpretations regarding the registration of market-making transactions in the ABS context in response to comment. In particular, we will no longer require registration or delivery of a prospectus for market-making transactions for asset-backed securities.

C. Disclosure

Before today, there were no disclosure items tailored specifically to asset-backed securities. We are adopting, with modifications in response to comment, a new principles-based set of disclosure items, ''Regulation AB,'' that will form

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

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

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

[31] See, *e.g.*, Jennifer Hughes and David Wells, ''Asset-Backed Bonds Hit Record,'' Financial Times, Nov. 11, 2004, at 17; Aaron Lucchetti, ''Indebted Consumers Reshape the Bond Market—Betting on Americans' Ability To Pay Their Bills May Pose Risks If Interest Rates Move Higher,'' Wall St. J., Sep. 14, 2004, at C1; and Christine Richard, ''US Asset-Backeds: No Slowdown As Consumers Borrow,'' Dow Jones Capital Markets Report, Sep. 17, 2004. See also The Bond Market Association, Bond Market Research Quarterly, November 2004.

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

[33] See Release No. 33–8501 (Nov. 3, 2004) [69 FR 67392] (the ''Offering Process Release'').

the basis for disclosure in both Securities Act registration statements and Exchange Act reports. Although the few comments we received on this point were mixed, we still do not believe it would be practical or effective to draft detailed disclosure guides for each asset type that may be securitized. Instead, and as proposed, we have attempted to identify the disclosure concept required and provide several illustrative examples, while understanding and emphasizing, as we did in the Proposing Release, that the application of the particular concept must be tailored to the particular transaction and asset type involved and resulting determinations as to the materiality of information.

As we explained in the Proposing Release, the new disclosure items are for the most part based on the market-driven disclosures that appear today. However, with a codification of a universal set of disclosure items, we do seek, as we stated in the Proposing Release, 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, and the comment process confirmed, 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 new disclosure items relating to these entities are designed to elicit additional information in these areas to the extent material, and we have made several revisions to the proposed disclosure items in response to comment.

Consistent with our proposal, we also are requiring for the first time that certain statistical information on a ''static pool'' basis be provided if material to the transaction. The final rules relating to the provision of this information have been revised from the Proposing Release in response to comment. The requirement to provide static pool data is still based upon the materiality of the data, although we are providing additional guidance on the scope of the data covered by the requirement. In addition, the guidance for static pool data under the final rules includes not only delinquency and loss data, but also prepayment data, if material. We also are providing flexibility in the manner of making the static pool data available. The final rules permit issuers to provide data that would be included in the prospectus but provided through a Web site under certain specified conditions.

Consistent with current practice and our proposals, we are not requiring audited financial statements regarding the issuing entity for the asset-backed securities in Securities Act or Exchange Act filings. However, we are adopting proposals, revised in response to comment, that consolidate and codify current staff positions on when financial or other descriptive information is required regarding certain other third parties, such as obligors of financial assets that reach pool concentration levels or providers of significant credit enhancement or other cash flow support for the asset-backed securities. In particular, we have revised our proposals regarding the provision of such information with respect to certain derivative counterparties to use an alternate measure for determining significance. We also are streamlining and codifying current staff positions, substantially as proposed, on when financial information regarding 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 1990's, Commission staff issued a series of no-action letters permitting the use of various written materials in addition to the statutory prospectus in an offering of asset-backed securities.[34] 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. Pending consideration of our broader communications proposals in the recently-issued Offering Process Release, we are here codifying and simplifying, as proposed, the current staff positions on when these materials can be used and when they must be publicly filed with the Commission. We are clarifying our intention stated in the Proposing Release that the communications allowed under our final rules mirror those allowed under the staff no-action letters. We also are reiterating clarifications regarding several interpretive issues involving 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 are eliminating as proposed 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.[35] 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.[36] However, several of the conditions in those rules were not relevant or practical for asset-backed securities. Again, pending consideration of any further changes to the research report safe harbors as a result of the Offering Process Release, we are codifying here, as proposed, the modified conditions in the staff no-action letter that 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 under the Exchange Act applicable to operating companies do not elicit information that would be most relevant for asset-backed securities. First through a series of exemptive orders, and then primarily through the issuance of scores 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,[37] ABS issuers today generally file under cover of 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

[34] 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 prospectus'' refers to the full prospectus required by Section 10 of the Securities Act (15 U.S.C. 77j).

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

[36] 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).

[37] 17 CFR 249.308a.

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 [38] 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.[39] ABS issuers are exempt from the rules implementing Section 404 of the Sarbanes-Oxley Act [40] regarding reporting on internal control over financial reporting.[41]

We are codifying as proposed 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 are adopting our proposal for 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 are adopting instructions, substantially as proposed, that specify which of the Commission's recently adopted Form 8–K events will be applicable to asset-backed securities, and we are adding a few additional events specific to asset-backed securities, again with certain modifications from the proposal. Consistent with the modified reporting no-action letters, we are adopting our proposals to expressly exclude ABS from quarterly reporting on Form 10-Q and exempt ABS from Section 16 of the Exchange Act.[42] We also are adopting proposed amendments to clarify how transition reports are to be filed regarding a change in fiscal year.

We are adopting instructions, substantially as proposed, that specify the disclosure requirements applicable for annual reports on Form 10–K regarding asset-backed securities, which also are drawn from Regulation AB, and we are codifying the form of certification to be used under Section 302 of the Sarbanes-Oxley Act for asset-backed securities. As proposed, we are retaining the longstanding requirements relating to servicer compliance statements and reports by an independent public accountant as to compliance with particular servicing criteria. Regarding servicing criteria, we explained in the Proposing Release that 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. However, the USAP's ''minimum servicing standards'' are designed to be applicable only to servicing of residential mortgages and do not necessarily represent the full spectrum of servicing activities that may be material to an asset-backed securities transaction. We are adopting, with modifications, the proposed disclosure-based servicing criteria that will 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 adopting a requirement that a registered public accounting firm attest to the assertion of compliance. We are revising our proposal, however, to permit separate reports from each party that performs the actual servicing or administration functions. Both the reports containing the assertion of compliance and the accountant's attestation reports will be required to be filed with the report on Form 10–K. We also are revising the form of the Sarbanes-Oxley Section 302 certification to include an express statement by the certifying party as to whether reports have been filed covering the entire servicing function.

As with the Securities Act, we are adopting our proposed specification that the depositor is the ''issuer'' for purposes of Exchange Act reporting regarding asset-backed securities. We also are specifying who may sign the various Exchange Act reports. As proposed, either the depositor or the servicer may sign the reports on Form 10–K, Form 10–D and Form 8–K. A designated officer of that same party also must sign the Sarbanes-Oxley Section 302 certification. We also are clarifying 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,[43] including codifying as proposed several interpretive positions as to when the obligation starts and when it may be suspended.

F. Other Miscellaneous Amendments

Finally, as discussed in the Proposing Release, we are making several miscellaneous and technical amendments to our rules and forms to accommodate the new rules and to update references regarding asset-backed securities.

II. Background and Development of ABS and Regulatory Treatment

As noted above, the ABS market rapidly has developed into an important part of the U.S. capital markets.[44] The modern securitization market originated in the 1970's with the securitization of residential mortgages.[45] 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.

There are several distinguishing features between asset-backed securities and other fixed-income securities. For example, ABS investors are generally

[38] 15 U.S.C. 7241.

[39] 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).

[40] 15 U.S.C. 7262.

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

[42] 15 U.S.C. 78p.

[43] 15 U.S.C. 78o(d).

[44] See note 31 above. See also 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)).

[45] 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. As a result, only non-GSE ABS, or so called ''private label'' ABS, will be required to comply with the new rules. 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 Web site at *http: www.sec.gov.*

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.[46] 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.[47]

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, one or more ''servicers,'' often affiliated with the sponsor, are generally 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, mutual funds and money managers.[48] 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.[49]

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 to be packaged into securities designed to provide returns with specific risk and timing characteristics.

Transaction agreements specify the structure of an ABS transaction. A common form of such an agreement is a ''pooling and servicing agreement'' 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, commonly 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.[50] 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 provide incidental changes to cash-flow and return, 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.

Before the Proposing Release, there had been few Commission initiatives directly related to ABS. In connection with the passage of the Secondary Mortgage Market Enhancement Act of 1984 (SMMEA),[51] the Commission permitted shelf registration to SMMEA eligible securities.[52] In 1992, the Commission extended shelf registration to non-mortgage investment grade ABS.[53] That same year, the Commission also adopted a rule under the Investment Company Act of 1940 [54] to exclude ABS transactions under specific conditions from the definition of an investment company.[55] More recently,

[46] 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.''

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

[48] See 2003 MBS Disclosure Report.

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

[50] 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)).

[51] Pub. L. No. 98–440, 98 Stat. 1689. See also Section II.C.1. of the 2003 MBS Disclosure Report.

[52] 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)).

[53] See note 32 above.

[54] 15 U.S.C. 80a–1 *et seq.*

[55] 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

Continued

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.[56] 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.

As we stated in the Proposing Release, we recognize 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. Even before we issued the proposals, many issuers, investors and other market participants had requested a defined set of regulatory requirements for guidance.[57] Commenters on the proposals expressed universal support for a separate framework for the registration and reporting of ABS.[58] 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.[59]

Against this background, we issued the proposals 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. After carefully evaluating the comments received on the proposals, we are adopting these new regulatory requirements, as discussed further below.

III. Discussion of the Amendments

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[60] asset-backed securities without a reporting history requirement for the issuing entity.[61] 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 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

ABS transactions). As we stated in the Proposing Release, 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.

[56] 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).

[57] 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 ICI to Michael H. Mitchell, Special Counsel, Division of Corporation Finance, ''Asset-Backed Securities Offerings'' (Oct. 29, 1996); Letter from 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 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 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).

[58] See note 27 above.

[59] See, *e.g.*, notes 201, 229, and 235 below. See, also, ''If Issuers Can Steal, Where's the Deal Cop,'' Asset Securitization Report, Feb. 17, 2003, at 6; Christine Richard; ''Moody's Trustees Don't See Eye-to-Eye on Trustee Role,'' Dow Jones Newswires, Feb. 4, 2003; and ''SEC Filings Reveal Little ABS Reporting Consistency,'' Asset Securitization Report, Sep. 23, 2002, at 10.

[60] ''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.

[61] 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 related securities, as defined in Section 3(a)(41) of the Exchange Act (15 U.S.C. 78c(a)(41)), are permitted to be offered on a delayed basis under Securities Act Rule 415(a)(1)(vii). See note 52 above. Our actions today do not affect the continued availability of Rule 415(a)(1)(vii) for shelf registration of mortgage related securities, as defined, even if they do not meet the requirements of Form S–3. However, consistent with our movement of all asset-backed securities offerings to Form S–1 or Form S–3, to the exclusion of Form S–11, mortgage related securities offerings should use Form S–1 in lieu of Form S–11 for future transactions. Just like prior practice on Form S–11, an offering meeting the requirements of Rule 415(a)(1)(vii) could be a continuous or delayed offering on Form S–1.

conducted in the future, including asset types that may be securitized, the types of security structures that may be used and possible credit enhancements or other forms of support. The registration statement at the time of effectiveness also contains one or more forms of prospectus supplement, which outline 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).[62]

2. Definition of Asset-Backed Security

a. Approach and Supplemental Request for Comment for Other Structured Securities

As we explained in the Proposing Release, the term ''asset-backed security'' currently is defined only for purposes of Form S–3. As many of our amendments relate to the treatment of asset-backed securities regardless of the form on which their offering is initially registered, we are moving the definition of ''asset-backed security,'' as proposed, to the definition section of Regulation AB, our new sub-part in Regulation S–K for asset-backed securities (discussed more fully in Section III.B). Under this new format, a security that meets the general definition of ''asset-backed security'' will be subject to the disclosure and other requirements of the new rules, regardless of the Form used for registration. Any additional conditions appropriate for Form S–3 eligibility, such as an investment grade requirement, will be retained in General Instruction I.B.5 of Form S–3, as discussed in Section III.A.3.c.

As we explained in the Proposing Release, 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 is principles-based and 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 and pay-through 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 a discrete pool of financial assets that by their terms convert into cash within a finite time period.[63] We continue to believe, conversely, that the regime we have specifically designed for asset-backed securities is not necessarily appropriate for securities that do not meet these principles.

As we explained in the Proposing Release, experience with the definition has resulted in several interpretations since its adoption. These interpretations clarify the principles in the definition or, in some instances, permit limited exceptions to one or more of those principles where appropriate and consistent with overall application of the ABS regulatory regime. 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, and we proposed codifying them with several expansions 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.

Commenters were mixed on our proposed approach. On the one hand, commenters representing investors expressed reticence in expanding access to the ABS regulatory regime out of concern that it could have certain unintended consequences, such as investment decisions on these additional transactions being made under more compressed time frames and with less access to information through shelf registration.[64] On the other hand, commenters representing primarily issuers and their representatives would have preferred, in lieu of our proposed approach of codifying limited exceptions to the existing definition's core principles, abandoning many of the core principles themselves to allow additional securities to receive the benefits of the proposed regime, such as immediate shelf registration and the ability to use ABS informational and computational material.[65] For example, most of these commenters would have preferred deleting the ''discrete pool'' requirement from the existing 1992 definition, hence rendering the proposed expansions to the existing interpretive exceptions from that requirement, such as those relating to master trusts, prefunding periods and revolving periods, unnecessary and thereby permitting unlimited use of those concepts. These commenters generally argued that such requirements would restrict innovation and were unnecessary to protect the universe of mostly institutional investors. According to the view of these commenters, any concerns with abandoning these and several other existing principles in the definition, such as the proposed delinquency and non-performing interpretations designed to uphold the principle that the ABS are primarily dependent on a pool of assets that self-liquidate instead of on the ability of the entity managing and foreclosing on the assets, could be addressed through disclosure.

We continue to believe that the ABS regime is at bottom not designed for transactions that depart significantly from the principles behind the definition. The alternative regime for asset-backed securities represents the codification of a very different registration, disclosure and reporting regime from that applicable to other securities, including other structured securities. We continue to believe that the current and proposed definition of ''asset-backed security'' reflects the core principles for securities that should be subject to this alternative regime, while still providing great flexibility and room for development. We continue to believe that emphasis on certain core principles is appropriate for these purposes, such as that the securities are primarily backed by a pool of assets, that there is a discrete pool with a general absence of active pool management, and an emphasis on the self-liquidating nature of pool assets that by their own terms convert into cash.

We do recognize, as have the staff in their prior interpretations, that there are instances where some limited exceptions to these general principles would be appropriate and consistent with access to the alternate regulatory regime, and these are reflected in the interpretations and exceptions discussed below. However, necessarily there is a point where application of the alternate regime is no longer appropriate. The further the security deviates from the core principles, the more acute concerns, such as those expressed by investors, become, which are not just disclosure concerns, that the security should not be treated necessarily the same as other securities

[62] 17 CFR 230.424(b).

[63] For example, common stock and similar equity instruments do not meet this general principle. Our view would not be altered if the equity security was subject to a separate liquidity or repurchase agreement or other arrangement. However, limited life equity securities, such as trust preferred securities, that themselves have a finite life and a mandatory redemption, could satisfy the general principle.

[64] See, *e.g.*, Letter of ICI.

[65] See, *e.g.*, Letters of ABA; ASF; Auto Group; ESF; and FSR.

that meet our definition of ''asset-backed security.'' In those instances, additional or different disclosures and/or registration and reporting treatment may be more appropriate.

As an example, we noted in the Proposing Release that, given the existing concept in the definition of a discrete pool of financial assets that by their terms convert into cash within a finite time period, so-called ''synthetic'' securitizations are not included in Regulation AB's basic definition of ABS for purposes of determining whether the security qualifies for the particularized registration, disclosure and reporting regime under the Securities Act and Exchange Act we are adopting today. Synthetic securitizations are designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool. These synthetic transactions are generally effectuated through the use of derivatives such as a credit default swap or total return swap. The assets that are to constitute the actual ''pool'' under which the return on the ABS is primarily based are only referenced through the credit derivative.

Some commenters representing primarily issuers and underwriters objected to not making accommodations in the definition of asset-backed security for synthetic securitizations.[66] These commenters generally argued that while these securities may not necessarily meet all of the core principles in the existing definition, they are still structured securities that should be treated under the Securities Act and the Exchange Act in the same manner and with access to the same benefits as an asset-backed security. The commenters also expressed concern that not addressing the appropriate treatment of synthetic securities would make it more difficult for market participants to develop such products without continued discussions with the staff, as they do today, for this developing submarket.

As we explained in the Proposing Release, for purposes of determining whether a security qualifies for the particularized regulation regime of Regulation AB, we believe the requirement that performance is primarily tied to a discrete pool of financial assets that by their terms convert into cash entails that the performance is primarily by reference to the assets in the pool. Synthetic securitizations do not meet the basic concepts embodied in our definition of asset-backed security for several reasons. Payments on the securities in a synthetic securitization can primarily or entirely comprise or include payments based on the value of a reference asset which is 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.

An 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 primarily on the performance of the external index and not by the performance of the actual securities in the pool. Because payments in synthetic securitizations are primarily based on the performance of assets or indices not included in the pool, we do not believe such a securitization should fall into the Regulation AB registration, disclosure and reporting regime. Payments on ABS must be based primarily on the performance of the financial assets in the pool.[67]

Synthetic securitization transactions also 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. 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 is still based primarily on the performance of the financial assets in the pool.[68] We believe there is a principles-based difference between structures that use an interest rate or currency swap but whose performance is still primarily based on the performance of the financial assets in the pool and structures that use a swap or other derivative such that the performance of the security is no longer primarily related to the performance of the pool. Because certain interest rate and currency swaps have been permitted consistent with this principle does not lead to the conclusion that there is no such principle or that the principle should be abandoned. Instead, the difference as to application in many instances necessarily depends on the particular nature and structure of the transaction in question.

As we explained in the Proposing Release, the basic definition of ''asset-backed security'' and its interpretations are intended to establish parameters for the types of securities that are appropriate for the alternate disclosure and regulatory regime we are adopting today. This approach is based on the history and development of the traditional ABS market such that a definable set of criteria and requirements can be established. The definition does not mean or imply in any way that public offerings of securities outside of these parameters, such as synthetic securitizations, may not be registered with the Commission, but only that the alternate regulatory regime we are adopting today is not designed for those securities. The definition does mean that such securities must rely on non-ABS form eligibility for registration, including shelf registration.[69]

Some commenters were concerned that if such structured securities were left outside the definition, issuers of those securities would be forced to provide potentially misleading disclosures under Regulation S–K if they were not included in Regulation AB. Structured securities outside of the definition have been registered before the adoption of Regulation AB, and the staff has worked with issuers to develop appropriate disclosures for such securities under our existing disclosure regime. As is the case today, we encourage issuers that are

[66] See, *e.g.*, ASF; BMA; and CGMI.

[67] Our view that securities resulting from synthetic securitizations are not within the definition of ''asset-backed security'' is not altered by the fact that payments on the swap or other derivative based on the value of assets or indices not related to the assets in the pool held by the issuer are conditioned on performance of the assets in the pool held by the issuer. In addition, the derivative does not 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.

[68] 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 those pool assets. 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 a 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.

[69] As is the case today, Form S–1 is the default form for registration for which no other form is authorized or prescribed. See General Instruction I. to Form S–1.

contemplating structured securities outside of the Regulation AB definition to have pre-filing conferences with the staff to discuss the proposed transaction and the appropriate approach.

At the same time, we recognize that while it is pragmatic and feasible to establish Regulation AB at this time for an appropriately definable group of asset-backed securities, we also want to foster a system that is most efficient and consistent with investor protection for other structured securities, particularly for those that may develop in the future but may not be contemplated in Regulation AB. We understand that a default application of the existing disclosure regime might not be most appropriate for these structured securities, but we also believe that neither would it be appropriate for such securities to be treated the same as ''asset-backed securities'' as we are defining that term under Regulation AB. Depending on the structure of the transaction and the terms of the securities, some disclosure aspects of Regulation AB may be applicable, but aspects from the traditional disclosure regime also may be applicable. In some instances, a third approach might be more appropriate.

We seek additional comment on whether we should consider an alternative scheme for these kinds of securities. We will evaluate comments received in determining whether it is appropriate to issue additional proposals or take other additional action, as appropriate. In providing comments, please be as specific as possible.

Request for Comment

- Apart from the traditional approach of addressing hybrid securities as they arise, are there definable categories of securities where neither the existing regime nor Regulation AB would be appropriate, but a specifiable alternative regime would be? What would be the advantages and disadvantages of such an approach? Is the existing approach of addressing these securities more practical if and until a market for that particular type of security matures such that establishing a separate regime is appropriate? Are there additional alternatives that should be considered? How are these securities offered and sold today? Who offers and purchases these securities?
- If an alternative regime should be established, how would these securities be defined? Why should they be treated differently?
- What would be appropriate for this alternative regime with respect to registration, disclosure and ongoing reporting? What flexibility should be permitted under the existing regime and what additional or alternate requirements should be imposed?
- While the Investment Company Act considerations are beyond the scope of this release for ABS, we also would seek comment as to the treatment of such securities, including synthetic securitizations, under Rule 3a–7 under that Act or other exemptive provisions of that Act or rules thereunder.
- Regarding synthetic securitizations where the return on the securities is not primarily dependent on the performance of the pool, what additional disclosures would be appropriate? For example, for other entities that offer securities and have derivatives or contingent obligations, there is required disclosure of financial intricacies, such as disclosures under FIN No. 45,[70] FIN No. 46,[71] SFAS No. 5 [72] and SFAS No. 133,[73] and off-balance sheet and MD&A disclosure.[74] Would some or all of these disclosures be appropriate in synthetic securitizations? If not, why not? Please note these are non-exclusive examples.
- Would financial statements be necessary to fully understand the risks and potential performance of these securities? Should some form of off-balance sheet disclosure be required when performance is tied to such instruments? Should market valuations of assets and liabilities be required?
- Where performance of the security is primarily tied to the performance of a derivative rather than the performance of the pool assets, what additional disclosure should be required regarding the derivative counterparty? Should financial statements for the derivative counterparty always be required?
- Where performance is by reference to an unrelated entity or assets, what information should be required about the referenced entity or assets?

b. Basic Definition

We are retaining the same basic definition of asset-backed security that has existed since 1992, with the addition of the one modification we proposed with respect to leases, discussed below. Under Regulation AB, the basic definition of ''asset-backed security'' is ''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.'' [75] We also are codifying, with modifications and expansions in response to specific comment, the several clarifying interpretations we proposed to the definition that recognize and build upon the operational and structural distinctions between ABS and non-ABS transactions. Each of these interpretations is discussed below in a separate subsection.

As we stated in the 1992 Release and the Proposing Release, the basic definition is sufficiently broad to encompass any self-liquidating asset which by its terms converts into 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. For example, so-called ''balloon'' loans that have large payments at maturity that differ from other payments during the term of the loan would be included.[76]

c. Nature of the Issuing Entity

The first set of interpretations we are codifying relates to the nature of the issuing entity in whose name the asset-backed securities are issued. As we explained in the Proposing Release, we believe that two interpretations always have been implied, and, as proposed, we are codifying both as additional

[70] See FASB Interpretation No. 45, Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others (Nov. 2002).

[71] See FASB Interpretation No. 46R, Consolidation of Variable Interest Entities (Dec. 2003).

[72] See FASB Statement of Financial Accounting Standards No. 5, Accounting for Contingencies (Mar. 1975).

[73] See FASB Statement of Financial Accounting Standards No. 133, Accounting for Derivative Instruments and Hedging Activities (Jun. 1998).

[74] See Item 303 of Regulation S–K.

[75] The reference to ''financial assets that are leases'' is meant to clarify the application of the definition with respect to leases and is not meant to affect the accounting treatment of the lease.

[76] We understand that in some jurisdictions, balloon loans for motor vehicles are structured to be similar to leases. At maturity of the loan, the obligor may return the vehicle to the lender to satisfy the balloon payment. In such instances, if the cash flows that are to back the asset-backed securities are to include the balloon payment, the limits on the portion of the securitized pool balance attributable to residual values of the pool assets, discussed in Section III.A.2.d., should apply to such securities the same as if they were backed by leases and disclosure similar to that described in Section III.B.5.b. should be provided. If the pool includes a mixture of leases and balloon loans, they should be treated together for purposes of those calculations.

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 continue to believe that the regime for asset-backed securities that we are adopting today would not be appropriate.

The second condition relates to the passive nature of the issuing entity in that its activities must be 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. 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.[77] 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.

Commenters generally agreed with this principle, although several expressed concern with the wording of the condition that the issuing entity's activities are limited to ''passively'' owning or holding the pool assets, issuing the ABS and other reasonably incidental activities.[78] This formulation already exists in Exchange Act Rule 10A–3 to exclude similar securities from the mandated requirements for national securities exchanges and national securities associations to impose audit committee listing requirements for such issuers.[79] We are retaining the term in the final condition for the definition of ''asset-backed security.'' We believe the use of this term neither imposes a new requirement, nor is inconsistent with existing practice, but instead is confirmatory of one of the fundamental premises of asset-backed securitization that the issuing entity is intended to be passive in nature and its activities limited to the asset-backed securities transaction.

In the Proposing Release, we also specified that in connection with this condition, securities issued out of so-called ''series trusts'' do not qualify as asset-backed securities under the definition. Under the concept of a series trust, the same trust will conduct wholly separate ABS transactions out of the same trust. The trust will hold separate pools of assets with separate classes of securities for each pool. Securities backed by one pool do not have rights to the other pools. As we described in the Proposing Release, the issuing entity in this instance is not limited to owning and holding one asset pool and issuing securities backed by that pool.

Several commenters representing issuers, underwriters and their representatives wished to relax this existing principle, arguing that series trusts may reduce the costs of creating multiple issuing entities by having multiple unrelated transactions under one entity.[80] However, the more fundamental issue with the use of multiple, separate and unrelated transactions under one issuing entity for asset-backed securities is that it raises concerns that deviate from the core principle that investors of a particular asset-backed security should look solely to the related pool of assets for primary repayment. With a series trust structure, instead of only analyzing the particular pool, an investor also may need to analyze any effect on its security, including bankruptcy remoteness issues, if problems were to arise in another wholly separate and unrelated transaction in the same issuing entity. These concerns are exacerbated if new unrelated transactions are created after the original transaction involving the investor. No commenter indicated that series trusts as described above have been commonly used for issuing asset-backed securities.

Other commenters requested clarification as to the scope of what is considered in the concept of a ''series trust.'' As we explained in the Proposing Release, the concept of a series trust, with multiple, separate and unrelated transactions in one issuing entity, is different from a master trust structure typical in credit card ABS and discussed later where all securities, although issued at different times, are backed by one pool. In addition, we explained that 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.''[81] This could include allocating cash flows from various defined subpools within the larger pool to support particular classes but not others, regardless of whether there is any cross-cashflow support or collateralization. In these instances, there is still only one ultimate pool held by the issuing entity with securities backed by that single pool.

We also explained in the Proposing Release that 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. 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. This structure would be consistent with the definition of ''asset-backed security.''[82]

Another structure we referenced in the Proposing Release relates to one used in some auto lease transactions where 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. For the next transaction, the origination trust will issue a separate SUBI representing a separate pool of leases and automobiles in the origination trust which is to constitute the asset pool for the next transaction. This SUBI will be transferred to a newly created issuing entity for the next transaction which will issue ABS backed by the second SUBI. In each instance, although the same origination trust will issue multiple SUBIs representing multiple pools in the trust, there is a separate

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

[78] See, *e.g.*, Letters of ABA; ASF; and MBA.

[79] See 17 CFR 240.10A–3(c)(7).

[80] See, *e.g.*, Letters of ABA; ASF; and BMA.

[81] Further, both the condition relating to the passive nature of the issuing entity and the concept of a series trust are unrelated to the tax treatment of the transaction, such as REMIC elections.

[82] However, using the issuance trust for subsequent unrelated transactions in the manner discussed in the text with respect to series trusts would not be consistent with the definition.

issuing entity for each ABS issuance whose ''pool'' consists of a separate SUBI, and hence indirectly a separate underlying group of assets. In our proposals and in our final rules we recognize this unique structure that developed under current practice before the codification of the new ABS regulatory regime, but, as proposed, we do not extend the origination trust structure to other asset classes that do not use it currently.

d. 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.'' [83] 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. We are codifying these interpretations, with modifications from our original proposal.

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. While as discussed above some commenters requested relaxing these clarifications, we believe the principle that the ABS should be primarily dependent on a pool of assets that self-liquidate instead of on the ability of the entity performing collection services is an important principle that should be retained. Further, we believe the conditions we are codifying regarding delinquent and non-performing assets, as revised in response to comment and discussed below, are appropriate in achieving this principle.

i. How To Calculate Delinquency and Non-Performing Levels

Several commenters requested clarification regarding when delinquency and non-performance levels should be measured.[84] In the Proposing Release, we reiterated the standard in the 1997 no-action letter that the cut-off date (*i.e.*, 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. The commenters requested further specificity regarding this standard, as well as clarity regarding application to master trusts. In response to commenters' suggestions, we are adding an instruction specifying that the measurement date for the delinquency and non-performing thresholds is to be the cut-off date for the transaction, if applicable, or, in the case of master trusts, the date as of which delinquency and loss information is presented in the prospectus for the securities.[85]

Additional commenters requested clarification regarding transactions that include non-performing or delinquent assets as part of a pool but not as part of the funded portion and not as part of cash flow calculations for the asset-backed securities.[86] In other words, some transactions permit non-performing or delinquent loans to be included, although the proceeds of the asset-backed securities are not used to fund or purchase those assets for the pool and those assets are not considered in cash flow calculations. As another example, a master trust may contemplate that a pool asset that becomes non-performing may remain designated to the pool after being charged-off, with the asset being assigned a zero balance and not considered in cash flow calculations. We are including an instruction clarifying that non-performing and delinquent assets that are not funded or purchased by proceeds from the asset-backed securities and that are not considered in cash flow calculations for the asset-backed securities need not be considered as part of the asset pool for purposes of determining non-performing and delinquency thresholds.[87]

Some commenters also requested clarification as to calculating the thresholds for master trusts given that the same asset pool supports different series of ABS over time.[88] We are adding an additional instruction clarifying that the thresholds are to be measured against the entire pool whose cash flows support the asset-backed securities and not just against any new assets that are added as a result of the new issuance. Otherwise, issuers could effectively avoid the requirements by conducting the transaction through a multi-step master trust transaction instead of through a single transaction.[89]

ii. Non-Performing Pool Assets

Regarding non-performing pool assets, we are codifying as proposed the longstanding requirement that no non-performing assets may be part of the asset pool, determined as of the measurement date discussed above. We are not persuaded by commenters' requests that the position should be relaxed.[90]

As we discussed in the Proposing Release, part of the difficulty for issuers in complying with the existing interpretive position is that there has been no uniform definition of what is a ''non-performing asset.'' As commenters confirmed to us, 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.[91] However, we continue to believe the point at which the financial asset should be charged-off is a consistent reference point, even if the point at which that event would occur may vary. Accordingly, we are defining ''non-performing'' to be a pool asset if any of the following is true:

- The pool asset would be treated as wholly or partially charged-off under the requirements in the transaction agreements for the asset-backed securities;
- The pool asset would be treated as wholly or partially charged-off under the charge-off policies of the sponsor, an affiliate of the sponsor that originates the pool asset or a servicer that services the pool asset; or
- The pool asset would be treated as wholly or partially charged-off under the charge-off policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed above or the program or regulatory entity that oversees the program under which the pool asset was originated.[92]

[83] See *Bond Market Ass'n* (Oct. 8, 1997).

[84] See, *e.g.*, Letters of ABA; ASF; and Kutak.

[85] Also in response to commenters' concerns, we have eliminated the word ''original'' from the proposed reference to the asset pool as unnecessary under the revised formulation.

[86] See, *e.g.*, Letters of ASF; Capital One; and MBNA.

[87] Of course, in such instances clear disclosure should be provided to investors of these features and the manner, composition, treatment and effect of those assets.

[88] See, *e.g.*, Letters of A&O; ASF; and MBNA.

[89] Some of these commenters expressed concern regarding master trusts with assets that were originally performing for a previous issuance but that subsequently become non-performing. This situation for subsequent ABS issuances can be addressed by the codification of existing practice that such assets be assigned a zero pool balance and no longer be considered in cash flow transactions as part of the securitized pool.

[90] See, *e.g.*, Letters of ABA and Jones Day.

[91] See, *e.g.*, Letters of ABA; Auto Group; MBA; and MBNA.

[92] As a result, the charge-off requirement that is most restrictive will govern. Of course, under the definition as proposed and as adopted, a pool asset that changes payment status in accordance with its

Continued

We believe this definition provides flexibility for different asset classes while still ensuring that no assets are included in the securitized pool balance that would otherwise be considered to be non-performing and thus charged-off under an objective standard. Commenters generally supported this approach.[93] This definition differs from our original proposal in two principal ways. First, the definition has been revised in response to a commenter's request to include references not only to the sponsor's charge-off policies, but also to the policies of any affiliated originator or the servicer of the pool asset.[94] Second, the definition also includes a reference to the charge-off policies applicable to such pool asset established by either the primary safety and soundness regulator of the sponsor, an originating affiliate or the servicer, or the program or regulatory entity that oversees the program under which the pool asset was originated, as applicable. Several commenters indicated that, depending on the loan type, these regulators also have requirements for recognizing delinquencies and losses.[95]

As we described in the Proposing Release, we also are adopting requirements for disclosure of the relevant charge-off policies in Regulation AB, discussed more fully in Section III.B. Commenters representing investors in particular strongly supported such disclosure.[96]

iii. Delinquent Pool Assets

In addition to the non-performing limitation, we also are codifying a delinquency concentration limit in a manner consistent with the 1997 staff no-action letter. As we stated in the Proposing Release, because we are creating a general definition of ''asset-backed security'' regardless of eligibility for shelf registration, we are adopting two separate delinquency concentration limits. We are adopting the percentage limits as proposed. For the general definition (*e.g.*, for offerings that could be registered on a non-shelf basis on Form S–1), delinquent assets may not constitute 50% or more, as measured by dollar volume, of the asset pool as of the measurement date described above. As we noted in the Proposing Release, 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 are retaining the existing 20% delinquency concentration level in the no-action letter, as proposed.

For purposes of determining whether a pool asset is delinquent under either threshold, we proposed 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. The proposed definition was based on the existing standard in the staff no-action letter.[97]

Several commenters requested more flexibility for the definition. In particular, several commenters noted that some sponsors do not consider an obligor delinquent when any portion of a contractually required payment is late, but instead only when less than some percentage (*e.g.*, 90%) or amount of a payment is received.[98] Changing their systems for purposes of the proposed requirement, these commenters argued, would be burdensome. Others argued that sponsors use different reporting methodologies in determining delinquency, such as the Office of Thrift Supervision method or the Mortgage Bankers Association of America method.[99]

We noted in the Proposing Release that, 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. We proposed clarifying 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. While not all agreed, commenters generally objected to this approach, arguing that servicers sometimes restructure obligations without contractually amending the pool asset documents.[100]

As an alternative to the proposed definition of ''delinquent,'' some of these commenters suggested an approach similar to the definition of ''non-performing'' that looks to the provisions specified in the relevant transaction agreements or the policies of the sponsor in determining delinquency, so long as these provisions and policies are disclosed. As commenters confirmed to us, policies relating to delinquency vary somewhat across asset types and sponsors, similar to charge-off policies. However, we continue to believe a standard linked to the longstanding 1997 no-action letter should be retained to clarify the degree of flexibility permitted.

Accordingly, we are defining a pool asset as ''delinquent'' if a pool asset is more than 30 or 31 days or a single payment cycle, as applicable, past due from the contractual due date, as determined in accordance with any of the following:

- The transaction agreements for the asset-backed securities;
- The delinquency recognition policies of the sponsor, any affiliate of the sponsor that originated the pool asset or the servicer of the pool asset; or
- The delinquency recognition policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed above or the program or regulatory entity that oversees the program under which the pool asset was originated.[101]

With an approach that relies more on a party's delinquency recognition policies, we believe appropriate disclosure of the policies and their application becomes even more important.[102] As a result and as referenced in the Proposing Release, in adopting delinquency limits, we also are adopting disclosure requirements, discussed more fully in Section III.B., of policies regarding grace periods, re-aging, restructures, partial payments considered current or other such practices on delinquencies. We also are adopting disclosure requirements for

terms (*e.g.*, a student loan that is in ''in-school,'' grace, deferment or forbearance status) does not make the asset ''non-performing,'' unless the asset also meets a charge-off policy identified in the definition of ''non-performing.''

[93] See, *e.g.*, Letters of ABA; Auto Group; and MBA.

[94] See Letter of ABA.

[95] See, *e.g.*, Letters of ASF and MBNA.

[96] See, *e.g.*, Letters of MetLife and State Street.

[97] See note 83 above.

[98] See, *e.g.*, Letters of ABA; ASFA; Auto Group; Citigroup; MBA; and TMCC.

[99] See, *e.g.*, Letters of ABA; MBA; and Metlife. See also Fitch, Inc., ''Residential Mortgage Delinquency Reporting Methods'' (Nov. 13, 2003).

[100] Compare, *e.g.*, Letters of ABA; ASFA; ASF; and TMCC; with Letter of State Street.

[101] Similar to the ''non-performing'' definition, the delinquency requirement that is most restrictive will govern. In addition and as similar to the ''non-performing'' definition, a pool asset that changes payment status in accordance with its terms (*e.g.*, a student loan that is in ''in-school,'' grace, deferment or forbearance status) does not make the asset ''delinquent,'' unless the asset also meets a delinquency policy identified in the definition of ''delinquent.''

[102] See, *e.g.*, Moody's Investors Service, Inc., ''Loan Modifications and Forbearance Plans Impact on Home Equity Securitizations'' (Sep. 24, 2004).

on-going reporting, discussed more fully in Section III.D., regarding material modifications, extensions or waivers to pool asset terms, fees, penalties or payments. We also are requiring disclosure of any material changes to delinquency recognition policies. Given this disclosure-based approach, we are not adopting the proposed requirement permitting only contractual-based re-agings.

e. Lease-Backed Securitizations and Residual Values

As discussed above, the one change we proposed making 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). 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.

As we explained in the Proposing Release, lease-backed ABS have grown into a common and recognized segment of the overall ABS market.[103] We received support from commenters for adding lease-backed ABS to the definition of ''asset-backed security,'' and therefore eligibility for shelf-registration if the requirements of Form S–3 are met.[104] However, as we explained in the Proposing Release, 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. Although some commenters did not believe we should have any limits on residual values,[105] we continue to believe, as discussed above, that the core principle that an asset-backed security should be primarily serviced by financial assets that by their terms convert into cash should be retained. At the same time, we believe a defined limited exception to this general principle is appropriate and consistent for access to the alternate regulatory regime for certain lease-backed ABS.

As we explained in the Proposing Release, we are addressing concerns with the deviation from the core principle in two principal ways. First, we are adopting disclosures, discussed more fully in Section III.B., on how residual values are 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, we are establishing limits on the percentage of the securitized pool balance attributable to residual values in order to be considered an ''asset-backed security.'' We believe these changes will expand eligibility of lease-backed transactions for shelf registration and appropriately permit lease-backed transactions under our new rules while continuing to apply the core principles underlying the definition of ''asset-backed security.''

As we noted in the Proposing Release, market practice regarding lease-backed securitizations varies on the typical percentage of the securitized pool balance attributable to residual values. For example, motor vehicle lease securitizations often have higher residual value percentages than equipment lease securitizations due to the higher resale values that often exist between motor vehicles and other equipment. Accordingly, after reviewing residual value percentages for typical lease-backed securitizations, we proposed that the portion of the cash flow to repay the securities anticipated to come from the residual value of the physical property underlying the leases could 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; 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 proposed a more stringent limitation for cash flow from residual values for offerings of securities backed by leases other than motor vehicle leases that may be registered on Form S–3 and thus eligible for shelf registration. For Form S–3 eligibility of ABS backed by such leases, we proposed that the portion of the cash flow anticipated to come from residual values could 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.

Commenters raised several concerns with our proposal if percentage limitations were to be maintained. First, commenters believed the proposal did not provide enough clarity on how to make the necessary calculations.[106] In particular, commenters were concerned with the proposed choice of language for the calculation, which was phrased in reference to ''the portion of the cash flow anticipated to come from residual values.'' We note that filings for lease-backed ABS today typically disclose the portion of the securitized pool balance attributable to residual values and the method of determining such figures. Our intention had been and is to codify that practice in connection with complying with the residual value percentages. To clarify this intention, we are revising the language in the requirement to more closely track language used in lease-backed ABS filings to refer to the portion of the securitized pool balance attributable to residual values, as determined as of the measurement date in accordance with the transaction agreements for the asset-backed securities. We note that the residual value itself is often calculated at the inception of the lease, but the portion of the securitized pool balance attributable to it (*e.g., vis a vis* lease payments) is a percentage determined at the time of the transaction. Similar to our final rules with respect to determining delinquency and non-performance thresholds, we are

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

[104] See, *e.g.*, Letter of Auto Group.

[105] See, *e.g.*, Letters of ABA; American Honda Finance Corporation (''AHFC''); ASF; Auto Group; and TMCC.

[106] See, *e.g.*, Letters of ABA; ASF; Auto Group; and TMCC.

clarifying in an instruction that the ''measurement date'' is the cut-off date for the transaction, if applicable, or, in the case of master trusts, the date as of which securitized pool balance information is presented in the prospectus for the securities.

Second, commenters believed the proposed percentages were too stringent to permit all motor vehicle lease-backed ABS transactions that have been conducted.[107] A threshold set against market practice may not encompass every transaction conducted before the threshold was set. However, we do seek to codify percentages that are based upon current market practice. Based on further review of lease-backed ABS transactions during the past five years, including the examples provided by commenters, we are raising the percentage for motor vehicle lease-backed ABS from 60% to 65%.

Finally, commenters believed that if residual value limitations are retained, an exception should be made to the extent there is a residual value guarantee, residual value insurance or where the lessee is obligated to cover any residual losses.[108] In each instance, these commenters argued, the credit risk for the residual loss is with a separate obligated party. We are providing an instruction that residual values need not be included in measuring against the limitation to the extent a separate party is obligated for such amount. However, we note that, depending on the extent of the separate party's obligation for such amounts, such obligation may result in that party constituting a significant provider of credit enhancement or other support or, when the lessee is obligated to cover any residual losses, a significant obligor. In that instance, as described in Sections III.B.7 and 8, additional disclosures, including financial disclosures, may be required.

In addition to other technical changes,[109] we are adopting as proposed the limits for non-motor vehicle leases. For the basic definition, the portion of the securitized pool balance attributable to residual values for such leases may not constitute 50% or more, as measured by dollar volume. For Form S–3 eligibility, the portion of the securitized pool balance attributable to residual values for such leases may not constitute 20% or more, as measured by dollar volume.[110]

f. Exceptions to the ''Discrete'' Requirement

The last set of interpretations we are codifying relates to exceptions to the requirement in the definition of ''asset-backed security'' that the asset pool be ''discrete.'' As discussed above, 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, as we explained in the Proposing Release, 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.''[111] Thus, the basic principle was that the balance of a pool asset may revolve, but not the asset pool itself.[112]

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 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, 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.[113]

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.''[114] As discussed above, we are codifying these three exceptions and also expanding them so that they are applicable to all asset types.[115] As we noted in the Proposing Release, a transaction can employ one or more of these features and still qualify as an ''asset-backed security.''[116] We believe these expansions will result in increased flexibility in structuring transactions to meet market demands.

As in the case of our treatment of lease-backed ABS that involve residual values, we believe a large part of the concern relating to these structures can be appropriately addressed through disclosure, both at the time of issuance

[107] See, *e.g.*, Letters of ABA; AHFC; ASF; Auto Group; and TMCC.

[108] See, *e.g.*, Letters of ABA; ASF; and Auto Group.

[109] For example, in response to comment we are clarifying the reference from ''automobile'' lease to ''motor vehicle'' lease. Motor vehicle leases for this purpose includes leases for automobiles (which includes light duty trucks, sport utility vehicles and vans), motorcycles, trucks and buses. As proposed, motor vehicle lease would not include leases for leisure craft such as watercraft or snowmobiles.

[110] 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 thresholds.

[111] See note 32 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.''

[112] As we indicated in the Proposing Release, 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 definition 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.

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

[114] For example, nearly all asset classes might employ a limited prefunding period. However, only a limited subset of asset classes were permitted to have revolving periods. Not all of these interpretations have been transparent.

[115] But see note 179 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.

[116] For example, an offering may be set up as a master trust with a prefunding period for a portion of the proceeds of the issuance and a revolving period.

of the asset-backed securities as well as on an ongoing basis through disclosure of how the asset pool is materially changing. As such, we are adopting, with certain modifications, our proposed requirements for more detailed disclosures in Regulation AB, discussed more fully in Sections III.B. and III.D., regarding the operation of such structures and changes to the asset pool over time.

We also are adopting limits, as discussed below, 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. As noted in the Proposing Release, 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 core principles underlying the definition of ''asset-backed security.''

i. Master Trusts

As proposed, master trust structures will be allowed to meet the definition of ''asset-backed security'' without any pre-determined limits.[117] Commenters supported expanding access to master trusts.[118] However, several commenters noted that most master trusts permit, and in some cases require, the depositor to make additional asset additions to the asset pool from time to time, regardless of when ABS are issued.[119] In particular, commenters expressed concern that the proposed wording of the exception for master trusts, which was limited to asset additions in connection with future issuances of asset-backed securities, would not allow for additions of pool assets in current master trust structures that are necessary to maintain minimum pool balances, such as the depositor's interest in the trust. As the commenters explained, permitting such additions is an essential means for these current structures of assuring an adequate pool balance for master trusts with revolving assets. To maintain existing practice, we are modifying the exception for master trusts to clarify that the offering related to the securities may contemplate both adding additional assets to the pool in contemplation of future issuances of asset-backed securities backed by such pool as well as, for master trusts with revolving periods or receivables or other financial assets that arise under revolving accounts, additions to the asset pool in connection with maintaining minimum pool balances in accordance with the transaction agreements.[120]

ii. Prefunding Periods

For prefunding periods, we proposed separate limits for shelf and non-shelf offerings similar to our proposals for lease-backed ABS. For the general definition of ''asset-backed security,'' we proposed that the amount of proceeds that may be used for a prefunding period could be up to 50% of offering proceeds and the length of the prefunding account could last up to one year from the date of issuance of the asset-backed securities. As we stated in the Proposing Release, 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 proposed that the amount of proceeds that may be used for a prefunding period could be up to 25% of offering proceeds over a similar one-year period.

Commenters were mixed on our proposals. One commenter representing an ABS investor supported the proposed limits.[121] Several other commenters representing primarily issuers and their representatives noted that although the proposed Form S–3 level was consistent with the requirements in the staff's no-action letter regarding relief from Rule 15c2–8(b), they believed the staff has permitted higher limits and requested eliminating or expanding the tests to provide increased flexibility.[122]

As discussed above, we continue to believe a limit on prefunding is appropriate. However, after evaluating the comment received, we no longer believe it is necessary to have separate limits for Form S–3 shelf registration. Therefore, we are only codifying the proposal with respect to the basic definition. In addition and in response to comment, we are clarifying application of the prefunding limitation with respect to master trusts.[123] Under the final rule, regardless of the form on which the offering was registered, a prefunding period is permitted for up to one year from the date of issuance of the asset-backed securities and the prefunded amount may consist of up to 50% of offering proceeds or, in the case of master trusts, up to 50% of the aggregate principal balance of the total asset pool whose cash flows support the asset-backed securities.

iii. Revolving Periods

Our proposals for revolving periods recognized the nature of the asset being securitized (*i.e.*, whether it itself is fixed or revolving). We proposed that 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 proposed limits similar to prefunding periods; that is, the basic 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.

Several commenters urged eliminating any restrictions on revolving periods, regardless of the type of asset or the form of registration.[124] Revolving periods, these commenters argued, allow issuers flexibility to create ABS with longer or different maturities and weighted average lives than the underlying pool assets. Revolving periods were argued to be particularly necessary in the case of shorter-term assets to create ABS with meaningful maturities. As with the other proposed exceptions to the definition of asset-backed security, these commenters believed concerns about increased revolving periods were mitigated by the proposed increased disclosure regarding

[117] 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.''

[118] See, *e.g.*, Letters of ABA; AFSA; AIG; Capital One; MBNA; and State Street.

[119] See, *e.g.*, Letters of AFSA, Capital One; and MBNA.

[120] Note that the limit on revolving periods for securities backed by receivables or other financial assets that do not arise under revolving accounts is co-extensive with this provision for master trusts. Hence, if a master trust for such pool assets uses a revolving period, including to maintain minimum pool balances, the revolving period for each series would be limited to a three-year period. We have included clarifying language regarding this point in the ''discrete'' pool exception for master trusts.

[121] See Letter of State Street. In addition, the commenter suggested further limiting prefunding such that it is applicable only to financially secure sponsors with a track record of securitizations with the same asset type.

[122] See, *e.g.*, Letters of ASFA; ASF; Auto Group; BMA; Capital One; FSR; and TMCC.

[123] See, *e.g.*, Letter of ASF.

[124] See, *e.g.*, Letters of ABA; AIG; ASF; Auto Group; ESF; and TMCC.

such periods and changes to the asset pool over time.

Revolving periods have long been permitted under staff practice for assets that by their nature revolve, as discussed above. There is thus an established record of experience with revolving periods for such asset classes. For other assets, while we recognize the commenters' arguments regarding the benefit of revolving periods in structuring asset-backed securities, we also recognize the management aspects that arise and are thus not prepared at this point to eliminate all restrictions on revolving periods for purposes of which securities should qualify as an ''asset-backed security'' subject to Regulation AB. However, after evaluating the comments and their arguments regarding the market reality of the use of revolving periods, we are expanding the exception from that proposed for those asset classes. We also are making technical changes to the proposal in response to comment to clarify the types of assets subject to the requirement.

Accordingly, under the final rules there will remain no restrictions on revolving periods for securities backed by receivables or other financial assets that arise under revolving accounts. For securities backed by receivables or other financial assets that do not arise under revolving accounts, an unlimited revolving period will be permitted for up to three years, so long as the new pool assets that are added are of the same general character as the original pool assets. One group of commenters who suggested such an alternative believed a three year revolving period would improve efficiency in structuring transactions.[125] As with prefunding accounts, we are not establishing a more stringent revolving limitation for Form S–3 eligibility. These expansions from the proposal allow issuers substantially increased flexibility over current staff practice to structure asset-backed securities.

3. Securities Act Registration Statements

a. Form Types

As we noted in the Proposing Release, we are not creating a new registration statement form for ABS offerings. We believe the existing form structure is sufficient, provided there are appropriate instructions in the applicable forms as to their use for ABS offerings. As proposed, we are limiting registration of asset-backed securities offerings to two forms: Form S–1 or Form S–3.[126] As is currently the case, Form S–3 will retain the requirements that will qualify an offering for delayed shelf registration on that form pursuant to Rule 415(a)(1)(x).[127] Form S–1 will be the form for all other offerings that meet the definition of an ''asset-backed security'' but do not meet the additional eligibility requirements for Form S–3 (*e.g.*, investment grade and additional limits on lease-backed ABS and delinquent pool assets). We received support from commenters for this approach.[128] As proposed, we are amending our other Securities Act registration statement forms for primary offerings to exclude explicitly their use for ABS offerings.[129] Since as discussed below we are not establishing a separate disclosure regime or requirements for foreign ABS, we continue to believe it is unnecessary to provide separate form types for foreign ABS offerings. These offerings also will be registered on Forms S–1 or S–3, as applicable.

As we noted in the Proposing Release, 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 are adopting our proposal for separate general instructions for both Form S–1 and Form S–3 to specify use for ABS offerings.

New General Instruction VI. to Form S–1 clarifies how that form is to be prepared for an ABS offering. In particular, the instruction clarifies 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 instruction identifies the existing items in the form that may be omitted as well as substitute core disclosure items from Regulation AB that will be required. As discussed in Section III.B., Items 1102–1120 of Regulation AB 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, will continue to be required.[130] Under the final rules, the application of the disclosure items for Form S–1 will be as follows:

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	•	
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	•	

[125] See Letter of Auto Group.

[126] As is the case today, Form S–4 also will remain available with respect to transactions, such as exchange offers, authorized by that Form. The disclosure required will remain consistent with that for a primary offering on Form S–1 or S–3, as applicable.

[127] 17 CFR 230.415(a)(1)(x). In the Offering Process Release, we proposed several changes to the operation of the shelf registration system under the Securities Act. We encourage ABS market participants to comment specifically on those proposals.

[128] See, *e.g.*, Letter of ABA.

[129] See 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 must henceforth be registered on Form S–1 instead. As discussed in Section III.E., we also are clarifying that ABS issuers do not qualify as a ''small business issuer.'' Therefore, ABS offerings are ineligible for Forms SB–1 and SB–2 (referenced in 17 CFR 239.9 and 17 CFR 239.10). For mortgage related securities that are relying on Rule 415(a)(1)(vii), see note 61 above.

[130] As is the case today, unless otherwise specified, no reference need be made in the prospectus to inapplicable items. See Securities Act Rule 404(c) (17 CFR 230.404(c)).

DISCLOSURE FOR FORM S–1 FOR REGISTERED ABS OFFERINGS—Continued

Existing form items	Required if applicable	May be omitted
Item 15. Recent Sales of Unregistered Securities	•	
Item 16. Exhibits and Financial Statement Schedules	•	
Item 17. Undertakings	•	
Additional Disclosure Items from Regulation AB:		
Items 1102–1120 of Regulation AB	•	

New General Instruction V. to Form S–3 performs a similar function for that form. As we explained in the Proposing Release, 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 most of their disclosure in the base prospectus and prospectus supplement in lieu of incorporating information by reference. Accordingly, the new Form S–3 instruction for ABS, as proposed, does not specify any existing items that may be omitted, but rather 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, will continue to be required as applicable. Therefore, as shown in the following table, the effect of the new instruction is to add the basic disclosure package of Items 1102–1120 of Regulation AB:

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	•	
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—1120 of Regulation AB	•	

b. Presentation of Disclosure in Base Prospectuses and Prospectus Supplements

As we noted in the Proposing Release, by specifying 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.[131] 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 can still be provided in the prospectus supplement.[132] If this approach is followed, a form of prospectus supplement is 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.[133]

[131] However, as stated in the 1992 Release and as currently 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 currently 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. The Commission has proposed to eliminate this restriction on the use of so called ''convenience shelf.'' See the Offering Process Release. This proposed general change, if adopted, would also apply to ABS.

[132] 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.

[133] In addition, consistent with the longstanding requirements for all registered offerings, required opinions of counsel regarding tax consequences and

Continued

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, 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 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.

In the Proposing Release, we explained the longstanding position that when presenting disclosure in base prospectuses and prospectus supplements, the base prospectus must 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. Registrants should exercise discretion, however, in describing only the material asset types or features reasonably contemplated to be included in an actual takedown.

As proposed, we are specifying in the 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 in discrete pools in takedowns under that registration statement. 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. We also are adopting as proposed a similar requirement for takedowns involving pools of foreign assets where the assets originate in separate countries or the property securing the pool assets is located in separate countries.

Commenters raised several questions about the proposed instruction, particularly regarding the proposed requirement for a separate base and form of supplement for takedowns involving separate jurisdictions.[134] We wish to clarify a potential misconception regarding these requirements. A separate base and form of supplement only is required for asset types or jurisdictions that may be securitized in a discrete pool in separate takedowns under the registration statement. If pool assets of different asset types or different jurisdictions are to be pooled together in a single transaction (*e.g.,* an offering with a multi-jurisdictional pool or an offering with a pool of 45% residential mortgages and 55% commercial mortgages), a single base and form of prospectus supplement would be permitted, so long as the appropriate disclosures for each asset type or jurisdiction were included.

Similarly, several commenters pointed out that the staff has permitted the use of a single base and form of supplement for transactions that principally consist of a particular asset class, but which also describes one or more potential additional asset classes, so long as the pool assets for the additional classes in the aggregate are limited to 10% of the pool for any particular takedown. We also are clarifying this position in the instruction and applying it to both separate asset classes and separate jurisdictions.

We noted in the Proposing Release that 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. As is currently the case today, 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.

c. Form S–3 Eligibility Requirements for ABS

As proposed, we are maintaining 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.[135] The definition of ''investment grade'' will remain the same as for other investment grade securities that may be registered on Form S–3.[136] As we explained in the Proposing Release, 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 broad 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.[137] We received comment in response to the Proposing

the legality of the securities being registered must 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.

We also are adding a clarifying instruction to General Instruction V.A.2. of Form S–3 that when a preliminary prospectus is required under Form S–3 pursuant to new Securities Act Rule 190(b)(7), the information to be included in the base prospectus and prospectus supplement is to be substantially similar to that which would be included if the preliminary prospectus was required under Form S–1 pursuant to such rules.

[134] See, *e.g.,* Letters of A&O; ABA; ASF; Association of the Bar of the City of New York (''NYCBA''); Aus. SF; CMSA; and ESF.

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

[136] See General Instruction I.B.2 of Form S–3 and note 60 above.

[137] 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 Web site.

Release on possible alternatives to using an investment-grade requirement for ABS Form S–3 eligibility purposes.[138] However, pending the outcome of our review of credit rating agencies, we are maintaining the same rules and standards currently used for purposes of Form S–3 eligibility.

As discussed more fully in Section III.A.2. above, we are adding two additional conditions regarding the types of asset-backed securities that would qualify for Form S–3 eligibility. First, we are codifying the current position that delinquent assets may not constitute 20% or more, as measured by dollar volume, of the asset pool. Second, for securities backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to residual values may not constitute 20% or more, as measured by dollar volume. As referenced in Section III.A.2.f., we are not adopting the proposed additional restrictions for prefunding accounts and revolving periods for Form S–3 eligibility.

Consistent with existing requirements, we did not propose to add an issuer Exchange Act reporting history requirement for ABS Form S–3 eligibility. However, we did propose codifying that Exchange Act reporting obligations regarding other asset-backed securities transactions established by the sponsor and the depositor must have been complied with for the prior 12 months for continued Form S–3 eligibility for new registration statements.[139] This proposal would not have required that there be a reporting history with respect to any prior transactions, only that any existing or prior requirements during the past year had been met. As explained in the Proposing Release, we did not believe it would be appropriate to continue to allow the benefits of shelf registration to new registration statements established by sponsors or depositors that have not complied with ongoing reporting obligations involving previous asset-backed securities transactions.

Comments from issuers and their representatives objected to the proposals as generally being more restrictive than necessary to encourage better Exchange Act reporting compliance.[140] Commenters also thought the proposed formulation linked to the sponsor was potentially ambiguous as to which depositors were affected. While some suggested alternatives, some commenters objected to conditioning form eligibility on any reporting history. Commenters also thought any disqualification should be limited to depositors of the same asset class, arguing that securitizations of separate asset classes are often separately managed business units within a sponsor and to penalize all of the sponsor's programs for the reporting noncompliance of one would be too burdensome. Several commenters also believed that Form S–3 eligibility for asset-backed securities should be treated differently from the requirements for non-ABS securities in that eligibility should not be impaired by good faith, immaterial, inadvertent or involuntary failures in Exchange Act reporting, particularly if the untimely reporting was the result of the inability to obtain information from an unaffiliated third party.

Compliance with Exchange Act reporting by ABS issuers under the existing modified reporting no-action letters has been unacceptable. While this may be partially attributable to a lack of widely understood requirements due to reduced transparency in the current process, which these final rules are intended to help remedy, the concerns in this area are more broad-based than minor inadvertent or unintentional failures to file. Instead, reporting issues in the ABS market include widespread instances of untimely, deficient and sometimes even complete lapses in reporting.

As a resultant responsibility from registering a public offering of securities under the Securities Act, the Exchange Act specifically requires that the obligation to provide information does not stop with the final prospectus, but continues afterwards, at least for a period of time.[141] For asset-backed securities in particular, commenters representing investors have expressed a clear preference for required Exchange Act reporting, regardless of whether the issuer also elects to provide the information voluntarily.[142] Given past deficiencies in Exchange Act reporting compliance in the ABS sector, we continue to believe that issuers that fail to comply with their responsibilities under the Exchange Act for prior transactions should not continue to receive the benefits of shelf registration for new registration statements. Nor do we believe that the current practice of being able to form a new special purpose depositor to avoid the consequences of reporting noncompliance creates appropriate incentives for reporting compliance. Several commenters also recognized the need to fix this current problem.[143] Further, the ability for investment grade ABS offerings to have immediate access to Form S–3 without a reporting history requirement for the newly created issuing entity separates ABS from most non-ABS issuers such that a linkage to affiliated entities is appropriate.

Accordingly, we believe it is appropriate to continue to link Form S–3 eligibility requirements to Exchange Act reporting compliance for prior transactions. In response to several commenter suggestions,[144] we are revising the proposal to focus not on any transactions established directly or indirectly by a sponsor, but instead on transactions established by affiliated depositors involving the same asset class. We think this approach addresses many commenter concerns about the potential breadth of the proposed application across asset classes and tying the requirements to the sponsor definition.[145]

Under the final rules, to the extent the depositor for an ABS offering or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor are or were during the previous twelve calendar months and any portion of a month immediately preceding the filing of the Form S–3 registration statement subject to Exchange Act reporting requirements with respect to asset-backed securities involving the same asset class, such depositor and each such issuing entity must have timely complied with its Exchange Act reporting requirements.[146] This would include all prior Exchange Act reporting obligations for such asset-backed securities 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.''[147]

[138] See, *e.g.,* Letters of ABA; Kutak; Moody's; and State Street.

[139] The proposal with regard to the depositor was consistent with existing staff policy.

[140] See, *e.g.,* Letters of ABA; ASF; BMA; BOA; CGMI; Citigroup; CMSA; FSR; MBA; NYSBA; and UBS.

[141] See, *e.g.,* Section 15(d) of the Exchange Act.

[142] See, *e.g.,* Letters of FMR and ICI.

[143] See, *e.g.,* Letters of ASF and BMA.

[144] See, *e.g.,* Letters of ASF; BMA; CMSA; FSR; NYCBA; and UBS.

[145] Commenters were particularly concerned that tying to common sponsors could inadvertently link a person's Form S–3 eligibility to an unrelated entity's reporting history in the ''rent-a-shelf'' context. We are persuaded that tying the requirements to a common depositor avoids this problem while still ensuring related sponsors are covered because all depositors of a given sponsor would be considered affiliates.

[146] As discussed subsequently, compliance with Form 8–K requirements for certain Items of that Form is limited to whether such filings are current, instead of timely and current, as of the filing of the registration statement.

[147] An ''affiliate'' of, or a person ''affiliated'' with, a specified person, is defined in Commission rules

Continued

In response to comment, we are adopting one exception to the requirement. Some comments requested an exception for depositors of other parties that are acquired in a good faith business combination transaction, arguing that prior noncompliance by the acquired depositors should not affect pare-existing depositors of the acquirer, so long as the acquisition is not part of a plan or scheme to evade the reporting requirements.[148] We are providing an exception that, regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during the twelve month period before the filing of the registration statement, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act.

With respect to imposing a reporting compliance requirement, some commenters expressed concern that an untimely Exchange Act filing would have an immediate effect on the ability to conduct offers and sales under previously filed registration statements.[149] We wish to clarify that Securities Act Form eligibility requirements for ABS issuers are determined at the time of filing of the registration statement.[150]

In the Proposing Release, we proposed to add one of our proposed new Form 8–K items for ABS—Item 6.03, Change in Credit Enhancement or Other External Support—to the list of Form 8–K Items where failure to file such Items timely would not result in Form S–3 ineligibility.[151] One commenter believed two other ABS Form 8–K Items—Item 6.01, ABS Informational and Computational Material, and Item 6.05, Securities Act Updating Disclosure—should be added to the list because they relate to offerings for specific transactions and not to ongoing reporting.[152] We are adding Items 6.01 and 6.05 along with Item 6.03 to the Form 8–K Item list for Form S–3 eligibility purposes. However, we do not believe it is appropriate to include Items 6.01 and 6.05 in the list of Form 8–K items for the Rule 10b–5 safe harbor for failure to file such items. As discussed in Section III.D.8.d., we are only adding Item 6.03 to that safe harbor, as proposed.

We do not underestimate the effects of linking reporting compliance with continued Form S–3 eligibility. Non-ABS issuers have long dealt with the consequences of reporting compliance for Form S–3 eligibility, and we appreciate the consequences of losing access to shelf registration. There are several accommodations, both in the amendments we are adopting today and under existing Commission rules, which should assist ABS issuers. Most notably, we are providing an extensive transition period to allow issuers to improve their reporting processes from the present state. As noted above, we also are expanding the number of Form 8–K Items that need only be current and not timely for ABS Form S–3 eligibility purposes. As discussed in Section III.D.4.a., we are extending Rule 12b–25 to provide filing extensions for Form 10–D reports. We also are modifying several of the proposed Regulation AB disclosure requirements, discussed more fully in Section III.D., that could potentially require third party information, such as information about unaffiliated servicers.[153]

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

We are clarifying as proposed 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.[154] Under current staff positions, the depositor must sign the Securities Act registration statement for an ABS offering.

We are clarifying 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.[155] Further, our new rule specifies 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 definition of asset-backed security requires the issuing entity to be a restricted special purpose investment vehicle, the new rule will 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, we are making clear our longstanding position that any applicable exemptions from registration that person may have with respect to its own securities are not applicable to the asset-backed securities.[156] Similarly, the reporting history with respect to a particular class of asset-backed securities does not affect Form S–3 eligibility with respect to the depositor's

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.'' 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.''

[148] See, *e.g.,* Letters of ABA; ASF; and Citigroup.

[149] See, *e.g.,* Letters of ABA; ASF; BMA; BOA; CMSA; FSR; Sallie Mae; and TMCC.

[150] In the Offering Process Release, the Commission has proposed that a new Form S–3 shelf registration statement would be required after three years, at which time form eligibility requirements would be reassessed.

[151] All required Form 8–K filings, however, must be current as of the date of filing.

[152] See Letter of ASF.

[153] Finally, we note that the need to rely on third party information certainly is not unique to ABS reporting, although we realize the extent of third party information that may be material for an ABS offering may be different from a non-ABS issuer. We also understand that informational and other aspects of ABS transactions are uniquely contractually based and that the long transition period should allow for contractual arrangements consistent with our adopted requirements.

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

[155] See Securities Act Rule 191 (17 CFR 230.191). We are adopting an identical rule for purposes of the Exchange Act. See Exchange Act Rule 3b–19 (17 CFR 240.3b–19) and Section III.D.2. As noted in Section III.B.3.b., we are defining ''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'' refers to the sponsor. See 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 final rules do not affect that definition.

[156] 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 rule does not mean that because the bank is acting as depositor, the asset-backed security is then 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).

or sponsor's own securities, although as discussed above we are requiring that the reporting history with respect to certain prior ABS transactions can affect continued Form S–3 eligibility for future ABS registration statements.

Consistent with our proposal, we also are codifying in the general instructions for Forms S–1 and S–3 that the registration statement must 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. As proposed, we are not requiring the issuing entity to sign if formed prior to effectiveness as such a requirement would be superfluous.

4. Foreign ABS

As we described in the Proposing Release, while not as prevalent as in the U.S., securitization by foreign issuers has been developing rapidly.[157] However, asset-backed securities issued by a foreign issuer[158] or that are backed by foreign assets raise special issues due to potential differences in the legal and regulatory regime of the relevant home jurisdiction. 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.[159]

As a result of these concerns, the staff historically has required additional conditions for the processing of Form S–3 registration statements involving foreign ABS offerings. These conditions have included 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 jurisdiction 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.

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

As discussed in the Proposing Release, we believe that many of the concerns relating to foreign ABS can be appropriately addressed through adequate disclosure. Commenters supported this approach.[160] As such, we are adopting as proposed an additional general instruction in Regulation AB focused on foreign ABS. This instruction provides 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 in the applicable home jurisdiction 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.[161] This disclosure should particularly address the material items and legal and regulatory or administrative factors discussed above.

We expect that at the time of filing, the registration statement will include fully developed disclosure clearly articulating the material aspects and effects of the applicable home jurisdiction legal and regulatory regime. In this regard, we also encourage pre-filing conferences with the staff where appropriate to discuss the applicable home jurisdiction legal and regulatory environment, the proposed transaction and the relevant disclosures that will be required.[162]

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

5. Exclusion From Exchange Act Rule 15c2–8(b) for Form S–3 ABS

Through a series of staff no-action letters dating back to 1995, broker-dealers, in connection with offerings of asset-backed securities eligible for registration on Form S–3, 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.[163] Without these no-

[157] 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).

[158] 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.''

[159] See, *e.g.*, Brian Bremner *et al.*, ''An Exit Plan for Japan?'' Business Week, Oct. 26, 1998. Our separate limits on delinquency concentrations and non-performing assets act somewhat as a limiter on such transactions qualifying as an ''asset-backed security.'' For example, the standard for non-performing assets includes linkage to the charge-off policies of the sponsor and the safety and soundness regulator, regardless of whether those policies are enforced by the sponsor or any relevant regulatory authority.

[160] See, *e.g.*, Letters of A&O; ABA; ASF; Aus. SF; ESF; Jones Day; and MBA.

[161] See 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 are required by Item 1100(e).

[162] 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, statistical disclosure regarding a hypothetical portfolio of financial assets that would be securitized in a takedown under the registration statement.

[163] 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.

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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)[164] or 15(d) of the Exchange Act. Most ABS issuers at the time of the ABS offering are not so required to report.

Given the more than eight years of experience with the staff no-action letters, we proposed codifying the basic concept in those letters as a formal exclusion from Exchange Act Rule 15c2–8(b).[165] However, we expressed concern in the Proposing Release 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.[166] We requested comment on these concerns.

Commenters were split on our proposal to codify the exclusion from Rule 15c2–8(b). Commenters representing primarily issuers and their representatives supported the codification of the existing staff positions and requested it be expanded to all ABS offerings, not just those eligible to use Form S–3.[167] One commenter noted that Rule 15c2–8(b) was originally designed to take into account new and speculative offerings.[168] Some of the commenters discounted concerns that investors do not have adequate information to make informed investment decisions. Also, one commenter believed most ABS investors are institutional investors and can refrain from purchasing if they believe they do not have sufficient information.[169] In light of the fact that most investors continue to purchase ABS under the current no-action letter relief, the commenter argued, it would appear most investors believe they have sufficient information.

Commenters representing investors disagreed.[170] These commenters believed there are problems and inconsistencies with the absence of material information at the time investment decisions are made, especially given the complexity of ABS and the need to properly assess risk. In addition, in order for investors to receive the full benefits of the proposed new disclosure requirements, the commenters argued it is critical that investors receive the information for investment decisions. These commenters generally did not support excluding any ABS from Rule 15c2–8(b). The commenters also recommended requiring, such as a condition to shelf registration, ABS informational and computational material in a reasonable time frame prior to effecting sales, either as an addition to or as an alternative to delivery of a preliminary prospectus under Rule 15c2–8(b).

On November 3, 2004, we issued proposals to revise the Securities Act regulatory process for securities offerings in the Offering Process Release. As noted in that release, we agree with investors that materially accurate and complete information regarding an offering should be available to investors at the time they make an investment decision, and we issued an interpretation and proposed an interpretive rule to support that unassailable proposition. Under that interpretation and proposed rule, in determining whether there is a material misstatement or material omission necessary to make the statements made at the time of contract of sale not misleading under Securities Act Sections 12(a)(2) and 17(a)(2), information conveyed only after that time would not be taken into account. We believe concerns about the availability of adequate information for ABS offerings raise the same issues as those discussed in the Offering Process Release for all offerings and are best addressed through those proposals.

We also agree with issuers that Form S–3 ABS offerings differ from the offerings that were the focus of Rule 15c2–8(b) when it was originally adopted. In light of our proposals to address the information disparity issue for all offerings in the Offering Process Release, we have determined to continue our proposed approach here with respect to the existing staff no-action position regarding Rule 15c2–8(b). Accordingly, we are codifying, as proposed, an exclusion from Rule 15c2–8(b) for Form S–3 ABS.[171]

We will evaluate the comments we received regarding the availability of information in ABS offerings in connection with the Offering Process Release. We also encourage ABS market participants to comment specifically on the proposals in that release to address information availability issues. We will consider whether additional action is necessary or appropriate with respect to ABS offerings in connection with those proposals.

As we stated in the Proposing Release, although we are codifying the basic concept of the staff position regarding Rule 15c2–8(b), the codification does not affect any other obligation in that rule nor any other prospectus delivery obligation that may be applicable. Also, as proposed, the exclusion only is available, as it is today, 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. Although some commenters representing issuers and their representatives requested expanding the exclusion to other asset-backed securities, we continue to believe that such securities should remain subject to Rule 15c2–8(b). As we noted in the Proposing Release, because a separate registration statement is prepared for each Form S–1 offering, the impact of continued compliance with Rule 15c2–8(b) is less significant.

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 backed by assets of 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-

26, 1997); and *Public Securities Ass'n* (Dec. 15, 1995).

[164] 15 U.S.C. 78m(a).

[165] The original no-action relief for Rule 15c2–8(b) 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. Otherwise, the relief from Rule 15c2–8(b) would not have been available. As discussed in Section III.A.2.f., we are now addressing limitations on prefunding periods in the definition of ''asset-backed security'' in lieu of in Rule 15c2–8(b). Because the definition of ''asset-backed security'' will permit a prefunding period of up to 50%, we are not codifying the 25% restriction on prefunding periods for the exclusion from Rule 15c2–8(b).

[166] 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.

[167] See, *e.g.*, Letters from ABA; ASF; and NYCBA.

[168] See, *e.g.*, Letter of ASF.

[169] See, *e.g.*, Letter of ABA.

[170] See, *e.g.*, Letters of CFAI; FMR; ICI; and MetLife.

[171] We also are making an unrelated technical correction to paragraph (a) of Rule 15c2–8 to correct references to other paragraphs of the rule.

issuers under Securities Act Rule 140.[172] 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.[173]

As we explained in the Proposing Release, in considering whether the distribution of the underlying assets must be registered, 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.[174] As a result, the definition of ''asset-backed security'' may encompass securities issued in structured financings backed by assets of 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. When Registration Is Required

To provide further clarification and regulatory certainty regarding this topic, we are adopting in substantial part our proposal that would codify existing staff positions in this area.[175] First, we are adopting conditions when registration of the distribution of the underlying security will not be required. As noted in the Proposing Release, most asset types that are securitized today, including residential mortgages, student loans, auto loans and credit card receivables, meet these conditions and thus will not be affected. Under our final rule, 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 our proposal and existing staff practice, we are including two examples in the final rule 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 under the safe harbor of Securities Act Rule 144(k) (*e.g.*, a two-year holding period by non-affiliates).[176] Second, the offering of the asset-backed security cannot 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 will be considered a distribution of the underlying securities.

We also are codifying as proposed the staff's 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.[177] As proposed, 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.[178] As we stated in the Proposing Release, 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

[172] 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.''

[173] 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, unless exempt, 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).

[174] See Sections III.B.7 and 8. See also Section III.B.10. 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.

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

[176] 17 CFR 230.144(k). The term ''restricted securities'' is defined in Securities Act Rule 144(a)(3) (17 CFR 230.144(a)(3)).

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

[178] If an underwriter or dealer transfers an unsold allotment to an investment account or an affiliate, that does not turn the allotment into anything other than an unsold allotment. Rule 144 is not available to underwriters or dealers with unsold allotments.

offering, then registration of the underlying distribution is required along with registration of the ABS offering.

If any of the three conditions discussed above are not met, the offering of the relevant underlying securities itself must be separately registered as a primary offering of such securities. As proposed, such registration must be conducted in accordance with the following conditions:[179]

- 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;[180]
- 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;[181]
- 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;[182]
- 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.[183]

c. Exceptions from Disclosure and Delivery Conditions and Form S–3 Eligibility Requirements

As discussed in Section III.A.2., some ABS transactions, such as credit card issuance trusts and motor vehicle lease 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. In each instance, these structures are solely designed to facilitate the ABS transaction. The ABS will be primarily serviced by cash flows from the underlying pool assets.[184] 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.

As we noted in the Proposing Release, 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.[185] Accordingly, although the distribution of the underlying financial asset in connection with the ABS offering must still be separately registered, we are excluding such transactions as proposed from the disclosure and delivery conditions discussed above with respect to other resecuritizations, if the following conditions are met:

- Both the issuing entity for the asset-backed securities and the entity issuing the underlying financial asset have been established under the direction of the same sponsor and 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 the resecuritization requirements discussed in the previous section; and
- The financial asset is held by the issuing entity and is a part of the asset pool for the asset-backed securities.

In the Proposing Release, we indicated that any separate registration of the distribution of the underlying financial asset would need to be on a form eligible for such distribution. Commenters requested relaxing Form S–3 eligibility requirements for such registration, arguing that the underlying financial asset being used to structure the transaction is not likely to otherwise be Form S–3 eligible.[186] If the underlying financial asset was required to be registered on Form S–1, the benefits of shelf registration for the ABS registered on Form S–3 would be lost. In response to these concerns, we are revising General Instruction I.B.5 to Form S–3 to permit the registration of the underlying financial asset on that form if it meets the same conditions outlined above.[187] As we indicated in the Proposing Release, 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 an underwriter.

7. Market-Making Transactions

In the Proposing Release, we briefly noted the requirements for keeping an ABS prospectus current for market-making or remarketing transactions. In non-ABS transactions, the Form S–3 registration statement is kept current by the incorporation by reference of subsequent Exchange Act reports. In a Form S–3 ABS transaction, the incorporation by reference of subsequent Exchange Act reports also would be important, although the information in those reports would not include the disclosure required in the registration statement regarding the

[179] As noted in the Proposing Release, because of the conditions, a prefunding or revolving period cannot be used to purchase unidentified securities whose distribution needs to be registered.

[180] 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.

[181] 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. Consistent with current practice, no additional filing fee is required for the underlying securities if they have already been registered under a previous registration statement. If adopted, the proposals in the Offering Process Release would allow a plan of distribution to be amended by supplement.

[182] The two prospectuses can be combined in a single prospectus that is filed pursuant to Rule 424 for each offering.

[183] In this instance, this condition would therefore overrule the exclusion from Exchange Act Rule 15c2–8(b). As noted above, the prospectuses may be combined into a single prospectus. See also note 133 above.

[184] See Section III.B.3.g. regarding the general instruction we are adopting for Regulation AB regarding the scope of disclosure that is required regarding these structures. In addition, any additional material risks regarding these structures should be clearly described.

[185] These other resecuritizations are subject to the requirements in the previous section on the method and manner of registering the distribution of the underlying securities.

[186] See, *e.g.*, Letters of ABA and Citigroup.

[187] The registration of the asset-backed securities and the underlying financial asset can be included on a combined Form S–3 registration statement.

asset pool, such as the pool composition tables. Consistent with staff interpretations, this information would have been required to be kept current for use in ABS market-making and remarketing transactions.

Many commenters argued that the basic policy of when registration of market-making transactions is required for ABS transactions was neither appropriate nor comparable to the requirements for non-ABS issuers.[188] One of the basic principles requiring registration of market-making transactions is that a broker-dealer affiliated with the issuer does not meet the definition of ''dealer'' in Section 2(a)(12) of the Securities Act,[189] and therefore the exemption from registration in Section 4(3) of the Securities Act [190] is not available for the market-making transaction, and it must be registered. Given the structure of ABS offerings, the staff has interpreted the requirement for ABS as instead relating to an affiliation between the broker-dealer and the servicer.

Commenters argued that this market-making registration paradigm is not appropriate to ABS transactions.[191] Unlike the relationship of an affiliated broker-dealer to a corporation, these commenters argued that a broker-dealer's affiliation with the servicer does not involve the same level of relationship to the issuer, the transaction and the securities as that of a broker-dealer affiliated with a corporate issuer. In addition, these commenters argued that other adequate safeguards exist under the federal securities laws, such as the general anti-fraud provisions, to prevent a broker-dealer from misusing any material non-public information it might obtain through its affiliated servicer.[192] We are sufficiently persuaded by these comments such that we no longer will require registration and delivery of a prospectus for market-making transactions for asset-backed securities.[193]

B. Disclosure

1. Regulation AB

As we explained in the Proposing Release, no disclosure items have previously existed that were tailored specifically to asset-backed securities. While some disclosure items in Regulation S–K are relevant to ABS, such as a description of the security, most items do not elicit useful disclosure for ABS investors. For ABS, 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 have been fully transparent to issuers and investors.

As proposed, we are adopting a new principles-based set of disclosure items in one central location in a subpart of Regulation S–K, called Regulation AB.[194] These disclosure items, based on existing disclosure practices and revised from the proposal in response to comment, will 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 will be keyed to items in Regulation AB in a manner consistent with the integrated disclosure system applicable to other issuers.

While not all commenters agreed, the majority of commenters supported our proposal for principles-based disclosure rules in lieu of detailed disclosure guides for each securitized asset class.[195] For example, one commenter representing ABS investors believed proposed Regulation AB represents a major step in improving disclosures provided to investors and includes many of the items investors have previously recommended as critical to investors.[196] We continue to believe a principles-based approach provides the best framework for disclosure in the context of asset-backed securities. 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 quickly.

Under our principles-based approach, in many instances we identify the disclosure concept or objective required and provide one or more illustrative examples. Some commenters objected to our providing illustrative examples, expressing concern that the mere identification of an item in the list could suggest that the item is required, regardless of its applicability or materiality to the particular asset class or transaction involved.[197] This concern is misplaced and would, if accepted, lead to a rules-based regime that would be both inflexible and subject to evasion. As we stressed in the Proposing Release, application of the particular concept or objective needs to be tailored in preparing and presenting the disclosure to the information material to the particular transaction and asset type involved. We have made several revisions to the proposed disclosure items where illustrative lists are used to clarify this point.

The balance we are striving 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 or that would result in disclosure that would be immaterial or inapplicable. We believe using illustrative lists, with a reference that the actual disclosure must be tailored based on the material aspects of the transaction involved, helps to identify the types of disclosures that may be

[188] See, *e.g.*, Letters of ABA; ASF; BMA; BOA; CGMI; CMSA; FSR; JPMorganChase; and NYCBA.

[189] 15 U.S.C. 77b(a)(12).

[190] 15 U.S.C. 77d(3).

[191] See, *e.g.*, Letter of ABA.

[192] See, *e.g.*, Letter of BMA.

[193] There remain a few situations where the prospectus must be kept evergreen or updated such as in a delayed or continuous selling shareholder offering, a registered remarketing transaction or a resecuritization of asset-backed securities where the underlying asset-backed securities constitute a significant obligor. In those situations our position on updating remains the same. A number of commenters requested clarification that merely incorporating by reference subsequent Exchange Act reports was sufficient for updating. A few commenters suggested that even if the issuer had suspended its reporting obligation, the prospectus could be used if it was accompanied by a copy of the most recent distribution report. We continue to believe that investors are entitled to the information required to be included in the prospectus when making an investment decision for a transaction covered by the registration statement. Therefore, to the extent information in the prospectus is not updated through incorporation of Exchange Act filings, which is typically not the case for much of the information about the composition of the asset pool, then the prospectus would need to be updated. This could be done either through filing and incorporating by reference a Form 8–K containing the information or by actually updating the prospectus.

[194] See Items 1100–1123 of Regulation AB.

[195] Compare, *e.g.*, Letters of AICPA; PWC; and State Street; with Letters of ABA; ASCS; ASF; FSR; ICI; MBA; MBNA; and MetLife.

[196] See Letter of ICI. See also Letter of CFAI.

[197] See, *e.g.*, Letters of ASF; ASFA; Capital One; MBA; and MBNA.

applicable in response to the identified disclosure concept. Issuers must assess the materiality to investors of the information that is identified by the particular concept or objective, or that would result from employing the example given, in the case of the particular transaction and asset type involved. We believe this approach fosters transparency and comparability without being overly rigid and reduces the risk that the disclosure requirements will become out-of-date. We also note that in some instances an item may not be material and therefore no disclosure would be required. We also direct issuers to longstanding Commission rules that state that, unless specified otherwise, no reference need be made in the prospectus to inapplicable disclosure items.[198]

Of course, as we stated in the Proposing Release, in some instances we believe we must and therefore do set forth certain disclosure items with greater specificity. Further, we are codifying several existing percentage tests, with several revisions from our proposal in response to comment, that provide requirements as to when particular disclosure is required, particularly regarding concentrated obligors or significant credit enhancement or other support. As we stated in the Proposing Release, we believe such breakpoints provide consistency, comparability and clarity.

The structure of Regulation AB is as follows:

- Item 1100 sets 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.10.) and guidance regarding disclosures related to foreign ABS (previously discussed in Section III.A.4.).
- Item 1101 sets forth definitions applicable to asset-backed securities.
- Items 1102—1120 constitute the basic disclosure package for Securities Act registration statements for ABS offerings. In addition, several of the items will 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 1121 identifies disclosure for distribution reports on 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 1122 and 1123 address two longstanding requirements for the annual Form 10–K report based on market practice and the modified reporting system. Item 1122 addresses assessments of compliance with servicing criteria and the filing of attestation reports by registered public accounting firms on such assessments. This item, as revised from the proposal, is discussed more fully in Section III.D.7. Item 1123 specifies 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.

As we stated in the Proposing Release, many of our disclosure items are based on the market-driven disclosures that appear in filings today. Commenters, although suggesting comment on some individual items, generally agreed with this assessment.[199] In addition, as we explained in more detail in the Proposing Release, our consideration of the disclosure items was informed by the staff review process as well as the staff's participation in the 2003 MBS Disclosure Report. Commenters on the proposals also provided additional examples and suggestions to improve the disclosure items.

As we stated in the Proposing Release, however, we remain concerned that current disclosure practice 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. The cumulative effect of these practices is to diminish in some cases the usefulness of the disclosure documents through the accumulation of unnecessary detail, duplicative or uninformative disclosure and legalistic recitations of transaction terms that obscures material information. 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.[200]

Therefore, in connection with our codification of a universal set of disclosure items, we continue to seek a reevaluation by transaction participants of the manner and content of presented disclosure, including the elimination of unnecessary boilerplate legal recitations of immaterial terms. Transaction participants should view this rulemaking initiative and the pre-compliance period for the new rules 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, and we have included, as proposed, several reminders and suggestions of these principles in various Items of Regulation AB where they may be particularly appropriate.

In addition to the manner and presentation of disclosures, we also stated in the Proposing Release and remain concerned that existing disclosure standards have not adequately captured certain categories of information in respect of 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, that may be material and should be disclosed when they are material. While asset-backed securities are designed not to be direct obligations of these entities,

[198] See, *e.g.*, Securities Act Rule 404(c).

[199] See, *e.g.*, Letters of ABA; ASF; and MetLife.

[200] 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 Web site at *http://www.sec.gov*.

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.[201] As a result, we proposed specific disclosure line items relating to these entities designed to elicit additional information in these areas to the extent material. While we received comment on the particularities of these disclosure items, we received overall support for increasing disclosure in this area beyond current market practice.[202] Accordingly, we have adopted these new disclosure items, with revisions in response to comment, discussed in more detail below.

We also note that several commenters speaking for investors expressed concerns that certain information is provided to rating agencies but is not otherwise disclosed or shared with investors, even upon request.[203] This practice, to the extent it exists, controverts in part issuer comments that such information is not available or that disclosure would be costly. If an issuer concludes that it need not disclose information in response to a particular disclosure line item because the issuer determines that the information is not material, but agrees to provide the information to credit rating agencies, the issuer should consider its determination regarding materiality in the context of the decision to provide the information to rating agencies.

Finally, consistent with current practice and our proposal, we are not requiring audited financial statements for the issuing entity in either Securities Act or Exchange Act filings. Commenters overall agreed that audited financial statements prepared in accordance with generally accepted accounting principles would not provide material information to investors.[204] 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 believe our amendments to require registered public accounting firm attestation reports as to assessments of compliance with particular servicing criteria, discussed in Section III.D.7., are 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 disclosure requirements regarding distributions on the asset-backed securities.

2. Forepart of Registration Statement and Prospectus

Existing Items 501–503 of Regulation S–K will 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. As proposed, new Items 1102 and 1103 of Regulation AB amplify those requirements by providing guidance on preparing those sections for ABS offerings consistent with current practice. In particular, they 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. We proposed that certain class-specific information appear on the cover page. However, some commenters noted that in some transactions, given the number of classes in the offering, it is difficult and sometimes impractical to provide such class-specific information on the cover page.[205] As suggested by these commenters, we are clarifying that if the information regarding multiple classes cannot appear on the cover page due to space limitations, the information is to be included in the summary or in an immediately preceding separate table.

Consistent with common ABS-specific items such as a summary of the flow of funds and credit enhancement, disclosure specified for the summary includes 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.[206] Also required is 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.[207] 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 is separately required for the prospectus summary.

As proposed, we are not providing a representative list of risk factors that may be common to many ABS transactions. The comment we received on this point supported this decision.[208] We remain 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

[201] See, *e.g.*, Moody's Investors Service, Inc., ''Rating Agency Will Launch Assessments of ABS, RMBS Governance'' (Oct. 6, 2004); Standard & Poor's, ''Operating Risk Analysis Strengthens Ties Between Structured Finance and Corporate Finance Sectors' (Sep. 15, 2004); 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).

[202] See, *e.g.*, Letters of ABA; ASF; CFAI; ICI; and State Street.

[203] See, *e.g.*, Letters of ICI and State Street.

[204] See, *e.g.*, Letters of ABA; AICPA; ASF; E&Y; NYCBA; PWC; and Wells Fargo.

[205] See, *e.g.*, Letters of ABA and ASF.

[206] 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 a comparable manner, that description alone in the prospectus would not raise general solicitation issues with respect to the private placement of the subordinated classes.

[207] Similar disclosure is 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 disclosure items, reference to particular activities do not imply that limits that exist elsewhere regarding such activities (*e.g.*, the requirement that the asset pool be ''discrete'') can be disregarded.

[208] See, *e.g.*, Letter of ABA.

particularly how those risks affect investors. We are clarifying, as proposed, 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.

3. Transaction Parties

a. Sponsor

We are adopting our proposed definition of ''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. While some commenters supported the definition for purposes of disclosure,[209] others expressed various concerns about the definition, particularly given that the proposed definition also was to be used in our proposed Form S–3 filing eligibility condition relating to Exchange Act reporting compliance.[210] As discussed in Section III.A.3.c., we are adopting a revised formulation of the reporting compliance condition that is no longer linked to the sponsor definition.

In addition, commenters who questioned the proposed sponsor definition appeared to construe the proposed definition beyond its plain language. In particular, the commenters questioned application of the definition to so-called aggregator or consolidator transactions where the sponsor acquires loans from many other unaffiliated sellers before securitization by the sponsor. We do not believe in these typical situations that each of the underlying sellers, who did not take part in the organization or initiation of the securitization transaction, would meet the plain language of the definition of ''sponsor.'' We do recognize that the facts and circumstances of the particular transaction may result in a sponsor that is unaffiliated with the depositor (*e.g.*, a ''rent-a-shelf'' transaction) or that there may even be more than one unaffiliated sponsor. We also believe that where pool assets are transferred through one or more affiliates of the sponsor before transfer to the depositor and the issuing entity, it will be clear in nearly all instances as to which party was in the position of organizing and initiating the securitization transaction and thus is the sponsor.

We also are adopting, with minor revisions in response to comment, our proposed disclosure item for the sponsor.[211] Commenters representing investors particularly supported the disclosure discussed in the Proposing Release.[212] In addition to basic identifying information about the sponsor, a description of the sponsor's securitization program will be required. The purpose of the description is to provide context within which to analyze the asset-backed securities and the characteristics and quality of the asset pool. Such a description is to consist, to the extent material, 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 is to 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, as well as information or factors related to the sponsor that may be materially relevant 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 or other performance triggering event. Another example would be any action taken outside the ordinary performance of a transaction to prevent such an occurrence.

As we stated in the Proposing Release, other relevant information for the description, 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 material funding source. A description of the sponsor's material roles and responsibilities in its securitization program and the sponsor's participation in structuring the transaction also is required, including whether the sponsor or an affiliate is responsible for the selection of the pool assets.

b. Depositor

We are adopting our proposed definition of ''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 is the depositor.[213]

Consistent with our proposal, if the depositor was not the same entity as the sponsor, separate identifying information about the depositor will 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.[214] In addition, if material and 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 will 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

As we explained in the Proposing Release, the nature of the issuing entity and the transfer of the pool assets is elemental to the concept of securitization. We are adopting our proposed definition of ''issuing entity'' as 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 our proposal, disclosure will be required regarding both the nature of the issuing entity and the sale or transfer of the pool assets.[215] Information about the issuing entity itself will include a description of its permissible activities, restrictions on activities and capitalization. If the issuing entity has its own executive officers, board of directors or persons performing similar functions, disclosure required by Items 401, 402, 403 and 404 of Regulation S–K will be required.

[209] See, *e.g.*, Letter of ABA.

[210] See, *e.g.*, Letter of ASF.

[211] See Item 1104 of Regulation AB. We discuss the disclosure requirement for static pool information separately in Section III.B.4.

[212] See, *e.g.*, Letters of ICI and State Street.

[213] As noted in Section III.A.2.c., 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 are specifying, as proposed, that the ''depositor'' of the issuing entity is the depositor of that trust.

[214] *See* Item 1106 of Regulation AB.

[215] *See* Item 1107 of Regulation AB.

The governing documents of the issuing entity will need to be filed as an exhibit.[216] This is consistent with the requirement in Item 601 of Regulation S–K of filing all governing documents and material agreements for the offering, which for ABS includes, among other things and as applicable depending on the transaction's structure, the pooling and servicing agreement, the indenture and related documents. The management or administration agreement for the issuing entity also must be filed in addition to describing its material terms in the prospectus.[217]

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. Disclosure also is required regarding any expenses incurred in connection with the selection and acquisition of the pool to be payable from offering proceeds.

Several commenters objected to our proposed disclosure requirement of the amount paid or to be paid for the pool assets, arguing that such information, particularly for pool assets that are not securities, is proprietary or in some instances not a meaningful concept.[218] We are limiting disclosure to instances when the pool assets are securities, as defined under the Securities Act, and requiring disclosure of the market price of the securities and the basis on which the market price was determined. We continue to support disclosure of such information in those securitizations, such as corporate debt securitizations or ABS repackagings.

We also are adopting our proposed requirements for disclosure, to the extent material, regarding any provisions or arrangements included to address any one or more of the following issues:[219]

- 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.

We continue to believe such disclosure, where material, is appropriate to provide transparency to investors regarding the legal and structural complexities of ABS transactions. In addition, any material risks related to the above must be discussed in the risk factors section of the prospectus. Consistent with current practice and our proposal, we are not mandating the filing of any report or opinion of an expert or counsel regarding any of the above items, although registrants may elect to file such items voluntarily, subject to any applicable consent requirements.[220]

d. Servicers

As we explained in the Proposing Release, the role of the servicer is often not limited to administration and collection of the pool assets. The servicer often also 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. We also recognize that in many transactions, multiple entities are used to perform different servicing functions. For example, while the particular division of responsibilities may vary by transaction or asset class, an ABS transaction may involve one or more entities, sometimes called ''master servicers,'' that oversee the actions of other servicers and may perform the allocation and distribution functions. Different servicers, sometimes called ''primary servicers,'' may be responsible for primary contact with obligors and collection efforts. In addition, one or more other servicers, sometimes called ''special servicers,'' may exist for specific servicing functions, such as borrower work-out or foreclosure functions. The allocation and distribution functions may be with a separate entity, sometimes called an ''administrator.'' While some servicers may be affiliated with the sponsor, other non-affiliated sub-servicers may be employed.

We are adopting as proposed a unified definition of ''servicer'' to mean any person responsible for the management or collection of the pool assets or making allocations or distributions to holders of the asset-backed securities. As we stated in the Proposing Release, our definition of ''servicer'' is designed to capture the entire spectrum of activity to include both collection and asset maintenance activities as well as cash flow allocation and distribution functions for the ABS. This includes parties often referred to as ''administrators.'' However, given that some of these functions may be performed by the trustee in certain transactions, the definition clarifies 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.

We are not persuaded by some commenter suggestions that we should create separate definitions for different aspects of the servicing function.[221] These commenters suggested various additional definitions, including master servicer, administrator, primary servicer, special servicer, affiliated servicer and unaffiliated servicer. Similar to our concerns about creating asset-specific disclosure guides, there is not a uniform differentiation of servicing functions consistent across all asset classes or even within the same asset class. Nor do we think it is appropriate to establish rigid definitions that may not encompass future changes to market practice involving servicing. Our definition of servicer is a principles-based definition for any entity that performs any one or more of the servicing functions.

[216] Item 1100(f) of Regulation AB specifies that where agreements or other documents are specified by Regulation AB to be filed as exhibits to a Securities Act 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.

[217] Any such description should avoid legal boilerplate and include the specific material duties imposed on the parties and not generic descriptions such as ''various administrative services.''

[218] See, *e.g.*, Letters ABA; AHFC; ASF; BMA; JPMorganChase; MBA; and TMCC.

[219] As proposed, 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.

[220] See, *e.g.*, Securities Act Rule 436 (17 CFR 230.436).

[221] See, *e.g.*, Letters of ABA; ASF; JPMorganChase; MBA; Sallie Mae; and Wells Fargo.

Some of these commenters were concerned that applying the servicer disclosure item to an entity that performs only a limited aspect of the servicing function would compel inapplicable or immaterial disclosure. As stated above, this does not reflect an accurate understanding of how Commission disclosure items are to be applied. We have made several additional modifications to the servicer disclosure item to make clear that disclosure is required based on materiality.[222] If an entity's role is limited to one or more of the servicing or administrative functions such that an aspect of the disclosure item is not applicable or material, it is not required. For example, if a trustee also calculated the flow of funds for the transaction, information about the size, composition and growth of its serviced asset portfolio may not be material. However, even if a party performs only one function, if that function is material, such as calculation of the flow of funds for the transaction, material disclosure with respect to that function would of course be required.

Understanding the material aspects of the entire servicing function is important to understanding how servicing may impact expected performance. As proposed, the disclosure item requires information regarding the entire servicing function, including a clear introductory description of the roles, responsibilities and oversight requirements of the entire servicing process and the parties involved.[223] This will include identifying, as applicable:

- Each master servicer;
- Each affiliated servicer;
- Each unaffiliated servicer (such as primary servicers) that services 10% or more of the pool assets; and
- Any other material servicer responsible for calculating or making distributions to holders of the asset-backed securities, performing work-outs or foreclosures, or other aspect of the servicing of the pool assets or the asset-backed securities upon which the performance of the pool assets or the asset-backed securities is materially dependent.

In addition, additional information, discussed further below, will be required about each servicer identified in the first, second and fourth bullets above, as well as each unaffiliated servicer identified in the third bullet above that services 20% or more of the pool assets.

We are not limiting disclosure, as suggested by some commenters, only to those in actual contractual privity with the issuing entity.[224] We received support for disclosure of underlying servicers and all entities with a role in the servicing function that may materially impact performance of the pool assets and thus the asset-backed securities.[225] As proposed, disclosure will be required for such entities, to the extent material. In addition, we are maintaining our proposed approach of requiring disclosure regarding all affiliated servicers.

We have revised our percentage breakpoints for determining servicer disclosure for unaffiliated servicers, such as primary servicers, that service individual pool assets. While not all commenters agreed, several commenters believed the 10% threshold we originally proposed was too low.[226] To lessen potential disclosure burdens, many of these commenters suggested, alternatively, limited disclosure for unaffiliated servicers that service at least 10% of the pool assets, but less than some higher threshold, such as 20%.[227] As noted above, the final disclosure item will require identification of each unaffiliated servicer that services 10% or more of the pool assets. The more detailed disclosure discussed below will only be required for such servicers that service 20% or more of the pool assets. As noted in the Proposing Release, we believe 10% and 20% breakpoints provide consistency and clarity in determining a triggering event for disclosure, and are consistent with many other longstanding standards used for our existing disclosure requirements.[228]

As to those servicers where more detailed information is required, we explained in the Proposing Release that given the increasing realization of the importance of the role of the servicer in ABS transactions, the disclosure item is designed to elicit additional material information regarding the servicer's function, experience and servicing practices.[229] Commenters were mixed over our proposed disclosure requirements for these servicers. Commenters representing investors in particular supported additional disclosure regarding servicers,[230] while those representing primarily issuers and their representatives suggested reductions for disclosure that is not typically provided today.[231] In most instances, the objections from this latter group of commenters centered around concerns that aspects of the disclosure item may not be material in all instances. As we specified above, we are making additional revisions to the disclosure item to clarify that disclosure is required based upon materiality. We also are making a few other minor changes to individual aspects of the disclosure item in response to comment, discussed in further detail below.

The information to be provided, to the extent material, can be categorized into three general categories: basic information and experience; the agreement with the servicer and servicing practices; and back-up servicing. Basic information and experience regarding the servicer includes disclosing how long it has been servicing assets. As with the sponsor, the servicer disclosure is to include, to the extent material, 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.

We also are retaining disclosure 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. Some commenters expressed concern that the disclosure required about servicing policies and procedures and their changes could result in excessive disclosure or inappropriate disclosure of competitively sensitive information.[232] The description contemplated is limited to that which a reasonable investor would find material in considering an investment in the asset-backed securities and the servicing and administration of the pool assets and the ABS, as the case may be. Further, we believe this will not encompass

[222] See Item 1108 of Regulation AB.

[223] In addition to an appropriate narrative discussion of the allocation of servicing responsibilities, registrants also should consider presenting the information graphically if doing so will aid understanding.

[224] See, *e.g.*, Letters of ABA; ASF; BMA; CMSA; and Sallie Mae.

[225] See, *e.g.*, Letters of ICI; MetLife; and Wells Fargo.

[226] Compare, *e.g.*, Letters of ABA; ASF; BMA; MBA; and NYCBA; with Letter of MetLife.

[227] See, *e.g.*, Letters of ABA; ASF; JPMorganChase; MBA; and NYCBA.

[228] See, *e.g.*, Items 101(c)(1)(vii), 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); and Topic 1.I. to Release No. SAB–103.

[229] See also, *e.g.*, Fitch, Inc., ''Rating ABS Seller/Servicers: Credit Where Credit is Due'' (Sep. 14, 2004); and Fitch, Inc., ''Seller/Servicer Risk Trumps Trustee's Role in U.S. ABS'' (Mar. 4, 2003).

[230] See, *e.g.*, Letter of ICI.

[231] See, *e.g.*, Letter of ABA; ASF; Auto Group; JPMorganChase; and MBA.

[232] See, *e.g.*, Letters of JPMorganChase and MBA.

inappropriate disclosure of information that would cause competitive harm.

Other information specified in the disclosure item includes, to the extent material, 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 assets or the asset-backed securities, as applicable. Other information that may be material could include whether any prior securitizations of the same asset type 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.

As proposed, information regarding the servicer's financial condition will continue to be required in some situations. In response to comments, we have revised this requirement to clarify information regarding the servicer's financial condition may be required to the extent that there is a material risk that the effect on one or more aspects of servicing resulting from such financial condition could have a material impact on pool performance or performance of the asset-backed securities. As we stated in the Proposing Release, general financial information is not required. We are seeking particular information when there is a material risk the financial condition could have a material impact as described.

Regarding the second category of disclosure, the material terms of the servicing agreement will need to be described, as well as the servicer's duties regarding the asset-backed securities transaction. As proposed, the servicing agreement will be required to be filed as an exhibit.[233] A description of the servicer's servicing practices also will be required to the extent material and applicable to the servicer's role in the transaction. The disclosure item identifies the following types of information:[234]

- The manner in which collections on the assets will be 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. As proposed, statistical information regarding past advance activity will 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 assets.
- Custodial requirements regarding the assets.

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.[235] 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 are adopting our proposed disclosure requirements 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 will 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.[236]

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. Commenters overall supported the proposed disclosure item regarding trustees.[237] We did not propose a separate definition of trustee, and, based on the comments received, we do not believe it is necessary to provide one.

As proposed, in addition to basic identifying information about any trustee, disclosure will be required regarding the trustee's prior experience in similar ABS transactions (if applicable), indemnification provisions, limitations on liability and removal or replacement provisions.[238] In addition, as we explained in the Proposing Release, 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.[239] To help provide transparency to this topic, we are adopting our proposal for 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 material factors, as applicable, 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 trustee disclosure item requires 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 must be described.

[233] We note that in certain limited instances, a registrant may request confidential treatment regarding information that otherwise would be required to be disclosed, such as commercial information obtained from a person and that is privileged or confidential. See, *e.g.*, Securities Act Rule 406 (17 CFR 230.406); Exchange Act Rule 24b–2 (17 CFR 240.24b–2); and Division of Corporation Finance Staff Legal Bulletins Nos. 1 (Feb. 28, 1997) and 1A (Jul. 11, 2001).

[234] Note that while this is a list for disclosure purposes, 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.

[235] See, *e.g.*, note 229 above; ''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).

[236] We note that a trustee's prospective role as a servicer ''of last resort'' would not alone make that trustee a ''servicer'' as defined in Regulation AB.

[237] See, *e.g.*, Letters of ABA; Am. Bankers; and MetLife.

[238] See Item 1109 of Regulation AB.

[239] 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,'' Wall St. J., Feb. 5, 2003, at C13.

Finally, in response to comment regarding transactions with multiple trustees,[240] we are adding a clarifying instruction to the disclosure item that if multiple trustees are involved in the transaction, a description should be provided of the roles and responsibilities of each trustee.

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 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.

We are adopting our proposed disclosure item for originators, but with revised percentage breakpoints for when disclosure is required.[241] The breakpoints we are adopting are similar to those being adopted for servicers. Like our proposed 10% threshold for servicers, some commenters believed the more detailed disclosure we proposed for originators should only be provided for originators that meet a higher percentage threshold, although again not all commenters agreed.[242]

Under the final disclosure item, each originator, apart from the sponsor or its affiliates, that has originated, or is expected to originate, 10% or more of the pool assets must be identified. In addition, for any originator where the percentage is 20% or more, additional information regarding the originator's origination program must be provided, including, 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. As with trustees, we do not believe it is necessary to provide a separate definition for originators.

g. Other Transaction Parties and Scope of Disclosure

As we explained in the Proposing Release, ABS transactions may involve additional or intermediate parties other than the typical ones identified above, such as intermediate transferors. As proposed, we are clarifying 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.[243] The material terms of any agreement with such party will need to be described, and the agreement with that party will need to be filed as an exhibit.

In addition, as noted in Section III.A.2.c., 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, such as in the case of a credit card issuance trust and an origination trust in a motor vehicle lease transaction. In many cases, such structures are established under the direction of the same sponsor or 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 are clarifying as proposed that, in such an instance, references to the asset pool and the pool assets of the issuing entity also include the other asset pool.[244] As such, required disclosure regarding the composition of the asset pool, including servicers and significant originators and obligors, will include disclosure of the composition of the underlying asset pool, to the extent material. In addition, the requirements regarding assessments of compliance with servicing criteria and servicer compliance statements, discussed in Section III.D., encompass the assets underlying the intermediate financial asset.

4. Static Pool Information

In the Proposing Release, we noted the development of static pool information as an increasingly valuable tool in analyzing performance.[245] Such information indicates 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. We had previously received requests that disclosure of such data should be required because investors view static pool data regarding delinquency and loss experience as important information in evaluating an investment in asset-backed securities.[246]

We proposed to require disclosure of static pool data if material to the transaction. In particular, we proposed to require static pool data with respect to the delinquency and loss experience of the sponsor's overall portfolio for the past three years, or such shorter period that the sponsor had been making originations or purchases, and that such data be presented in increments (*e.g.*, monthly or quarterly) material to the asset type being securitized. In addition to the sponsor's overall portfolio, static pool data also was proposed to be required, if material, on a pool level basis with respect to prior securitized pools involving the same asset type established by the sponsor during the period. We separately proposed requiring static pool data for the offered asset pool itself, to the extent material, such as in the case of securitizations involving seasoned assets.

Our proposals relating to static pool information generated considerable comment. Investors uniformly supported the proposals, emphasizing the importance of the information to them in making informed investment decisions.[247] Commenters representing issuers and their representatives generally expressed reticence about, and in some cases even opposition to, the proposed requirement, primarily because static pool data is not typically provided to investors today.[248] While this was in fact one of the primary reasons for our proposal, issuers nevertheless expressed concern about the lack of existing market practice for gauging materiality of the data.

Some of these commenters argued that because static pool data is not provided today, issuers have determined that such data is not and never would be material. However, as set out in the leading cases on the

[240] See, *e.g.*, Letters of ABA; ASF; and CMSA.

[241] See Item 1110 of Regulation AB.

[242] Compare, *e.g.*, Letters of ABA and ASF; with Letter of MetLife.

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

[244] *Id.*

[245] See also, *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).

[246] See, *e.g.*, note 166 above.

[247] See, *e.g.*, Letters of ASF; FMR; ICI; MetLife; and State Street. Please note that the ASF submitted a separate comment letter, dated July 30, 2004, on our static pool disclosure proposal. In general, references in this section to the ASF letter are to that separate letter.

[248] See, *e.g.*, Letters of ABA; AFSA; ASF; Auto Group; Citigroup; Capital One; JPMorganChase; MBA; and UBS.

subject, *TSC Industries, Inc.* v. *Northway, Inc.*[249] and *Basic, Inc.* v. *Levinson*,[250] materiality is judged from the standpoint of a reasonable investor and whether there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision.[251] The argument by commenters against the materiality of the data is to some extent belied by the universal and sustained comment we have received from investors that they would find the information very important in making their investment decisions.

A new line item disclosure requirement represents our judgment that an item is or has become material. It is not, in and of itself, a judgment about past disclosure practices or requirements.[252] This is particularly true in the ABS context, where there have not previously been explicit Commission disclosure requirements. Disclosures for ABS offerings have developed informally over time through the staff review process. However, the basic disclosure framework was developed with the staff nearly two decades ago when the registered ABS market was in its relative infancy. The market has matured since that time, as has sophistication of investors in analyzing ABS. In addition, the growth of technology and the attendant ability to analyze more information means that information that may have not been considered material in the past may now have become material. The fact that we are now requiring static pool information as a disclosure item represents a judgment by us today that there are cases where the data is material and should be disclosed in such cases.

Some commenters, instead of arguing that static pool data would never be material, argued alternatively that the lack of additional guidance from the Commission regarding the scope of the proposed requirement could lead issuers to conclude that static pool information is required in all cases, which could, among other things, lead to unnecessary, excessive and expensive disclosure without corresponding benefits to investors. We stressed in the Proposing Release that in all instances disclosure was conditioned on what would be material for the particular asset class, sponsor and asset pool involved, and that disclosure for groups or factors that would not be material was not required. We recognize that under both our proposal and our final rules, there may be transactions where static pool information is not material. At the same time, and similar to many other disclosure requirements under the Federal securities laws, materiality determinations are necessary to determine appropriate levels of disclosure. Finally, we do not believe it is appropriate to exclude particular asset classes or transactions from the requirement in their entirety in lieu of requiring issuers and other offering participants to make materiality determinations.

Other commenters not taking blanket positions against the inclusion of static pool data instead requested more specific guidance as to the scope of the requirement, as well as additional flexibility in presenting the information that would be provided in response to the requirement. After careful consideration of all comments, we continue to believe that a requirement to provide static pool information based on the materiality of the information is appropriate to provide greater transparency to investors. As with our approach for Regulation AB overall, we do not believe it is practical or effective to prescribe specific disclosure by asset class. However, in response to comment, we are making several revisions to the proposal to provide more guidance on the scope of information contemplated by the requirement, as well as to provide alternative means to present the information. Both issuers and investors strongly support using electronic communications and Web site availability to present static pool information. We believe these changes should address many of the commenters' concerns as to the potential breadth and burdens of the proposal.

a. Disclosure Required

Several commenters expressed concern over the breadth of the proposals to require data for several different data groups, including the sponsor's overall portfolio, prior securitized pools and the asset pool itself.[253] These commenters believed that without additional direction regarding the appropriate starting point and parameters of the disclosure, uncertainty may promote excessive or redundant disclosures for all data groups. While not all commenters agreed, most believed the starting point for disclosure should be information for a single data group, with that data group being dependent on the type of ABS transaction being offered.[254] In particular, commenters suggested that the starting point could be different depending on whether the transaction involved an amortizing asset pool, such as residential mortgages, or a revolving asset master trust, such as a credit card master trust. For transactions involving amortizing asset pools, the starting point for disclosure also could be different depending on the sponsor's ''seasoning'' (*e.g.*, the amount of experience the sponsor has had securitizing assets of the same asset class). Using such starting points for disclosure also could promote comparability of information across issuers within particular asset types.

To provide further clarity in determining the material information to disclose, we are adopting this framework in the final rules.[255] We provide separate starting points for disclosure depending on whether the ABS transaction involves an amortizing asset pool or a revolving asset master trust. For amortizing asset pools, we further specify suggested starting points based on the sponsor's experience with securitizing assets of the type to be included in the offered asset pool.

In addition, while we proposed requiring material static pool information with respect to delinquency and loss experience, several commenters recommended expanding the requirement to also include prepayment experience, to the extent material for the particular asset class.[256] Prepayments typically include both voluntary prepayments and liquidations after defaults or charge-offs. For some asset types, such as home equity loans, prepayments also could refer to the liquidation rate of a portfolio, where such rate is a combination of scheduled payments, prepayments and charge-offs.

Under our final rules, the scope of the static pool requirement will encompass, to the extent material, static pool

[249] 426 U.S. 438 (1976).

[250] 485 U.S. 224 (1988).

[251] See *TSC Industries, Inc.* v. *Northway, Inc.,* at 449; and *Basic, Inc.* v. *Levinson,* at 231. See also the definition of ''material'' in Securities Act Rule 405, which states: The term ''material,'' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.

[252] See, *e.g.*, Securities Act Rule 408; Securities Act Sections 11, 12(a)(2) and 17(a); Exchange Act Section 10(b); Exchange Act Rule 10b–5; and Exchange Act Rule 12b–20.

[253] See note 248 above.

[254] See, *e.g.*, Letters of ABA; ASF; and BMA. But see, *e.g.*, Letter of FMR.

[255] See Item 1105 of Regulation AB.

[256] See, *e.g.*, Letters of ABA and ASF. While some commenters suggested cumulative prepayment information, investors also expressed a preference for period prepayment information.

information regarding delinquencies, cumulative losses and prepayments, as applicable for the respective asset type.[257] As with prepayments, we also recognize that the particular metrics that would be material for delinquencies and cumulative losses may vary by asset class. For example, metrics for student loans, depending on the program, could include not only current period delinquency and cumulative net loss information, but also payment status information (*e.g.*, forbearance and deferment percentages) and claims reject information. For leases, metrics could include credit losses and residual losses.

i. Amortizing Asset Pools

Several commenters believed that in the context of amortizing asset pools, static pool data for prior securitized pools would be a better starting point for disclosure over information about the sponsor's overall portfolio, particularly as the sponsor's experience in securitizing prior pools increases.[258] These commenters argued that sponsor portfolio data by year, sometimes called ''vintage data,'' is less ''static'' than prior securitized pools because new loans are continually added to the portfolio over the course of that year's vintage. In addition, the sponsor's retained portfolio may include assets not eligible for securitization. As such, these commenters argued, static pool data for prior securitized pools would typically be more readily comparable to the current securitization transaction. However, to the extent the sponsor's experience with prior securitized pools is limited, vintage data on the sponsor's portfolio could be more appropriate as a starting point for static pool disclosure.

We are adopting this suggested approach for amortizing asset pools. Unless the registrant determines that such information is not material, the starting point for disclosure is static pool information, to the extent material, regarding delinquencies, cumulative losses and prepayments, if applicable, for prior securitized pools of the sponsor for that asset type. For unreasoned sponsors—sponsors lacking three years of securitization experience with the same asset type—consideration should be given to instead using as a starting point static pool information, to the extent material, regarding delinquencies, cumulative losses and prepayments, if applicable, by vintage origination years of originations or purchases by the sponsor, as applicable, for that asset type. A vintage origination year represents assets originated during the same year.

We proposed three years of static pool data (or such shorter period of time as the sponsor had been making originations or purchases). However, some commenters indicated that the amount of pool experience necessary for a meaningful evaluation of trends varies by asset type and three years may not be sufficient.[259] Our final rules call for information, to the extent material, for a minimum of five years (or such shorter period the sponsor has been either securitizing assets of the same asset type (in the case of seasoned sponsors) or making originations or purchases of assets of the same type (in the case of unseasoned sponsors)).

Consistent with our proposal, delinquency, cumulative loss and prepayment data for each prior securitized pool or vintage origination year, as applicable, is to be presented in periodic increments (*e.g.*, monthly or quarterly), to the extent material, over the life of the prior securitized pool or vintage origination year. We also are establishing a requirement regarding the age of the most recent periodic increment to ensure the currency of the data. Under the final rule, the most recent periodic increment for the data must be as of a date no later than 135 days of first use of the prospectus. For data based on quarterly increments, this allows 45 days from the end of the most recent quarter to include the data. The 135-day standard is consistent with our updating rules for interim financial information for non-ABS issuers that are not ''accelerated filers.''[260]

Several commenters also believed that selected material characteristics for the prior securitized pools or vintage origination years should be provided along with the data to facilitate review and to assess comparability.[261] We are including in the requirement that summary information is to be provided for the original characteristics of the prior securitized pools or vintage origination years, as applicable and material. Commenters provided several examples of metrics that could be provided based on the relevant asset type. The final rule specifies that while the material summary characteristics may vary, these characteristics may include, among other things, the following: the number of pool assets; original pool balance; weighted average initial pool balance; weighted average interest or note rate; weighted average original term; weighted average remaining term, weighted average and minimum and maximum standardized credit scores or other applicable measure of obligor credit quality; product type; loan purpose; loan-to-value information; distribution of assets by loan or note rate; and geographic distribution information.

Based on the comment received, we are not adopting for amortizing asset pools our proposal to include a line-item disclosure requirement for static pool information for the offered pool itself. However, as we discuss more fully in Section III.B.4.a.iii., while we are not including a specific disclosure requirement for such information, we note there may be instances where failure to provide such information would make the data that is presented misleading.[262] For example, for a pool with a material concentration of seasoned assets, disclosure of static pool data about the pool itself may be necessary depending on whether such data would reveal a trend or pattern concerning one or more elements of pool performance and risk that is material and not evident from data relating to asset performance otherwise presented and such omission makes the information presented misleading.[263]

ii. Revolving Asset Master Trusts

We received comment that an alternative starting point would be more suitable for revolving asset master trusts, such as credit card master trusts.[264] In particular, these commenters argued there could be even more concerns about the ''static'' nature of the pool due to changes in the master trust revolving asset pool over time and the relationship between the sponsor's retained portfolio or other securitized pools previously established by the sponsor and the master trust asset pool. Instead, additional incremental performance information based on asset age for the master trust revolving asset pool itself was suggested as a more appropriate starting point. The additional disclosure, where material, would allow an investor to distinguish performance of newer accounts comprising the master trust asset pool from those of more seasoned accounts. Investors also suggested presenting static age-related data for payment rate, yield and standardized credit scores or

[257] As discussed in Section III.B.4.a.ii., additional variables were suggested and are included for revolving asset master trusts.

[258] See., *e.g.*, Letters of ABA; ASF; and BMA.

[259] See, *e.g.*, Letters of ASF and MetLife.

[260] See, *e.g.*, Rule 3–01 of Regulation S–X (17 CFR 210.3–01) and Rule 3–12 of Regulation S–X (17 CFR 210.3–12).

[261] See, *e.g.*, Letters of ABA; ASF; and Auto Group.

[262] See note 252 above.

[263] See Section III.B.3.a. of the Proposing Release.

[264] See, *e.g.*, Letter of ASF.

other applicable measure of obligor credit quality in addition to delinquency and loss data, if applicable.[265]

For such transactions, we are clarifying that, unless the registrant determines that such information is not material, the starting point for disclosure is data, to the extent material, regarding delinquencies, cumulative losses, prepayments, payment rate, yield and standardized credit scores or other applicable measure of obligor credit quality, as applicable, in separate increments based on the date of origination of the pool assets. While the material increments for presenting the performance data may vary, we are suggesting, based on comment, that issuers consider presenting such data at a minimum in 12-month increments through the first five years of the account's life (*e.g.*, 0–12 months, 13–24 months, 25–36 months, 37–48 months, 49–60 months and 61 months or more). However, as noted above for amortizing asset pools, performance data for longer periods, in shorter increments or for different pool characteristics may be more appropriate depending on the asset class involved.

iii. Alternative Presentations or Other Disclosure

We have attempted to identify above characteristics that may suggest to issuers the appropriate starting point for static pool disclosure. However, we recognize that materiality considerations may dictate that these starting points may not always be suitable to the particular sponsor, asset pool and transaction involved. For example, a sponsor may have three years of experience securitizing a particular asset type, but the sponsor's experience may have been sporadic, there may have been a significant gap in the experience, or the sponsor's origination or acquisition program may have materially changed to the point such that information about the sponsor's vintage portfolio, as well as any explanatory disclosure, may be more appropriate in lieu of or in addition to prior pool information. Similarly, for takedowns involving a new revolving asset master trust, information about prior master trusts by the sponsor or information about the sponsor's vintage portfolio, in addition to other explanatory disclosure, may also be appropriate in addition to or in lieu of age-related information about the offered master trust pool. Also, as we are expanding the ability to use master trusts to new asset classes, the same may be true for additional asset classes that may be securitized in the future. We noted above as well that in some instances static pool data about the pool itself may be more appropriate for amortizing asset pools.

To clarify this point, we are expressly providing in the final rule that if the information that would otherwise be required by the directed starting point is not material, but alternative static pool information (*e.g.*, prior pools, portfolio vintage or asset pool) would provide material disclosure, such alternative information is to be provided instead. Further, as we stated in the Proposing Release, registrants may and are encouraged to provide other explanatory information, including disclosure explaining the absence of data.[266]

Several commenters also expressed concern as to application of the disclosure requirement in transactions, such as ''rent-a-shelf'' [267] and aggregator transactions, where one or more entities transfer the pool assets to an unaffiliated depositor.[268] In particular, these commenters argued that in some instances static pool information for one or more entities other than the sponsor may be more appropriate than information about the sponsor. In response, we are clarifying that static pool information regarding a party or parties other than the sponsor may be provided in addition to or in lieu of the contemplated information regarding the sponsor if appropriate to provide material disclosure.

We are not including in the final rule the proposed general instruction to present static pool data separately based on other pool variables. Although as with the rest of our proposal this instruction was conditioned on materiality, the majority of commenters objected to including the language, arguing that the potential breadth of the disclosure that would be required would be too burdensome for prospectus disclosure.[269] Several of these commenters also believed the alternative approach we are adopting of requiring material summary characteristics for prior securitized pools or vintage origination years deemphasized the need for such data stratifications.

b. Method of Presentation

Many commenters, including those representing investors, requested flexibility in the presentation of required static pool information.[270] In particular, such commenters universally argued for the ability to provide such information electronically through an Internet Web site. Even under the revised disclosure framework suggested by commenters that we are adopting, commenters believed the resulting disclosure could nevertheless involve a significant amount of statistical information for some issuers with features that would be difficult to file electronically on EDGAR as it exists today and difficult for investors to use in that format. Commenters noted that several issuers already provide performance data through their Web sites, although it may not be freely accessible by all investors. In addition, a Web site-based approach, these commenters argued, could provide greater dynamic functionality and utility both for the ability of issuers to present the information and the ability of investors to access and analyze the information, including interactive facilities for organizing and viewing the information. Moreover, given that much of the information for prior securitized pools or the sponsor's portfolio would be similar from one transaction to the next, providing flexibility to allow the information to be presented in one place for multiple prospectuses would reduce the burdens of repeating the data for each prospectus. In addition, allowing a single place for presentation of the information would provide efficiencies for keeping the data updated and current for future transactions.

We wish to encourage efficient means of providing information to investors. Advances in technology, particularly the Internet, have greatly increased efficiencies in the ability to gather, process, present and analyze information of this type.[271] Both issuers and investors have expressed a preference for Web site disclosure of such information. Accordingly, we are providing issuers with alternatives for providing the required information for inclusion in the prospectus, as discussed below.

First, as is the case today, the issuer could physically include the information in the prospectus or, for ABS offerings on Form S–3, incorporate the information by reference from a filed Exchange Act report. Some commenters

[265] *Id.*

[266] As we stated in the Proposing Release, in some instances such additional information may be required. See note 252 above.

[267] A typical ABS ''rent-a-shelf'' transaction is one where the sponsor of the transaction transfers the pool assets to an unaffiliated depositor for a takedown off of a registration statement filed by the unaffiliated depositor, usually for a fee.

[268] See, *e.g.*, Letters of ASF and BMA.

[269] See, *e.g.*, Letters of A&O; ABA; ASF; BMA; MBA; Sallie Mae; and TMCC.

[270] See, *e.g.*, Letters of ABA; ASF; Auto Group; BMA; Citigroup; JPMorganChase; NYCBA; and TMCC.

[271] See also, *e.g.*, the Offering Process Release.

also suggested flexibility to provide the information in an electronic format together with the prospectus, such as a CD–ROM delivered with the prospectus. We have previously provided guidance on the use of such electronic media in providing prospectus disclosure.[272] This guidance continues to apply. However, as discussed below, we also are providing separate and specific guidance for providing the information through a Web site.

The second alternative for providing static pool information involves a temporary filing accommodation under our rules governing EDGAR filing that applies until December 31, 2009 and permits the posting of the information on an Internet Web site, subject to the following conditions.[273] As discussed further below, if these conditions are met, the information will be deemed to be included in the prospectus and need not be physically repeated in the prospectus or in a Form 8–K report incorporated by reference into the prospectus and registration statement. It will therefore be subject to all liability provisions applicable to prospectuses and registration statements, including Section 11 of the Securities Act.[274]

First, the prospectus at effectiveness shall disclose the intention to provide the information through a Web site and the final prospectus shall provide the specific Internet address where the information is posted.[275] This alerts investors to the location of the information. The specificity of the Internet address should be directly to the information that is to be deemed part of the prospectus.[276] The Web site used for disclosure of the information need not be a Web site maintained by the issuer, although, as noted below, there are conditions for the retention and availability of the information and the information provided through the Web site will be deemed part of the prospectus included in the registration statement.

Second, the information shall be provided through the designated Web site unrestricted as to access and free of charge. As we have stated in our other releases regarding Web site posting,[277] the medium to access the information must not be so burdensome that the intended users cannot effectively access the information provided. In addition, as the information provided through the Web site will be deemed a portion of the prospectus no different than if the information was physically included in the prospectus itself and available on EDGAR, we do not believe it would be appropriate to require prior user registration to access the Web site information.

Third, the information shall remain available on the Web site for a period of not less than five years. If a subsequent update or change is made to the information, the date of such update or change shall be clearly indicated on the Web site and the registrant shall undertake to provide to any person without charge, upon request, a copy of the information as of the date of the prospectus. In addition, the registrant shall retain all versions of the information posted through the Web site address for a period of not less than five years in a form that permits delivery to an investor or the Commission, and the registrant shall furnish to the Commission or its staff upon request a copy of any or all information retained pursuant to this requirement. The five-year period shall commence from the filing date of the prospectus, or the date of first use of the prospectus, whichever is earlier. These record retention provisions are consistent with record retention requirements for information retained by the issuer regarding Securities Act registration statements.[278] The requirement to keep the information posted ensures that, no different than if the information was physically included in the prospectus, an investor has access to the information at all times during such period.

Fourth, the registration statement shall contain an undertaking that, except as discussed below regarding certain information relating to periods before the compliance date of the new disclosure requirement, the information provided through the specified Internet address is deemed to be a part of the prospectus included in the registration statement for the asset-backed securities.[279] As the information will be deemed to be included in that prospectus no different than if the information was physically included in the prospectus, disclaimers of liability or responsibility for the information are not appropriate.[280]

The information that will be deemed to be part of the prospectus included in the registration statement as a result of the undertaking is limited to the information provided through the specified Web site address.[281] The reference to the specified Web site address would not mean, standing alone, that other information, including additional static pool information, available elsewhere on the Web site but not available through the Web site address would automatically be deemed to be a part of that prospectus.[282] As such, issuers electing the Web site disclosure option should ensure that the portion of the Web site used to disclose the information that is to be included as part of the prospectus does not contain references or hyperlinks to other portions of the Web site not to be included as part of the prospectus (for example, to the general corporate home page of the sponsor). However, for purposes of this requirement, we believe the Internet address to be disclosed in the prospectus would not necessarily be required to be to a separate address for each address that is a ''cul-de-sac.'' There may be circumstances where the

[272] See Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458]; Release No. 33–7288 (May 9, 1996) [61 FR 24644]; Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843]; and Rule 304 of Regulation S–T (17 CFR 232.304).

[273] See Rule 312 of Regulation S–T.

[274] 15 U.S.C. 77k.

[275] Note that the EDGAR System prohibits the use of active HTML hypertext links to external Web sites other than the SEC Web site. See Rule 105(b) of Regulation S–T (17 CFR 232.105(b)). Accordingly, the reference to the Internet address should be presented in the EDGAR submission as an inactive textual reference to avoid a suspension of the submission. Further, because new Rule 312 of Regulation S–T specifically provides for the availability of this accommodation to satisfy the disclosure requirement under identified conditions, which includes, among other conditions, an identification in the filing of an Internet address (which will not be an HTML hypertext link), Rule 105(c) of Regulation S–T (which prohibits satisfying reporting obligations through an external HTML hypertext link) is not implicated. Rule 105(c) of Regulation S–T continues to prohibit a filer from satisfying its disclosure requirements through impermissible hypertext links or references to external Web sites. However, like Rule 105(c) of Regulation S–T and as further explained in the text, the inclusion of the address in response to Rule 312 of Regulation S–T will cause the filer to be subject to the civil liability and anti-fraud provisions of the federal securities laws with reference to the information contained in the Internet address.

[276] See also the subsequent discussion in notes 281, 282 and their accompanying text. Our final rules are designed to provide issuers flexibility regarding the methods of presenting the information through a Web site.

[277] See, *e.g.*, Release No. 33–7233, at n. 24 and the accompanying text; Release No. 33–8128 (Sep. 16, 2002) [67 FR 58480] and Release No. 33–8230 (May 7, 2003) [68 FR 25788].

[278] See, *e.g.*, Securities Act Rule 428 (17 CFR 230.428); and Rule 304 of Regulation S–T (17 CFR 232.304).

[279] See also amendments to Item 512(l) of Regulation S–K (17 CFR 229.512(*l*)).

[280] For more information regarding inappropriate disclaimers or legends, see Section III.C.1.d.

[281] The static pool information could be provided through an address to a webpage that provides links or access to additional webpages that together constitutes the required information. All such information would be deemed a part of the prospectus.

[282] For additional interpretive guidance regarding the treatment of other Web site information during a registered offering and issuer responsibility for hyperlinked information, see Release No. 33–7856. For recent proposals in this area and a discussion of when other information by an issuer is considered an offering communication, see the Offering Process Release.

reference could be to a general index or introduction page for static pool data for multiple offerings with links on that page clearly indicating the information to be provided for each prospectus.[283] Unless the registrant or another offering participant otherwise acts to include the other static pool information as part of the prospectus included in the registration statement, the reference to the other information on the index or introduction page will not, by itself, make that information part of that prospectus or an offer for the respective asset-backed securities.[284]

While recognizing the desire to provide a potentially more cost-effective and useful method of providing static pool information through Web sites, nevertheless we continue to believe at some point for future transactions the information should also be submitted with the Commission in some fashion, provided this does not result in investors not receiving the information in the form they have requested. Accordingly, we are providing that the filing accommodation will apply with respect to filings filed on or before December 31, 2009. We are directing our staff to consult with the EDGAR contractor, EDGAR filing agents, issuers, investors and other market participants to consider how such information can be filed so it is also with the Commission in a cost-effective manner without undue burden or expense and without affecting the result we achieve today that realizes the overriding objective of allowing issuers to be able to provide the data in the form expressed as most desirable by commenters. We wish to assure market participants that any such filing mechanism to replace or supplement the temporary accommodation for filings after December 31, 2009 will not undercut these objectives. As a result, this could include, if necessary, extending the accommodation or, if it appears that an EDGAR solution would not be feasible in that timeframe, alternative methods of having the information submitted to the Commission.

Several commenters expressed concern over applying Securities Act liability standards[285] to static pool information, arguing instead for application of only general antifraud liability.[286] We note that investors expressed uniform support for the value of static pool information in making informed investment decisions.[287] We believe it is appropriate for such information used as part of the offering process to be subject to Securities Act liability requirements for the accuracy and reliability of the information, regardless of the medium in which the information is presented. Similarly, just because the information also may be prepared and used for additional corporate purposes does not mean that it should be treated differently from other offering information when used in connection with the offering.

Some of these commenters, due to concerns about issuer responsibility for materiality judgments, also requested a liability safe harbor for the selection of static pool information similar to that provided for forward-looking information.[288] However, many disclosure requirements under the Federal securities laws are based on a materiality standard without such a safe harbor.[289] Further, unlike forward-looking information relating to subjective events that may occur in the future, static pool information is by definition historical performance information. We also are not persuaded that the lack of existing market practice for the disclosure of static pool information justifies excluding such disclosure from Securities Act liability requirements. We note from the comments received that issuers already are developing standards for static pool disclosure for various asset classes. We are, however, providing accommodations, discussed below, for data regarding certain historical transactions and periods before the compliance date of the disclosure requirement.

As discussed further in Section III.F., we are providing an extended transition period for compliance with the disclosure requirements in Regulation AB, including the static pool disclosure requirements. This extended period allows issuers time to implement policies, processes and procedures to adapt to the new disclosure requirements. For offerings covered by the new rules and forms, material static pool information will be required for the time periods identified above (*e.g.*, previous five years). We believe this approach minimizes the amount of time before investors can begin to incorporate the information into their investment decisions. Of course, registrants voluntarily may comply with the new disclosure requirement before the compliance date, and we encourage them to do so if practicable.

However, we recognize that issuers may not have been collecting the necessary data for periods before the implementation date of the new rules. Even if they had been collecting the necessary information, the information may not have been collected under processes and controls with a view toward disclosure in a prospectus. Similarly, several commenters expressed concern regarding historical data before the implementation date of the rules that may not exist or cannot be provided without unreasonable effort or expense.[290]

Given that we are establishing a requirement for disclosure of material static pool information as well as an extended transition period to prepare for such disclosure, we believe many commenter concerns regarding availability and access to the data on a going forward basis will not be applicable. However, we are addressing commenter concerns in two ways to address the following static pool information:

- For static pool information regarding prior securitized pools of the sponsor that do not include the currently offered pool, information regarding prior securitized pools that were established before January 1, 2006; and
- For static pool information regarding the currently offered pool, information about the pool for periods before January 1, 2006.

First, we are providing in the Item that if any of such information is unknown and not available to the registrant without unreasonable effort or expense, such information may be omitted, provided the registrant provides the information on the subject it possesses or can acquire without unreasonable effort or expense, and the registrant includes a statement showing that unreasonable effort or expense would be involved in obtaining the omitted information.

Second, even for such information that is available or accessible without

[283] Such an index or introduction page is a possible example of how the information might under appropriate circumstances be provided through a Web site. If market participants need additional guidance regarding the operation of the Web site disclosure option for other considered alternatives, please feel free to contact the staff.

[284] Note that if an offering participant is otherwise using the information as part of the offering process, such information might be considered an ''offer'' and a ''prospectus,'' regardless of whether it is deemed to be part of the prospectus included in the registration statement discussed in the text. For more information, see the Offering Process Release.

[285] See Sections 11, 12(a)(2) and 17(a) of the Securities Act.

[286] See, *e.g.*, Letters of ABA; ASF; BMA; and NYCBA.

[287] See note 247 above.

[288] See, *e.g.*, Letters of ABA; ASF; and BMA.

[289] In particular, see Item 303 of Regulation S–K (17 CFR 229.303) regarding Management's Discussion and Analysis of Results of Operations.

[290] See, *e.g.*, Letters of ABA; ASF; and BMA.

unreasonable effort of expense, given concerns about proper due diligence regarding such information, we are specifying that the pre-January 1, 2006 information identified above provided in response to the static pool information disclosure requirement will not be deemed to be a prospectus or part of a prospectus for the asset-backed securities, nor shall such information be deemed to be part of the registration statement for the asset-backed securities. Of course, such information will remain subject to the general antifraud provisions of the Securities Act and Exchange Act.[291] In addition, the prospectus must disclose that such information is not deemed to be part of that prospectus or the registration statement for the asset-backed securities in order to alert investors.

5. 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 are not establishing 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, we continue to believe, as proposed, that there are certain broad categories of disclosure and examples of common characteristics that can be identified. Of course, the actual disclosure to be provided must be tailored to the asset type and asset pool involved for the particular offering and resulting determinations as to the materiality of information.

a. Pool Composition

As proposed, certain general information regarding the asset pool will 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.[292] In addition, the solicitation, credit-granting or underwriting criteria used to originate or purchase the pool assets must be described. The selection criteria for the asset pool also must 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 are 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.[293]

As information about the asset pool necessarily includes statistical information, the need for clear presentations emphasizing material information is important. Appropriate introductory and explanatory information is to be provided to introduce characteristics, the methodology used in determining or calculating the characteristics and any terms or abbreviations used. For example, this would include explaining the definitions and methodologies for various categories provided (*e.g.*, documentation guidelines for each loan documentation type), the components and method of calculating variables (*e.g.*, loan-to-value or debt-to-income ratios) and the date used for determining statistical data (*e.g.*, if not the cut-off date), as applicable. As is the case today, statistical information is to be presented in tabular or graphical format, if it will aid understanding. Statistical information also is to 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.[294]

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, statistical information for each group or range also should be presented by other material variables, such as, average balance, weighted average coupon, average age and remaining term, average loan-to-value or similar ratio, and weighted average standardized 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 presented regarding 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.

As discussed above, we have made several technical and clarifying revisions in response to comment to the proposed list of pool characteristics. While again recognizing that the characteristics that are material will vary depending on the nature of the pool assets, examples of illustrative characteristics in the disclosure item 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.
- 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 distribution, 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); and type and/or use of underlying property, product or collateral.
- If a receivable or other financial asset that arises under a revolving account, such as a credit card receivable: Monthly payment rate; maximum credit lines; average account balance; yield percentages; type of asset; finance charges, fees and other income earned; balance reductions granted for refunds, returns, fraudulent charges or other reasons; 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.
- 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.

In addition to the above, we are retaining a reference in the disclosure list to standardized credit scores of obligors and other information regarding obligor credit quality. While disclosure of standardized credit scores is typical today for several consumer asset classes, commenters representing issuers from other consumer asset classes that do not typically disclose such information, although generally agreeing that material information surrounding the

[291] See 15 U.S.C. 77q(a) and 78j(b) and Exchange Act Rule 10b–5.

[292] See Item 1111 of Regulation AB.

[293] As proposed, an instruction to the Item would specify that unless a material concentration of assets exists, it is not necessary to provide details of the laws in each jurisdiction. Even in that case, a legalistic description or recitation of the laws or regulations in a particular jurisdiction is not required.

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

credit underwriting process and data used to determine suitability and extension of credit should be disclosed, nevertheless expressed reticence to the proposed reference to standardized credit scores.[295] However, comment from investors uniformly emphasized the importance of such data as an indicator of potential performance, similar to other variables such as loan-to-value and geographic origination, even though the data may not have been, like these other variables, the primary basis for the initial credit decision.[296] Accordingly, we are retaining the reference to standardized credit scores.[297]

Our proposed disclosure item also included disclosure about the geographic distribution of the pool assets, such as by state or other material geographic region. This aspect of the proposal caused some confusion among commenters as to the extent of disclosure that would be required.[298] We are clarifying this aspect of the disclosure item.[299] We are retaining a requirement for disclosure regarding the geographic distribution of the pool assets.[300] In addition, we are retaining the aspect of the proposal, which is typical for transactions today, that 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. To avoid confusion, we are not adopting the other part of our proposed disclosure item that suggested separate statistical data should be provided for each 10% geographic concentration according to the factors or variables listed above for the entire asset pool. However, if additional material information about the geographic concentration would be necessary to make the disclosure otherwise provided not misleading, such disclosure would be required.[301] In addition to geographic concentrations, the disclosure requirement also references 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.

Consistent with existing practice, delinquency and loss information for the pool also will be required. As proposed, an item of general applicability for Regulation AB will provide guidance regarding the presentation of such information.[302] We received comment on the proposed minimum distributional groupings, or ''buckets,'' that are to be used in presenting delinquency information in addition to overall delinquency percentages.[303] We are clarifying that, at a minimum, delinquency experience is to be presented in 30 or 31 day increments, as applicable, beginning at least with assets that are 30 or 31 days delinquent, as applicable, through the point that assets are written off or charged off as uncollectable. Such information is to be presented at a minimum by number of accounts and dollar amount. Disclosure also will be required, as proposed, on how delinquencies, charge-offs and uncollectable accounts are defined or determined, addressing the effect of any grace period, re-aging, restructure, partial payments considered current or other practices on delinquency experience.[304] We believe this would include separate information on the amount of pool assets that had been previously re-aged, if material.

In a commercial mortgage-backed securitization, given the importance of the underlying properties, we proposed a separate list of illustrative disclosure items for these assets. The proposed disclosure was consistent with similar disclosure required by existing Form S–11 for the registration of offerings of securities for certain real estate companies. We received additional comment to tailor the disclosure further for CMBS transactions, particularly for significant loans in the pool.[305] Under the final rule, the following is to be provided, to the extent material.[306] For all commercial mortgages:

- Location and present use of each mortgaged property;
- Net operating income and net cash flow information, as well as the components of such items, for each mortgaged property;
- Current occupancy rates for each mortgaged property;
- Identity, square feet occupied by and lease expiration dates for the three largest tenants at each mortgaged property; and
- The nature and amount of all other material mortgages, liens or encumbrances against such properties and their priority.

In addition, the following additional information is to be provided for each commercial mortgage that represents, by dollar value, 10% or more of the asset pool, as measured as of the cut-off date:

- Proposed renovation, improvement or development programs.
- Competitive conditions.
- Management of the properties, historical occupancy rates and property uses.
- Further information about material tenants and lease terms.

b. Sources of Pool Cash Flow

As we explained in the Proposing Release, cash flows to support the asset-backed securities in some transactions 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 will be required, as proposed, 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 must be described.

As discussed in Section III.A.2.e., we are adopting our proposed requirements for additional specific disclosures in lease backed ABS if a portion of the securitized pool balance is attributable to the residual values of the physical property underlying the leases. Such disclosure includes information on how residual values are estimated and derived, statistical information regarding estimated residual values and historical statistics on turn-in rates and

[295] See, *e.g.*, Letters of ASF; AHFC; MBNA; and TMCC.

[296] See, *e.g.*, Letter of ASF.

[297] As proposed, the reference is to standardized credit scores, not proprietary internally-derived credit scores of the originator. However, as discussed above, a description of the material solicitation, credit-granting and underwriting criteria used to originate or purchases the pool assets is to be described.

[298] See, *e.g.*, Letters of ABA; AFSA; ASF; Citigroup; and TMCC.

[299] As proposed, an instruction to this Item specifies 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.

[300] See, *e.g.*, Kevin Donovan, ''Zimmerman Outlines Risks in HELs,'' Asset Securitization Report (Sep. 20, 2004).

[301] See note 252 above.

[302] See Item 1100(b) of Regulation AB.

[303] See, *e.g.*, Letters of ABA; ASF; Auto Group; MBA; and MetLife.

[304] Such disclosure should include the policies being used for purposes of the non-performing and delinquency thresholds in the definition of ''asset-backed security.''

[305] See, *e.g.*, Letter of CMSA.

[306] Similar to Form S–11, an instruction to the disclosure item specifies that what is required under the item 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.

residual value realization rates. Information also will 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 will be required of the effects if not enough proceeds are received from the realization of residual values, whether there exists any provisions to address such a contingency, as well as how any cash flow greater than that necessary to repay security holders will be allocated.

c. Changes to the Asset Pool

As discussed in Section III.A.2.f., we are adopting, as proposed, 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 includes:

- The term or duration of any prefunding or revolving period.
- Aggregate amounts and percentages involved in the prefunding or revolving period, if applicable.
- Triggers that would limit 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.
- Whether, and if so, 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 assets that do comply with the representations and warranties for that non-complying asset. As proposed, and consistent with current practice, disclosure of these rights and remedies will be required, as well as disclosure 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.

6. Transaction Structure

As proposed, existing Item 202 of Regulation S–K will continue to provide the core disclosure requirements for describing the securities being offered, and new Item 1113 of Regulation AB will provide additional guidance consistent with existing practice for preparing this disclosure for asset-backed securities. For example, the item clarifies 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 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 is required. Such a description is to 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 are 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.[307] To provide increased transparency of this information in a single location, we are adopting our proposal for a separate table with an itemized list of all estimated fees and expenses to be paid or payable out of the cash flows for the transaction. As proposed, the fee and expense table is to indicate for each item the 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 is not fixed, the formula or method of calculation used to determine the fee or expense is to be provided. The tabular presentation should 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, such as any restrictions or limits on fees or whether the estimate may change in certain instances, such as in the event of an event of default (and how the fees would change in such an instance or the factors that would affect the change). In addition, through footnote or other accompanying narrative disclosure, disclosure is required of any, and if so how, fees or expenses could be changed without notice to, or approval by, security holders and any restrictions on the ability to change a fee or expense amount, such as due to a change in transaction party.

Other disclosures regarding the transaction structure include information on the frequency of distribution dates and 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. We also are retaining information on the ownership of any residual or retained interests to the cash flows, as well as the disposition of excess cash flow, although we are making revisions in response to comment.[308] In particular regarding residual ownership, the identity of the residual holder must be disclosed only if the residual holder is an affiliated party or if the residual holder has rights that may alter the transaction structure beyond receipt of residual or excess cash flows. Finally, disclosure will be required 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 are to be described, including any ''clean up'' calls if the principal balance of the pool assets reaches a specified minimum level, with minor revisions to our

[307] See, *e.g.*, notes 229 and 239 above. See also Fitch, Inc., ''Credit Card ABS Servicing Fee Adequacy and Priority'' (Sep. 15, 2004).

[308] See, *e.g.*, Letters of ABA; ASF; BMA; JPMorganChase; and MetLife.

proposal in response to comment.[309] 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.[310] They are typically conducted only when less than 10% of the outstanding pool balance is outstanding. As proposed, we are codifying the existing staff position that the title of any class of securities with an optional 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.''[311] This is to alert investors that the callable feature is greater than a typical ABS ''clean up'' call. In addition, in response to comment,[312] we are clarifying that in the case of a master trust, a title of a class of securities must include the word ''callable'' when an optional redemption or termination feature may be exercised when 25% or more of the original principal balance of the particular series in which the class was issued is still outstanding, in lieu of the original principal balance of the entire master trust asset pool.

As proposed, we are adopting additional disclosure requirements if the transaction structure involves a master trust. For example, information will 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;
- The terms of any security holder approval or notification of any additional issuance; and
- Which party has the authority to determine whether additional securities may be issued.

In addition, if there are conditions to such additional issuance, whether or not there will be an independent verification of such person's exercise of authority or determinations.[313]

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. As proposed, a description is required 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 must, to the extent material, explain the degree to which each class of securities is sensitive to changes in the rate of payment on the pool assets, and describe the consequences of such changing rate of payment.[314] 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 must be described, as well as whether any class protects other classes from the effects of the uncertain timing of cash flow.

7. Significant Obligors

As we explained in the Proposing Release, a securitized asset pool typically represents obligations of a large enough number of separate obligors such that information on any individual obligor may not be 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%.[315] Commenters supported our proposals to codify these longstanding practices.[316]

As proposed, we 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 definition 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 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 is required, consistent with existing practice and our proposal.[317] Descriptive information includes 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 and the agreements with the obligor involving the pool assets.

Also consistent with current practice and our proposal, different levels of financial information will be required depending upon the level of concentration.[318] If the pool assets relating to a significant obligor represent 10% or more, but less than 20%, of the asset pool, selected financial data required by Item 301 of Regulation S–

[309] See, *e.g.*, Letter of ABA.

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

[311] In response to comment, we are not including a mandatory redemption or termination features in this requirement. See, *e.g.*, Letter of ABA. However, structuring a redemption or termination feature as ''mandatory,'' but with the ability to waive or opt-out of the redemption or termination will still constitute an optional redemption or termination feature subject to the ''callable'' titling requirement.

[312] See, *e.g.*, Letters of ASF and Capital One.

[313] This final bullet was included to conform to the similar disclosure for the other ''discrete'' pool exceptions (prefunding and revolving periods).

[314] This includes, for example, information on interest rate sensitivity.

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

[316] See, *e.g.*, Letters of ABA; CMSA; and MetLife.

[317] See Item 1112 of Regulation AB.

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

K must be provided.[319] If the pool assets relating to the significant obligor represent 20% or more of the asset pool, audited financial statements meeting the requirements of Regulation S–X are required.[320] As we noted in the Proposing Release, both thresholds represent longstanding breakpoints in Commission and staff requirements for determining the level of required financial disclosure.[321] Section III.B.10. discusses 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.

As proposed, we are adopting instructions to address exceptions to the requirement to provide financial information regarding a significant obligor. For example, no financial information is 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 is 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 [322] regarding the foreign government can be incorporated by reference from a Commission filing.[323] 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 disclosure is required pursuant to Items 1104–1115, 1117 and 1119 of Regulation AB regarding such asset-backed securities. However, if the disclosure about the asset-backed securities is required in a Form 10–K or Form 10–D, the information required by General Instruction J. of Form 10–K regarding such asset-backed securities is to be provided instead for the period for which the last Form 10–K of the asset-backed securities was due (or would have been due if such asset-backed securities are not subject to Exchange Act reporting requirements).

8. 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 or support.

We proposed a unified disclosure item for all such methods of enhancement and support, to the extent material, regardless of form. As we noted in the Proposing Release, our disclosure requirements were intended to cover all providers of external credit or liquidity enhancement, including 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.

In addition, similar to significant obligors and consistent with existing practice, we proposed that if the enhancement or other support by a particular entity or group of affiliated entities reached a certain level of concentration, additional disclosures, including financial disclosures, would be required. We also proposed a unified method for determining concentration based on whether the enhancement or support provider was liable or contingently liable to provide payments regarding cash flows supporting any offered class of asset-backed securities. Similar to significant obligors and existing practice, we proposed 10% and 20% breakpoints for determining the level of financial information that would be required.

We received substantial comment on our proposed unified approach. While generally agreeing with the proposal for most forms of enhancement or support, such as guarantees and bond insurance, many commenters believed the proposed approach was not appropriate for determining financial significance for all forms of such enhancement or support, in particular for counterparties of certain derivative instruments such as interest rate and currency swaps.[324] According to the commenters, this is because for some swaps, such as uncapped interest rate or currency swaps, a test based on contingent liability would require a measurement against maximum potential exposure, which would always result in financial disclosures regarding the swap counterparties. Such a result, the commenters argued, was against prevailing market practice and would be burdensome.

Several commenters suggested treating such derivative instruments differently from other forms of enhancement or support and suggested alternatives, such as using alternate tests for significance or alternate disclosures in lieu of any significance test. After evaluating the comments, we are separating the treatment and method of determining disclosure for such counterparties from other providers of enhancement or support for the ABS.[325] Derivatives, such as interest rate and currency swaps, that are used to alter the payment characteristics of the cashflows from the issuing entity and whose primary purpose is not to provide credit enhancement related to the pool assets or the ABS will have their own disclosure item and disclosure breakpoints. As noted in Section III.A.2.a., however, there are certain derivative instruments that could be structured such that their primary purpose is to provide credit enhancement for asset-backed securities.[326] These derivatives will continue to be treated the same as other forms of enhancement or support, as proposed.[327]

i. Forms of Enhancement and Support Other Than Certain Derivative Instruments

Accordingly, with the exception of the derivative instruments as discussed above, we are adopting our proposed disclosure item for other methods of enhancement or support substantially as

[319] 17 CFR 229.301. We also are clarifying in response to comment that for a significant obligor under Item 1100(k)(2) of Regulation AB, only net operating income for the most recent fiscal year and interim period is required. We also are providing a separate instruction if the significant obligor is a foreign business clarifying how the requirements may be complied with for such entities.

[320] Existing practices regarding financial statements that meet the requirements of Regulation S–X, including applicability of requirements for real estate properties, will continue to apply. See, *e.g.*, Rule 3–14 of Regulation S–X (17 CFR 210.3–14).

[321] See, *e.g.*, note 315 above.

[322] 15 U.S.C. 77aa.

[323] For example, a Form 18–K (17 CFR 249.318) or a Securities Act registration statement or filed prospectus.

[324] See, *e.g.*, ABA; ASFA; ASF; Auto Group; BMA; Capital One; ESF; JPMorganChase; MBNA; NYCBA; Sallie Mae; and TMCC.

[325] As with significant obligors, however, if the same party, or its affiliate, is providing multiple forms of enhancement or support, the exposure is to be aggregated and considered together in determining significance levels.

[326] See, *e.g.*, note 68 above.

[327] As discussed in Section III.A.2.a., synthetic securitization transactions do not qualify for the ABS regime we adopt today. If a registration and disclosure framework is developed for synthetic securitizations, the approach for valuing and disclosure required regarding a swap or a derivative in that transaction may differ from either of these two approaches.

proposed.[328] As proposed, the final item will encompass disclosure, to the extent material, regarding any of the following:[329]

- 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 whose primary purpose is to provide credit enhancement related to pool assets or the asset-backed securities;[330] 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 the agreement to provide such enhancement or support is 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 regarding substitution of enhancement also must be disclosed. The agreement relating to the material enhancement or support must be filed as an exhibit to the filing.

If an entity or group of affiliated entities providing enhancement or other support as listed above 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, will be required. In addition to the identity of the enhancement provider, the descriptive information includes its organizational form and the general character of its business.

Regarding the level of financial information required, we are adopting the proposed 10% and 20% breakpoints currently used. In particular, if any entity or group of affiliated entities that provided 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 offered class of the asset-backed securities, selected financial data required by Item 301 of Regulation S–K must be provided. If the entity or group of affiliated entities is liable or contingently liable to provide payments representing 20% or more of the cash flow supporting any offered class of the asset-backed securities, audited financial statements meeting the requirements of Regulation S–X are required. As with financial disclosure regarding significant obligors, Section III.B.10. discusses alternative methods that may be available to incorporate the information by reference. We also are adopting 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.[331]

In response to comment, we also are adopting an instruction if the enhancement provider is a guarantee agency under the Higher Education Act of 1965 for student loans under the Federal Family Education Loan Program (FFELP).[332] Due to the structure of the FFELP program, including reinsurance by the U.S. Department of Education, alternate statistical information about a significant guarantee agency has been permitted by the staff in lieu of the financial information discussed above. Accordingly, the instruction provides that if the pool assets are FFELP student loans and the enhancement provider for the pool assets is a guarantee agency under the Higher Education Act, the following information may be provided instead:[333]

- The number of pool assets and aggregate outstanding principal balance of pool assets guaranteed by the guarantee agency (both by number and percentage of the asset pool as of the cut-off date or other applicable date).
- Disclosure of the following with respect to the guarantee agency, as applicable, including a brief description regarding the method of calculation, covering at least five federal fiscal years:
- Aggregate principle amount of all student loans guaranteed.
- Reserve ratio.
- Recovery rate.
- Loss rate.
- Claims rate.

ii. Derivative Instruments Whose Primary Purpose Is Not To Provide Credit Enhancement

As discussed above, we are adopting a separate disclosure item for derivatives, such as interest rate and currency swaps, that are used to alter the payment characteristics of the cashflows from the issuing entity and whose primary purpose is not to provide credit enhancement.[334] For all such instruments, basic information about the derivative counterparty is required, including the name of the counterparty, its organizational form and the general character of its business. Disclosure of the material terms of the instrument is required, including any limits on the timing or amount of payments or any conditions to payments. Provisions regarding substitution of the instrument also must be disclosed. The agreement relating to derivative instrument must be filed as an exhibit.

With respect to determining whether additional financial information is required regarding the derivative counterparty, several commenters noted that participants in the derivatives markets routinely evaluate the maximum probable exposure of a counterparty, such as in order to make a credit decision as to counterparty risk or set required collateral levels.[335] These commenters believed that a similar approach should be used for measuring the financial significance of derivatives subject to our new disclosure item. Such an approach, these commenters argued, would be more consistent with how the market estimates the significance of such instruments.

We are adopting this approach. The measurement of the significance of the derivative is to be determined based on a reasonable good-faith estimate of maximum probable exposure, made in substantially the same manner as that

[328] See Item 1114 of Regulation AB.

[329] As we stated in the Proposing Release, 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.

[330] Instruction to both Item 1114(a) and Item 1115 of Regulation AB provide that those items should not be construed as allowing anything other than an asset-backed security whose payment is based primarily by reference to the performance of the receivables or other financial assets in the asset pool. 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 67 and the accompanying text.

[331] We also are providing separate instructions in Items 1114 and 1115, similar to the instruction for significant obligors, if the enhancement provider is a foreign business.

[332] See, *e.g.*, Letter of Sallie Mae.

[333] Of course, as with other parties, to the extent disclosure of additional information about the guarantee agency would be necessary to make the required disclosure, in the light of the circumstances under which they are made, not misleading, such disclosure also would be required. See note 252 above.

[334] See Item 1115 of Regulation AB.

[335] See, *e.g.*, Letter of ABA; ASF; and BMA.

used in the sponsor's internal risk management process in respect of similar instruments. The resulting estimate is to be measured against the aggregate principal balance of the pool assets. However, if the derivative only relates to one or more ABS classes, the estimate is to be measured against the aggregate principal balance of those classes.

For all such instruments, disclosure will be required regarding this significance measurement. At a minimum, disclosure is required as to whether the resulting significance percentage is less than 10%, at least 10% but less than 20%, or 20% or more. Further, if the significance percentage is 10% or more, we continue to believe that additional financial information should be provided, consistent with the approach for other third parties that may provide support for the ABS cashflows. In particular, if the significance percentage is at least 10%, but less than 20%, selected financial data required by Item 301 of Regulation S–K must be provided. If the significance percentage is 20% or more, audited financial statements meeting the requirements of Regulation S–X are required. As with disclosure for enhancement providers, alternative methods discussed in Section III.B.10. may be available to incorporate the information by reference.

9. Other Basic Disclosure Items

a. Tax Matters

Consistent with our proposal and existing practice, a brief, clear and understandable summary will be required of: [336]

- 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 must 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.

As we explained in the Proposing Release, the filing and disclosure of tax opinions is a frequent topic of staff comment. The requirements with respect to tax opinions in ABS transactions have long been generally consistent with the requirements for non-ABS transactions.[337] For example, when using a ''short form'' tax opinion where disclosure in the prospectus or prospectus supplement is to constitute counsel's opinion, the tax opinion filed as an exhibit to the registration statement or filed on a Form 8–K and incorporated by reference 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.[338]

b. Legal Proceedings

In lieu of Item 103 of Regulation S–K, we are adopting, substantially as proposed, a more tailored disclosure item for material legal proceedings with respect to asset-backed securities.[339] Under the final disclosure item, a brief description will be required regarding any legal proceedings pending against the sponsor, depositor, trustee, issuing entity, servicer meeting the thresholds of Item 1108(a)(3) of Regulation AB [340] or 20% or more originator, or of which any property of the foregoing is the subject, that is material to security holders. Consistent with longstanding requirements under existing Item 103 of Regulation S–K, similar information will be required as to any such proceedings known to be contemplated by governmental authorities.

c. Affiliations and Certain Relationships and Related Transactions

As we explained in the Proposing Release, there often can be several affiliations between parties in an ABS transaction. For example, the servicer is often an affiliate of the sponsor. We are adopting as proposed a requirement to describe whether, and if so, how, the sponsor, depositor or issuing entity is an affiliate of any of the following parties: Servicer meeting the thresholds of Item 1108(a)(3) of Regulation AB, trustee, originator of at least 10% of the pool assets, significant obligor, significant provider of enhancement or other support or other material party identified with respect to the transaction. Disclosure also will be required, to the extent known and material, of any affiliate relationships among any of the parties listed above.[341]

We also are adopting disclosure requirements regarding material related party transactions between the sponsor, depositor or issuing entity and the above-referenced entities.[342] As under the proposal, two aspects of disclosure in this area are required. First, disclosure is required 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 item clarifies that what is required is information material to an investor's understanding of the asset-backed securities, not a detailed description or itemized listing of all commercial relationships among the parties. 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.

We have revised the disclosure item to clarify further the second aspect of the related party disclosure that we proposed and that will be required under the Item, which is disclosure regarding specific material relationships involving or related to the current ABS transaction and the pool assets. Unlike non-ABS or pool asset specific relationships the general character of which only need be described if outside the ordinary course of business or not on arm's length terms, there is no such limiter for relationships specific to the transaction, other than materiality. An ABS or pool asset specific transaction with a related party may still be material even if made in the ordinary course of business or on arm's length terms. For any ABS or pool asset specific transaction, the material terms and approximate dollar amount involved

[336] See Item 1116 of Regulation AB.

[337] See also note 133.

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

[339] See Item 1117 of Regulation AB.

[340] *I.e.,* master servicer, each affiliated servicer, each unaffiliated servicer that services 20% or more of the pool assets and any other servicer that performs a material aspect of the servicing of the pool assets.

[341] For the definition of affiliate, see note 147 above and accompanying text.

[342] See Item 1119 of Regulation AB.

will need to be described, to the extent material.[343]

We are not including a reference to underwriters in this disclosure item, including the proposed example of material credit arrangements relating to the pool assets provided by an underwriter, because existing Item 508 of Regulation S–K [344] already requires disclosure of material relationships with such parties.[345] We would expect comparable disclosure of relationships and transactions between the sponsor, depositor and issuing entity and an underwriter, where material, in connection with that information.

d. Ratings

We are adopting our disclosure Item regarding ratings as proposed.[346] As proposed, the Item codifies 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.[347] 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 is 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 are adopting our proposed requirement for disclosure of the reporting investors can expect to receive and be able to access.[348] This disclosure is 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 are adopting our proposed requirement to disclose whether Web site access will be provided to Commission and transaction reports.[349] Commenters supported this proposal.[350] Disclosure is to be provided 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 Web site 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.[351] In addition, disclosure will 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 and other reports 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 and other reports 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, will be equally applicable to this disclosure.[352] In addition, the inclusion of the Web site address in response to the disclosure requirement will 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.[353] Similarly, the disclosure requirement 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 will not separately create or otherwise affect any duty to update prior statements.

10. Alternatives to Present Third Party Financial Information

As discussed in Sections III.B.7. and 8., there are instances both today and under our final rules when additional financial information regarding third parties is 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 certain unrelated 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 proposed codifying both of these alternatives.

Commenters expressed support for the flexibility provided by these proposed alternatives,[354] and we are adopting both substantially as proposed. As stated in the Proposing Release, both alternatives 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

[343] Some of these relationships may be disclosed already under other Regulation AB items. Duplicate disclosure is not required.

[344] 17 CFR 229.508.

[345] We note that the requirement in Item 508 of Regulation S–K for material relationships is also not limited to transactions outside the ordinary course or not on arm's length terms. Where material, such relationships are to be described.

[346] See Item 1120 of Regulation AB. For additional information regarding the Commission's current 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, see note 137 above and accompanying text.

[347] As proposed, we are not codifying 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.

[348] See Item 1118 of Regulation AB.

[349] ''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.

[350] See, *e.g.*, Letter of ABA.

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

[352] *Id.*

[353] 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. See also Section III.B.4. and note 282 above.

[354] See, *e.g.*, Letters of ABA and BMA.

significant obligors or the enhancement in the case of an enhancement provider, will 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.[355] We are codifying an expansion of these positions substantially as proposed 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 are met: [356]

- The third party or entity that consolidates the third party in its financial statements is subject to the Exchange Act reporting requirements;
- The third party or entity that consolidates the third party in its financial statements is current with its Exchange Act reporting for the past twelve months (or such shorter period that it has been required to file reports); [357]
- The reports to be incorporated by reference include (or properly incorporate by reference) the financial statements of the third party; and [358]
- If incorporated by reference into 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.

As proposed, this option also is available under the same conditions to include the information required of any significant obligor.

Because we are expanding the basic definition of asset-backed security to registered offerings on Form S–1, we also are permitting incorporation by reference of third party financial information for ABS offerings registered on that form, as proposed. 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.[359] For example, if the registrant is relying on the incorporation by reference alternative for third party financial information, it will 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,[360] 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.

As proposed, we also are adding three instructions to remind registrants of our other existing incorporation by reference and updating requirements. The first instruction reminds ABS issuers that in addition to the conditions above, any information incorporated by reference must comply with any other applicable Commission rules pertaining to incorporation by reference.[361] The second instruction reminds 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 applies to the material incorporated by reference.[362] These consent requirements reflect the application of longstanding requirements under the Securities Act.[363] The third instruction reminds issuers that any undertakings set forth in Item 512 of Regulation S–K apply to any material incorporated by reference in a registration statement or prospectus.

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.[364] 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 final rules, 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 file number) in lieu of providing the required financial information in the filing, if the following conditions are met: [365]

- 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

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

[356] If the conditions are not met, the required information will need to be provided in the filing.

[357] An instruction provides that, if 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 ABS transaction, and neither the third party nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the ABS transaction, then this condition is qualified by the knowledge of the ABS registrant.

[358] An instruction provides that, if incorporation by reference is being used with respect to information about a significant obligor that is an asset-backed issuer and the pool assets relating to the significant obligor are asset-backed securities, then the term ''financial statements'' means the information about the asset-backed securities discussed in Section III.B.7 (*e.g.*, Item 3.(a) of Item 1112 of Regulation AB for a registration statement or Rule 424 prospectus, and Item 3.(b) of Item 1112 of Regulation AB for a Form 10–K or 10–D). The instruction also provides that information required by Instruction 3.a. of Item 1112 may be incorporated by reference from a prospectus included in an effective Securities Act registration statement or filed pursuant to Rule 424.

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

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

[361] 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).

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

[363] See, *e.g.*, Section 7 of the Securities Act (15 U.S.C. 77g).

[364] See, *e.g.*, *Morgan Stanley & Co., Inc.* (Jun. 24, 1996). This letter related to non-ABS 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).

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

of the asset-backed securities transaction;[366] and

• To the knowledge of the registrant, the significant obligor meets at least one of the eligibility categories discussed below.

The first condition clarifies that the significant obligor must be unaffiliated and otherwise not involved with the ABS transaction.[367] While some commenters suggested expanding existing practice to allow the reference alternative for all third parties, regardless of their affiliation or involvement with the transaction, we are not persuaded that it is appropriate at this time to expand existing practice.[368] As we explained in the Proposing Release, 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 reference alternative will continue to be unavailable for financial information regarding such parties, including significant enhancement providers due to their involvement in the transaction. Instead, the information must either be included in the filing or, if the conditions in Section III.B.10.a. are met, incorporated by reference.

The second condition refers to the categories of significant obligors eligible for the reference alternative. Consistent with existing staff positions and market practice, the eligible categories relate to the existing Form S–3 eligibility requirements of the significant obligor. For example, the first category is 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.[369] A second category is a significant obligor 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 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[370] 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 relates 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 securitizations of the securities issued or guaranteed by these entities so long as the GSE's 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. As proposed, the final Item clarifies 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. As proposed, reference is permitted in this instance if the significant obligor is filing Exchange Act reports and is 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 also are adding an instruction that if the reference alternative is being used for purposes of a registration statement under the Securities Act or the Exchange Act or a prospectus to be filed pursuant to Rule 424, a reference also must be included to the final prospectus or effective registration statement for the third party asset-backed securities that contains the information about the asset-backed securities discussed in Section III.B.7.[371]

As we noted in the Proposing Release, because of the possibility that corporate debt issuers can suspend their Exchange Act reporting requirements, the staff has acceded to the requests of ABS issuers securitizing such debt to include a provision that, if an ABS issuer is unable or unwilling to provide the significant obligor's financial information, the transaction, or the portion of the transaction, will 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 was suggested by market participants who believed that the alternative of including the necessary information in the ABS filing might become impractical or impossible. Consistent with this practice, our proposal would have allowed termination as an alternative to providing the information.

Several commenters objected to codifying this position.[372] However, many of these commenters appeared to be under the belief that the existing option to terminate the transaction was a staff requirement that was proposed to be codified. The underlying requirement has been and remains that because of the concentration of the significant obligor in the asset pool, financial information about that significant obligor is required. The reference alternative, like the incorporation by reference alternative, represents an alternative that may be available to present that disclosure. Each alternative is subject to conditions, including that the third party is reporting under the Exchange Act. If the third party ceases to report, the reference or incorporation by reference alternative will no longer be available because the obligor will no longer file reports with the Commission, but the requirement to provide the financial information about the significant obligor remains.[373] Through the course of reviews of registration statements by the staff, ABS issuers decided to include termination provisions in their transaction

[366] 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. The reference alternative is not available with respect to information about the issuer of the underlying securities if registration is required pursuant to Securities Act Rule 190.

[367] Of course, if the registrant is in possession of material nonpublic information about the third party being referenced, such information must be disclosed. The absence of such material nonpublic information was a determining factor in the original staff no-action letters on this topic.

[368] See, *e.g.*, Letters of ABA and NYCBA.

[369] 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.

[370] 17 CFR 210.3–10.

[371] *E.g.*, the information required by Item 3.(a) of Item 1112 of Regulation AB.

[372] See, *e.g.*, Letters of ABA; ASF; BMA; and NYCBA.

[373] For example, if the information is available from another source (*e.g.*, a Web site), while the incorporation by reference or reference alternative would not be available, the ABS issuer could physically include the information in its Exchange Act report.

structures to address their unwillingness to provide the information if the reference alternative was no longer available.

To avoid confusion, we are not codifying the proposed undertaking that references the termination option in lieu of providing the information if the reference alternative is not available. As before, issuers can still structure their securities to provide for termination if they are unwilling or unable to provide the required financial information.[374] However, we are not providing an exception to the requirement to provide the required financial information if the underlying issuer ceases reporting. The need for the information about the underlying issuer in the reports for the asset-backed securities does not change due to a change in the reporting status of the underlying issuer.

C. Communications During the Offering Process

1. ABS Informational and Computational Material

a. Current Requirements

As we explained in the Proposing Release, the Securities Act currently restricts the types of offering communications that a registrant or other parties subject to the Act's provisions (such as underwriters) may use during a registered public offering.[375] The nature of the restrictions depends on the period during which the communications are to occur. Before the registration statement is filed, all offers, in whatever form, are prohibited.[376] Between the filing of the registration statement and its effectiveness, offers made in writing (including by e-mail or Internet), by radio or by television are limited to a ''statutory prospectus'' that conforms to the information requirements of Section 10 of the Securities Act.[377] As a result, the only written material that is permitted 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.[378] Even after the registration statement is declared effective, offering participants may still make written offers only through a statutory prospectus, except that they may use additional written offering materials, if a final prospectus that meets the requirements of Section 10(a) of the Securities Act precedes or accompanies those materials.[379]

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. These factors may vary from transaction to transaction. Given the important focus on tranching and pool characteristics, including potential cash flow patterns, sponsors or underwriters may 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 had the computer resources to prepare these analytics themselves.

Following a series of staff no-action letters from the mid-1990's, issuers of Form S–3 ABS have been 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.[380] 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.

All of 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 after 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 after 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.

Commenters confirmed our understanding that where they are used, term sheets and computational material often represent the primary, if not the only, written materials that currently are used to offer asset-backed securities.[381] As we stated in the Proposing Release, we also understand that advances in technology over the decade 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.[382] There had been some concern over whether the existing no-action letters would have permitted 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

[374] Disclosure of such provisions should be made clear to investors. In addition, as we stated in the Proposing Release, 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 the required information, just as such delays would not be available with respect to providing the required information itself.

[375] See Section 5 of the Securities Act (15 U.S.C. 77e). For more information on the background and current operation of Securities Act communication requirements, as well as our recent proposals in this area, see the Offering Process Release.

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

[377] 15 U.S.C. 77j. See Section 5(b)(1) of the Securities Act (15 U.S.C. 77e(b)(1)).

[378] Oral offers are allowed during this period and do not have to satisfy the informational requirements of Section 10. See note 375 above.

[379] 15 U.S.C. 77j(a). See Section 2(a)(10) (15 U.S.C. 77b(a)(10)) and Section 5(b)(1) of the Securities Act.

[380] See note 34 above.

[381] See, *e.g.*, Letter of ABA.

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

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 had raised questions over what information should be filed with the Commission under the no-action letters where such services are used.

b. Exemptive Rule

We proposed 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 Form S–3 registration statement for an offering of asset-backed securities but before delivery of the final Section 10(a) prospectus. Commenters overall supported the proposals, although several commenters representing primarily issuers and their representatives requested several expansions beyond the existing no-action letter positions.[383] For example, these commenters requested expanding the type of materials that may be used, expanding the ability to use materials to Form S–1 ABS offerings, allowing the use of materials before effectiveness of the registration statement and excluding underwriter-prepared material from filing and Securities Act liability requirements.

As discussed previously, we recently issued expansive proposals to revise the Securities Act regulatory process for all securities offerings.[384] These proposals directly address matters such as the appropriate use, filing and liability requirements for communications during the offering process, including whether communications prepared by separate parties should be treated differently. As we indicated in the Proposing Release, requests for further relaxation of the communications restrictions in the ABS context raise broad issues that also are implicated by the proposals in the Offering Process Release. Given the current evaluation of these broader issues in that release, we do not think it would be appropriate at this time to make substantial changes to our proposed approach with respect to ABS communications. The existing staff no-action letters already permit ABS Form S–3 offerings to use significantly more material outside of the statutory prospectus than non-ABS Form S–3 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 the Offering Process Release. Therefore, our approach here remains codifying the longstanding existing allowance for additional materials in the ABS context. We will evaluate the comments we received regarding ABS communications in connection with the Offering Process Release. We also encourage ABS market participants to comment specifically on the proposals in that release.

Accordingly, today we are adopting, as proposed, an exemption from Section 5(b)(1) of the Securities Act for the use of ABS informational and computational materials in offerings of Form S–3 ABS after the effectiveness of a registration statement but before delivery of the final Section 10(a) prospectus.[385] As we stated in the Proposing Release, given 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 during such period is appropriate in the public interest and consistent with the protection of investors under the conditions discussed below, including the filing conditions.[386] However, as we stated in the Proposing Release and similar to our existing communications exemptions regarding business combination transactions, the rule makes clear that the exemption is not available to communications that may technically comply with the rule, 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.[387]

As proposed, the exemption continues to include filing requirements for such material and only will 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, which is consistent with the existing staff no-action letters. As discussed above, we do not believe it is appropriate at this time to either expand the exemption to additional offerings or alter the basic filing requirements under the letters, except as discussed below regarding consolidating those requirements, as proposed.

c. Definition of ABS Informational and Computational Material

We explained in the Proposing Release that there is an overlap in the existing no-action letters 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 must be filed given the overlapping descriptions.

We proposed consolidating the descriptions of the materials that may be used under a single definition of ''ABS informational and computational material.'' Although we were proposing to consolidate the descriptions, we specifically noted that we were not intending to change the scope of materials that may be used. Nevertheless, several commenters were concerned that the proposed consolidated definition could possibly be read as somehow more restrictive than the no-action letters and suggested revisions to more closely track the descriptions of such material in the existing no-action letters to avoid any confusion.[388]

We believe many of the examples provided by commenters of information used today were already covered by the proposed consolidated definition. However, in response to these comments and to clarify further that we are not intending to change current practice, we are revising the definition of ''ABS informational and computational material'' to more closely track the descriptions in the existing staff no-action letters. We also are adding several non-exclusive examples provided by commenters of information provided today that may not have been otherwise clear from the descriptions of the materials in the no-action letters, such as information on key parties to the transaction, to clarify the scope of

[383] See, *e.g.*, Letters of ABA; ASF; BMA; FSR; and NYCBA.

[384] See note 33 above.

[385] See 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 are adopting a general Securities Act Rule that sets forth the basic exemption and its conditions (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 (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].

[386] As is the case under the existing no-action letters, such material can be used regardless of whether a preliminary prospectus is prepared and used.

[387] For similar provisions, see Securities Act Rules 165 and 166 (17 CFR 230.165 and 17 CFR 230.166). We also proposed similar provisions in the Offering Process Release.

[388] See, *e.g.*, Letters of ABA; ASF; BMA; CMSA; FSR; and NYCBA.

materials that can be used. Finally, we are expanding the scope of the definition in response to comment to include certain basic factual information about the offering process.[389]

As a result, ABS informational and computational material will be defined as a written communication consisting solely of one or some combination of the following:

- Factual information regarding the asset-backed securities being offered and the structure and basic parameters of the securities, such as the number of classes, seniority, payment priorities, terms of payment, the tax, ERISA and other legal conclusions of counsel, and descriptive information relating to each class (*e.g.*, principal amount, coupon, minimum denomination, anticipated price, yield, weighted average life, credit enhancements, anticipated ratings, and other similar information relating to the proposed structure of the offering);
- Factual information regarding the pool assets underlying the asset-backed securities,[390] including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (*e.g.*, weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated;
- Identification of key parties to the transaction, such as servicers, trustees, depositors, sponsors, originators and providers of credit enhancement or other support, including a brief description of each such party's roles, responsibilities, background and experience;
- Static pool data, as discussed previously, such as for the sponsor's and/or servicer's portfolio, prior transactions or the asset pool itself;[391]
- 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 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.
- The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;
- The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations and procedures for attending or otherwise accessing them); and
- A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy).

As we stated in the Proposing Release, the definition of ABS informational and computational material is intended to include existing structural term sheets, collateral term sheets and computational materials and also to clarify that several additional items are permitted, such as static pool data and basic information about the offering process. Consistent with the unified filing rule we are adopting for these materials discussed below, 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.[392]

We also are reiterating several clarifications from the Proposing Release regarding the scope of the materials. First, and as noted above, some had 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 was already consistent with the no-action letters and is permitted under the exemptive rule. However, we again note, as we did in the Proposing Release, that in providing such detail 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 had 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 exemptive rule, 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. As we stated in the Proposing Release, 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 exemptive rule.[393]

[389] Note we also proposed to add these items to Rule 134 in the Offering Process Release.

[390] We note this may include graphical material regarding the pool assets, such as photographs, maps and site plans in CMBS transactions.

[391] Such information could be provided through a Web site address for inclusion in the ABS informational and computational material under the same conditions specified in Section III.B.4.b. In addition, disclosure required by Item 1105(e) of Regulation AB is to be provided in ABS informational and computational material, if applicable.

[392] As a result, the definition subsumes 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 34 above.

[393] 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 was the case under the no-action letters, under the final rule, data presented in ABS informational and computational material that are

Some also had 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 that already existed in the no-action letters and which will continue in the exemptive 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. As we stated in the Proposing Release, 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.[394] As is the case today, issuers and underwriters should contact the staff with any specific questions regarding the filing of particular materials.

d. Conditions for Use

As proposed, the final rule requires two conditions for ABS informational and computational material, both of which are consistent with the existing no-action letters:

- The communications shall be filed to the extent required under new Rule 426 (discussed in Section III.C.1.e.); and
- The communication shall 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 the exemptive 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 shall 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.

As we stated in the Proposing Release, we are not conditioning use on providing 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.[395] Instead, the legend we are adopting is designed to alert investors of the documents filed or to be filed with the Commission. We also are not requiring the condition in the no-action letters that any required filings must be made before an Exchange Act Rule 10b–10 confirmation of sale may be sent.[396] As we explained in the Proposing Release, the filing requirement discussed below is a separate condition under Commission rules, and thus conditioning the exemption on filing before sending of the Rule 10b–10 confirmation does not appear to be warranted as an additional incentive for filing.

We also explained in the Proposing Release that, in addition to the legends discussed above, some issuers and other users of these materials have been including legends or disclaimers in the materials that are inappropriate. As discussed more fully below, the materials are considered prospectuses and in many instances also must be filed with the Commission and incorporated by reference into the registration statement. Thus, as we stated in the Proposing Release, disclaimers of responsibility or liability that are not appropriate for a prospectus or registration statement also are not appropriate for these materials.

Examples of inappropriate legends or disclaimers that we identified 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.[397] Language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy also is 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 are inappropriate.

Several commenters indicated that they wish to include additional legends in their materials and requested an instruction clarifying that the prescribed legend in the exemptive rule is not exclusive and other legends may be included.[398] We do not believe such an instruction is necessary. However, some of the legends suggested by commenters also would be inappropriate. For example, as explained in the Offering Process Release, we interpret Section 12(a)(2) and Section 17(a)(2) as not taking into account information conveyed only after the date of sale, which includes the date of a contract for sale (*e.g.*, the date of the investment decision). As such, it would be inappropriate to include a legend that information contained in ABS informational and computational material will be superceded or changed by the final prospectus, even if limited to the extent the information was included in the final prospectus, if the final prospectus is not delivered until after the date of the contract for sale.

Apart from the two conditions for the exemption, we also are clarifying, as proposed and consistent with a similar provision in our communications exemptions for business combination transactions,[399] 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. As we explained in the Proposing Release, this ensures that affiliates, underwriters, dealers and others acting on behalf of the parties to the transaction are permitted to rely on the exemption if necessary. While we realize that in many circumstances the exemptions will 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.

We also are codifying as requested a provision in the existing no-action letters that failure by a particular underwriter to cause the filing of materials in connection with an offering will not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption.

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.

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

[395] As we stated in the Proposing Release, one of the reasons such statements do not appear applicable is that not all of the information—particularly the computational material—is included or updated in subsequent materials or the final prospectus. In addition, and as discussed subsequently in the text, there are additional problems with such statements. For more information, see the Offering Process Release.

[396] See 17 CFR 240.10b–10.

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

[398] See, *e.g.*, Letters of ASF; BMA; and FSR.

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

While this position was mentioned in the text of the Proposing Release, several commenters wished to codify the provision to avoid any potential confusion.[400] We are including it in the final rule as it appears in the existing no-action letters.

We are adding another provision in response to comment that currently exists in the communications exemptions for business combination transactions[401] that an immaterial or unintentional failure to file or delay in meeting the filing requirements will not result in a loss of protection under the exemption, so long as a good faith and reasonable effort was made to comply with the filing requirement and the material is filed as soon as practicable after discovery of the failure to file.[402] Several commenters believed that the absence of this provision in the existing no-action letters, which were issued before the communications exemptions for business combination transactions were adopted, has had a chilling effect on the use of materials due to concerns over filing errors and the harsh consequences of a potential Section 5 violation as a result.[403] Commenters particularly stressed the need for such a provision if underwriter communications continue to be included in the filing requirements. As discussed in our adopting release for the business combination communication exemptions, this provision is similar to the good faith standard in Rule 508(a) of Regulation D.[404] Although an immaterial or unintentional failure to file or delay in filing is a violation of the filing requirement, it will not render the exemption unavailable.

e. Filing Requirements

As noted above, there are multiple filing requirements under the staff no-action letters depending on the type of materials used and the circumstances in which they are used. As proposed, we are streamlining these requirements into a unified filing rule that applies regardless of the type of materials used. We believe a unified filing requirement will result in a more consistent approach and ease compliance without a significant drop in investor protection.

As proposed, under new Rule 426 the following ABS informational and computational material must be filed:

- If a prospective investor has indicated to the issuer or an 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 or have been provided to such prospective investor;[405] 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.

As under the existing no-action letters, these materials must be filed on Form 8–K (under new 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 after first use.

The cover page of the Form 8–K must 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 issuer or an underwriter its intention to purchase the asset-backed securities need not be filed.

The final rule clarifies, as did the letters and our proposal, 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,[406] Exchange Act Rule 10b–10[407] confirmations, prospectuses filed under Securities Act Rule 424 and research reports relying on one of our safe harbors discussed below.[408]

Under the final rule, as was the case under the existing no-action letters, 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 and the Proposing Release, ABS informational and computational material are not being excluded from the definition of ''offer,'' ''offer to sell,'' ''offer for sale'' or ''prospectus'' under the Securities Act.[409] We continue to believe the Securities Act standard of liability is appropriate for materials that are used to offer the asset-backed securities. The flexibility to use offering materials outside the statutory prospectus does not mean that the materials should not have liability as offering materials. Accordingly and as proposed, to the extent these communications constitute offers, they will continue to be subject to liability under Section 12(a)(2) of the Securities Act, as is the case today with oral offers and statutory prospectuses.[410] In addition, the final rule specifies, as proposed, that material used in reliance on the exemption will be considered ''prospectuses'' and thus subject to Section 12(a)(2) liability, even if not filed. Further, consistent with the existing no-action letters and our proposal, the materials that are filed on Form 8–K will be incorporated by reference into the registration statement, which is subject to liability under Section 11 of the Securities Act.

As we explained in the Proposing Release, the staff no-action letters were

[400] See, *e.g.*, Letters of ABA; ASF; FSR; and NYCBA.

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

[402] A similar provision has been proposed in connection with written communications in the Offering Process Release.

[403] See, *e.g.*, Letters of ABA and ASF.

[404] 17 CFR 230.508(a).

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

[406] 17 CFR 230.134; 17 CFR 230.135; and 17 CFR 230.135c.

[407] 17 CFR 240.10b–10.

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

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

[410] 15 U.S.C. 77*l*(a)(2). Such information also will remain subject to the general antifraud provisions of the Securities Act and Exchange Act. See Section 17(a) of the Securities Act; Section 10(b) of the Exchange Act and Exchange Act Rule 10b–5.

issued when electronic filing on EDGAR was still in its relative infancy. At that time, EDGAR only accepted submissions in ASCII format, and ABS market 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.[411] Instead, such materials can currently be filed in paper under cover of a Form SE.[412]

We proposed eliminating the electronic filing exemption. There have been many 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.

Two commenters suggested delaying electronic filing until the ability to file material in additional formats, such as PDF, is allowed.[413] However, we continue to believe that even under the current system, the filing of ABS informational and computational material no longer needs an electronic filing exemption. As we stated in the Proposing Release, filing in paper form is of little practical use to investors as the material cannot be retrieved electronically. By treating these materials consistently with nearly all other material filed with the Commission, we seek to realize the same investor benefits and efficiencies in information transmission, dissemination, retrieval and analysis achieved since we began mandating EDGAR filing in 1993. Accordingly, as proposed, we are eliminating the electronic filing exemption.[414]

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.[415] In particular, such a report may constitute an offer to sell the securities and thus constitute an illegal offer if published or distributed before a 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.

As we explained in the Proposing Release, 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, 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.[416] The no-action letter contained conditions for the safe harbor adapted from Rules 137, 138 and 139 and modified for ABS. We proposed codifying this safe harbor with several minor adjustments to add it to our existing research report safe harbors.

b. ABS Research Report Safe Harbor

Commenters were mixed about our proposal to codify the no-action letter. One commenter believed the 1997 no-action letter provides a workable compromise to address the issues discussed above.[417] However, this commenter and several others also suggested extending the proposal in several ways beyond the current no-action letter, such as extending the safe harbor to Form S–1 ABS, eliminating one or more of the letter's conditions or suggesting alternative sets of conditions that would have the same practical effect of eliminating conditions in the letter.[418]

However, another commenter objected to codifying the no-action letter and instead urged a 30-day quiet period on research for ABS offerings.[419] This commenter believed permitting research during this period is unlikely to provide any benefits to the institutional investors which make up most of the market but could have a harmful impact if retail investors take a more active role. The commenter also thought permitting research could lead to structures designated as ABS but that are, in effect, equity securities to avoid other research rules.

After evaluating these comments, we are adopting the safe harbor along the lines of the existing no-action letter as proposed.[420] We are not persuaded that one or more of the existing conditions in the no-action letter should be relaxed to expand the safe harbor beyond its current contours. The reasons expressed for the expansions do not sufficiently relate to whether the proposed research is separate enough from offering

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

[412] 17 CFR 239.64.

[413] See, *e.g.*, Letters of ASF and BMA.

[414] As electronically filed documents, ABS informational and computational material are 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 is not 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 qualifies for a continued hardship exemption.

[415] For more information about research reports and recent Commission proposals in this area, see the Offering Process Release. The Commission's existing 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 in this release 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 does our new safe harbor in new Rule 139a 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. For more information, again see the Offering Process Release.

[416] See note 35 above.

[417] See Letter of ABA.

[418] See, *e.g.*, Letters of ABA; ASF; BMA; and NYCBA.

[419] See Letter of CFAI.

[420] See Securities Act Rule 139a. As we noted in the Proposing Release, the safe harbor is a non-exclusive safe-harbor the same as existing Rules 137, 138 and 139. In addition, each of the existing safe harbors in Rules 137, 138 and 139 remain available with respect to asset-backed securities if the conditions for the particular safe harbor are met.

material such that it should be excluded from the definition of ''offer'' in its entirety.

In addition, consistent with our proposal and the existing no-action letter, the safe harbor will be available only with respect to ABS offerings registered on Form S–3. That is, it is only 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 rules for ABS informational and computational material and existing Rule 139, we believe offerings of securities meeting the requirements for Form S–3 registration represent the appropriate categories of offerings for the safe harbor.

Under the safe harbor, 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:[421]

- The broker or dealer shall 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 shall 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;[422] or
- 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 shall 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 shall explain in reasonable detail the reasons for such preference.

As proposed, not included in the list 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.'' As we explained in the Proposing Release, because these types of disclosures 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 retain this condition to the safe harbor does not affect any other requirement that would require disclosure of such relationships.

As part of the Offering Process Release, we proposed revisions to the existing research report safe harbors of Rules 137, 138 and 139.[423] To the extent these existing safe harbors are modified, we also will consider similar modifications to the ABS safe harbor. We also encourage ABS market participants to comment specifically on the proposals in that release regarding any appropriate changes to the existing safe harbors or the ABS safe harbor.

3. Other Communications During the Offering Process

In response to a request for comment, several commenters recommended revising Securities Act Rule 134[424] to provide additional items for purposes of ABS offerings.[425] Rule 134 deems certain limited communications announcing an offering (often called ''tombstone'' announcements) not a prospectus so long as the communication is limited to the items specified in that rule. In the Offering Process Release, we proposed several expansions to Rule 134 that would address in part these commenters' requests. Some of the remaining items requested by commenters may be beyond the proper scope of Rule 134.[426] As we stated in the Offering Process Release, we have not proposed to amend Rule 134 in a manner that would permit detailed term sheets for offerings under the rule, which is consistent with Rule 134 for offerings generally. We encourage ABS market participants to comment specifically on the proposals in that release. In the meantime, we note that the scope of the detailed items requested by commenters for Rule 134 are generally subsumed already within the scope of permitted ABS informational and computational material.

Finally, one commenter requested clarification regarding issuer or underwriter involvement with pre-sale reports by rating agencies.[427] Whether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or underwriter depends upon whether the issuer or underwriter has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. The courts and we have referred to the first line of inquiry as the ''entanglement'' theory and the second as the ''adoption'' theory.[428] We think these theories are equally applicable with respect to ABS issuer or

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

[422] Consistent with the staff no-action letter, this condition does 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).

[423] For example, we proposed to remove a similar prohibition in existing Rule 139 on a broker or dealer making a more favorable recommendation than the one it made in the last publication.

[424] 17 CFR 230.134.

[425] See, *e.g.*, Letters of ABA; ASF; BMA; and FSR.

[426] *E.g.*, more detailed class or pool level information, even if on a summary characteristic basis, such as LTV ratio, weighted average FICO, grace and forbearance percentages, delinquencies, losses and asset concentrations.

[427] See Letter of ABA.

[428] For a fuller discussion of these theories, see Release No. 33–7856 (Apr. 28, 2000) [65 FR 24843], at fn. 48 and accompanying text.

underwriter involvement regarding rating agency pre-sale reports. For example, if an issuer or underwriter distributed the pre-sale report in connection with an offering of the securities, it would be appropriate to conclude that such party has adopted that report and should be liable for its contents. Liability under the ''entanglement'' theory depends upon the level of pre-publication involvement in the preparation of the information.

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.[429] 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[430] and file reports pursuant to Section 13(a) of the Exchange Act.[431] 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.[432]

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 suspend if those securities subsequently meet the 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 Web sites, although some still require registration and pre-approval before permitting access to such important information. Third party services continue to evolve to provide post-issuance performance data, although again such services often charge a fee and 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.[433]

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. It also is a longstanding requirement under the modified reporting system that 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 reporting 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 consideration of the existing requirement in the modified reporting system for an accountant attestation as to an assertion of compliance with servicing criteria, the Commission exempted asset-backed issuers from the reporting requirements regarding internal control over financial reporting.[434] However, asset-backed issuers must include a certification

[429] See Section III.B.9.e. See also Hema B. Oza, ''Surveillance—The Truth * * * Told by Investors,'' Asset Securitization Report, Sep. 27, 2004.

[430] 15 U.S.C. 78*l*.

[431] 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.

[432] 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). Our rules do not affect Form 15 filing requirements. In addition, we are not addressing at this time the definition of ''held of record,'' as defined in Exchange Act Rule 12g5–1 (17 CFR 240.12g5–1).

[433] As 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.

[434] See note 41 above.

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.[435] 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.

Commenters supported our proposal to codify the basic modified reporting system for asset-backed securities.[436] We describe the final rules and forms with respect to the system, as modified in response to comment, in more detail below. In addition and as noted in Section III.A.4., we are not creating a separate Exchange Act reporting system for foreign ABS. As a result, foreign ABS will report on Forms 10–K, 10–D and 8–K, the same as domestic ABS. Commenters also supported this approach.[437]

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

First, we are adopting our proposed 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 statutory definition of ''issuer'' under the Exchange Act are identical to the Securities Act definition.[438] Accordingly, we are adopting a corollary Exchange Act rule for clarifying the definition of ''issuer'' for ABS similar to our new rule discussed in Section III.A.3.d. regarding the Securities Act. In particular, the Exchange Act rule clarifies 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.[439] Like our similar definition for the Securities Act, the Exchange Act definition 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 will 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.[440] Like our Securities Act rule, our Exchange Act rule will apply regardless of the issuing entity's form of organization.

This approach addresses the reality of ABS offerings that 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 new definition, we are identifying who must sign Exchange Act reports. The particular signature requirements for each Exchange Act report are discussed below in connection with the discussions of the requirements for each report. However, our basic principle remains the same as in the Proposing Release that the depositor is to sign Exchange Act reports, although an authorized representative of the servicer will be permitted 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 access 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. As proposed and consistent with longstanding staff and prevalent industry practice, 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 are clarifying, as proposed, several interpretive positions regarding the operation of the Section 15(d) reporting obligation with respect to asset-backed securities, which commenters supported.[441] 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 are codifying the longstanding interpretive position that no annual or other reports need be filed pursuant to Section 15(d) for ABS until the first bona fide sale in a takedown of securities under the registration statement.[442] For example, if an ABS Form S–3 shelf registration statement was declared effective on October 1, 2004 but no takedown occurred until February 1, 2005, no reports will need to be filed until after the first takedown. The first reporting obligation is triggered by the first takedown of asset-backed securities.[443]

[435] 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)).

[436] See, *e.g.*, Letters of ABA; ASF; FSR; and ICI.

[437] See, *e.g.* Letter of A&O.

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

[439] See Exchange Act Rule 3b–19 (17 CFR 240.3b–19). The rule in the Exchange Act is identical to Securities Act Rule 191. See Section III.A.3.d. As proposed, we also are defining 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.

[440] Likewise, any applicable exemptions from reporting that the person acting as depositor may have with respect to its own securities will not be applicable to the asset-backed securities.

[441] See, *e.g.*, Letters of ABA and ASF. As proposed, these new rules only are applicable with respect 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 is not applicable while a class of securities is reporting pursuant to Section 13(a).

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

[443] 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

We also are codifying 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.[444] 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 is 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 will be suspended.[445] Of course, the suspension of that reporting obligation has 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.

We requested comment on whether the ability to suspend reporting under Section 15(d) should be revisited. For example, we requested comment on whether it should be a condition or required undertaking for registration statement form eligibility or for any of our other proposals that Exchange Act reporting must continue for the life of the security. One commenter primarily representing investors recommended conditioning ABS shelf registration upon an issuer agreeing either to continue filing reports under Section 15(d) or to make publicly available on their Web sites copies of reports that contain the information required by proposed Form 10–D.[446] Under the current system, the commenter argued, most investors remain dependent on sponsors voluntarily providing ongoing disclosures after the Section 15(d) suspension, and some issuers refuse to issue ongoing disclosures after their Exchange Act reporting obligation has been suspended.

Many other commenters did not believe the ability to suspend the Section 15(d) reporting obligation should be revised.[447] These commenters generally argued that there is no reason to treat ABS issuers differently from other securities that can suspend reporting under Section 15(d). In addition, such a change would be costly and the commenters believed ABS investors, which are mostly institutional, already have sufficient access to information through proprietary and third party Web sites.

We are not at this time revisiting the statutory framework of Section 15(d) regarding the suspension of reporting obligations. Modifying the obligation would raise broad issues regarding the treatment of other non-ABS issuers that do not have public common equity. However, the concerns raised by investors do confirm the importance to investors of post-issuance reporting of information regarding an ABS transaction in understanding transaction performance and in making ongoing investment decisions.

Finally, we are adopting a separate rule, as proposed, 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.[448] 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 are providing that no separate annual and other reports need be filed with respect to the intermediate financial asset's reporting obligation, if the following conditions are met:[449]

- 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 and 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.

As proposed, the new rule does not affect any reporting obligation applicable with respect to the asset-backed securities, nor does it affect any obligation to provide information regarding the financial asset or the underlying asset pool in the ABS reports.[450]

3. Reporting on EDGAR

Registration statements and annual and other periodic and current reports are filed in electronic format on EDGAR.[451] As proposed, we are not fundamentally changing how documents regarding asset-backed securities are to be filed on EDGAR. However, there have been and continue to be inconsistencies by ABS issuers with respect to filing of registration statements and 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 reiterating the following guidance from the Proposing Release on how to submit

to the end of the fiscal year. See, *e.g., Fleet Finance Home Equity Trust 1990–1* (Apr. 9, 1991); *AIC Premium Finance Loan Master Trust* (Apr. 3, 1995); and *Toyota Auto Receivables 1995–A Grantor Trust* (Dec. 19, 1995). While not all commenters agreed (See, *e.g.*, Letters of Am. Bankers and ASF), we continue to believe that, even if the period is short, information regarding the servicing and administration of the asset pool for the period (particularly the servicer compliance statement and assessment of compliance with servicing criteria) is still important information to provide to investors in an annual report, even if no distributions were made to investors prior to the fiscal year end. For example, such information is not otherwise required to be part of or filed in connection with the filing of the final prospectus. Accordingly, as proposed, the accommodation in those letters will no longer be available.

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

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

[446] See, *e.g.*, Letter of ICI.

[447] See, *e.g.*, Letters of ABA; Am. Bankers; ASF; Capital One; CMSA; and Wells Fargo.

[448] See Exchange Act Rule 15d–23. This rule is not applicable with respect to underlying securities that do not meet its 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.

[449] As with note 441 above, these amendments are only applicable with respect to the reports filed pursuant to Section 15(d) for the intermediate financial asset. They do 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.

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

[451] See Rule 101 of Regulation S–T (17 CFR 232.101).

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. In addition, we are planning programming changes to the EDGAR system to permit the generation of new EDGAR access codes for an issuing entity before the Securities Act Rule 424(b) prospectus is filed. We believe such changes should significantly reduce some of the technical and compliance issues involved in establishing new transactions under the EDGAR system. We or the staff will issue additional instructive guidance once these programming changes are made to update and clarify further EDGAR reporting processes for ABS.

Under our EDGAR system, 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.[452] The depositor must include the complete name of the new entity as part of the serial tag.[453] 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.[454]

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.[455] 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 Web site.

As we explained in the Proposing Release, the creation of new issuing entities by identifying the serial tag in the Rule 424 filing header effectively identifies the reporting obligation of the depositor from that of the new entities. While not all commenters agreed,[456] we continue to believe that 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 increases 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 continue to believe that 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 inconsistent with these objectives.[457] 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.

4. Distribution Reports on Form 10–D

a. New Form 10–D and Deadline for Filing

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 are adopting our

[452] As we explained in the Proposing Release, 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 securities that are to be listed on a national securities exchange, an Exchange Act registration statement, such as a Form 8–A (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. Until the programming changes discussed in the text 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.

[453] 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 the problems we have seen in the past regarding inconsistent abbreviation of names.

[454] 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. See Release No. 33–8410 (Apr. 21, 2004). As noted in the text, we are considering EDGAR programming changes to streamline this process for ABS.

[455] 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, does not affect the incorporation by reference of these documents into the registration statement originally filed under the depositor's CIK code.

[456] See, *e.g.*, Letters of ASF and Sallie Mae.

[457] We understand the staff in a few isolated instances has previously allowed combined reporting for a limited number of trusts. 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. Combined reporting is not the prevalent industry practice, even for issuers that frequently access the public securitization market, and the position in these letters is no longer applicable.

proposal for one new form type for asset-backed securities, Form 10–D, to act as the report for the periodic distribution and pool performance information.[458] Commenters supported a new form type for such reports.[459] Under the final rule, every asset-backed issuer subject to Exchange Act reporting requirements will be required to make such reports on Form 10–D.[460]

Consistent with our proposal and the existing modified reporting system, these reports will 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. Commenters generally supported codifying the existing deadline.[461] As proposed, a report will 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.

We also are providing the ability to obtain a five calendar day filing extension under Exchange Act Rule 12b–25 for Form 10–D filings, similar to the process available today for Form 10–Q filings by non-ABS issuers.[462] Commenters supported extending Rule 12b–25 to Form 10–D filings, particularly if we continued an approach that linked Exchange Act reporting compliance with Form S–3 eligibility requirements.[463] Under Rule 12b–25, the issuer must file a Form 12b–25 no later than one business day after the due date for the Form 10–D filing if all or any portion of the Form 10–D report is not filed in a timely manner. To obtain the filing extension, the Form 12b–25 must contain certain representations by the registrant, including why the inability to file timely could not be eliminated without unreasonable effort or expense and that the subject Form 10–D filing will be made not later than the fifth calendar day following its original due date. The related Form 10–D filing must then be made not later than five calendar days after its original due date.[464] If the issuer timely provides the proper notice on Form 12b–25 filing and subsequently makes the related Form 10–D filing within the required five calendar day period, the Form 10–D filing will be deemed to be filed on its original due date, including for purposes of Form S–3 eligibility.[465]

b. Signatures

As we stated in the Proposing Release, it is our understanding that in many ABS transactions, the trustee is the recipient and not necessarily the preparer of the Form 10–D 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 signature requirements for Form 10–D reflected 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 (or master servicer if multiple servicers were involved). We did not propose to permit the trustee to sign the report as an alternative to the depositor or the servicer.

Commenters were mixed on these proposals. While some commenters supported the proposals,[466] others believed additional parties should be able to sign, including the trustee.[467] Some of these commenters believed any party should be permitted to sign an Exchange Act report for asset-backed securities, if the transaction parties so agreed.

We are not persuaded that additional parties should be permitted to sign the Form 10–D. While the final rule will result in a change in practice for some issuers from the inconsistent practice under the modified reporting system, we continue to believe it is more appropriate for the reports to be signed by either the depositor, or the servicer in the alternative. In the various scenarios presented by commenters who argued for the ability of additional parties to sign, in each case either the depositor or the servicer would still be in a position to sign. We also do not believe it is appropriate to permit any transaction party to sign a required report under the Exchange Act.[468] Accordingly, we are adopting our signature requirements as proposed.[469]

c. Content

Consistent with our proposal and the longstanding requirements under the modified reporting system, the disclosure content for Form 10–D will consist of both the distribution and pool performance information for the distribution period, and certain non-financial disclosures, similar to those required by Part II of Form 10–Q, that occurred during the period. Some commenters requested a change from this longstanding practice by limiting the Form 10–D to only distribution and pool performance information and moving the other disclosures from the modified reporting system to Form 8–K disclosure requirements, albeit with longer deadlines than current Form 8–K requirements.[470] Given our other amendments to Form 8–K disclosure requirements for ABS, discussed below, we do not believe it is necessary at this time to deviate further from the established requirements of the ABS modified reporting system.

The menu of disclosure items for Form 10–D is presented in the following table:

[458] See 17 CFR 249.312. Like our other Exchange Act reports, Form 10–D will 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 will be required to be submitted in electronic form in accordance with the EDGAR rules set forth in Regulation S–T.

[459] See, *e.g.*, ABA; ASF; Aus. SF; ICI; JPMorganChase; MBNA; and Wells Fargo.

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

[461] See, *e.g.*, Letters of ABA; ASF; JPMorganChase; MBNA; and Wells Fargo.

[462] A 15 calendar day filing extension for Form 10–K already exists under Exchange Act Rule 12b–25.

[463] See, *e.g.*, Letters of ABA; ASF; Capital One; CMSA; JPMorganChase; and U.S. Bank.

[464] The filing extension procedure in Rule 12b-25 is not available more than once for any particular Form 10–D filing.

[465] Note, however, that Exchange Act Rule 12b–25(d) provides that ''a registrant will not be eligible to use any registration statement form under the Securities Act of 1933 the use of which is predicated on timely filed reports until the subject report is actually filed'' pursuant to Rule 12b–25.

[466] See, *e.g.*, Letters of JPMorganChase and Wells Fargo.

[467] See, *e.g.*, Letters of ABA; Am. Bankers; ASF; BMA; and U.S. Bank.

[468] This approach is consistent with non-ABS, including other structured securities.

[469] Several commenters requested clarification on the use of a power of attorney to sign Exchange Act reports. See, *e.g.*, Letters of ASF; BMA; JPMorganChase; and U.S. Bank. Existing Item 601(b)(24) of Regulation S-K addresses the procedural requirements for the use of a power of attorney if any name is signed to an Exchange Act report pursuant to a power of attorney. Manually signed copies of such power of attorney must be filed. In addition, if the name of any officer signing on behalf of the registrant (*e.g.*, for ABS, either the officer of the depositor signing on behalf of the depositor or the officer of the servicer signing on behalf of the issuing entity by the servicer) is signed pursuant to a power of attorney, certified copies of a resolution of the registrant's board of directors authorizing such signature shall also be filed (*e.g.*, by the depositor's board of directors). A power of attorney filed relating to an Exchange Act report must relate to a specific filing or amendment. A power of attorney that confers general authority shall not be filed. A power of attorney is to be for an individual person. Note that a power of attorney cannot be used for signing a certification pursuant to Exchange Act Rule 13a-14 or 15d-14. See Exchange Act Rule 13a-14(c) and 15d-14(c). In addition, even in instances where a power of attorney may be used, the use of the power of attorney does not affect the responsibility of the principal whose signature is being signed pursuant to the power of attorney.

[470] See, *e.g.*, Am. Bankers; ASF; CMSA; and Sallie Mae.

DISCLOSURE FOR FORM 10–D

Form items and source of disclosure required
Item 1. Distribution and Pool Performance Information (Item 1121 of Regulation AB).
Item 2. Legal Proceedings (Item 1117 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 (Item 1112(b) of Regulation AB).
Item 7. Significant Enhancement Provider Information (Items 1114(b)(2) and 1115(b) 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 requires the registrant to provide the information required by Item 1121 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 will be required by Item 1121 of Regulation AB, any information required by that Item that was included in the attached distribution report need not be repeated in the Form 10–D.[471] 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 is included in the attached distribution report. However, taken together, the attached distribution report and the information provided in the Form 10–D must contain the information required by Item 1121 of Regulation AB.

Item 1121 of Regulation AB, as proposed, requires 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 did not propose and we are not adopting a standardized format for the presentation of either the information required by Item 1121 of Regulation AB or the distribution report prepared under the transaction agreements. Commenters overall supported this decision.[472] However, while the material characteristics will vary depending on the nature of the transaction, we continue to believe that, similar to asset pool disclosure for the registration statement prospectus, there are certain broad categories of disclosure and examples of common characteristics that can be identified as illustrative examples. Therefore, Item 1121 of Regulation AB continues to set forth non-exclusive examples of such information, as revised in response to comment. As we stressed in the Proposing Release, and consistent with our discussion above regarding prospectus disclosure, the actual disclosure to be provided will need to be tailored to the material characteristics of the asset pool and transaction involved. As with the item for prospectus asset pool disclosure, we recognize that not all of the characteristics identified will be applicable or material to the particular asset class and transaction involved. As proposed, appropriate introductory and explanatory information should be provided to introduce material terms, parties and abbreviations used (or a cross-reference to a Commission filing where such information may be found), and statistical information should be presented in tabular and graphical formats, if such presentations will aid understanding.

Commenters representing investors in particular supported our proposed disclosure for the distribution and pool performance information.[473] As adopted, examples of illustrative characteristics in Item 1121 of Regulation AB 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 and disposition of excess cash flow.[474]
- Interest rates applicable to the assets and the asset-backed securities, as applicable. Registrants should consider providing interest rate information for pool assets in appropriate distributional groups or incremental ranges.
- Beginning and ending principal balances of the asset-backed securities.
- Beginning and ending balances of transaction accounts, such as reserve accounts, and material account activity during the period.
- Amounts drawn on any credit enhancement or other support, as applicable,[475] and amounts still available, if known and applicable.
- 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 and prepayment amounts.[476]
- Delinquency and loss information for the period.[477]
- The amount, terms and general purpose of any advances made or reimbursed during the period.
- Material modifications, extensions or waivers to pool asset terms, fees, penalties or payments during the distribution period or that have cumulatively become material over time.
- Material breaches of pool asset representations or warranties or transaction covenants.
- Information on ratio, coverage or other tests used for determining any early amortization, liquidation or other

[471] While we make this point specifically in Item 1 of Form 10–D with respect to distribution and pool performance information, the same is true regarding any of the other Items of Form 10–D. See, *e.g.*, General Instruction D. of Form 10–D. In addition, 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 had been previously reported by the asset-backed issuer, an additional report of the information on Form 10–D need not be made. See General Instructions C.3 an C.4 of Form 10–D and the definition of ''previously reported'' in Exchange Act Rule 12b–2.

[472] See, *e.g.*, Letter of ABA; ASF; and PWC.

[473] See, *e.g.*, Letters of CFAI and ICI.

[474] For example, excess cash flow released to the residual holder or other disposition, such as deposit into a transaction account.

[475] For example, for internal credit enhancement or other support, this would not include application of subordination among classes, but would include use of reserve accounts.

[476] For asset-backed securities backed by leases where a portion of the securitized pool balance is attributable to the residual value of the physical property underlying the leases, this information also would include turn-in rates and residual value realization rates.

[477] This item, like the other listed items in Item 1121(a) of Regulation AB, is based on materiality. We have deleted the reference in this item to Item 1100(b) of Regulation AB. We included the reference as general guidance on presenting delinquency and loss information. We understand that such information in distribution reports typically is less expansive than the full delinquency and loss information presented in the final Rule 424 prospectus for the offering. However, we would expect any material changes to how delinquencies, charge-offs and uncollectable accounts are defined or determined, including re-aging policies, would be disclosed in the Form 10–D report.

performance trigger and whether the trigger was met.

As explained in the Proposing Release, in part because we are expanding the availability of prefunding periods, revolving periods and master trusts, we also are expanding related periodic disclosure to include information regarding any new issuance of asset-backed securities backed by the same asset pool and any pool asset changes (other than in connection with a pool asset converting into cash in accordance with its terms), such as additions or removals in connection with a prefunding or revolving period and pool asset substitutions and repurchases. Such information includes any material changes in solicitation, credit-granting, underwriting, origination, acquisition or pool selection criteria or procedures. While comments on this aspect of the proposal were mixed between investors who desired such information and issuers and their representatives who generally objected to providing information that is not already provided today,[478] we continue to believe it is important to provide transparency in those instances where the pool is changing not as a result of the assets converting into cash in accordance with their terms, but instead through external administration via an exception to the basic principle that the asset pool is discrete.

In addition, we proposed that if the addition, substitution or removal of pool assets had materially changed the composition of the asset pool as a whole, full updated pool composition information required by Items 1110, 1111 and 1112 of Regulation AB would be required to the extent such information had not been provided previously. Several commenters representing primarily issuers and their representatives objected to the proposal, generally arguing that disclosure of the parameters of the possible pool changes in the prospectus should be sufficient and updated pool disclosure reflecting actual changes, even if the pool has materially changed, should not be required because such disclosure is not publicly provided today.[479] We continue to believe that, with respect to changes to the asset pool that occur not as a result of the assets converting into cash in accordance with their terms but rather as a result of external administration, updated disclosure about the effects of such external changes should be required. We understand that the proposal, which would have triggered new pool composition information at any time a material change in pool composition occurred, could create administrative burdens in assessing on an ongoing basis whether the pool composition has materially changed. To ease these burdens and difficulties associated with the proposal, our final requirement will require such updated pool composition information at set times, but only where a prefunding or revolving period is in effect or new issuances have occurred from a master trust and, in each instance, only if the information has materially changed from that previously provided.

Under the final requirement, during a prefunding or revolving period (including for asset classes where an unlimited revolving period is permitted), or if there has been a new issuance of ABS backed by the same pool under a master trust during the fiscal year of the issuing entity, updated pool composition information will be required in the Form 10–D report for the last required distribution of the fiscal year of the issuing entity. In addition, such updated pool composition information also will be required in the first Form 10–D report filed for the period in which the prefunding or revolving period ends (if applicable).[480] Consistent with the proposal, such updated pool composition information will include information required by Items 1110, 1111 and 1112 of Regulation AB applied taking the revised pool composition into account.[481]

Consistent with our proposal, no information will be required, however, if the information has not materially changed from that provided previously in an Exchange Act report, 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. For example, if a takedown related to an ABS transaction with a revolving period occurred in October and the revised pool as of the end of the issuing entity's fiscal year in December while the revolving period was still in effect had not materially changed from the pool described in the prospectus supplement for the takedown, updated pool composition information would not be required. Similarly, if a new issuance from a master trust occurred in October and the revised pool as of the end of the issuing entity's fiscal year in December was substantially similar to the pool described in the prospectus supplement for the takedown, updated pool composition information would not be required.

Regarding the other disclosure items for Form 10–D, the requirements regarding disclosure of legal proceedings, sales of securities, use of proceeds, submission of matters to a vote of security holders, defaults on senior securities and other information are consistent with the longstanding non-financial disclosures in Form 10–Q required under the modified reporting system.[482] For legal proceedings, we reference as proposed the tailored ABS disclosure in Item 1117 of Regulation AB. As with legal proceedings disclosure in Form 10–Q, a proceeding only will need to be reported for the distribution period in which it first became a reportable event and in subsequent periods where there have been material developments. The other disclosure items contain cross-references to similar items in Form 10–Q. For disclosure regarding the issuance of additional securities, we are providing, in response to comment, that information regarding consideration required by Item 701(c) of Regulation S–K[483] need not be provided with respect to securities that were not registered under the Securities Act.[484]

As proposed, Items 6 and 7 of Form 10–D will require updated financial information about significant obligors and providers of enhancement, to the extent updated information is required. As has long been the case under the modified reporting system and consistent with the practice for non-ABS issuers, we continue to believe that such information should be provided on an ongoing basis in addition to in the initial prospectus while the asset-backed securities are reporting under the Exchange Act. As proposed, such information only will need to be included in the first distribution report for the period in which updated

[478] Compare, *e.g.*, Letters of CFAI and ICI; with Letters of ABA and ASF.

[479] See, *e.g.*, Letters of ABA; ASF; BMA; and Wells Fargo.

[480] In most instances, due to the fact most ABS issuers suspend reporting obligations under Section 15(d) after the end of their first fiscal year after the takedown occurs, the operation of these requirements will most likely result in the disclosure being provided once, if applicable.

[481] See Item 1121(b) of Regulation AB. The original proposal also would have required information required by Item 1108 of Regulation AB (proposed Item 1107) to address new servicers not previously described. However, as new servicer disclosure already will be covered by Item 6.02 of Form 8–K, we are not including it separately with this disclosure requirement.

[482] 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 are incorporated into the similar disclosure required for Form 10–D.

[483] 17 CFR 229.701(c).

[484] See, *e.g.*, Letter of ASF.

financial information regarding the third party is required under Regulation S–X. As discussed in Section III.B.10., 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.

Regarding providing updated financial information for third parties, several commenters requested clarification as to when the percentage concentration tests should be measured for determining significant obligors.[485] The suggestions by commenters were mixed. Some commenters believed determinations should be made at closing and not change over time as a result of pool fluctuations, arguing that to monitor changes on an ongoing basis would be burdensome.[486] In addition, some of these commenters argued that it is typical to contract with known significant obligors at closing that additional information is to be provided for securitization reporting, and new significant obligors that arise as the pool pays down would not have such provisions negotiated into their agreements. Other commenters, however, thought the tests should be recalculated with pool fluctuations.[487] One commenter believed the tests should be measured as of the date the significant obligor is initially added to the transaction, but not change as the pool pays down.[488]

We are clarifying in an instruction to the definition of significant obligor that the determination of significant obligors is to be made as of the designated cut-off date for the transaction, provided, that, in the case of master trusts, the determination is to be made as of the cut-off date (or issuance date if there is not a cut-off date) for each issuance of asset-backed securities backed by the same asset pool.[489] We also are noting, however, that if the percentage concentration drops below 10% subsequent to the dates discussed above, then the entity no longer need be considered a significant obligor.

Similar to recent revisions to Form 10–Q, we are requiring, as proposed, 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.[490] Like Form 10–Q, this requirement applies 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.[491] 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).

5. Annual Reports on Form 10–K

Similar to our new general instructions for Forms S–1 and S–3, we are adopting 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.[492] As proposed, under the instruction the depositor's name and sponsor's name also will need to be listed on the cover page of the Form 10–K.[493]

The instruction also clarifies who is to sign the Form 10–K. Consistent with our proposal and the existing requirements for who must sign the Sarbanes-Oxley Section 302 certification, the report must 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 is to sign the report on behalf of the issuing entity and multiple servicers are 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 function) must sign. For the same reasons as the Form 10–D, we are not persuaded that additional parties, such as the trustee, should be permitted to sign the report as an alternative to the depositor or the servicer.[494]

Substantially as proposed, the general instruction identifies the existing items in the form that may be omitted as well as substitute items from Regulation AB that are required. Any other applicable items specified in Form 10–K will continue to be required.[495] As we explained in the Proposing Release, the requirements specified are consistent with the modified reporting system, and commenters overall agreed.[496] The application of the disclosure items for Form 10–K is presented in the following table:[497]

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		•

[485] We are adopting our proposed Form 8–K requirement for the addition and loss of material providers of credit enhancement or other support. Therefore, we do not believe separate accommodations are necessary for such entities.

[486] See, *e.g.*, Letters of ASF and CMSA.

[487] See, *e.g.*, Letter of NYCBA.

[488] See, *e.g.*, Letter of ABA.

[489] As noted in Section III.D.8.c., we also are clarifying that separate determinations of significant obligors must be made for disclosure required by Item 6.05 of Form 8–K if the actual asset pool differs materially from that described in the prospectus. Separate determinations also must be made if disclosure is required by Item 1121(b) of Regulation AB. See note 481 above and accompanying text.

[490] See also Section III.D.8.d.

[491] 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.

[492] See General Instruction J. to Form 10–K. We also are codifying as proposed the 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.

[493] While we are requiring 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.

[494] Regarding the potential use of a power of attorney, see note 469 above.

[495] As is the case today for Form 10–K, 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).

[496] See, *e.g.*, Letters of ABA and ASF.

[497] In response to comment and given our revisions to the assessment and attestation proposal, we have moved Items 5 and 9 of Form 10–K to the list of Items that may be omitted. See, *e.g.*, Letters of ABA and ASF.

DISCLOSURE FOR FORM 10–K FOR ABS—Continued

Existing form items	Required if applicable	May be omitted
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		•[1]
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 1112(b) of Regulation AB, Significant Obligor Financial Information	•	
Items 1114(b)(2) and 1115(b) of Regulation AB, Significant Enhancement Provider Financial Information	•	
Item 1117 of Regulation AB, Legal Proceedings	•	
Item 1119 of Regulation AB, Affiliations and Certain Relationships and Related Transactions	•	
Item 1122 of Regulation AB, Compliance with Applicable Servicing Criteria	•	
Item 1123 of Regulation AB, Servicer Compliance Statement	•	

[1] If the issuing entity does not have any executive officers or directors.

As noted in the table above, if the issuing entity has its own executive officers, board of directors or persons performing similar functions, Items 401, 402, 403 and 404 of Regulation S–K, will be required.[498] As discussed in Section III.B.1., we are not requiring audited financial statements for the issuing entity, nor are we adding reporting requirements regarding internal control over financial reporting.

Regarding the items to be included from Regulation AB, information about legal proceedings required by Item 1117 of Regulation AB will need to be provided, as well as information on affiliate relationships and related party transactions required by Item 1119 of Regulation AB. Regarding the latter, no information will be required, however, if substantially the same information had been provided previously in an annual report on Form 10–K for the asset-backed securities or in an effective registration statement under the Securities Act or prospectus timely filed pursuant to Securities Act Rule 424 under the same CIK code as the current annual report on Form 10–K. Updated financial information regarding significant obligors and enhancement providers also will be required,[499] 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. The reporting requirement regarding an assessment of compliance with servicing criteria is discussed in Section III.D.7.

As proposed, we are codifying the longstanding requirement in the modified reporting system that a servicer compliance statement must be filed as an exhibit to the Form 10–K.[500] 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 the assessment of and attestation regarding compliance with servicing criteria, which is 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 servicer compliance statement is 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 are involved in servicing the pool assets, separate compliance statements are required from each servicer that meets the criteria in Item 1108(a)(2)(i) through (iii) of Regulation AB (*i.e.*, master servicer, each affiliated servicer and each unaffiliated servicer that services 10% or more of the pool assets). As we explained in the Proposing Release, we believe this is consistent with general practice and should result in coverage of the material aspects of the primary servicing function.

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.[501] As proposed, we are amending Item 601 of Regulation S–K to add the specific form and content of the required ABS Section 302 certification to the exhibit filing requirements.[502]

[498] Otherwise, all of Item 403 of Regulation S–K, including Item 403(a) of Regulation S–K, may be omitted.

[499] See text accompanying note 489 above regarding when determinations of significant obligors must be made.

[500] See Item 1123 of Regulation AB. Amendments to Item 601 of Regulation S–K specify that servicer compliance statements are to be filed as Exhibit 35 to the Form 10–K.

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

[502] See 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 amendments to Item 601 of Regulation S–K segregate the separate forms of Section 302 certifications for non-ABS issuers (required by paragraph (a) of Exchange Act Rules 13a–14 and

Continued

As we explained in the Proposing Release, in specifying the form of the ABS Section 302 certification, we are making several amendments to the form provided in the revised staff statement to reflect our other substantive Exchange Act amendments.[503] Other changes reflect the approach, as proposed and consistent with the approach for non-ABS issuers, 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. Commenters generally agreed with our proposed revisions to the form of the certification.[504] The new form of certification, as modified from the proposal, is as follows: [505]

Certifications

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] (the ''Exchange Act periodic reports'');

2. Based on my knowledge, the Exchange Act periodic reports, taken as a whole, do 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 with respect to 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 the Exchange Act periodic reports;

4. [I am responsible for reviewing the activities performed by the servicer(s) and based on my knowledge and the compliance review(s) conducted in preparing the servicer compliance statement(s) required in this report under Item 1123 of Regulation AB, and except as disclosed in the Exchange Act periodic reports, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and]

[Based on my knowledge and the servicer compliance statement(s) required in this report under Item 1123 of Regulation AB, and except as disclosed in the Exchange Act periodic reports, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and]

5. All of the reports on assessment of compliance with servicing criteria for asset-backed securities and their related attestation reports on assessment of compliance with servicing criteria for asset-backed securities required to be included in this report in accordance with Item 1122 of Regulation AB and Exchange Act Rules 13a–18 and 15d–18 have been included as an exhibit to this report, except as otherwise disclosed in this report. Any material instances of noncompliance described in such reports have been disclosed in this report on Form 10–K.

[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]

As we explained in the Proposing Release, paragraphs 1 and 3 have been changed from the revised staff statement to reflect the addition of Form 10–D and the fact that the certification covers the information filed in those distribution reports rather than Form 8–K.[506] Paragraph 4 refers to the servicer compliance statement explicitly required by our rules. In addition and consistent with the revised staff statement, two alternatives are provided for paragraph 4 depending on who is signing the Form 10–K report. The first version is to be used when the servicer signs the report on behalf of the issuing entity. The second version is to be used when the depositor is signing the report. Paragraph 5 of the certification has been amended from the revised staff statement and our proposal to refer specifically to our revised requirements regarding assessment of compliance with servicing criteria, discussed more fully in Section III.D.7.

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 our proposal and the revised staff statement, the final rules specify who must sign the certification. 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.[507] 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 function) must sign if a representative of the servicer is to sign, and references in the certification 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.

As proposed, these signature requirements are consistent with our final rules for who must sign the Form 10–K. The same person that signs the Form 10–K must sign the Section 302 certification. Although comments in this area were mixed, we are not persuaded that a representative of the trustee should be permitted to sign the Section 302 certification, especially given that the trustee is not the party signing the report itself.[508]

Consistent with our proposal and the revised staff statement, we are including 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

15d–14) from those for ABS filings (required by paragraph (d) of Exchange Act Rules 13a–14 and 15d–14). In both instances, Section 302 certifications still must be filed under Exhibit 31. We also are revising Exchange Act Rules 13a–14(d) and 15d–14(d) as proposed to delete from those paragraphs the detailed description of the contents of the ABS Section 302 certifications. We are making several other technical amendments to the rules regarding certifications, as proposed, 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.

[503] We believe the combination of these and other amendments 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).

[504] See, *e.g.*, Letters of ABA and ASF.

[505] 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 are not requiring that ABS reports on Form 10–K must contain the ABS issuer's financial statements. Thus, a Section 906 certification requirement will not be triggered.

[506] In addition, we are making conforming revisions to paragraph 2 of the certification to track similar changes made in the June 2003 certification release, which was issued after the revised staff statement.

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

[508] Compare, *e.g.*, Letters of Aus. SF and Wells Fargo; with Letters of ABA; ASF; and BMA.

co-servicers have provided. As is the case today, if the signer does so, it must provide an additional statement in the certification identifying the unaffiliated parties on which the signer reasonably relied. Commenters supported retaining this instruction.[509] Like the revised staff statement, we are not specifying the manner in which reasonable reliance may be established. As proposed, the reasonable reliance instruction for the Section 302 certification is not applicable with respect to affiliated parties, nor is it applicable with respect to information from any registered public accounting firm or firms performing an attestation on an assessment of compliance with servicing criteria for an affiliated party.

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

a. Background

As noted above, the modified reporting system has not required audited financial statements for the issuing entity in the annual report on Form 10–K, but has instead generally required an assertion by the servicer and an attestation by an independent public accountant regarding compliance with servicing criteria. This longstanding 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.

However, the types of assessments and attestations, and the criteria that servicing compliance was assessed against, historically have varied significantly. The most common example involves an assertion on and disclosure regarding compliance with criteria set forth in the Uniform Single Attestation Program for Mortgage Bankers, or USAP, developed by the Mortgage Bankers Association.[510] The accountant's report attesting to the assertion under the USAP is prepared in accordance with SSAE No. 10.[511] The servicer's assertion as to compliance and the accompanying accountant's report are commonly referred to as a ''USAP Report.''

As we noted in the Proposing Release, the USAP was created early in the 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 makes 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 evaluates the servicer's assertion regarding compliance with the minimum servicing criteria.[512]

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 may be 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. As a result, the current system potentially leaves gaps in servicing compliance reporting.

b. Our Proposal and Overview of Revised Approach

Our proposal sought to retain the assessment and attestation approach as well as improve and add consistency to the approach by providing a specified manner for making assertions and associated attestations. These improvements were largely facilitated by the introduction of a single uniform set of servicing criteria that covers all aspects of the servicing function and that could be used in the context of multiple asset classes.

We continue to believe that for asset-backed securities, an assessment and attestation regarding servicing compliance provides material information to investors in monitoring transactions and thus their investments more directly and efficiently than an audit of financial statements or reporting on internal control over financial reporting. As we stated in the Proposing Release, the performance of the servicing function 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

[509] See, *e.g.*, Letters of ABA and ASF.

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

[511] Statements on Standards for Attestation Engagements No. 10 (SSAE No. 10), *Attestation Standards: Revision and Recodification* (Jan. 2001). 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.

[512] 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.''

to assess compliance with controls and processes.[513] A disclosure-based assessment and attestation system identifies for investors those aspects of the standard servicing criteria that are in material compliance. Investors will thus 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.

As we noted in the Proposing Release, 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 significant inconsistencies in the type of reporting provided, diminishing its usefulness, relevance and comparability.[514]

Accordingly, we are retaining the basic approach set forth in our original proposal, although we are making certain modifications, discussed in more detail below. Specifically, we are modifying our original proposal to remove the requirement for a single responsible party to make an assertion regarding servicing compliance covering the entire servicing function, which was the primary area of comment on the proposals.[515] Instead, we are adopting a revised approach suggested by many commenters that will require reports on assessments of compliance with servicing criteria from each party participating in the servicing function as specified, with associated attestation reports from registered public accountants, to be filed as exhibits to the Form 10–K report.[516] As an additional aspect of this revised approach, we are revising paragraph 5 of the ABS Section 302 certification, as discussed further below in response to comment, to require a certification that, except as otherwise disclosed, required reports from all parties participating in the servicing function as specified have been included as an exhibit to the Form 10–K report.

As proposed, a material instance of noncompliance identified in the reports will not by itself have regulatory restrictions on market access, such as an effect on continued form eligibility under the Securities Act for additional ABS transactions.[517] Rather, the assessment and reporting on the criteria is designed to operate within a disclosure-based framework.

c. Assessment and Attestation of Servicing Compliance

As discussed above, our revised approach will require that the annual report on Form 10–K must include as exhibits reports from each party participating in the servicing function that assesses compliance with the servicing criteria that we are adopting in Item 1122 of Regulation AB.[518] Item 1122 of Regulation AB also specifies the format for each of the assessment reports and requires them to include:[519]

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

As discussed further in Section III.D.7.d, our revised approach also requires the attestation report of a registered public accounting firm to be filed as an exhibit to the Form 10–K report.[520]

i. Responsible Party

Our proposal contemplated that a single ''responsible party,'' defined 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, would make an assertion regarding compliance with the servicing criteria. The proposal contemplated that the responsible party's assertion would cover the entire servicing function and that the responsible party would, in certain instances, have to place reasonable reliance upon third parties in making its assertion.

As discussed above, this was the primary focus of comment on our assessment and attestation proposals. Many of the commenters, in responding to our specific requests for comment on this point, believed that instead of a single ''responsible party,'' there should be separate assessments of compliance by each entity responsible for the particular criteria and separate accompanying auditor attestations.[521] These commenters believed the responsibility for assessing compliance with the criteria should be placed solely, in each case, with the individual party whose servicing activities are being evaluated. As stated by one of these commenters, individual assessments can be performed by each party at a platform level consistent with the proposal and these reports could be filed as exhibits to the Form 10–K report along with the responsible party's assessment of its own servicing compliance, as applicable.[522] Several commenters also supported as an addition to this alternative a requirement that a single party would either confirm that an assessment and attestation covering each unaffiliated party with material servicing or administration responsibilities has been received, or disclose that an entity with such responsibilities has failed to deliver its required assessment and attestation.[523]

These alternatives still achieve our proposed objective of covering the entire servicing function. We continue to believe it is important that the investor receives notice as to whether reports evidencing all aspects of the servicing function are in fact provided. As discussed in Section III.B.3.d., the

[513] See, *e.g.*, note 59 above.

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

[515] See, *e.g.*, Letters of ABA; AICPA; ASF; BMA; CMSA; Dewey Ballantine (''Dewey); E&Y; JPMorganChase; MBA; MBNA; U.S. Bank; and Wells Fargo.

[516] See, *e.g.*, Letters of AICPA; ASF; BMA; CMSA; E&Y; JPMorganChase; MBA; and Wells Fargo.

[517] However one of the proposed criteria relates to reporting with the Commission. If reports are not filed in accordance with our reporting rules, this may have an effect on continued form eligibility. See Section III.A.3.

[518] See Exchange Act Rules 13a–18 and 15d–18. Item 601 of Regulation S–K specifies that the assessment reports will need to be filed under Exhibit 33 to the Form 10–K.

[519] See Item 1122(a) of Regulation AB.

[520] See Item 1122(b) of Regulation AB. Item 601 of Regulation S–K specifies that each attestation report of a registered public accounting firm will need to be filed under Exhibit 34 to the Form 10–K. As proposed, the substitution of another type of accountant's report or opinion, such as a USAP report or an agreed-upon procedures report, will 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 the report called for by this rule.

[521] See note 515 above.

[522] See Letter of ASF.

[523] See, *e.g.*, Letters of AICPA; ASF; BMA; CMSA; E&Y; JPMorganChase; MBA; and Wells Fargo.

delegation of servicing and administration functions in an ABS transaction can vary significantly among different parties, even in the same asset class. The investor likely will not be in the best position to determine whether the reports that are ultimately attached to the Form 10–K report collectively cover all aspects of the servicing criteria.

Thus, we are adopting a revised approach in response to these comments that does not require an assertion by a single responsible party, but instead requires that the person that signs the Section 302 certification certify in paragraph 5 of the certification that assertions prepared by all parties participating in the servicing function as specified, and associated attestation reports from registered public accountants, have been included as exhibits to the report on Form 10–K, except as otherwise disclosed in the report.[524] In addition, the certifying person must certify that all material instances of noncompliance with the servicing criteria described in the reports have been disclosed in the report on Form 10–K. In order to make this certification, reports will need to be accumulated from all parties participating in the servicing function as specified, along with associated attestation reports from registered public accounting firms, and filed as exhibits. Disclosure will be required in the Form 10–K if any of those reports are missing, along with an associated explanation, and disclosure also will be required of material instances of noncompliance described in the reports, if any.

The revised approach we are adopting requires coordination among the various parties participating in the servicing function to be able to comply with the filing requirements; however, we believe that the amount of required coordination is reduced from our original proposal and, as discussed above, meets the regulatory objective of providing investors insight into the operation of the entire servicing function. We expect that such coordination is possible and, as confirmed to us by commenters, issuers can obtain the reports that must be filed as exhibits.

ii. Scope: Period Covered

We proposed that the assessment of the servicing function would be for a full fiscal period, rather than just at a point in time. We continue to believe that an assessment and attestation for the entire period covered by the report on Form 10–K is the appropriate approach in this context, and commenters generally agreed.[525] This approach is consistent with the USAP approach commonly followed today. Accordingly, we are adopting this approach without modification.

iii. Scope: Level of Reporting

In light of current practice and servicers' focus on overall compliance with standards at the platform level, we proposed to accept a ''platform'' level assessment for purposes of assessing servicing compliance. This means an assessment of compliance with respect to all asset-backed securities transactions involving the asserting 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 was proposed to permit a single assessment and assertion regarding compliance for entities involved in multiple ABS transactions, as compared to requiring separate assessments for each individual transaction, which would be more costly and might be administratively burdensome. Commenters generally supported an assessment at the platform, rather than transaction, level.[526] We are adopting this approach as we continue to believe a platform level assessment provides an appropriate level of information to investors and does not result in substantial increased cost to issuers. As commenters confirmed to us, we believe that platform level assessments can be performed by all parties participating in the servicing function to allow an issuer to meet its requirements to file the resulting assessment and related attestation reports as exhibits to the Form 10–K report.

iv. Scope: Entire Servicing Function

As we explained in the Proposing Release, 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 entire servicing function may be performed by a single party or different aspects may be performed 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 calculating 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 report covering only a limited subset of the servicing function. As we explained in the Proposing Release, 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 may lead 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 these concerns, we proposed that the responsible party would assess material compliance with the servicing criteria covering the entire servicing function, based on reasonable reliance upon third-parties where necessary. We continue to believe that the entire servicing function should be subject to an assessment of compliance. As noted above, we believe the revised approach we are adopting requiring separate reports regarding compliance by each party participating in the servicing function as specified also achieves this objective while eliminating many of the concerns or potential complexities raised by commenters regarding a single ''responsible party'' approach.

Some commenters thought that, in the event that we pursued a multiple report approach, we should set a specific threshold for which reports should be required as some parties may be providing servicing activities for only a minor portion of the assets included in a transaction.[527] Other commenters thought that providing a threshold for reporting may result in very few reports being included in instances where there

[524] See Item 601(b)(31)(ii) of Regulation S–K; Item 1122 of Regulation AB; and Exchange Act Rules 13a–18 and 15d–18.

[525] Compare, *e.g.*, Letters of ASF and E&Y; with Letter of ABA.

[526] See, *e.g.*, Letters of AICPA; ASF; E&Y; MBNA; PWC; and Wells Fargo.

[527] See, *e.g.*, Letters of AICPA; ASF; BMA; Dewey; and E&Y.

are multiple parties each servicing a minor portion of the assets included in the transaction, such as may be the case in residential mortgage ABS transactions.[528]

To address this issue, we are specifying that reports will be required by any ''party participating in the servicing function,'' which is defined as any entity that is performing activities that address the servicing criteria, unless such entity's activities relate only to 5% or less of the pool assets. For example, if a party is servicing individual pool assets that comprise only 4% of the pool, a report from that party will not be required. However, some servicing functions cover all assets included in a transaction. For example, a single party, such as a trustee or an administrator, may calculate the amount due to investors in a transaction. In those cases, an assessment from that party and a related attestation report from a registered public accounting firm will be required to be filed as an exhibit to the Form 10–K for the transaction.

As proposed, the revised approach we are adopting does not distinguish which parties should file reports based on the respective role played by the party in the servicing function. Any party participating in the servicing function, including trustees, may be required to provide an assessment and related attestation report to the extent that the assets covered by their activities relates to more than 5% of the pool assets. However, the fact that a party, such as a trustee, may perform an aspect of the servicing function covered by the criteria for purposes of requiring an assessment and attestation report does not mean that the party is included in the definition of ''servicer'' in Regulation AB for purposes of other requirements, such as disclosure regarding servicers and servicer compliance statements.

v. Servicing Criteria

As we explained in the Proposing Release, 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.

In the absence of other suitable criteria, we proposed to establish disclosure-based servicing criteria to be used by those making an assertion regarding servicing compliance and by registered public accounting firms in assessing servicing compliance. Our proposal illustrated our belief that a single set of servicing criteria that is publicly available would enhance the quality of the assessment of compliance, promote the comparability of reports of different issuers, and provide value in establishing market-wide benchmarks with respect to assessing the servicing function.

Most commenters commended the initiative to enunciate a consistent set of criteria.[529] As explained by one of these commenters, substantial modifications to the existing criteria under the USAP were in order and the proposed modifications were appropriate.[530]

With certain minor clarifying revisions in response to comment, we are adopting the uniform set of servicing criteria substantially in the form proposed. As we explained in the Proposing Release, no other set of uniform servicing criteria exists for purposes of this type of compliance assessment today, nor are we aware of any that are under development in the market. A few commenters believed that our final rules should permit the use of criteria established by a private body or group that followed due-process procedures.[531] If other sets of criteria were developed by market participants in the future that were subject to appropriate due process, we would be willing to consider, at that time, their applicability in a separate rulemaking action. As we explained in the Proposing Release, in order for a set of servicing criteria to be considered in the future, the criteria 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.[532] In addition, the set of criteria would need to address all material aspects of the servicing function with respect to an asset-backed securities transaction.

As proposed, the disclosure-based servicing criteria we are adopting are designed to be incremental to the current criteria in the USAP. Accordingly, and as commenters confirmed to us, many of the criteria are not new.[533] Criteria that we proposed that included specific timeframes, such as two business days, mirrored for the most part the current criteria in the USAP. The servicing criteria we proposed that were 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. Commenters suggested several minor clarifying revisions to the proposed criteria, and as discussed above we have made clarifying revisions to the final criteria in response.

While certain of the proposed servicing criteria referred to specific timeframes as adapted from the USAP, others relied upon transaction agreements to set forth specific details regarding that aspect of the servicing function. The few commenters that commented on this aspect of the proposal were mixed. One commenter preferred more reliance on transaction agreements instead of specific timeframes to provide flexibility, while another commenter preferred specific timeframes in the criteria instead of reliance on transaction agreements to promote consistency.[534] To balance these objectives, we are maintaining our proposed references to specific timeframes in the criteria, which as noted above were adapted from the current USAP. However, we are also providing in those criteria that transaction agreements can expressly provide an alternate timeframe. Under this approach, the specific timeframes in the criteria will continue to apply in the event that the transaction agreements happen to be silent on those timeframes. We believe this approach appropriately leaves the responsibility for determining the details of the servicing functions with investors and ABS issuers while still providing default benchmarks that are generally consistent with the existing USAP. Further, as ABS transaction agreements are required to be filed with the Commission, disclosure of these details for individual transactions will be readily available.

Regarding another commenter's concern that the assessment and related attestation regarding servicing compliance will be performed at the platform level while the servicing criteria refer to transaction

[528] See, *e.g.*, Letter of Wells Fargo.

[529] See, *e.g.*, Letters of ASF; CMSA; MBA; U.S. Bank; and Steve Walls. One of these commenters noted that while market participants could develop suitable uniform criteria if given enough time, the proposed criteria, if revised to give effect to the commenter's comments on specific items, would be an acceptable set of criteria that could be applied across asset types. See Letter of ASF.

[530] See Letter of Steve Walls.

[531] See, *e.g.*, Letters of AICPA; E&Y; and PWC.

[532] See AT § 101, paragraph 24.

[533] See, *e.g.*, Letter of MBA.

[534] Compare the Letter of ABA with the Letter of MBA.

agreements,[535] in many instances we do not expect this will be a major issue because it is our understanding that many transaction agreements, particularly in the same asset class, contain the same or nearly the same specific servicing-related requirements.

The criteria, as proposed, consist of four broad categories: general servicing considerations; cash collection and administration; investor remittances and reporting; and pool asset administration. As we explained in the Proposing Release, these categories describe major components of the servicing function, and 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 Item 1122 of Regulation AB. As noted in Section III.D.7.c.vi., some servicing criteria may be more or less applicable depending on the type of asset underlying the ABS transactions.

The 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. As we explained in the Proposing Release, 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 continue to 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 (as applicable) and reconciled such cash for investors and maintained transaction accounts as set forth in the transaction agreements. As we explained in the Proposing Release, the servicing criteria included within this section are comparable to those set forth in the USAP, although the USAP does not have specific criteria to address the maintenance of transaction accounts. We continue to 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. These 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. As we explained in the Proposing Release, 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 remains our understanding that oversight of the flow of funds calculations can 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.

As we explained in the Proposing Release, 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.

vi. Identification of Inapplicable Criteria

Because of the unique and fluid nature of the ABS market, our proposal provided discretion to the responsible party to exclude those servicing criteria that were inapplicable to the servicing of a particular asset class, so long as the excluded criteria were identified in the responsible party's and the registered public accounting firm's reports. We also requested comment on an alternative approach that would allow for a 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.

One commenter thought it critical to permit exclusion of criteria that was inapplicable to the asset class and did not object to requiring each assessing party to identify either all of the inapplicable criteria, or, alternatively, only the criteria that were applicable.[536] One commenter supported our alternative approach and believed a servicer should be able to exclude any particular criterion, even if it cannot conclude that the criterion is not applicable to the asset class, as long as it discloses the exclusion in the assessment (*e.g.*, the criterion is not required by the transaction documents).[537]

As noted above, we continue to believe all applicable servicing criteria should be covered. However, with our revised approach requiring reports from multiple parties that participate in the servicing function, we also recognize that it may be necessary for a particular party to exclude a particular criterion from its assessment not because it is inapplicable to the asset class, but because that particular party does not perform it. As a result, we are revising our proposal to allow for the exclusion in a party's assessment report of those specific servicing criteria that are not applicable to the asserting party based on the activities it performs with respect to asset-backed securities transactions taken as a whole involving such party and that are backed by the same asset type backing the class of asset-backed securities. For example, a servicer may exclude a particular criterion either because in its servicing platform it does not participate in that element of the servicing function or the criterion is broadly inapplicable in the context of the asset class being serviced. However, a party may not voluntarily select to exclude specific servicing criteria if they are otherwise applicable to that party.

In the event that servicing criteria are excluded for those reasons that are permitted, the inapplicability of the criteria must be disclosed in both the asserting party's assertion and the

[535] See Letter of Wells Fargo.

[536] See, *e.g.*, Letter of ASF.

[537] See, *e.g.*, Letter of TMCC.

related registered public accounting firm's report. However, while the individual asserting parties will be permitted to exclude criteria they do not perform, it will be incumbent on the person making the Section 302 certification to certify whether all required reports covering the entire servicing function, including all the criteria applicable to the asset class, are included with the Form 10–K report.

One commenter requested the ability to exclude certain servicing criteria that are inapplicable in certain foreign jurisdictions, as some of the proposed criteria do not apply to non-U.S. issuers given there is not a corresponding concept in the home jurisdiction.[538] We do not believe it is necessary to create a separate ability to exclude certain criteria for foreign ABS transactions. The approach we have adopted provides those parties who participate in servicing foreign ABS transactions the ability to exclude certain criteria if those criteria are not applicable to the asserting party based on the activities it performs. For example, if there are certain activities that are necessary for the servicing of a mortgage loan in the U.S. that are not applicable for the servicing of a mortgage loan in a foreign jurisdiction because of regulatory or other structural reasons, the approach we have adopted would permit the inapplicable criteria for the foreign asset class to be excluded from the assertion and related attestation with appropriate disclosure in each of those reports.

vii. Disclosure of Material Instances of Non-Compliance

Our proposal contemplated that the responsible party's report on an assessment of compliance with servicing criteria would identify any material instance of noncompliance with the criteria, and that the same party would be required to disclose in the report on Form 10–K any material impacts or effects as a result of the material instances of noncompliance 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. We continue to believe it is important for material instances of noncompliance that are reported in each of the reports prepared by parties participating in the servicing function to be identified by the person preparing the Form 10–K in the report on Form 10–K.

However, we are not adopting a specific line item requirement to disclose any material impacts or effects as a result of the material instances of noncompliance. Commenters were mixed on whether and to what extent there should be such a specific disclosure requirement.[539] Even in the absence of a specific line item disclosure requirement, whether any such disclosure is required will depend on the particular facts and circumstances.[540]

Consistent with our proposal, the period to be covered by the report on Form 10–K is consistent with the common practice today under the USAP of assessing compliance as of and for the period ending on a particular date. As we explained in the Proposing Release, 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, consistent with our proposal and general practice today, disclosure will be required of material instances of noncompliance during the reporting period, even if such noncompliance was subsequently corrected in the period. We continue to believe this approach is consistent with our approach 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.

d. Attestation Report on Assessment of Compliance

We proposed that a registered public accounting firm would be required to attest to, and report on, the assessment of compliance made by the single responsible party through performance of an examination engagement. As our proposal would be in lieu of audited financial statements and Sarbanes-Oxley Section 404 reporting, we believed that 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, and thereby increase investor confidence in the reliability of the compliance assessment.

Our revised approach does not require an assertion by a single responsible party covering the entire servicing function, but instead contemplates that assertions will be made by each party participating in the servicing function as specified and that each party will be responsible for having an attestation engagement performed by a registered public accounting firm. The attestation would not cover servicing criteria properly excluded by the servicing party and disclosed as described above. Further, the revised approach requires that each registered public accounting firm's report be filed as an exhibit to the report on Form 10–K.[541] As proposed, the attestation examination must 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.[542] The Attestation Standards for Compliance Attestation (AT § 601) in those interim auditing and attestation standards should be used in performing this examination engagement.

We are adopting conforming amendments to Regulation S–X, substantially as proposed, 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 amendments, a new ''Attestation report on assessment of compliance with servicing criteria for asset-backed securities'' is defined as a report in which a registered public accounting firm expresses an opinion, or states that an opinion cannot be expressed, concerning an asserting party's assessment of compliance with servicing criteria, as required under the revised approach, in accordance with standards on attestation engagements.[543] When an overall opinion cannot be expressed, the registered public accounting firm must state why it was unable to express such an opinion. As proposed, the report must be dated, signed manually, identify the period covered by the report and clearly state the opinion of the accountant as to

[538] See, *e.g.*, Letter of A&O.

[539] Compare, *e.g.*, Letter of ASF; with Letters of AICPA; E&Y; and Wells Fargo.

[540] See note 252 above.

[541] 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.

[542] See Release No. 33–8222 (Apr. 25, 2003) [68 FR 23335]. See also Release No. 34–50495 (Oct. 5, 2004) [69 FR 60913] (Notice of Filing of Proposed Rules on Conforming Amendments to PCAOB Interim Standards Resulting from the Adoption of PCAOB Auditing Standard No. 2, ''An Audit Of Internal Control Over Financial Reporting Performed In Conjunction With An Audit of Financial Statements''); and Release No. 34–50688 (Nov. 17, 2004) [69 FR 68434] (Order Approving Proposed Conforming Amendments to PCAOB Interim Standards Resulting from the Adoption of PCAOB Auditing Standard No. 2, ''An Audit Of Internal Control Over Financial Reporting Performed In Conjunction With An Audit of Financial Statements'').

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

whether the 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.[544]

Consistent with our proposal, the report issued by the registered public accounting firm must be available for general use and not contain restricted use language. We believe that the servicing criteria we have adopted as part of Item 1122 of Regulation AB are suitable criteria, as that term is defined in the SSAE No. 10, and are available to enable a registered public accounting firm to issue a report on a party's assertion without restricted use language.

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.[545] The amendments also shortened 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 were responsive to the ''real time disclosure'' mandate in Section 409 of the Sarbanes-Oxley Act and were intended to provide investors with better and faster disclosure of important events.[546] As we stated in the Proposing Release, we believe the objectives of those amendments are equally applicable with respect to asset-backed securities. Accordingly, we are clarifying application of the Form 8–K reporting items for asset-backed securities. As proposed, the result of the existing amendments and our clarifying amendments 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 are adding a new 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 instruction permits either the depositor or the servicer to sign Form 8–K reports. The depositor's name and sponsor's name will need to be listed on the cover page of the Form 8–K.[547+] As proposed, the instruction also identifies which of the existing items may be omitted. Any other applicable items specified in Form 8–K will continue to be applicable under the new reporting deadlines adopted in the Form 8–K Release. While some commenters did not agree, we continue to believe the same Form 8–K reporting deadlines that apply to non–ABS issuers should apply to ABS issuers.[548] We also are adopting several proposed ABS-specific items under Section 6 of Form 8–K, with modifications in response to comment, which are discussed further below.

The resulting application of the Form 8–K items for ABS is presented in the following table:[549]

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 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. Securities Act Updating Disclosure	•	

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

[545] See the Form 8–K Release.

[546] 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.''

[547] See note 493 above.

[548] See, *e.g.*, Letters of Am. Bankers; JPMorganChase; and Wells Fargo.

[549] In response to comment and given our revisions to the assessment and attestation proposal, we have moved Items 2.02 and 4.01 of Form 8–K to the list of Items that may be omitted. See, *e.g.*, Letters of ABA and ASF.

b. Clarifying Amendments to Existing Items

As proposed, we are adopting several clarifying instructions to the existing items that remain applicable for ABS. For example, we are clarifying that a reportable event under Items 1.01 and 1.02 also includes the entry into, modification of or termination of a material transaction agreement, even if the issuing entity is not a party to the transaction, such as a servicing agreement involving a servicer discussed in Item 1108(a)(3) of Regulation AB. A new instruction to Item 1.03 clarifies that disclosure also is 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 new instruction to Item 2.04 clarifies that a reportable event also includes 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. Finally, for Item 5.03 regarding amendments to governing documents, a new instruction clarifies, as proposed, 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 will trigger disclosure under that Item. Not only do we believe this requirement is appropriate given the critical role these governing documents serve for the transaction, the requirement is consistent with the same requirement for non-ABS under Item 5.03.

c. New Items

As proposed, we are adding several new ABS-specific reportable events to Form 8–K. These new items are grouped under Section 6 to the Form. As with the existing Form 8–K items, we believe that, with the exception of the new Item regarding ABS informational and computational material, which is designed to facilitate the categorization of Form 8–K disclosures, these new Items represent events that unquestionably or presumptively have such significance that timely disclosure should be required. In response to comment, we are not adopting the proposed Form 8–K item relating to sales of additional securities in lieu of similar disclosure on Form 10–D.[550]

As proposed, all of the new Items, except Item 6.01, will have a four business day reporting deadline similar to other Form 8–K reportable events. Filing deadlines with respect to Item 6.01 are pursuant to our new rule for filing ABS informational and computational material, as discussed in Section III.C.1.

The following is a discussion of the new items, as modified in response to comment.[551]

Item 6.01. ABS Informational and Computational Material

This item provides a Form 8–K item to report any ABS informational and computational material filed pursuant to new Securities Act Rule 426.[552] It does not otherwise create an obligation to file such material.

Item 6.02. Change of Servicer or Trustee

If a servicer that met the thresholds for disclosure in Item 1108(a)(2) 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 will 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 Item 1108(d) of Regulation AB, will 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 will be required.

In response to concerns by commenters regarding obtaining the required information within the four business day deadline,[553] we are providing an instruction similar to Instruction 2 to existing Item 5.02 of Form 8–K regarding new executive officers that, to the extent that information called for by Item 6.02 is not determined or is unavailable at the time of the required Form 8–K filing, the registrant must include a statement to this effect in the filing and then must file an amendment to the Item 6.02 Form 8–K filing containing the information within four business days after the information is determined or becomes available.

Item 6.03. Change in Credit Enhancement or Other External Support

This item requires disclosure of the loss, addition or material modification of any material credit enhancement or other support provided by a third party.[554] If any such enhancement or support is terminated other than by expiration of the contract on its stated termination date or as a result of all parties completing their obligations, disclosure will be required of the date of termination, identity of the parties to the agreement, a brief description of the terms of the enhancement or support, 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 or support is added, disclosure specified in Items 1114 or 1115 of Regulation AB will be required, as applicable, regarding the new enhancement or support. If any existing material enhancement or support has been materially modified, a brief description of the material terms and conditions of the amendments will be required. An instruction to the new Item specifies that disclosure under this Form 8–K item will be required whether or not the issuing entity was a party to any agreement regarding the enhancement or support if the loss, addition or modification of such enhancement or support materially affects, directly or indirectly, the asset-backed securities, the pool assets or the cash flows underlying the asset-backed securities. Similar to Item 6.02 discussed above, we are providing an instruction to Item 6.03 that, to the extent that information called for by the Item regarding the enhancement or support is not determined or is unavailable at the time of the required Form 8–K filing, the registrant must include a statement to this effect in the filing and then must file an amendment to the Form 8–K filing containing the information within four business days after the information is determined or becomes available.

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, and such failure is material, disclosure will be required of the failure and the nature of the failure. Accelerated disclosure

[550] See, *e.g.*, Letters of ABA and ASF.

[551] In the Form 8–K Release, 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.

[552] See Section III.C.1.

[553] See, *e.g.*, Letter of ABA.

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

under this item will not replace the requirement to file a report on Form 10–D with respect to the related distribution period (*e.g.*, to include pool performance information).

Item 6.05. Securities Act Updating Disclosure

As proposed, the last 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 longstanding staff position, if, with respect to a takedown off of a shelf registration statement on Form S–3, any material pool characteristic of the asset pool at the time of issuance of the asset-backed securities differs by 5% or more (other than as a result of the pool assets converting into cash in accordance with their terms) [555] 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 will be required, including disclosure regarding any new significant obligors, servicers or significant originators.[556] As proposed, no report will 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.

We continue to believe that if the actual pool backing the investor's securities differs materially from that offered and described to the investor in the prospectus (and hence was to reflect the basis for the investor's investment decision), the investor is entitled to disclosure of the actual asset pool that the investor is primarily dependent on for repayment. We note that the requirement in Item 6.05 only relates to the situation where the actual asset pool at issuance differs materially from that described in the prospectus, other than as a result of the pool assets converting into cash in accordance with their terms.

[555] If a revolving period was in effect, while this proviso would exclude asset paydowns, it would not exclude additional assets acquired into the pool with the proceeds of the paydowns.

[556] This reportable event only will be applicable with respect to offerings registered on Form S–3. For registered offerings on Form S–1, due to current 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 will 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 such that a filing on Form 8–K would not be the appropriate means to address the changes.

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

In the March amendments to Form 8–K, 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.[557] 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.

In the Proposing Release, we proposed extending the safe harbor to proposed Item 6.03, Change in Credit Enhancement or Other External Support, as this Item appears to meet the criteria of the existing subset of Form 8–K items to which the safe harbor applies. In addition, as discussed in Section III.D.4., because asset-backed securities will be excluded from quarterly reporting on Form 10–Q, we are requiring that disclosure prescribed by a required but not filed item of Form 8–K must 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).

While a few commenters did not believe the Form 8–K safe harbor should be conditioned on Form 10–D disclosure, arguing that the Form 10–D should be limited to remittance reporting,[558] we continue to believe that tying the safe harbor to the next periodic report, which the Form 10–D would be, is appropriate and consistent with the application of the safe harbor to non-ABS issuers. The alternative of extending the term of the safe harbor to the next annual report on Form 10–K would not be consistent with the objective of Exchange Act Section 13(l) in promoting real time issuer disclosures.

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.[559] 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 are adopting a requirement that reporting obligations regarding other asset-backed securities transactions by the depositor or an affiliated depositor involving the same asset class must be complied with for continued Form S–3 eligibility for new transactions. Consistent with the March amendments, we are clarifying, as proposed, 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 will 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. As noted in Section III.A.3., we also are adding Items 6.01 and 6.05 to the Form S–3 eligibility safe harbor, although we are not adding them to the Section 10(b) and Rule 10b–5 safe harbor.

9. Other Exchange Act Amendments

a. Exclusion From Form 10–Q

As noted above, we are codifying 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 will be required in Form 10–D. As with 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, as proposed, we are excluding asset-backed securities from quarterly reporting on Form 10–Q.[560]

[557] 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.

[558] See, *e.g.*, Letters of Am. Bankers and Wells Fargo.

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

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

b. 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 requests 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.

As proposed, we are exempting asset-backed securities from Section 16 in its entirety.[561] 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 is appropriate in the public interest and consistent with the protection of investors.

c. 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 amending our transition report rules to clarify their application to asset-backed issuers.[562] Under the amendments, an asset-backed issuer that changed its fiscal year end will 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.[563] The asset-backed issuer must provide all information required in response to proposed General Instruction J. of Form 10–K, including filing any servicer compliance statements and assessments of compliance and attestation reports regarding compliance with servicing criteria. The servicer compliance statements and assessment reports must reflect the same transition period covered by the transition report. Of course, any obligation to file distribution reports under Form 10–D will continue to apply regardless of a change in fiscal year.

E. Other Miscellaneous Amendments

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

- Updating references to reflect new definitions and references;[564]
- Removing instructions and references that will no longer be applicable;[565]
- Including cross-references for certain disclosure items in Regulation S–K to items in Regulation AB that clarify their application for asset-backed securities;[566]
- Clarifying that an ABS issuer is not eligible for the disclosure system for ''small business issuers'' with respect to asset-backed securities because that disclosure system, like most of the basic Regulation S–K disclosure system, is not applicable to asset-backed securities;[567] and
- Clarifying that Regulation BTR[568] is not applicable to any acquisition or disposition of an asset-backed security.[569]

F. Transition Period

We received a number of comments urging us to adopt an extended transition period for compliance with the new rules.[570] In particular, these commenters argued that compliance will require changes in procedures and systems, which in some cases may involve multiple parties. Existing master trusts also present difficulties as changes to transaction documents and procedures necessarily will affect prior outstanding ABS because the prior and future ABS are backed by the same asset pool and often are governed by the same transaction documents. As a result of the above, the majority of commenters suggested a twelve month delay before compliance.

Further, asset-backed securities that have been publicly offered and issued before the effective date of the new rules are subject to additional complications due to the fact that such transactions were not undertaken in contemplation of the new rules or the required changes. Because of any of a number of considerations, which could include fee levels, ABS issuers may have less leverage to amend existing contracts with various transaction participants regarding such securities.

We have decided to delay the compliance date beyond that discussed in the Proposing Release so that market participants will have ample time to prepare and satisfy the new requirements. While most of our final amendments codify existing staff and market practice, we recognize that we are adopting several changes that may require implementation time. We believe the extension ultimately will benefit investors because it will help ensure that issuers and market participants have the time to plan for and implement appropriate disclosure processes, including improved Exchange Act reporting processes and more meaningful and relevant disclosure documents. We continue to believe it is appropriate in order to establish consistency and ensure an orderly transition to the new regulatory regime that takedowns off of existing

[561] See amendments to Exchange Act Rule 3a12–12.

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

[563] 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 will 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 are applicable to transition reports on Form 10–K.

[564] See, *e.g.*, 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 Rule 434; Exchange Act Rules 10A–3, 13a–15 and 15d–15; and Rule 100 of Regulation M.

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

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

[567] See, *e.g.*, 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.

[568] 17 CFR 245.101 through 245.104.

[569] See amendments to 17 CFR 245.101.

[570] See, *e.g.*, Letters of ABA; ASFA; AICPA; Am. Bankers; ASF; Auto Group; BMA; BOA; Capital One; CMSA; FSR; JPMorganChase; MBA; NYCBA; Sallie Mae; TMCC; and Wells Fargo.

registration statements pursuant to Rule 415(a)(1)(x) also must comply after the designated transition period. At the same time, however, we are grandfathering ABS that become subject to Exchange Act reporting obligations before the end of our extended transition period.

Under the compliance dates we are adopting today, any registered offering of asset-backed securities commencing with an initial bona fide offer after December 31, 2005, and the asset-backed securities that are the subject of that registered offering, must comply with the new rules and forms. For any such offerings that rely on Rule 415(a)(1)(x), Securities Act registration statements filed after August 31, 2005 related to such offerings must be pre-effectively or post-effectively amended, as applicable, to make the prospectus included in Part I of the registration statement compliant and to make any required undertakings or other changes for Part II of the registration statement.[571] For Securities Act registration statements that were filed on or before August 31, 2005, the prospectus and prospectus supplement, taken together, relating to such offerings that rely on Rule 415(a)(1)(x) must comply,[572] provided, that, the Securities Act registration statement will need to be post-effectively amended if any new undertakings are required to be made with respect to such offerings in Part II of the registration statement. In addition, these Securities Act registration statements will need to be post-effectively amended to make the prospectus included in Part I of the registration statement compliant, as well as to make changes, if any, to Part II of the registration statement with respect to any registered offering of asset-backed securities under such registration statement commencing with an initial bona fide offer after March 31, 2006.

[571] In addition, for existing shelf registration statements, any prior fee associated with any unsold securities under that registration statement may be offset against the total filing fee due for a subsequent registration statement filed by the registrant. Registrants electing this option should so indicate by adding a note to the ''Calculation of Registration Fee'' table in the subsequent registration statement providing the information specified in Securities Act Rule 457(p) (17 CFR 230.457(p)).

[572] For Form S–3 registration statements, exhibits may be filed on Form 8–K and incorporated by reference. Existing Securities Act Rule 462(d) also provides immediate effectiveness for a post-effective amendment filed solely to add exhibits. Notwithstanding this accommodation, changes requiring post-effective amendments other than to provide disclosure complying with the new rules—for example changes in credit enhancements or structural features since the time of effectiveness—will continue to require post effective amendments.

IV. Paperwork Reduction Act

A. Background

Our amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[573] We published a notice requesting comment on the collection of information requirements in the Proposing Release, and we submitted these requirements to the Office of Management and Budget (OMB) for review in accordance with the PRA.[574]

We did not receive any comments on the PRA analysis contained in the Proposing Release. As discussed in Part III, we have made several changes to the proposed rules in response to comments on the substance of the proposals. These changes are designed to avoid potential unintended consequences and reduce possible additional costs or burdens pointed out by commenters. After evaluating the comments and our responsive revisions to address them, we have decided not to change our initial PRA estimates described in the Proposing Release and submitted to OMB.

However, as part of our changes to reduce potential additional burdens, we are extending the availability of filing extensions under Exchange Act Rule 12b–25 to new Form 10–D. Filing extensions under Rule 12b–25 already are available for several other required Exchange Act reports, and we requested comment in the Proposing Release as to whether we should extend the rule to Form 10–D. Filing extensions under Rule 12b–25 are contingent on filing a Form 12b–25 to provide notice to the Commission and the marketplace that registrants will be unable to file a required report in a timely manner. Form 12b–25 is a separate ''collection of information'' under the PRA, and accordingly we are revising our burden estimates for Form 12b–25 to reflect our amendments and new filings for Form 10–D late filings. We are submitting these revised burden estimates for Form 12b–25 to OMB for review in accordance with the PRA, and in this release we are publishing notice and requesting comment on the revised Form 12b–25 ''collection of information'' requirement.

In sum, the titles for all the collections of information affected by these amendments 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);

(6) ''Regulation S–K'' (OMB Control No. 3235–0071);

(7) ''Form 10–D'' (a new collection of information); and

(8) ''Form 12b–25'' (OMB Control No. 3235–0058).

As we explained in the Proposing Release, 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 represents 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. As noted above, Form 12b–25 provides notice to the Commission and the marketplace that a registrant will be unable to file a required report in a timely manner and is a condition to a filing extension for the underlying Exchange Act report. 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.

B. Summary of Amendments

We are addressing 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. As we explained in the Proposing Release, 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

[573] 44 U.S.C. 3501 *et seq.*

[574] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

developed taking into account evolving industry practices.

With a few exceptions, the amendments consolidate and codify current staff positions and industry practice. We are adopting a new principles-based set of disclosure items, ''Regulation AB,'' as a sub-part of Regulation S–K that will 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 [575] and Form 12b–25) 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. As noted above, our amendments to Form 12b–25 extend the availability of filing extensions under Exchange Act Rule 12b–25 to new Form 10–D.

The amendments are designed to establish a tailored registration, disclosure and reporting system for asset-backed securities offerings. Compliance with the revised disclosure requirements will be mandatory. There will be no mandatory retention period for the information disclosed (except with respect to registrants that elect to avail themselves of the Web site filing accommodation for static pool data in prospectuses, which entails a five year record retention requirement), and responses to the disclosure requirements will not be kept confidential.

C. Summary of Comment Letters on the PRA Analysis and Revisions to Proposals

As noted above, we received no comments in response to our request for comment on the PRA analysis in the Proposing Release. We have made several changes in response to comments on the substance of the proposals that are designed to avoid potential unintended consequences and reduce possible additional costs or burdens pointed out by commenters. For example, in response to comment regarding potential additional disclosure burdens regarding the proposed static pool disclosure requirement, we have made responsive revisions to clarify the disclosure required and to provide alternate means to provide the disclosure, including through Internet Web sites. As another example, we have revised the tests for determining financial significance regarding certain derivative instruments in response to comment that the proposed tests would lead to potential additional disclosure burdens. We have revised our proposal regarding an assessment and attestation of compliance with servicing criteria in response to comment that the proposed approach may also result in unintended additional burdens. We also have made several changes to the proposed disclosure items for prospectus and distribution report disclosure to further tailor and clarify the disclosure required, particularly in the areas where we proposed additional disclosure, such as that regarding the background, roles and experience of various transaction parties. As discussed above, we are revising our burden estimates for Form 12b–25 to reflect amendments to extend filing extensions to Form 10–D made in response to comment. These revisions are discussed below.

D. Revisions to PRA Reporting and Cost Burden Estimates

As discussed in the Proposing Release, the existing PRA burden estimates before these amendments 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 are codifying recognizes that information relevant to ABS differs substantially from that relevant to other securities.

For purposes of the PRA collection of information requirements discussed in the Proposing Release, we first estimated the average number of hours that an ABS issuer currently spends to complete one of the listed forms.[576] We then estimated the incremental burden change that would result from the amendments. Our final rules include disclosure options for providing static pool information in prospectuses, including through an Internet Web site under certain conditions. These conditions include Web site availability and record retention requirements. We have evaluated these disclosure options and their respective requirements in the context of the collections of information to which they relate (Forms S–1 and S–3), and they are incorporated into the estimates discussed below.

Further, and as discussed in the Proposing Release, we understand that some issuers may experience costs in excess of our average estimates in the first year of compliance, such as revising their systems and practices to adjust to the new rules, but that costs should decrease in subsequent years. The burden also will vary among issuers based on the complexity of the ABS transaction, the number of parties involved (especially parties participating in the servicing function in the case of Form 10–K), the disclosure option they choose for static pool information (in the case of Forms S–1 and S–3), and the nature and level of initial development of their compliance procedures. We considered all of these factors in evaluating our estimates. As discussed above, after evaluating the comments received and our changes to the proposals, we are not revising our estimates overall for each collection of information.

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. As we explained in the Proposing Release, 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 were based on filings made during the Commission's 2003 fiscal year: October 1, 2002 through September 30, 2003.

1. Form S–3

We revised our current burden estimate for Form S–3 for ABS issuers to take into account that ABS issuers do not principally rely on incorporation by reference from separately required Exchange Act reports to provide their disclosure, which is the practice for most non-ABS issuers that use Form S–3. As a result, for ABS we used the same burden estimate for Form S–3 as we estimated for Form S–1 for ABS issuers, which we estimated to be an average of 1,000 hours. We then estimated that completing and filing a Form S–3 under the new disclosure requirements will result in an average increase of approximately 25% to our estimate of the current Form S–3 reporting burden imposed on ABS issuers, or 250 hours per form. We estimated 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

[575] We are moving all Securities Act registrations of ABS offerings to Form S–1 or Form S–3. Correspondingly, we reduced our estimate of responses on Form S–11.

[576] 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.

hour.[577] During our 2003 fiscal year, we received 168 Form S–3 filings related to asset-backed securities. Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimated that the amendments will 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 × 250 additional hours × .75 × $300 per hour).

2. Form S–1 and Form S–11

As discussed above, we estimated 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 estimated that completing and filing a Form S–1 under the new disclosure requirements will result in an increase of approximately 25% over the amount of time currently spent by ABS issuers to complete and file the form, resulting in an increase of 250 hours per response over the current reporting burden. As with Form S–3, we estimated 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.

During our 2003 fiscal year, we received 7 Form S–1 filings related to asset-backed securities. In addition, we received 18 filings on Form S–11 related to asset-backed securities. As we explained in the Proposing Release, we are moving 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 estimated that these filings would instead be made on Form S–1. Thus, we estimated there would be 25 ABS offerings registered on Form S–1, and we correspondingly reduced our estimate of responses on Form S–11 by 18 responses. Using our estimates of the percentages of the Form S–1 burden prepared by the issuer and outside professionals, we estimated that the amendments will 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).

[577] 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.

3. Form 10–K

As with our burden estimates for Securities Act registration statements, we first derived a reporting burden estimate to reflect the substantially different and more limited disclosures ABS issuers provide under the existing modified reporting system. We estimated that currently it takes an ABS issuer an average of 90 hours to prepare a Form 10–K. As we explained in the Proposing Release, the most significant difference between the amendments and the existing system is with respect to the assessment of compliance with servicing criteria. We estimated that completing and filing a Form 10–K under the amendments will result in an average increase of approximately 33% over the amount of time currently spent by entities completing the form, or 30 hours per response. We estimated that 25% of the reporting 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.

Based on filings in our 2003 fiscal year, we estimated 1,200 Form 10–K filings related to asset-backed securities.[578] Using our estimates of the percentages of the burden prepared by the issuer and outside professionals, we thus estimated that the amendments will 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).

4. Form 8–K

As we explained in more detail in the Proposing Release, ABS issuers under the existing modified reporting system use Form 8–K to file periodic distribution and pool performance information in addition to reporting current events. To separate this reporting from the disclosure of current events, we proposed and are creating 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 will continue to prescribe certain reportable events that require current disclosure by ABS issuers. Form 8–K also continues to be available to report any events that an ABS issuer deems to be of importance to security holders.

[578] This estimate was 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 used the Rule 424(b) 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.

During our 2003 fiscal year, we received 12,633 Form 8–K filings related to asset-backed securities. We estimated 9,500 of these filings will instead appear as Form 10–D filings under the amendments.[579] Accordingly, we estimated a 9,500 decrease in the total number of Form 8–K filings.

With respect to the use of Form 8–K for required reportable events, we estimated that the time it takes to prepare a Form 8–K for a required reportable event does not vary between an ABS and a non-ABS issuer. Thus, we estimated that an ABS issuer spends, on average, approximately 5 hours completing the form. As with our estimates for non-ABS issuers, we estimated 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 estimated that our amendments to the required reportable events on Form 8–K applicable to ABS issuers will 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 estimated 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 estimated that the amendments will result in an added annual burden of 9,000 hours (2,400 filings × 5 hours × .75) and an added annual cost of $900,000 (2,400 filings × 5 hours × .25 × $300 per hour).

5. Form 10–D

As discussed above, we estimated there will be 9,500 Form 10–D filings per year. We estimated that, on average, completing and filing a Form 10–D under the amendments will result in a burden of 30 hours per filing. As with our other estimates for Exchange Act reports by non-ABS issuers, we estimated 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 estimated that 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

[579] This estimate also reflected the approximate number of distribution report filings that would have been made by ABS issuers in the absence of combined reporting.

$21,375,000 (9,500 filings × 30 hours × .25 × $300 per hour).[580]

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 disclosure changes include changes to items under Regulation S–K and the addition of a new subpart to Regulation S–K—Regulation AB—that provides disclosure items particularly tailored to asset-backed securities.[581] However, as noted in the Proposing Release, the filing requirements themselves are included in Forms S–1, S–3, 10–K, 10–D and 8–K, and we reflected the burden for the new requirements in the burden estimates for those forms. The items in Regulation S–K, including Regulation AB, do not impose any separate burden. Consistent with historical practice, 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.

7. Form 12b–25

As discussed above, we are extending Exchange Act Rule 12b–25 and Form 12b–25 to Form 10–D filings. The amendments permit ABS issuers to use Form 12b–25 for the purpose of obtaining a filing extension with respect to a Form 10–D filing. Form 10–D filings previously have been made under Form 8–K, which is not eligible for filing extensions under Rule 12b–25. Hence, we do not have experience with filing extensions or Form 12b–25 filings for the types of reports that will constitute Form 10–D filings. We do know that, based on filings in our 2003 fiscal year, Form 12b–25 filings were made for approximately 20% of Form 10–K and 10–KSB filings and approximately 12% of Form 10–Q and 10–QSB filings. After considering factors such as the frequency, disclosure requirements and relative administrative complexity of Form 10–D filings compared to these other filings, we are estimating that Form 12b–25 filings will be made for approximately 20% of Form 10–D filings. Based on our estimate of 9,500 Form 10–D filings, we thus estimate an increase of 1,900 Form 12b–25 filings. We estimate the time it takes for an ABS issuer to prepare a Form 12b–25 will not vary from that required by a non-ABS issuer, which we have estimated to be, on average, approximately 2.5 hours per form, all of which is borne by the issuer. Accordingly, we estimate that the amendments will result in an added annual burden of 4,750 hours (1,900 filings × 2.5 hours).

E. Request for Comment

We request comment on our amendments to the collection of information requirements for Form 12b–25 in order to (a) evaluate whether the collection of information is 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 collection 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 collection 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 amendments to Form 12b–25 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 the Form 12b–25 burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the Form 12b–25 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

A. Background and Summary of the Final Rules

The final rules and Regulation AB provide definitive rules for public offerings of asset-backed securities registered under the Securities Act as well as ongoing reporting by asset-backed issuers under the Exchange Act. They mostly codify staff and industry practice for ABS offerings with some incremental changes and responsive changes made to comments on the proposals. The rules and this release also should resolve a number of ambiguities and potential misconceptions regarding application of the federal securities laws to asset-backed securities. We are sensitive to the cost and benefits that result from our rules. In this section, we examine the benefits and costs of our rules.

As discussed in the Proposing Release, 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. Before the Proposing Release, many issuers, investors and other market participants had requested a defined set of regulatory requirements.[582] 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 of entry into the market. As a result, the final rules to codify staff position and industry practice with incremental changes and responsive changes should clarify and simplify the process of registering an ABS offering. This should lower the overall costs of complying with the federal securities

[580] We noted that this reflection of the burden predominantly consists of codifying the already existing requirements applicable under 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 will be filed.

[581] We also are adopting, as proposed, 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.

[582] See note 57 above.

laws, promote more efficient capital markets, and potentially lower the cost of capital. There also may be secondary effects relating to more efficient securitizations, such as the opportunity for lowered borrowing costs for obligors of the underlying assets, such as consumers.

In order to improve an investor's understanding of an ABS offering, we are adopting incremental enhancements, with modifications in response to comment, to disclosure regarding the participants involved in an 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. In addition, we intend to improve the current framework for reporting on compliance with servicing criteria that will operate within a disclosure-based framework and cover the entire spectrum of the servicing function in an ABS transaction. We are retaining the basic approach set forth in our original proposal with a uniform set of criteria, although we are adopting a modification in response to comment that instead of a single ''responsible party,'' reports of compliance with servicing criteria from each party participating in the servicing function, with associated attestation reports from registered public accountants, must be provided.

We also are adopting incremental changes to current staff and industry practice to allow certain lease-backed asset-backed securities immediate access to shelf registration through Form S–3 eligibility, along with disclosure to address the different nature of these offerings. In addition, we are allowing additional asset types to be securitized through master trusts or through transactions using a revolving period, again with 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 for asset-backed securities and codifying alternatives to refer to third party filings to provide more cost-effective options to provide required information. We also are granting foreign ABS issuers access to shelf offerings and Form S–3. Finally, we are providing interpretive guidance in a number of areas in addition to the final rules, 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.

Commenters on the proposals overwhelmingly supported establishing a separate framework for the registration and reporting of asset-backed securities.[583] We did not receive any specific comments on our cost-benefit analysis contained in the Proposing Release. Some commenters suggested as a general matter that we should carefully consider each incremental step beyond current market practice to ensure that the perceived benefit to investors is outweighed by the additional burdens that would be imposed, and whether the benefits sought can be achieved in a less intrusive manner.[584] Another commenter also noted on a general matter that, because of the limited recourse special purpose nature of most ABS transactions, the costs of compliance burdens are likely to be passed through to the investor who owns the residual or junior cash flows in the ABS transaction.[585]

As discussed in the Proposing Release, we are aware of potential costs and burdens associated with the incremental changes that we proposed to the existing current market practices for ABS transactions and requested comments on these potential burdens. We have carefully evaluated the concerns expressed by commenters and have made several measured changes in response to comments on the substantive discussion of the proposals that are designed to alleviate potential unintended consequences and reduce possible additional costs or burdens pointed out by commenters. For example, in response to comment regarding potential additional disclosure burdens regarding the proposed static pool disclosure requirement, we have made responsive revisions to clarify the scope of the disclosure required and to provide alternative means to provide disclosure, including through Internet Web sites. We have revised our proposal regarding an assessment and attestation of compliance with servicing criteria in response to comment that the proposed approach may also result in unintended administrative burdens. We also have made several changes to the proposed disclosure items for prospectus and distribution report disclosure to further tailor and clarify the disclosure required. Cumulatively, we believe the final rules, as revised from the proposal, will achieve clearer and more transparent regulatory requirements for both issuers and investors in a less intrusive manner to issuers.

We also have delayed the compliance date beyond that discussed in the Proposing Release in response to requests for an extended transition period. A longer transition period will help to alleviate the immediate impact of any costs and burdens imposed on issuers. We expect investors to benefit from the additional time that we are affording issuers and market participants to implement appropriate disclosure processes, including improved Exchange Act reporting processes and more meaningful and relevant disclosure documents. In addition, we are grandfathering ABS offerings that become subject to Exchange Act reporting obligations before the end of our extended transition period. These allowances should assist various transaction participants in planning for compliance with the new regulatory regime for future ABS offerings, which may reduce uncertainty and support more effective pricing of those asset-backed securities.

B. Parties Eligible To Use the New Regulatory Structure

We continue to take a principles-based approach to the definiton of asset-backed security that allows broad flexibility as to asset types and structures that we believe should be subject to the alternative regulatory regime that we are creating for such securities. The definition of an asset-backed security will 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 definition. This is intended to bring all ABS transactions and issuers into an appropriate registration, disclosure and reporting system regardless of what Securities Act form they are eligible to use.

Our amendments 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 will be incorporated into the definition of an asset-backed security. We have made revisions in response to comment to take a disclosure-based approach to delinquent assets as a less burdensome way to incorporate the current staff position on delinquency into the definition of an asset-backed security. We are adopting, with certain modifications in response to comment, proposed expansions of certain staff positions to allow additional asset types and transaction features to be included. For example, the definition of asset-backed security will be expanded so

[583] See note 27 above.

[584] See Letters of ABA and ASF.

[585] See Letter of AFGI.

that more lease-backed ABS will be eligible to use Form S–3. The rules we are adopting will 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. In response to comment, we have even further expanded the revolving period. We believe these expansions will result in increased flexibility in structuring transactions that meet market demands. The rules we are adopting will require more disclosure to provide greater transparency of the operations of these structures and changes to pool composition over time.

As discussed in Section III.A., commenters were mixed on our approach to the definition of an asset-backed security. On the one hand, commenters representing investors expressed concern in expanding access to the alternative regulatory regime for asset-backed securities in recognition of the fact that investment decisions on these transactions are being made under more compressed time frames and with less access to information through shelf registration. On the other hand, commenters representing primarily issuers and their representatives would have preferred, in lieu of our approach of codifying exceptions to the definition of an asset-backed security, abandoning many of the core principles of the definition, such as deleting the ''discrete pool'' requirement, which would permit unlimited use of master trusts structures and revolving periods, in order to encourage further innovation. While we recognize that there are instances where some limited exceptions to these general principles would be appropriate and consistent for access to the ABS regulatory regime, and these are reflected in the modifications adopted in the final rules, we agree with the concerns of investors that lack of a ''discrete'' requirement in the definition of an asset-backed security 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, in response to comment, we made several minor revisions to the proposed limits as well as modifications to staff positions relating to delinquent and non-performing assets to reduce the potential costs raised by commenters and to be more consistent with current market practice.

The definition and interpretations we are adopting are intended to establish parameters for the types of securities that are appropriate for our alternative regulatory regime for ABS. The definition does 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 specifically designed for those securities. Such securities would need to rely on non-ABS form eligibility for registration and additional or alternative disclosures would be required.

Commenters also noted that some securities, most notably synthetic securitizations, may not necessarily meet all of the core principles in the definition of an ''asset-backed security,'' but nonetheless argued it would make it more difficult for market participants to develop such products without continued discussions with the staff if they were not included in our new regulatory regime. We continue to believe the ABS regulatory regime that we are adopting should be appropriately limited to a definable group of asset-backed securities. However, we also recognize that the default application of the existing disclosure regime for corporate issuers might not be most appropriate for synthetic securitization. We encourage issuers and promoters of such securities to continue their interaction with the staff. In addition, we request additional comment about these securities and whether an appropriate alternative regime should be established for these kinds of securities with respect to registration, disclosure and ongoing reporting.

C. Securities Act Registration

We are adopting rules to allow domestic and foreign issuers to use either Form S–1 or Form S–3 to register an offering of asset-backed securities. Some transactions backed by lease pools also will be allowed to use Form S–3 under the final rules. This will provide the benefit of delayed offerings to foreign issuers and many issuers of ABS backed by pools of leases that currently are not S–3 eligible. We believe this will make the offering process less costly for these issuers. We are adopting, substantially as proposed, disclosure requirements for these two types of offerings to provide investors with a clear understanding of the unique issues these offerings raise, which commenters generally supported.

The rules codify current staff position that the depositor is considered the issuer for Securities Act purposes and should sign the registration statement. To remove regulatory uncertainty for issuers, we are codifying 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 are codifying, as proposed, the basic concept in existing staff no-action letters 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. We believe these rules we are adopting for Securities Act registration will 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.

We are adopting general instructions for Form S–1 and Form S–3 for registered asset-backed offerings substantially as proposed to clarify those items under Regulation S–K that an issuer will be required to disclose, if applicable, and list the items that an issuer may omit due to the different nature of the ABS transactions. The instructions for Form S–1 and Form S–3 also specify the additional disclosure items to be required under Regulation AB, which is a new set of principles-based disclosure requirements for ABS discussed in the next section. We believe the 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.

As discussed above, we are adopting limits on the amounts and duration on the codified exceptions to the ''discrete'' requirement in the definition of an ''asset-backed security.'' However, in response to comments describing the current market practice of prefunding accounts and the commercial reality of the use of revolving periods, we are not adopting the proposed additional restrictions for prefunding accounts and revolving periods for Form S–3 eligibility.

As noted in Section III.A., issuers and their representatives generally objected to the proposals requiring Exchange Act reporting compliance for Form S–3 eligibility as being more restrictive than necessary. While recognizing there have been compliance problems with Exchange Act reporting as well as the need to fix the problem with the current staff position, which simply allows a sponsor to establish a new special purpose depositor, most commenters nevertheless requested flexibility and less restrictive alternatives. In response to several commenter suggestions, we are revising the proposal to limit the focus to transactions established by affiliated depositors involving the same

asset class. We believe this revision, while maintaining an emphasis on Exchange Act reporting and proper disclosure for investors, reduces the potential breadth of the proposed application of the reporting compliance requirement for Form S–3 eligibility across all asset classes and avoids commenter concerns about inadvertently linking a person's Form S–3 eligibility to an unrelated party's reporting history. We also are providing several additional accommodations to assist issuers with the requirement, including an extensive transition period to allow issuers to improve their reporting practices from the present state, instituting Rule 12b–25 filing extensions for Form 10–D filings, modifying several Regulation AB disclosure items that could potentially require third party information, and expanding the number of Form 8–K items that need only be current and not timely for Form S–3 eligibility.

The Proposing Release discussed what needs to be included in a market-making prospectus when a broker-dealer is an affiliate of the servicer. As discussed in Section III.A., we received many comments requesting that the Commission revisit staff interpretations regarding the registration of market-making transactions in the ABS context given the costs involved in meeting the market-making prospectus delivery requirements and the limited investor benefits as a result. We are persuaded that the affiliation issue in ABS is not the same as a broker-dealer affiliated with a corporation, such as through significant ownership or board representation, and we will no longer interpret a requirement to register market-making transactions for asset-backed securities. As pointed out by many commenters on this topic, this should result in reduced compliance expenses and risk of shelf disqualification, all without materially affecting investor protections.

D. Disclosure

The disclosure items in Regulation AB that we are adopting provide a disclosure structure tailored to the different nature of ABS. This requirement will assist issuers and investors by clarifying the disclosure requirements. We have made revisions to the proposed disclosure structure as suggested by commenters in recognition of market practice. We continue to provide several illustrative examples for a limited number of disclosure items in response to comment for additional guidance by issuers. In addition, the final rules:

- Confirm that financial statements of the issuing entity are not required for ABS transactions;
- Clarify and revise in response to comment when third party financial information and other descriptive information is required; and
- Codify when third party financial information may be incorporated by reference or referred to in registration statements.

As we noted in Section III.B., commenters generally agreed that the disclosure required under Regulation AB is largely based on market driven disclosure that appears in public filings today. One commenter representing investors believed Regulation AB represents a major step in improving disclosures provided to investors and includes many of the items investors have previously recommended as critical to investors.[586] Most commenters also supported principles-based disclosure requirements in lieu of an exhaustive list of disclosure items for each asset-class. We continue to believe a principles-based approach fosters clarity and comparability for investors without being overly rigid and burdensome for issuers. The emphasis on a materiality-based standard for the new disclosure items attempts to mitigate the possibility that immaterial information may overwhelm the disclosure. The new principles-based set of disclosure based on materiality in Regulation AB 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. As we stated in the Proposing Release, whether they will take advantage of this opportunity is largely their decision.

The disclosure rules require increased disclosure regarding the roles and qualifications of parties involved in the offering and on-going activities of the ABS transaction. As discussed more fully in Section III.B., commenters generally endorsed increasing disclosure beyond current market practice to increase transparency in this area. In particular, investors supported increased disclosure regarding the servicer and its servicing practices. However, commenters representing issuers and their representatives were also concerned with the potential breadth of the disclosure, and we have made responsive revisions to these concerns. In recognition of the importance of the servicer to the ongoing performance of the ABS transaction, we are retaining our proposed approach for a principles-based definition of ''servicer'' that captures the multiple entities that may perform one or more material aspects of the entire servicing function. We believe it would be impractical and ineffective to create separate definitions to describe the many entities used to perform different servicing functions across all classes. However, to reduce potential disclosure burdens regarding unrelated third parties, we have revised the percentage breakpoint for determining when more detailed disclosure would be required for unaffiliated servicers that service individual pool assets from 10 percent to 20 percent. We have made similar changes for required disclosure for unaffiliated originators. Similarly, we have significantly revised the test for determining financial significance for certain derivative instruments in response to comment that the proposed tests would lead to potential additional disclosure burdens. The revised test to determine the maximum probable exposure for these derivatives will reduce the potential burden while still providing disclosure to investors regarding such instruments, including when their financial significance to the transaction increases.

As discussed in Section III.B., investors uniformly supported the proposed requirement for static pool information, emphasizing the importance of the information to them in making informed investment decisions. Further, as we stated in the Proposing Release, we understand many issuers already have static pool information available, although it may have to be subjected to additional procedures and diligence before it is included in the disclosure documents. The most common concern for issuers was the lack of guidance on the scope of the requirement might result in unnecessary and excessive disclosure. These commenters provided a number of suggestions to clarify the scope of the request and tailor it to reduce the issuer's burden.

To provide clarity in determining the material information to be disclosed by issuers, we are adopting separate starting points for disclosure depending on whether the ABS transaction involves an amortizing asset pool or a revolving asset master trust. These flexible starting points should help guide issuers in determining the scope of the static pool data, while still promoting comparability of information across issuers. At the same time, we are revising the requirement in response to comment to include several additional features. For example, we are increasing the amount of data to a minimum of five

[586] See Letter of ICI. See also Letter of CFAI.

years, to the extent material, based upon commenter concerns that the proposed three year requirement may not be sufficient for a meaningful evaluation of trends by asset type. We also are adding prepayment information and, for prior pools and information about the sponsor's portfolio, summary characteristics. These additional features, some of which were suggested by issuers themselves, may impose certain additional marginal costs, but commenters agreed they will significantly increase the usefulness of the data and the resultant benefits to investors and the efficiency of the ABS market. However, we are not adopting several other proposed items as specific line items in the disclosure requirement in response to comment that their potential breadth would be too burdensome and to tailor the disclosure that is material to the transaction. We also are providing a limited safe harbor for static pool data that relate to certain pools and periods before the compliance date to encourage disclosure of such information and minimize the amount of time before investors can begin to incorporate static pool information into their investment decisions.

In response to comment on making the disclosure more functional by taking advantage of the technological advancements of the Internet to enable investors to access and analyze the information, we are providing a filing accommodation that permits issuers to provide the information through an Internet Web site. Commenters confirmed that many issuers already provide performance data through an Internet Web site. Under this accommodation, investors could be assured access to accurate and reliable information since the information provided through the specific Internet Web site is deemed to be a part of the prospectus included in the registration statement for the asset-backed securities. The functionality of this alternative method will assist investors in analyzing the information and remove the burden to issuers of duplicating the information in each prospectus and should ease updating such information. Despite the potential benefits of being able to provide the disclosure in the manner most desirable to investors, issuers electing the Web-based option will incur cost in maintaining and retaining information to satisfy the record retention requirement. There also may be start-up costs in creating or modifying Web sites for disclosure through this accommodation consistent with its required conditions.

Even with the responsive revisions to clarify and tailor the disclosure requirements, we recognize the disclosure under Regulation AB may increase the costs to issuers of asset-backed securities. The final rules are 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 by investors, 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 and Exchange Act reports under the new ABS disclosure regime.

We also estimate that issuers may, at least initially, need extra time to prepare the information or obtain such information from the respective parties to the ABS transaction. However, we continue to believe that parties already provide much of this information to rating agencies during the process of obtaining a rating on the offering based on comments we received, and thus such information should be readily available. In addition, we are providing an extended transition period for compliance with the disclosure requirements in Regulation AB to allow issuers additional time to implement processes and procedures to adapt to the new disclosure structure. Therefore, we do not anticipate that issuers should incur significant long-term costs in complying with the new disclosure regime.

For purposes of the Paperwork Reduction Act, we estimated 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 estimated the incremental PRA hour-burden would translate into an approximate cost of $12,967,275.[587] We did not receive any comments on the PRA analysis contained in the Proposing Release and none of the commenters provided any comments to the estimates of increased compliance costs. 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.

E. Communications During the Offering Process

In codifying as proposed the existing ability to use written communications outside of the statutory prospectus, we recognize the current beneficial information these communications provide to potential investors in an ABS offering. Under the final rules, issuers and underwriters can communicate with potential investors through additional communications apart from the statutory prospectus to structure the offering. The rules we are adopting clarify further the definition of the written communications that an issuer may use to avoid uncertainty and incrementally expand it by allowing the use of static pool data, the identification of key parties and information about the offering process. The rules also clarify that the scope of the written communications permitted includes 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. As we explain in Section III.C., commenters overall supported the proposals although some requested expansion. We are addressing whether additional accommodations to the communications restrictions would be appropriate in connection with the Offering Process Release.

The rules adopted today streamline the filing requirements for the communications allowed by providing that all types of ABS informational and computational material are to be filed in the same timeframe, thus reducing the regulatory uncertainty for issuers as to when to file written communications. The rules eliminate the hardship exemption for filing these materials in paper rather than on EDGAR. While two commenters suggested delaying the electronic filing requirement until the ability to file material in additional format, such as PDF, is allowed,[588] we

[587] We estimated 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.

[588] See, *e.g.*, Letters of ASF and BMA.

continue to believe that even under our current system, the filing of ABS information and computational material no longer needs an electronic filing exemption. The rules should increase the uniformity and timeliness of information received by investors as well as disseminated to the marketplace. Since all investors almost uniformly access offering information electronically, these rules should significantly benefit them.

As proposed, we are not changing the scope or liability requirements of the material that may be used from the present state, so our rules should not result in incremental costs from existing requirements. At the request of commenters and in order to provide certainty, we have codified in the final rules our discussion in the Proposing Release that failure by a particular underwriter to cause the filing of materials in connection with an offering will not affect the ability of any underwriter who has complied with the procedures to rely on the exemptions. In addition, we are adding another provision in response to comment that an immaterial or unintentional failure to file will not result in a loss of protection under the exemption. As commenters explained, both of these provisions should further encourage an appropriate free flow of information.

We also are codifying as proposed an existing staff safe harbor regarding the use of research reports published or distributed by a broker or dealer involving ABS. Our rule recognizes the different nature of ABS by providing tailored conditions for ABS research reports. Given that the rule we are adopting is consistent with the existing staff safe harbor, it too should not result in incremental costs.

F. Ongoing Reporting Under the Exchange Act

We are adopting our proposals 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, which received general support from commenters. The final rules clarify who has the reporting obligation under the Exchange Act and who must file and sign the annual, periodic and current reports. Although the comments we received on this point were mixed, we continue to believe that either the depositor, or the servicer in the alternative, should sign the Exchange Act reports because either the depositor or servicer is the party most able to monitor the ongoing Exchange Act reporting requirements of the ABS transaction. In addition, the final rules provide clarifying guidance on when the reporting obligation begins and when it can be suspended, which commenters overall supported. This will provide certainty to issuers as to when their reporting obligation is suspended as well as provide notice to investors as to when issuers may cease post-issuance reporting under the Exchange Act.

The final rules outline the required disclosure in the Exchange Act reports to ensure uniform reporting by issuers while reducing information asymmetry between issuers and investors. We are codifying the longstanding requirements that periodic information be disclosed based on the periodicity of distributions on the securities and the periodic reports contain the non-financial disclosures in Form 10–Q. Rather than filing these reports on Form 8–K, as they are currently, we are adopting our proposal that issuers use a new form type for ABS, 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, which commenters supported. We believe the use of the new form will not result in additional costs beyond minimal one-time transition costs. We have made several measured amendments to the disclosure for Form 10–D in response to comment to focus more on statistical disclosures than disclosures that require analysis, which we understand is more consistent with current practice and should ease preparation burden. We do continue to support some additional disclosure to investors, which may be incremental to what is typically provided today, such as disclosure regarding asset pool changes where those changes are the result of external administration instead of the pool converting into cash in accordance with their terms. Here again, however, we have made measured modifications in an attempt to ease administrative complexity. To further remove regulatory uncertainty for issuers, we also clarify when periodic disclosure for significant obligors is required. For purposes of the Paperwork Reduction Act, we continue to 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 estimated the incremental PRA hour-burden would translate into an approximate cost of $19,593,750.[589]

The final rules also provide the ability for issuers to obtain a five calendar day filing extension under Exchange Act Rule 12b–25 for Form 10–D filings, similar to the current process available for Form 10–Q filings by corporate issuers. The ability to use the Rule 12b–25 extension, if necessary, should help issuers with the implementation process and with staying timely with their Exchange Act reporting, which is important in order to maintain Form S–3 eligibility for new registration statements. To use the exemption, an issuer must file a Form 12b–25 with respect to the subject report, although we believe the burden is minimal. For purposes of the Paperwork Reduction Act, we estimate that the burden in preparing these Form 12b–25 filings would be an average 2.5 hours of in-house staff time. Based on our estimated cost of in-house staff time, we estimate the incremental PRA hour burden would translate into an approximate cost of $831,250.[590]

We are adopting instructions, substantially as proposed, to specify which of the existing items of Form 8–K will be applicable to ABS issuers. We also are adopting several ABS-specific reportable events for Form 8–K disclosure, again with certain modifications from the proposal to reduce potential additional disclosure burdens pointed out by commenters. 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 estimated that the proposals may 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 estimated the PRA

[589] We estimated 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.

[590] We estimate that the additional Form 12b–25 filings would result in 4,750 internal burden hours. Assuming a cost of $175/hour for in-house professional staff, the total cost of the internal burden hours would be $831,250.

hour-burden will translate into an approximate cost of $2,475,000.[591]

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 an assertion of compliance with servicing criteria. Under this approach, audited financial statements of the issuing entity and reporting regarding internal control over financial reporting are not required. We are adopting the basic approach set forth in our original proposal, with the one primary modification discussed below, because we continue to believe the costs to provide audited financial statements and reporting regarding internal control over financial reporting are not justified by any minimal benefits obtained from these requirements, which commenters generally supported. We believe the approach we are adopting today is more cost-effective to issuers and beneficial to investors and the market in monitoring ABS transactions.

We are modifying our original assessment and attestation proposal to remove the requirement for a single responsible party in response to comment that such a requirement would be more costly and might be administratively burdensome. Instead, we are adopting a revised approach suggested by commenters that reports on assessments of compliance with servicing criteria from each party participating in the servicing function, along with associated attestation reports from a registered public accountant, be filed as exhibits to the Form 10–K report. To ensure that the investor receives notice as to whether reports evidencing all aspects of the servicing function are in fact provided, we also are requiring that the person who signs the Section 302 certification must certify the required reports from all parties participating in the servicing function have been included as an exhibit to the Form 10–K report, or explain why. The revised approach resolves several concerns and potential complexities raised by commenters regarding a single responsible party approach while still achieving our proposed objective of covering the entire servicing function and clarifying to the investor whether all aspects of the servicing function are covered. When multiple parties are participating in the servicing function, we are providing that no report need be filed for a party that is servicing individual pool assets that comprise only 5% or less of the asset pool. This allowance should reduce time and cost in obtaining reports.

We are adopting, substantially in the form proposed, a single set of transparent and comprehensive servicing criteria regarding an ABS transaction, which should enhance the current framework for reporting on compliance. As discussed in the Proposing Release, the framework generally used today is limited to a specific asset class, covers only limited servicing functions and represents minimum standards. We have attempted to provide flexibility by utilizing servicing criteria that clarify the transaction agreements can expressly provide an alternative timeframe for those servicing criteria that refer to specific timeframes. We continue to believe that the disclosure-based criteria will improve the quality of the assessment of compliance and elicit disclosure that is comparable among different issuers. As we explained in Section III.D., most commenters on this aspect of the proposal commended our initiative to put forward a consistent set of criteria that could be applied across asset types.

As we noted in the Proposing Release, the servicing criteria are designed to be incremental to the current framework and several commenters confirmed that many of the criteria are not new. The servicing criteria is designed to cover the full spectrum of servicing asset-backed securities, thereby facilitating an evaluation of all relevant servicing activities by each party involved in the servicing function. For example, one of the additional components of the servicing criteria that we continue to believe to be critical to the servicing function is the calculation of the payments on the securities, also referred to as the ''flow of funds.'' This improved assessment will enable investors, other parties participating in 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.

The assessment and reporting on the servicing criteria will continue to operate within a disclosure-based framework. For example, because our revised approach requires reports from multiple parties that participate in the servicing function, we have revised the proposed approach to allow a party to exclude a particular criterion from its assessment if it is not applicable to the asserting party based on the types of activities it performs. Disclosure also will be required of any material instances of noncompliance in the reports, if any. The revised approach continues to have the benefit of alerting investors whether all relevant reports covering the entire servicing function have been filed as exhibits to the Form 10–K as well as informing investors of any potential problems regarding a participating party's servicing function. As proposed, disclosure of material non-compliance in the Form 10–K would not result in regulatory restrictions on market access such as Form S–3 eligibility.

We estimate that the servicing criteria may impose new disclosure requirements on compliance assessments that do not presently utilize the current framework. Since the 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. To the extent that parties involved in servicing do not maintain compliance with the servicing criteria and do not wish to publicly disclose this fact, the disclosure-based criteria could lead to these parties instituting appropriate procedures to comply with the criteria and thus incur implementation costs. We also understand that additional time and cost may be required to obtain reports from all appropriate parties, including those that may not have provided such reports previously. The extended transition period for compliance with the applicable servicing criteria should help mitigate transition to the new requirements. In addition, we are maintaining the proposed approach of requiring platform level assessments, which as noted in Section III.D., commenters supported as less costly.

Consistent with the modified reporting system, we are adopting the requirement that a registered public accounting firm attest to the assessment of compliance with servicing criteria. As discussed above, each party participating in the servicing function will engage its own independent accountant for the attestation of the party's assessment and the attestation will be required to be filed as an exhibit to the Form 10–K. As we stated in the Proposing Release, the engagement of an independent accountant improves investor confidence by establishing an independent check on the party's assessment of servicing compliance. In addition, the attestation by the independent accountant may detect

[591] We estimated 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.

material instances of noncompliance with the servicing criteria that may provide early warning signals to investors. As with the assessments themselves, the attestation of the entire servicing function may increase the accounting costs for those criteria that are incremental to the current framework.

In addition to the assessment of compliance with servicing criteria, we will continue requiring issuers to file a servicer compliance statement regarding compliance with material aspects of the servicing agreement. This rule generally codifies current practice and should not by itself result in any additional costs. The final rules, as proposed, also specify the form and content of the Sarbanes-Oxley Section 302 certification for ABS issuers consistent with existing staff practice, with the one primary modification discussed above regarding the revised assessment of compliance. As proposed, the language of the certification is not to be revised 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 estimated that the incremental burden in preparing the Form 10–K, including the assessment of compliance with servicing criteria, will be on average 30 hours per response. Based on our estimated costs, we estimated the PRA hour-burden will translate into an approximate cost of $9,675,000.[592] We continue to believe this increased burden will 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. Taken together, the total increased cost using PRA estimates is approximately $45,542,275. As noted above, we did not receive any comments on the PRA analysis contained in the Proposing Release and none of the commenters provided any comments to the estimates of increased compliance costs.

Finally, we reiterate the 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.[593] While not all commenters agreed, we continue to believe this facilitates access to information relevant to the particular securities involved, which increases transparency of such information for investors as well as the market for these securities. We anticipate that some issuers may incur additional costs by preparing separate Exchange Act reports for each issuing entity because these issuers currently provide combined reports. However, we continue to 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 Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[594] 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[595] and Section 3(f) of the Exchange Act[596] 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 final rules are intended to increase transparency by codifying informal industry and staff practices, along with incremental changes and responsive changes, 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 rules will enhance capital formation by simplifying the process of registering an offering of asset-backed securities, thereby allowing parties not fully immersed in the ABS market to ascertain and understand the offering and disclosure requirements. Establishing clear and transparent requirements also should remove barriers to entry for securitizations, thus promoting efficiency and competitiveness of the U.S. capital markets for asset-backed offerings. Commenters overwhelmingly supported our proposed separate framework for the registration and reporting of asset-backed securities due to the growth of the market and inherent differences between asset-backed securities and other securities.[597]

The principles-based disclosure requirements we are adopting will allow great flexibility in implementation for all asset classes while enhancing the quality of disclosure for ABS transactions. Similarly, the servicing criteria we are adopting are intended to provide a comprehensive assessment to evaluate the overall servicing function for the ABS transaction. We anticipate these rules, that have been modified in response to comment, 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. Enhanced disclosure should raise investors' expectations regarding material information that issuers must make available to the public. We anticipate this will 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.

In addition, the rules are designed to improve the current framework for reporting on compliance with servicing criteria that will operate within a disclosure-based framework and cover the entire spectrum of the servicing function. We believe the servicing criteria will provide value to the ABS industry in establishing market-wide disclosure benchmarks and promote market efficiency by providing meaningful disclosure regarding each party participating in the servicing function that is attested to by the respective party's independent public accountant. The disclosure-based framework of the servicing criteria will provide information about the entire servicing function to be publicly available for investors, as well as to the

[592] We estimated 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.

[593] We also are planning programming changes to the EDGAR system that should significantly reduce some of the technical and compliance issues involved in establishing new transactions under the EDGAR system.

[594] 15 U.S.C. 78w(a)(2).

[595] 15 U.S.C. 77b(b).

[596] 15 U.S.C. 78c(f).

[597] See note 27 above.

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 servicing criteria will promote the comparability of reports of different issuers, thus promoting investor analysis as well as competition among such issuers.

We requested comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. We received no comments on this subject but a few of the comments on other areas touched on these issues. Two commenters thought the requirement to disclose the policies and procedures of the servicer is too broad and would require servicers to disclose competitive information to the public.[598] We have emphasized in the release the materiality-based standard for the new disclosure items in Regulation AB, including disclosure regarding the servicer. This should mitigate the possibility that detailed information about the servicer's operational practices would not subsume the disclosure. However, we continue to believe enhanced material disclosure about the servicer's business practices provides more certainty to investors that they are making investment decisions in a transparent market. All material parties that meet the definition of ''servicer'' will be required to make available to the public the same level of disclosure on their business practices. To reduce potential disclosure burdens regarding unrelated third parties, we have raised the percentage breakpoint for determining when more detailed disclosure would be required for unaffiliated servicers thereby decreasing the number of times disclosure is required.

Commenters also believed there was no compelling reason to propose different bright-line limits for ABS transactions using a prefunding period or revolving period if the transaction is filed on Form S–1 or Form S–3.[599] One group of commenters suggested increasing the proposed limit for revolving periods to an unlimited three-year revolving period would improve efficiency in structuring transactions.[600] In response to comment, we have eliminated the different bright-line percentage tests for ABS offerings utilizing a prefunding period or revolving period and registered on either Form S–1 or Form S–3. We also have further expanded the revolving period to allow an unlimited revolving period for up to three years so long as added assets are of the same general character as the original pool assets. These expansions should allow similar treatment in structuring transactions that meet market demands.

We have made several measured changes in the final rules after carefully balancing issuer concerns of potential burdens with the need for investor protection and market efficiency. For example, we made responsive revisions to the final rules and Regulation AB to assist issuers meet the eligibility requirements to register an offering on Form S–3 to quickly access the ABS market. We are supporting an alternative method of providing disclosure through publicly available Internet Web sites to limit the potential burden of the static pool disclosure requirement for issuers while increasing the efficiency of the disclosure for investors and the market. We also are extending the transition period to assist various transaction participants plan for compliance with the new regulatory regime for future ABS offerings and ensure orderly transition of the alternative disclosure regime for existing ABS transaction with minimal disruption to the ABS market.

The rules could have certain indirect negative effects. For example, if transactions in the private market for ABS or in foreign markets do not result in similar disclosures, issuers could, all things being equal, migrate to those markets to avoid such disclosures. A few commenters mentioned such concerns generally.[601] Conversely, some commenters believed practices in the public markets would influence disclosures in the private market as well.[602] We have made responsive revisions to the proposals to address commenter concerns about potentially adverse unintended consequences from the new requirements. Moreover, there may be limitations on the ability to migrate to other markets given the large size of the U.S. registered ABS market and potential regulatory or investment restrictions on the ability of investors to purchase non-registered ABS. In addition, competitors and markets not subject to the new alternative disclosure regime for asset-backed securities may suffer from decreased investor confidence if the asset-backed offerings lack the transparency of asset-backed offerings that do comply with the new regime. The possibility of these effects and their magnitude if they were to occur are difficult to quantify.

Our specific rules relate only to transactions that meet the definition for an asset-backed security under the Securities Act. The definition and interpretations that we are adopting are intended to establish parameters for the types of securities that are appropriate for our new regulatory regime for ABS. Although the definition for an asset-backed security is flexible as to capture most asset-backed structures, there may be transactions that are fundamentally different from the principles-based definition. However, we continue to believe transactions that do not fit the parameters of the definition will still be able to access the capital markets. These transactions will need to rely on non-ABS form eligibility for registration, and additional disclosures, depending on the type of offering and transaction, will be required.

VII. Regulatory Flexibility Analysis Certification

Under Section 605(b) of the Regulatory Flexibility Act,[603] we certified that, when adopted, the proposals would not have a significant economic impact on a substantial number of small entities. We included this certification in Part VII of the Proposing Release. While we encouraged written comment regarding this certification, none of the commenters responded to this request.

VIII. Statutory Authority and Text of Rule and Form Amendments

We are adopting the new rules, forms and amendments contained in this document under the authority set forth in Sections 6, 7, 8, 10, 19 and 28 of the Securities Act,[604] Sections 3, 10A, 12, 13, 14, 15, 16, 23 and 36 of the Exchange Act,[605] and Sections 3, 302, 306, 404, 406 and 407 of the Sarbanes-Oxley Act.[606]

Text of the Amendments

List of Subjects

17 CFR Part 210

Accountants, Accounting, Reporting and recordkeeping requirements, Securities.

[598] See Letters of JPMorganChase and MBA.

[599] See, *e.g.*, Letters of ASF, Citigroup, and MBNA.

[600] See Letter of Auto Group.

[601] See, *e.g.*, Letter of ABA; Jones Day; and NYCBA.

[602] See, *e.g.*, Letter of A&O.

[603] 5 U.S.C. 605(b).

[604] 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77q, 77s and 77z-3.

[605] 15 U.S.C. 78c, 78j, 78j-1, 78*l*, 78m, 78n, 78o, 78p, 78w and 78mm.

[606] 15 U.S.C. 7202, 7241, 7244, 7262, 7264 and 7265.

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 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.

■ 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, as required by § 240.13a–18(c) or 240.15d–18(c) of this chapter, expresses an opinion, or states that an opinion cannot be expressed, concerning an asserting party's assessment of compliance with servicing criteria, as required by § 240.13a–18(b) or 240.15d–18(b) 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 revision 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(c) or 240.15d–18(c) 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 asserting 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 1113 of Regulation AB (§ 229.1113).

■ 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 § 240.15d–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)''.

§ 229.406 [Amended]

■ 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 paragraphs (k) and (l).

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.

(l) *Filings regarding asset-backed securities that provide certain information through an Internet Web site.* Include the following if the registration statement is to provide information required by Item 1105 of Regulation AB (§ 229.1105) through an Internet Web site in accordance with Rule 312 of Regulation S–T (§ 232.312 of this chapter):

The undersigned registrant hereby undertakes that, except as otherwise provided by Item 1105 of Regulation AB (17 CFR 229.1105), information provided in response to that Item pursuant to Rule 312 of Regulation S–T (17 CFR 232.312) through the specified Internet address in the prospectus is deemed to be a part of the prospectus included in the registration statement. In addition, the undersigned registrant hereby undertakes to provide to any person without charge, upon request, a copy of the information provided in response to Item 1105 of Regulation AB pursuant to Rule 312 of Regulation S–T through the specified Internet address as of the date of the prospectus included in the registration statement if a subsequent update or change is made to the information.

■ 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

* * * * *

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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	X
(ii) By-laws	X	---	---	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	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	---	---	---
(8) Opinion re tax matters	X	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	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 (ii) Rule 13a-14(d)/15d-14(d) Certifications[6]	--- ---	--- ---	--- ---	--- ---	--- ---	--- ---	--- ---	--- ---	--- ---	--- ---	--- ---	--- ---	--- ---	X ---	X X
(32) Section 1350 Certifications[6]	---	---	---	---	---	---	---	---	---	---	---	---	---	X	X
(33) Report on assessment 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.

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(b) *Description of exhibits.* * * *

(31)(i) * * *

(ii) *Rule 13a–14(d)/15d–14(d) Certifications.* If an asset-backed issuer (as defined in § 229.1101), 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] (the ''Exchange Act periodic reports'');

2. Based on my knowledge, the Exchange Act periodic reports, taken as a whole, do 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 with respect to 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 the Exchange Act periodic reports;

4. [I am responsible for reviewing the activities performed by the servicer(s) and based on my knowledge and the compliance review(s) conducted in preparing the servicer compliance statement(s) required in this report under Item 1123 of Regulation AB, and except as disclosed in the Exchange Act periodic reports, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and]

[Based on my knowledge and the servicer compliance statement(s) required in this report under Item 1123 of Regulation AB, and except as disclosed in the Exchange Act periodic reports, the servicer(s) [has/have] fulfilled [its/their] obligations under the servicing agreement(s); and] [2]

5. All of the reports on assessment of compliance with servicing criteria for asset-backed securities and their related attestation reports on assessment of compliance with servicing criteria for asset-backed securities required to be included in this report in accordance with Item 1122 of Regulation AB and Exchange Act Rules 13a–18 and 15d–18 have been included as an exhibit to this report, except as otherwise disclosed in this report. Any material instances of noncompliance described in such reports have been disclosed in this report on Form 10–K.[3]

[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].] [4]

Date: _____

_____

[Signature]

[Title]

[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 function) 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.

[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] The certification refers to the reports prepared by parties participating in the servicing function that are required to be included as an exhibit to the Form 10–K. See Item 1122 of Regulation AB (§ 229.1122) and Rules 13a–18 and 15d–18 (§§ 240.13a–18 and 240.15d–18 of this chapter). If a report that is otherwise required to be included is not attached, disclosure that the report is not included and an associated explanation must be provided in the Form 10–K report.

[4] 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.

* * * * *

(33) *Report on assessment of compliance with servicing criteria for asset-backed securities.* Each report on assessment of compliance with servicing criteria required by § 229.1122(a).

(34) *Attestation report on assessment of compliance with servicing criteria for asset-backed securities.* Each attestation report on assessment of compliance with servicing criteria for asset-backed securities required by § 229.1122(b).

(35) *Servicer compliance statement.* Each servicer compliance statement required by § 229.1123.

(36) through (98) [Reserved]

* * * * *

§ 229.701 [Amended]

■ 20. Amend § 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 229.1123 to read as follows:

Subpart 229.1100—Asset-Backed Securities (Regulation AB)

229.1100 (Item 1100) General.
229.1101 (Item 1101) Definitions.
229.1102 (Item 1102) Forepart of registration statement and outside cover page of the prospectus.
229.1103 (Item 1103) Transaction summary and risk factors.
229.1104 (Item 1104) Sponsors.
229.1105 (Item 1105) Static pool information.
229.1106 (Item 1106) Depositors.
229.1107 (Item 1107) Issuing entities.
229.1108 (Item 1108) Servicers.
229.1109 (Item 1109) Trustees.
229.1110 (Item 1110) Originators.
229.1111 (Item 1111) Pool assets.
229.1112 (Item 1112) Significant obligors of pool assets.
229.1113 (Item 1113) Structure of the transaction.
229.1114 (Item 1114) Credit enhancement and other support, except for certain derivatives instruments.
229.1115 (Item 1115) Certain derivatives instruments.
229.1116 (Item 1116) Tax matters.
229.1117 (Item 1117) Legal proceedings.
229.1118 (Item 1118) Reports and additional information.
229.1119 (Item 1119) Affiliations and certain relationships and related transactions.
229.1120 (Item 1120) Ratings.
229.1121 (Item 1121) Distribution and pool performance information.
229.1122 (Item 1122) Compliance with applicable servicing criteria.
229.1123 (Item 1123) Servicer compliance statement.

Subpart 229.1100—Asset-Backed Securities (Regulation AB)

§ 229.1100 (Item 1100) General.

(a) *Application of Regulation AB.* Regulation AB (§§ 229.1100 through 229.1123) is the source of various disclosure items and requirements 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.*). Unless otherwise specified, definitions to be used in this Regulation AB,

including the definition of ''asset-backed security,'' 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 or 31 day increments, as applicable, beginning at least with assets that are 30 or 31 days delinquent, as applicable, 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 and cumulative 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) In a registration statement under the Securities Act or the Exchange Act or in a prospectus to be filed pursuant to § 230.424, describe how delinquencies, charge-offs and uncollectable accounts are defined or determined, addressing the effect of any grace period, re-aging, restructure, partial payments considered current or other practices on delinquency and loss experience.

(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 1112(b) of this Regulation AB (Information regarding significant obligors) or Items 1114(b)(2) or 1115(b) of this Regulation AB (Information regarding significant provider of enhancement or other support), such information, in lieu of including 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.

(iv) If incorporated by reference into 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.

4. If 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 ABS transaction, and neither the third party nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the ABS transaction, then paragraph (c)(1)(ii) of this section is qualified by the knowledge of the registrant.

5. If you are relying on paragraph (c)(1) of this section to provide information required by Item 1112 of this Regulation AB regarding a significant obligor that is an asset-backed issuer and the pool assets relating to such significant obligor are asset-backed securities, then for purposes of paragraph (c)(1)(iii) of this section, the term ''financial statements'' means the information required by Instruction 3 of Item 1112 of this Regulation AB. Such information required by Instruction 3.a. of Item 1112 of this Regulation AB may be incorporated by reference from a prospectus that contains such information and is included in an effective Securities Act registration statement or filed pursuant to § 230.424 of this chapter.

(2) *Reference information for significant obligors.* If the third party information relates to a significant obligor and the following conditions are met, you may 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 file number, if applicable (See, *e.g.*, Item 1118 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) To the knowledge of the registrant, 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 paragraph (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 paragraph (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 229.1123).

Instruction to Item 1101(c)(2). If you are relying on paragraph (c)(2)(ii)(E) of this section because the pool assets relating to such third party are asset-backed securities, then for purposes of a registration statement under the Securities Act or the Exchange Act or a prospectus to be filed pursuant to § 230.424 for your securities, you also must include a reference (including Commission reporting number and filing date) to the prospectus for the third party asset-backed securities that:

(a) Is either included in an effective Securities Act registration statement or filed pursuant to § 230.424 of this chapter; and

(b) Contains the information required by Instruction 3.a. of Item 1112 of this Regulation AB.

(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 1123 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 or support contemplated by Items 1114 or 1115 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 1110 of this Regulation AB regarding origination and securitization practices, Item 1107 of this Regulation AB regarding the sale or transfer of the pool assets, bankruptcy remoteness and collateral protection, Item 1108 of this Regulation AB regarding servicing, Item 1109 of this Regulation AB regarding the rights, duties and responsibilities of the trustee, Item 1111 of this Regulation AB regarding the terms, nature and treatment of the pool assets and Items 1114 or 1115 of this Regulation AB, as applicable, 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 in the applicable home jurisdiction 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 Securities Act 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 229.1123), unless specified otherwise:

(a) *ABS informational and computational material* means a written

communication consisting solely of one or some combination of the following:

(1) Factual information regarding the asset-backed securities being offered and the structure and basic parameters of the securities, such as the number of classes, seniority, payment priorities, terms of payment, the tax, Employment Retirement Income Security Act of 1974, as amended, (29 U.S.C. 1001 *et seq.*) (''ERISA'') or other legal conclusions of counsel, and descriptive information relating to each class (*e.g.*, principal amount, coupon, minimum denomination, anticipated price, yield, weighted average life, credit enhancements, anticipated ratings, and other similar information relating to the proposed structure of the offering);

(2) Factual information regarding the pool assets underlying the asset-backed securities, including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (*e.g.*, weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated;

(3) Identification of key parties to the transaction, such as servicers, trustees, depositors, sponsors, originators and providers of credit enhancement or other support, including a brief description of each such party's roles, responsibilities, background and experience;

(4) Static pool data, as referenced in Item 1105 of this Regulation AB, such as for the sponsor's and/or servicer's portfolio, prior transactions or the asset pool itself;

(5) 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 include:

(i) 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;

(ii) Statistical information showing the cash flows that would be associated with a particular class of asset-backed securities at a specified prepayment speed; and

(iii) Statistical information reflecting the financial impact of losses based on a variety of loss or default experience, prepayment, interest rate and related assumptions.

(6) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(7) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them); and

(8) A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy).

(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.*) nor 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 asset pool as of the measurement date.

(iv) Delinquent assets do not constitute 50% or more, as measured by dollar volume, of the asset pool as of the measurement date.

(v) With respect to securities that are backed by leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute:

(A) For motor vehicle leases, 65% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

(B) For all other leases, 50% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

(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. The offering related to the securities also may contemplate additions to the asset pool, to the extent consistent with paragraphs (c)(3)(ii) and (c)(3)(iii) of this section, in connection with maintaining minimum pool balances in accordance with the transaction agreements for master trusts with revolving periods or receivables or other financial assets that arise under revolving accounts.

(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 the duration of the prefunding period does not extend for more than one year from the date of issuance of the securities and the portion of the proceeds for such prefunding account does not involve in excess of:

(A) For master trusts, 50% of the aggregate principal balance of the total asset pool whose cash flows support the securities; and

(B) For other offerings, 50% of the proceeds of the offering.

(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 securities backed by receivables or other financial assets that do not arise under revolving accounts, the revolving period does not extend for more than three years from the date of issuance of the securities and the additional pool assets are of the same general character as the original pool assets.

Instructions to Item 1101(c).

1. For purposes of determining non-performing, delinquency and residual value thresholds, the ''measurement date'' means either:

a. The designated cut-off date for the transaction (*i.e.*, the date on and after which collections on the pool assets accrue for the benefit of asset-backed security holders), if applicable; or

b. In the case of master trusts, the date as of which delinquency and loss information or securitized pool balance information, as applicable, is presented in the prospectus for the asset-backed securities to be filed pursuant to § 230.424(b) of this chapter.

2. Non-performing and delinquent assets that are not funded or purchased by proceeds from the securities and that are not considered in cash flow calculations for the securities need not be considered as part of the asset pool for purposes of determining non-performing and delinquency thresholds.

3. For purposes of determining non-performing, delinquency and residual value thresholds for master trusts, calculations are to be measured against the total asset pool whose cash flows support the securities.

4. For purposes of determining residual value thresholds, residual values need not be included in measuring against the thresholds to the extent a separate party is obligated for such amounts (*e.g.*, through a residual value guarantee, residual value insurance or where the lessee is obligated to cover any residual losses).

(d) *Delinquent*, for purposes of determining if a pool asset is delinquent, means if a pool asset is more than 30 or 31 days or a single payment cycle, as applicable, past due from the contractual due date, as determined in accordance with any of the following:

(1) The transaction agreements for the asset-backed securities;

(2) The delinquency recognition policies of the sponsor, any affiliate of the sponsor that originated the pool asset or the servicer of the pool asset; or

(3) The delinquency recognition policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed in paragraph (d)(2) of this section or the program or regulatory entity that oversees the program under which the pool asset was originated.

(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:

(1) The pool asset would be treated as wholly or partially charged-off under the requirements in the transaction agreements for the asset-backed securities;

(2) The pool asset would be treated as wholly or partially charged-off under the charge-off policies of the sponsor, an affiliate of the sponsor that originates the pool asset or a servicer that services the pool asset; or

(3) The pool asset would be treated as wholly or partially charged-off under the charge-off policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed in paragraph (g)(2) of this section or the program or regulatory entity that oversees the program under which the pool asset was originated.

(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 securitized pool balance is attributable to 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.

4. The determination of significant obligors is to be made as of the designated cut-off date for the transaction (*i.e.*, the date on and after which collections on the pool assets accrue for the benefit of asset-backed security holders), provided, that, in the case of master trusts, the determination is to be made as of the cut-off date (or issuance date if there is not a cut-off date) for each issuance of asset-backed securities backed by the same asset pool. In addition, if disclosure is required pursuant to either Item 6.05 of Form 8–K (17 CFR 249.308) or in a Form 10–D (17 CFR 249.312) pursuant to Item

1121(b) of this Regulation AB, the determination of significant obligors is to be made against the asset pool described in such report. However, if the percentage concentration regarding an obligor falls below 10% subsequent to the determination dates discussed in this Instruction, the obligor no longer need be considered a 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. If information regarding multiple classes cannot appear on the cover page due to space limitations, include the information in the summary or in an immediately preceding separate table.

(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 or other support for the transaction and identify any enhancement or support provider referenced in Items 1114(b) or 1115 of this Regulation AB.

Instruction to Item 1102. Also see Item 1113(f)(2) of this Regulation AB regarding the title of any class of securities with an optional 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, trustee and servicers contemplated by Item 1108(a)(2) of this Regulation AB, and their respective roles. Describe the roles briefly if they are not apparent from the title of the role. Identify any originator contemplated by Item 1110 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 Items 1114(a) and 1115 of this Regulation AB, and briefly describe what protection or support is provided by the enhancement. Identify any enhancement provider referenced in Items 1114(b) and 1115 of this Regulation AB. Summarize how losses not covered by credit enhancement or support 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) If the transaction will include prefunding or revolving periods, 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, if applicable.

(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, if applicable.

(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, to the extent material, 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. Include to the extent material 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.

(d) Describe the sponsor's material 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.

§ 229.1105 (Item 1105) Static pool information.

(a) For amortizing asset pools, unless the registrant determines that such information is not material:

(1) Provide static pool information, to the extent material, regarding delinquencies, cumulative losses and prepayments for prior securitized pools of the sponsor for that asset type.

(2) If the sponsor has less than three years of experience securitizing assets of the type to be included in the offered asset pool, consider providing instead static pool information, to the extent material, regarding delinquencies, cumulative losses and prepayments by vintage origination years regarding originations or purchases by the sponsor, as applicable, for that asset type. A vintage origination year represents assets originated during the same year.

(3) In providing the information required by paragraphs (a)(1) and (a)(2) of this section:

(i) Provide the requested information for prior pools or vintage origination years, as applicable, relating to the following time period, to the extent material:

(A) Five years, or

(B) For so long as the sponsor has been either securitizing assets of the same asset type (in the case of paragraph (a)(1) of this section) or making originations or purchases of assets of the same asset type (in the case of paragraph (a)(2) of this section) if less than five years.

(ii) Present delinquency, cumulative loss and prepayment data for each prior securitized pool or vintage origination year, as applicable, in periodic increments (*e.g.*, monthly or quarterly), to the extent material, over the life of the prior securitized pool or vintage origination year. The most recent periodic increment for the data must be as of a date no later than 135 days of the date of first use of the prospectus.

(iii) Provide summary information for the original characteristics of the prior securitized pools or vintage origination years, as applicable and material. While the material summary characteristics may vary, these characteristics may include, among other things, the following: number of pool assets; original pool balance; weighted average initial pool balance; weighted average interest or note rate; weighted average original term; weighted average remaining term; weighted average and minimum and maximum standardized credit score or other applicable measure of obligor credit quality; product type; loan purpose; loan-to-value information; distribution of assets by loan or note rate; and geographic distribution information.

(b) For revolving asset master trusts, unless the registrant determines that such information is not material, provide, to the extent material, data regarding delinquencies, cumulative losses, prepayments, payment rate, yield and standardized credit scores or other applicable measure of obligor credit quality in separate increments based on the date of origination of the pool assets. While the material increments may vary, consider presenting such data at a minimum in 12-month increments through the first five years of the account's life (*e.g.*, 0–12 months, 13–24 months, 25–36 months, 37–48 months, 49–60 months and 61 months or more).

(c) If the information that would otherwise be required by paragraph (a)(1), (a)(2) or (b) of this section is not material, but alternative static pool information would provide material disclosure, provide such alternative information instead. Similarly, information contemplated by paragraph (a)(1), (a)(2) or (b) of this section regarding a party or parties other than the sponsor may be provided in addition to or in lieu of such information regarding the sponsor if appropriate to provide material disclosure. In addition, other explanatory disclosure, including disclosure explaining the absence of any static pool information, may be provided.

(d) The following information provided in response to this section shall not be deemed to be a prospectus or part of a prospectus for the asset-backed securities nor shall such information be deemed to be part of the registration statement for the asset-backed securities:

(1) With respect to information regarding prior securitized pools of the sponsor that do not include the currently offered pool, information regarding prior securitized pools that were established before January 1, 2006; and

(2) With respect to information regarding the currently offered pool, information about the pool for periods before January 1, 2006.

(e) For prospectuses to be filed pursuant to § 230.424 of this chapter that include information specified in paragraph (d)(1) or (d)(2) of this section, the prospectus shall disclose that such information is not deemed to be part of that prospectus or the registration

statement for the asset-backed securities.

(f) If any of the information identified in paragraph (d)(1) or (d)(2) of this section that is to be provided in response to this section is unknown and not available to the registrant without unreasonable effort or expense, such information may be omitted, provided the registrant provides the information on the subject it possesses or can acquire without unreasonable effort or expense, and the registrant includes a statement in the prospectus showing that unreasonable effort or expense would be involved in obtaining the omitted information.

§ 229.1106 (Item 1106) 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) of Item 1104 of this Regulation AB, and, to the extent the information would be material and materially different from the sponsor, paragraphs (c) and (d) of Item 1104 of this Regulation AB. In addition, provide the following information:

(a) The ownership structure of the depositor.

(b) 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) Any continuing duties of the depositor after issuance of the asset-backed securities being registered regarding the asset-backed securities or the pool assets.

§ 229.1107 (Item 1107) 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 and 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 allowing 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 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, 403 and 404 of Regulation S-K (§§ 229.401, 229.402, 229.403 and 229.404) 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) If the pool assets are securities, as defined under the Securities Act, state the market price of the securities and the basis on which the market price was determined.

(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 contemplated by Item 1108(a)(2) of this Regulation AB, depositor, issuing entity, originator contemplated by Item 1110 of this Regulation AB, 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.

§ 229.1108 (Item 1108) Servicers.

Provide the following information for the servicer.

(a) *Multiple servicers.* Where servicing of the pool assets utilizes multiple servicers (*e.g.*, 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):

(1) Provide a clear introductory description of the roles, responsibilities and oversight requirements of the entire servicing structure and the parties involved. In addition to an appropriate narrative discussion of the allocation of servicing responsibilities, also consider presenting the information graphically if doing so will aid understanding.

(2) Identify:

(i) Each master servicer;

(ii) Each affiliated servicer;

(iii) Each unaffiliated servicer that services 10% or more of the pool assets; and

(iv) Any other material servicer responsible for calculating or making distributions to holders of the asset-backed securities, performing work-outs or foreclosures, or other aspect of the servicing of the pool assets or the asset-backed securities upon which the performance of the pool assets or the asset-backed securities is materially dependent.

(3) Provide the information in paragraphs (b), (c) and (d) of this

section, as applicable depending on the servicer's role, for each servicer identified in paragraphs (a)(2)(i), (ii) and (iv) of this section and each unaffiliated servicer identified in paragraph (a)(2)(iii) of this section that services 20% or more of the pool assets

(b) *Identifying information and experience.* (1) State the servicer's name and describe the servicer's form of organization.

(2) State how long the servicer has been servicing assets. Provide, to the extent material, 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 the servicing function it will perform in the current transaction for assets of the type included in the current transaction. Include to the extent material information regarding the size, composition and growth of the servicer's portfolio of serviced assets of the type included in the current transaction and information on factors related to the servicer that may be material to an analysis of the servicing of the assets or the asset-backed securities, as applicable.

(3) Describe any material changes to the servicer's policies or procedures in the servicing function it will perform in the current transaction for assets of the same type included in the current transaction during the past three years.

(4) Provide information regarding the servicer's financial condition to the extent that there is a material risk that the effect on one or more aspects of servicing resulting from such financial condition could have a material impact on pool performance or performance of the asset-backed securities.

(c) *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 to the extent material the manner in which collections on the assets will be maintained, such as through a segregated collection account, and the extent of commingling of funds that occurs or may occur from the 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 current transaction, such as subprime assets, and the servicer's processes and procedures designed to address such factors.

(4) Describe to the extent material 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 to the extent material 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 to the extent material any ability of the servicer to waive or modify any terms, fees, penalties or payments on the assets and the effect of any such ability, if material, on the potential cash flows from the assets.

(7) If the servicer has custodial responsibility for the assets, describe material arrangements regarding the safekeeping and preservation of the assets, such as the physical promissory notes, and procedures to reflect the segregation of the assets from other serviced assets. If no servicer has custodial responsibility for the 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 limitations on the servicer's liability under the transaction agreements regarding the asset-backed securities transaction.

(d) *Back-up servicing.* Describe the material 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 assets and the identity of any such back-up servicer.

§ 229.1109 (Item 1109) Trustees.

Provide the following information for each trustee:

(a) State the trustee's name and describe the trustee's form of organization.

(b) Describe to what extent the trustee has had prior experience serving as a trustee for asset-backed securities transactions involving similar pool assets, if applicable.

(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 under the transaction agreements 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.

Instruction to Item 1109. If multiple trustees are involved in the transaction, provide a description of the roles and responsibilities of each trustee.

§ 229.1110 (Item 1110) Originators.

(a) Identify any originator or group of affiliated originators, apart from the sponsor or its affiliates, that originated, or is expected to originate, 10% or more of the pool assets.

(b) Provide the following information for any originator or group of affiliated originators, apart from the sponsor or its affiliates, that originated, or is expected to originate, 20% or more of the pool assets:

(1) The originator's form of organization.

(2) 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.

§ 229.1111 (Item 1111) Pool assets.

Describe the pool assets, including the information required by this Item 1111. 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, to the extent material, such as, average balance, weighted average coupon, average age and remaining term, average loan-to-value or similar ratio and weighted average standardized 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 information 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 1111(a)(6). Unless a material concentration of assets exists, it is not necessary to provide details of the laws in each jurisdiction. Even in that case, 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, the methodology used in determining or calculating the characteristics and any terms or abbreviations used. While the material characteristics will vary depending on the nature of the pool assets, such characteristics may include, among other things:

(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.

(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 distribution, 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).

(8) If a receivable or other financial asset that arises under a revolving account, such as a credit card receivable:

(i) Monthly payment rate.

(ii) Maximum credit lines.

(iii) Average account balance.

(iv) Yield percentages.

(v) Type of asset.

(vi) Finance charges, fees and other income earned.

(vii) Balance reductions granted for refunds, returns, fraudulent charges or other reasons.

(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) For all commercial mortgages:

(A) The location and present use of each mortgaged property.

(B) Net operating income and net cash flow information, as well as the components of net operating income and net cash flow, for each mortgaged property.

(C) Current occupancy rates for each mortgaged property.

(D) The identity, square feet occupied by and lease expiration dates for the three largest tenants at each mortgaged property.

(E) The nature and amount of all other material mortgages, liens or encumbrances against such properties and their priority.

(ii) For each commercial mortgage that represents, by dollar value, 10% or more of the asset pool, as measured as of the cut-off date:

(A) 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.

(B) The general competitive conditions to which such properties are or may be subject.

(C) Management of such properties.

(D) Occupancy rate expressed as a percentage for each of the last five years.

(E) Principal business, occupations and professions carried on in, or from the properties.

(F) 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.

(G) The average effective annual rental per square foot or unit for each of the last three years prior to the date of filing.

(H) Schedule of the lease expirations for each of the ten years starting with the year in which the registration statement is filed (or the year in which the prospectus supplement is dated, as applicable), stating:

(*1*) The number of tenants whose leases will expire.

(*2*) The total area in square feet covered by such leases.

(*3*) The annual rental represented by such leases.

(*4*) The percentage of gross annual rental represented by such leases.

Instruction to Item 1111(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) 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, describe any economic or other factors specific to such state or region that may materially impact the pool assets or pool asset cash flows.

Instruction to Item 1111(b)(14). For most assets, such as credit card accounts, motor vehicle 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.

(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 securitized pool balance is attributable to the residual value of the underlying physical property underlying the leases, 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 1119(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) To the extent material, 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, as applicable. 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 or a breach of a pool asset representation or warranty:

(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, if applicable.

(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, if applicable.

(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 whether or not 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 whether, and if so, how, investors will be notified of changes to the asset pool.

§ 229.1112 (Item 1112) 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 and 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, provided, however, that for a significant obligor under Item 1101(k)(2) of this Regulation AB, only net operating income for the most recent fiscal year and interim period is required.

(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 1112(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 from a Commission filing 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 following information in lieu of the information required by paragraph (b) of this section:

a. For a registration statement under the Securities Act or the Exchange Act or a prospectus to be filed pursuant to § 230.424 of this chapter, the information required by Items 1104 through 1115, 1117 and 1119 of this Regulation AB regarding such asset-backed securities; and

b. For an Exchange Act report on Form 10–K or Form 10–D (§ 249.310 or 249.312 of this chapter), the information required by General Instruction J. of Form 10–K regarding such asset-backed securities for the period for which the last Form 10–K of the asset-backed securities was due (or would have been due if such asset-backed securities are not required to file reports with the Commission pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)).

4. If the significant obligor is a foreign business (as defined § 210.1–02 of this chapter):

a. Paragraph (b)(1) of this section may be complied with by providing the information required by Item 3.A. of Form 20–F (§ 249.220f of this chapter). If a reconciliation to U.S. generally accepted accounting principles called for by Instruction 2. to Item 3.A. of Form 20–F is unavailable or not obtainable without unreasonable cost or expense, at a minimum provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements used as a basis for the selected financial data from those accepted in the U.S.

b. Paragraph (b)(2) of this section may be complied with by providing financial statements meeting the requirements of Item 17 of Form 20–F for the periods specified by Item 8.A. of Form 20–F.

§ 229.1113 (Item 1113) 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 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 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 should 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, such as any restrictions or limits on fees or whether the estimate may change in certain instances, such as in an event of default (and how the fees would change in such an instance or the factors that would affect the change). 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 and any restrictions on the ability to change a fee or expense amount, such as due to a change in transaction party.

(d) *Excess cash flow*. (1) Describe the disposition of residual or excess cash flows. Identify who owns any residual or retained interests to the cash flows if such person is affiliated with the sponsor, depositor, issuing entity or any entity identified in Item 1119(a) of this Regulation AB or if such person has rights that may alter the transaction structure beyond receipt of residual or excess cash flows. Describe such rights, as material.

(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 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.

(5) Which party has the authority to determine whether such additional securities may be issued. In addition, if there are conditions to such additional issuance, disclose whether or not there will be an independent verification of such person's exercise of authority or determinations.

(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 identity of the party that holds the redemption or termination option or obligation, as well as whether such party is an affiliate of the sponsor, depositor, issuing entity or any entity identified in Item 1119(a) of this Regulation AB.

(iii) The amount of the redemption or repurchase price or formula for determining such amount.

(iv) The procedures for redemption or termination, including any notices to security holders.

(v) 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 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,'' *provided, however*, that in the case of a master trust, a title of a class of securities must include the word ''callable'' when an optional redemption or termination feature may be exercised when 25% or more of the original principal balance of the particular series in which the class was issued is still outstanding.

(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 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.

§ 229.1114 (Item 1114) Credit enhancement and other support, except for certain derivatives instruments.

(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 whose primary purpose is to provide credit enhancement related to pool assets or the asset-backed securities.

(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.

Instructions to Item 1114(a).

1. Include a description of the material terms of any enhancement or support described, including any limits on the timing or amount of the enhancement or support or any conditions that must be met before the enhancement or support can be accessed. The enhancement or support agreement is to be filed as an exhibit. Also describe any provisions regarding the substitution of enhancement or support.

2. This Item should not be construed as allowing anything other than an asset-backed security whose payment is based primarily by reference to the performance of the receivables or other financial assets in the asset pool

(b) *Information regarding significant enhancement providers*—(1) *Descriptive information.* If an entity or group of affiliated entities providing enhancement or other support described in paragraph (a) of this section 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 described in paragraph (a) of this section is liable or contingently liable to provide payments representing 10% or more, but less than 20%, of the cash flow supporting any offered class of the asset-backed securities, provide financial data required by Item 301 of Regulation S–K (§ 229.301) for each such entity or group of affiliated entities.

(ii) If any entity or group of affiliated entities providing enhancement or other support described in paragraph (a) of this section is liable or contingently liable to provide payments representing 20% or more of the cash flow supporting any offered 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 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 1114.

1. The requirements in paragraph (b) of this section apply to all providers of external credit enhancement or other support, other than those described in Item 1115 of this Regulation AB. 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 from a Commission filing in lieu of providing the financial information required pursuant to paragraph (b)(2) of this section.

4. If the pool assets are student loans originated under the Federal Family Education Loan Program of the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*)) and the enhancement provider for the pool assets is a guarantee agency as defined under the Higher Education Act, then the following information may be provided in lieu of providing financial information required pursuant to paragraph (b)(2) of this section:

a. The number of pool assets and aggregate outstanding principal balance of pool assets guaranteed by the guarantee agency (both by number and percentage of the asset pool as of the cut-off date or other applicable date).

b. Disclosure of the following with respect to the guarantee agency, as applicable, including a brief description regarding the method of calculation, covering at least five federal fiscal years:

i. Aggregate principal amount of all student loans guaranteed.

ii. Reserve ratio.

iii. Recovery rate.

iv. Loss rate.

v. Claims rate.

5. If the enhancement provider is a foreign business (as defined § 210.1–02 of this chapter):

a. Paragraph (b)(2)(i) of this section may be complied with by providing the information required by Item 3.A. of Form 20–F (§ 249.220f of this chapter). If a reconciliation to U.S. generally accepted accounting principles called for by Instruction 2. to Item 3.A. of Form 20–F is unavailable or not obtainable without unreasonable cost or expense, at a minimum provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements used as a basis for the selected financial data from those accepted in the U.S.

b. Paragraph (b)(2)(ii) of this section may be complied with by providing financial statements meeting the requirements of Item 17 of Form 20–F for the periods specified by Item 8.A. of Form 20–F.

§ 229.1115 (Item 1115) Certain derivatives instruments.

This item relates to derivative instruments, such as interest rate and

currency swap agreements, that are used to alter the payment characteristics of the cashflows from the issuing entity and whose primary purpose is not to provide credit enhancement related to the pool assets or the asset-backed securities. For purposes of this section, the ''significance estimate'' of the derivative instrument is to be determined based on a reasonable good-faith estimate of maximum probable exposure, made in substantially the same manner as that used in the sponsor's internal risk management process in respect of similar instruments. The ''significance percentage'' is the percentage that the amount of the significance estimate represents of the aggregate principal balance of the pool assets, provided, that if the derivative instrument relates only to one or more classes of the asset-backed securities, the ''significance percentage'' is the percentage that the amount of the significance estimate represents of the aggregate principal balance of such classes.

(a) *Descriptive information.* (1) Describe the following regarding the external counterparty:

(i) The name of the derivative counterparty.

(ii) The organizational form of the derivative counterparty.

(iii) The general character of the business of the derivative counterparty.

(2) Describe the operation and material terms of the derivative instrument, including any limits on the timing or amount of payments or any conditions to payments.

(3) Describe any material provisions regarding substitution of the derivative instrument.

(4) At a minimum, disclose whether the significance percentage, as calculated in accordance with this section, is less than 10%, at least 10% but less than 20%, or 20% or more.

(5) File the agreement relating to the derivative instrument as an exhibit.

(b) *Financial information.* (1) If the aggregate significance percentage related to any entity or group of affiliated entities providing derivative instruments contemplated by this section is 10% or more, but less than 20%, provide financial data required by Item 301 of Regulation S–K (§ 229.301) for such entity or group of affiliated entities.

(2) If the aggregate significance percentage related to any entity or group of affiliated entities providing derivative instruments contemplated by this section is 20% or more, 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 such entity or group of affiliated entities. Financial statements of such entity and its subsidiaries consolidated (as required by § 240.14a–3(b) of this chapter) shall be filed under this item.

Instructions to Item 1115.

1. Instructions 2, 3 and 5 to Item 1114 of this Regulation AB apply to the information contemplated by paragraph (b) of this item.

2. This Item should not be construed as allowing anything other than an asset-backed security whose payment is based primarily by reference to the performance of the receivables or other financial assets in the asset pool.

§ 229.1116 (Item 1116) 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.

§ 229.1117 (Item 1117) Legal proceedings.

Describe briefly any legal proceedings pending against the sponsor, depositor, trustee, issuing entity, servicer contemplated by Item 1108(a)(3) of this Regulation AB, originator contemplated by Item 1110(b) of this Regulation AB, or other party contemplated by 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.

§ 229.1118 (Item 1118) Reports and additional information.

(a) *Reports required under the transaction documents.*

Describe the reports or other documents provided 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 under which reports about the asset-backed securities will be filed 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 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 and other reports 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 and other reports free of charge upon request.

§ 229.1119 (Item 1119) 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 § 230.405 of this chapter) of any of the following parties as well as, to the extent known and material, if so, and how, any of the

following parties are affiliates of any of the other following parties:

(1) Servicer contemplated by Item 1108(a)(3) of this Regulation AB.

(2) Trustee.

(3) Originator contemplated by Item 1110 of this Regulation AB.

(4) Significant obligor contemplated by Item 1112 of this Regulation AB.

(5) Enhancement or support provider contemplated by Items 1114 or 1115 of this Regulation AB.

(6) Any other material parties related to the asset-backed securities contemplated by Item 1100(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)(6) 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 1119(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.

(c) Notwithstanding paragraph (b) of this section, describe, to the extent material, any specific relationships involving or relating to the asset-backed securities transaction or the pool assets, including the material terms and approximate dollar amount involved, between the sponsor, depositor or issuing entity and any of the parties in paragraphs (a)(1) through (a)(6) of this section, or any affiliates of such parties, that currently exists or that existed during the past two years.

Instruction to Item 1119. With respect to disclosure in an annual report on Form 10–K, information required by this Item 1119 may be omitted to the extent that substantially the same information had been provided previously in an annual report on Form 10–K (§ 249.310) for the asset-backed securities or 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 as the current annual report on Form 10–K.

§ 229.1120 (Item 1120) 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.

§ 229.1121 (Item 1121) Distribution and pool performance information.

(a) 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 (or a cross-reference to a Commission filing where such information may be found). 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, such information may include, among other things:

(1) Any applicable record dates, accrual dates, determination dates for calculating distributions and actual distribution dates for the distribution period.

(2) Cash flows received and the sources thereof for distributions, fees and expenses (including portfolio yield, if applicable).

(3) Calculated amounts and distribution of the flow of funds for the period itemized by type and priority of payment, including:

(i) Fees or expenses accrued and paid, with an identification of the general purpose of such fees and the party receiving such fees or expenses.

(ii) Payments accrued or paid with respect to enhancement or other support identified in Item 1114 of this Regulation AB (such as insurance premiums or other enhancement maintenance fees), with an identification of the general purpose of such payments and the party receiving such payments.

(iii) 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.

(iv) The amount of excess cash flow or excess spread and the disposition of excess cash flow.

(4) Beginning and ending principal balances of the asset-backed securities.

(5) Interest rates applicable to the pool assets and the asset-backed securities, as applicable. Consider providing interest rate information for pool assets in appropriate distributional groups or incremental ranges.

(6) Beginning and ending balances of transaction accounts, such as reserve accounts, and material account activity during the period.

(7) Any amounts drawn on any credit enhancement or other support identified in Item 1114 of this Regulation AB, as applicable, and the amount of coverage remaining under any such enhancement, if known and applicable.

(8) 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 and prepayment amounts. For asset-backed securities backed by leases where a portion of the securitized pool balance is attributable to residual values of the physical property underlying the leases, this information also would include turn-in rates and residual value realization rates.

(9) Delinquency and loss information for the period. In addition, describe any material changes to the information specified in Item 1100(b)(5) of this Regulation AB regarding the pool assets.

(10) Information on the amount, terms and general purpose of any advances made or reimbursed during the period, including the general use of funds advanced and the general source of funds for reimbursements.

(11) Any material modifications, extensions or waivers to pool asset terms, fees, penalties or payments during the distribution period or that have cumulatively become material over time.

(12) Material breaches of pool asset representations or warranties or transaction covenants.

(13) Information on ratio, coverage or other tests used for determining any early amortization, liquidation or other performance trigger and whether the trigger was met.

(14) Information regarding any new issuance of asset-backed securities backed by the same asset pool, any pool asset changes (other than in connection with a pool asset converting into cash in accordance with its terms), such as additions or removals in connection with a prefunding or revolving period and pool asset substitutions and

repurchases (and purchase rates, if applicable), and cash flows available for future purchases, such as the balances of any prefunding or revolving accounts, if applicable. Disclose any material changes in the solicitation, credit-granting, underwriting, origination, acquisition or pool selection criteria or procedures, as applicable, used to originate, acquire or select the new pool assets.

(b) During a prefunding or revolving period, or if there has been a new issuance of asset-backed securities backed by the same pool under a master trust during the fiscal year of the issuing entity, provide the information required by Items 1110, 1111 and 1112 of this Regulation AB applied taking the revised pool composition into account in the Form 10–D report (§ 249.312 of this chapter) for the last required distribution of the fiscal year of the issuing entity. In addition, provide such updated information in the first Form 10–D report for the period in which the prefunding or revolving period ends (if applicable). However, no disclosure need be provided by this paragraph if the information has not materially changed from that previously provided in an Exchange Act report relating to the asset-backed securities or 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.

§ 229.1122 (Item 1122) Compliance with applicable servicing criteria.

(a) *Reports on assessment of compliance with servicing criteria for asset-backed securities.* As required by paragraph (b) of § 240.13a–18 or 240.15d–18 of this chapter, provide as an exhibit from each party participating in the servicing function a report on an assessment of compliance with the servicing criteria set forth in paragraph (d) of this section that contains the following:

(1) A statement of the party's responsibility for assessing compliance with the servicing criteria applicable to it;

(2) A statement that the party used the criteria in paragraph (d) of this section to assess compliance with the applicable servicing criteria;

(3) The party's assessment of compliance with the applicable servicing criteria as of and for the period ending the end of the fiscal year covered by the Form 10–K report (§ 249.310 of this chapter). This discussion must include disclosure of any material instance of noncompliance identified by the party; and

(4) A statement that a registered public accounting firm has issued an attestation report on the party's assessment of compliance with the applicable servicing criteria as of and for the period ending the end of the fiscal year covered by the Form 10–K report.

(b) *Registered public accounting firm attestation reports.* Provide the registered public accounting firm's attestation report required by paragraph (c) of § 240.13a–18 or 240.15d–18 of this chapter on the party's assessment of compliance with the applicable servicing criteria as an exhibit.

(c) *Additional disclosure for the Form 10–K report.*

(1) If any party's report on assessment of compliance with servicing criteria required by paragraph (a) of this section, or related registered public accounting firm attestation report required by paragraph (b) of this section, identifies any material instance of noncompliance with the servicing criteria, identify the material instance of noncompliance in the report on Form 10–K.

(2) If any party's report on assessment of compliance with servicing criteria required by paragraph (a) of this section, or related registered public accounting firm attestation report required by paragraph (b) of this section, is not included as an exhibit to the Form 10–K report, disclosure that the report is not included and an associated explanation must be provided in the report on Form 10–K.

(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 party participating in the servicing function 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, or such other number of days specified in the transaction agreements.

(ii) Disbursements made via wire transfer on behalf of an obligor or to an 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 depository institution'' with respect to a foreign financial institution means a foreign financial institution that meets the requirements of § 240.13k-1(b)(1) of this chapter.

(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, or such other number of days specified in the transaction agreements;

(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, or such other number of days specified in the transaction agreements.

(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:

(A) Are 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) Are filed with the Commission as required by its rules and regulations; and

(D) Agree with investors' 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 servicer's investor records, or such other number of days specified in the transaction agreements.

(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 servicer's obligor records maintained no more than two business days after receipt, or such other number of days specified in the transaction agreements, 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 servicer's records with respect to an obligor's 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.*, forbearance plans, modifications and deeds in lieu of foreclosure, foreclosures and repossessions, as applicable) are initiated, conducted and concluded in accordance with the timeframes or other requirements established by the transaction agreements.

(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, or such other period specified in the transaction agreements, 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, or such other period specified in the transaction agreements;

(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, or such other number of days specified in the transaction agreements.

(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, or such other number of days specified in the transaction agreements.

(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, or such other number of days specified in the transaction agreements.

(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 1114(a)(1) through (3) or Item 1115 of this Regulation AB, is maintained as set forth in the transaction agreements.

Instructions to Item 1122.

1. If certain servicing criteria are not applicable to the asserting party based on the activities it performs with respect to asset-backed securities transactions taken as a whole involving such party and that are backed by the same asset type backing the class of asset-backed securities, the inapplicability of the criteria must be disclosed in that asserting party's and the related registered public accounting firm's reports.

2. If multiple parties are participating in the servicing function, a separate assessment report and attestation report must be included for each party participating in the servicing function. A party participating in the servicing function means any entity (*e.g.*, master servicer, primary servicers, trustees) that is performing activities that address the criteria in paragraph (d) of this section, unless such entity's activities relate only to 5% or less of the pool assets.

3. 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 and depositor, see also Item 1100(d)(2) of this Regulation AB.

§ 229.1123 (Item 1123) Servicer compliance statement.

Provide as an exhibit 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 failure to fulfill any such obligation in any material respect, specifying each such failure known to such officer and the nature and status thereof.

Instruction to Item 1123. 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 1108(a)(2)(i) through (iii) of this Regulation AB.

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, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d),

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 if 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 shall 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 shall 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; or

(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 shall 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 shall 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 shall be filed to the extent required pursuant to § 230.426.

(2) Every communication used pursuant to this section shall 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 shall 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) Failure by a particular underwriter to cause the filing of a prospectus described in this section will not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption.

(e) An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The prospectus is filed as soon as practicable after discovery of the failure to file.

(f) 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 and 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) If a prospective investor has indicated to the issuer or an 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 or have been provided to such prospective investor; and

(ii) For any other prospective investor, all materials 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 after 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 issuer or an 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.

§ 230.434 [Amended]

■ 28. Amend § 230.434 by removing the phrase ''General Instruction 1.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 is revised to read 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, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

§ 232.311 [Amended]

■ 30. Amend § 232.311 by removing paragraph (j).

■ 31. Add § 232.312 to read as follows:

§ 232.312 Accommodation for certain information in filings with respect to asset-backed securities.

(a) For filings with respect to asset-backed securities filed on or before December 31, 2009, the information provided in response to Item 1105 of Regulation AB (§ 229.1105 of this chapter) may be provided under the following conditions on an Internet Web site for inclusion in the prospectus for the asset-backed securities, and will be deemed to be included in the prospectus included in the registration statement, in lieu of reproducing the information in the electronically filed version of that document. Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(1) The prospectus in the registration statement at the time of effectiveness shall disclose the intention to provide such information through a Web site and the prospectus to be filed pursuant to § 230.424 of this chapter shall provide the specific Internet address where the information is posted.

(2) Such information shall be provided through the Web site unrestricted as to access and free of charge.

(3) Such information shall remain available on the Web site for a period of not less than five years. If a subsequent update or change is made to the information, the date of such update or change shall be clearly indicated on the Web site.

(4) The registrant shall retain all versions of such information provided through the Web site for a period of not less than five years in a form that permits delivery to an investor or the Commission. Upon request, the registrant shall furnish to the Commission or its staff a copy of any or all information retained pursuant to this requirement.

(5) The registration statement shall contain the undertakings required by Item 512(l) of Regulation S–K (§ 229.512(l) of this chapter) that:

(i) Except as otherwise provided by this section, such information provided through the specified Internet address is deemed to be a part of the prospectus included in the registration statement for the asset-backed securities.

(ii) The registrant shall provide to any person without charge, upon request, a copy of such information provided through the specified Internet address as of the date of the prospectus included in the registration statement if a subsequent update or change is made to that information.

Note to paragraph (a). With respect to paragraphs (a)(3) and (a)(4) of this section, the five-year period shall commence from the filing date of the prospectus filed pursuant to § 230.424 of this chapter, or the date of first use of the prospectus, whichever is earlier.

(b) This section does not affect any obligation to provide any other information in the filing electronically on EDGAR.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 32. 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.

* * * * *

■ 33. 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 Item 11, Information with Respect to the Registrant.

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 1120 of Regulation AB (17 CFR 229.1102 through 229.1120).

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.

* * * * *

■ 34. 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.

■ 35. 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.

* * * * *

■ 36. 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), 6.01, 6.03 or 6.05 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 securities described in paragraph (b)(5) of this section. However, for such offerings of asset-backed securities, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in § 229.1101 of this chapter) are or were 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 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 involving the same asset class, 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), 6.01, 6.03 or 6.05 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. Regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during such period, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from this section, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act. See the definition of ''affiliate'' in § 230.405 of this chapter.

* * * * *

(b) * * *

(5) *Offerings of investment grade asset-backed securities.* (i) 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; and

(ii) Securities relating to an offering of asset-backed securities registered in accordance with paragraph (b)(5)(i) of this section where those securities represent an interest in or the right to the payments of cash flows of another asset pool and meet the requirements of § 230.190(c)(1) through (4) of this chapter.

* * * * *

■ 37. 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), 6.01, 6.03 or 6.05 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 securities described in I.B.5 below. However, for such offerings of asset-backed securities, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) are or were 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 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 involving the same asset class, 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), 6.01, 6.03 or 6.05 of Form 8-K (17 CFR 249.308). 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. Regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during such period, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from this section, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act. See the definition of ''affiliate'' in Securities Act Rule 405 (17 CFR 230.405).

* * * * *

B. *Transaction Requirements.* * * *

5. *Offerings of Investment grade Asset-backed Securities.*

(a) Asset-backed securities (as defined in 17 CFR 229.1101) to be offered for cash, provided:

(i) The securities are ''investment grade securities,'' as defined in I.B.2 above (Primary Offerings of Non-convertible Investment Grade Securities);

(ii) Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date; and

(iii) With respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

Instruction. For purposes of making the determinations required by paragraphs (a)(ii) and (a)(iii) of this General Instruction I.B.5, refer to the Instructions to Item 1101(c) of Regulation AB (17 CFR 229.1101(c)).

(b) Securities relating to an offering of asset-backed securities registered in accordance with paragraph (a) of this General Instruction I.B.5 where those securities represent an interest in or the right to the payments of cash flows of another asset pool and meet the requirements of Securities Act Rule 190(c)(1) through (4) (17 CFR 240.190(c)(1) through (4)).

* * * * *

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.*

1. 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 1120 of Regulation AB (17 CFR 229.1102 through 229.1120).

2. 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. For both separate asset classes and jurisdictions of origin or property, a separate base prospectus and form of supplement is not required for transactions that principally consist of a particular asset class or jurisdiction which also describe one or more potential additional asset classes or jurisdictions, so long as the pool assets for the additional classes or jurisdictions in the aggregate are below 10% of the pool, as measured by dollar volume, for any particular takedown. When a preliminary prospectus is required under this Form pursuant to Securities Act Rule 190(b)(7) (17 CFR 230.190(b)(7)), the information to be included in the base prospectus and prospectus supplement is to be substantially similar to that which would be included if the preliminary prospectus was required under Form S–1 (17 CFR 239.11) pursuant to such rules.

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.

* * * * *

■ 38. 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.

■ 39. 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. Rule 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.

* * * * *

■ 40. 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.

* * * * *

■ 41. 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.

* * * * *

■ 42. 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.

■ 43. 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 17 CFR 229.1101.

* * * * *

■ 44. 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.

* * * * *

■ 45. 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

■ 46. 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.

* * * * *

■ 47. 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).

■ 48. 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]

■ 49. 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)''.

§ 240.12b–2 [Amended]

■ 50. 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

* * * * *

■ 51. 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. * * *

■ 52. Amend § 240.12b–25 by revising the section heading and paragraphs (a) and (b)(2)(ii) to read as follows:

§ 240.12b–25 Notification of inability to timely file all or any required portion of a Form 10–K, 10–KSB, 20–F, 11–K, N–SAR, N–CSR, 10–Q, 10–QSB or 10–D.

(a) If all or any required portion of an annual or transition report on Form 10–K, 10–KSB, 20–F or 11–K (17 CFR 249.310, 249.310b, 249.220f or 249.311), a quarterly or transition report on Form 10–Q or 10–QSB (17 CFR 249.308a or 249.308b), or a distribution report on Form 10–D (17 CFR 249.312) required to be filed pursuant to section 13 or 15(d) of the Act (15 U.S.C. 78m or 78o(d)) and rules thereunder, or if all or any required portion of a semi-annual, annual or transition report on Form N–CSR (17 CFR 249.331; 17 CFR 274.128) or Form N–SAR (17 CFR 249.330; 17 CFR 274.101) required to be filed pursuant to section 13 or 15(d) of the Act or section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a–29) and the rules thereunder, is not filed within the time period prescribed for such report, the registrant, no later than one business day after the due date for such report, shall file a Form 12b–25 (17 CFR 249.322) with the Commission which shall contain disclosure of its inability to file the report timely and the reasons therefor in reasonable detail.

(b) * * *

(2) * * *

(ii) The subject annual report, semi-annual report or transition report on Form 10–K, 10–KSB, 20–F, 11–K, N–SAR, or N–CSR, or portion thereof, will be filed no later than the fifteenth calendar day following the prescribed due date; or the subject quarterly report

or transition report on Form 10–Q or 10–QSB or distribution report on Form 10–D, or portion thereof, will be filed no later than the fifth calendar day following the prescribed due date; and

* * * * *

■ 53. 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 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 § 240.13a–17 will continue to apply regardless of a change in the asset-backed issuer's fiscal closing date.

* * * * *

§ 240.13a–11 [Amended]

■ 54. 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''.

■ 55. 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.

* * * * *

■ 56. 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 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. Terms used in paragraphs (d) and (e) of this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(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 function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

§ 240.13a–15 [Amended]

■ 57. 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).

■ 58. 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.

* * * * *

■ 59. 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) of the Act (15 U.S.C. 78m(a)). Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) *Reports on assessments of compliance with servicing criteria for asset-backed securities required.* With regard to a class of asset-backed securities subject to the reporting requirements of section 13(a) of the Act, the annual report on Form 10–K (§ 249.308 of this chapter) for such class must include from each party participating in the servicing function a report regarding its assessment of compliance with the servicing criteria specified in paragraph (d) of Item 1122 of Regulation AB (§ 229.1122(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 party participating in the servicing function 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).

(c) *Attestation reports on assessments of compliance with servicing criteria for asset-backed securities required.* With respect to each report included pursuant to paragraph (b) of this section, the annual report on Form 10–K must also include a report by a registered public accounting firm that attests to, and reports on, the assessment made by the asserting party. The attestation report on assessment of compliance with servicing criteria for asset-backed securities must be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board.

Note to § 240.13a–18. If multiple parties are participating in the servicing function, a separate assessment report and attestation report must be included for each party participating in the servicing function. A party participating in the servicing function means any entity (*e.g.*, master servicer, primary servicers, trustees) that is performing activities that address the criteria in paragraph (d) of Item 1122 of Regulation AB (§ 229.1122(d) of this chapter), unless such entity's activities relate only to 5% or less of the pool assets.

■ 60. Amend § 240.15c2–8 by:
■ a. Removing the phrase ''paragraphs (b) through (g)'' in paragraph (a) and adding, in its place, the phrase ''paragraphs (b) through (h)'' and
■ b. Adding a sentence to the end of paragraph (b).
The revisions read as follows.

§ 240.15c2–8 Delivery of prospectus.

(a) ***

(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).

* * * * *

■ 61. 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]

■ 62. 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''.
■ 63. 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.

* * * * *

■ 64. 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 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. Terms used in paragraphs (d) and (e) of this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(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 function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

§ 240.15d–15 [Amended]

■ 65. 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).
■ 66. Amend § 240.15d–16 by:
■ a. Removing the period at the end of paragraph (a)(2) and adding, in its place, ''; or''; and
■ b. 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.

* * * * *

■ 67. 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.

■ 68. 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 15(d) of the Act (15 U.S.C. 78o(d)). Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§ 229.1101 of this chapter).

(b) *Reports on assessments of compliance with servicing criteria for asset-backed securities required.* With regard to a class of asset-backed securities subject to the reporting requirements of section 15(d) of the Act, the annual report on Form 10–K (§ 249.308 of this chapter) for such class must include from each party participating in the servicing function a report regarding its assessment of compliance with the servicing criteria specified in paragraph (d) of Item 1122 of Regulation AB (§ 229.1122(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 party participating in the servicing function 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).

(c) *Attestation reports on assessments of compliance with servicing criteria for asset-backed securities required.* With respect to each report included pursuant to paragraph (b) of this section, the annual report on Form 10–K must also include a report by a registered public accounting firm that attests to, and reports on, the assessment made by the asserting party. The attestation report on assessment of compliance with servicing criteria for asset-backed securities must be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board.

Note to § 240.15d–18. If multiple parties are participating in the servicing function, a separate assessment report and attestation report must be included for each party participating in the servicing function. A party participating in the servicing function means any entity (*e.g.*, master servicer, primary servicers, trustees) that is performing activities that address the criteria in paragraph (d) of Item 1122 of Regulation AB (§ 229.1122(d) of this chapter), unless such entity's activities relate only to 5% or less of the pool assets.

■ 69. 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) Paragraph (a) or (b) of this section does 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 and 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, SHO, ATS, AND AC AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 70. 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), 78*l*, 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.

■ 71. 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 (Regulation BTR—Blackout Trading Restriction)

■ 72. The authority citation for part 245 continues to read in part as follows:

Authority: 15 U.S.C. 78w(a), unless otherwise noted.

* * * * *

■ 73. Amend § 245.101 by:

■ a. Removing the period at the end of paragraph (c)(2) and in its place adding a semi-colon;

■ 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

■ 74. 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.

* * * * *

■ 75. 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. Adding Instruction 5 to Item 2.04;

■ f. 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

■ g. 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 2.02, Results of Operations and Financial Condition;

(c) Item 2.03, Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant;

(d) Item 2.05, Costs Associated with Exit or Disposal Activities;

(e) Item 2.06, Material Impairments;

(f) Item 3.01, Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing;

(g) Item 3.02, Unregistered Sales of Equity Securities;

(h) Item 4.01, Changes in Registrant's Certifying Accountant;

(i) Item 4.02, Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review;

(j) Item 5.01, Changes in Control of Registrant;

(k) Item 5.02, Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers;

(*l*) Item 5.04, Temporary Suspension of Trading Under Registrant's Employee Benefit Plans; and

(m) 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 function) 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 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)).

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 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)).

* * * * *

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 of any instances described in paragraph (a) or (b) of this Item with respect to the sponsor, depositor, servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)), trustee, significant obligor, enhancement or support provider contemplated by Items 1114(b) or 1115 of Regulation AB (17 CFR 229.1114(b) or 229.1115) or other material party contemplated by Item 1101(d)(1) of Regulation AB (17 CFR 1101(d)(1)). Terms used in this Instruction 2 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

* * * * *

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 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 1108(a)(2) of Regulation AB (17 CFR 229.1108(a)(2)) or a trustee has resigned or has been removed, replaced or substituted, or if a new servicer contemplated by Item 1108(a)(2) 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 1108(d) of Regulation AB (17 CFR 229.1108(c)), as applicable, regarding the servicer or trustee change. If a new servicer contemplated by Item 1108(a)(3) of this Regulation AB or a new trustee has been appointed, provide the information required by Item 1108(b) through (d) of Regulation AB regarding such servicer or Item 1109 of Regulation AB (17 CFR 229.1109) regarding such trustee, as applicable.

Instruction. To the extent that any information called for by this Item regarding such servicer or trustee is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8–K filing under this Item 6.02 containing such information within four business days after the information is determined or becomes available.

Item 6.03 Change in Credit Enhancement or Other External Support.

(a) *Loss of existing enhancement or support.* 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 or support specified in Item 1114(a)(1) through (3) of Regulation AB (17 CFR 229.1114(a)(1) through (3)) or Item 1115 of Regulation AB (17 CFR 229.1115) 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 or support;

(3) A brief description of the terms and conditions of the enhancement or support 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 or support.* 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 1114(a)(1) through (3) of Regulation AB (17 CFR 229.1114(a)(1) through (3)) or Item 1115 of Regulation AB (17 CFR 229.1115) 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 or support and the disclosure required by Items 1114 or 1115 of Regulation AB, as applicable, with respect to such new enhancement or support.

(c) *Material change to enhancement or support.* 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 or support specified in Item 1114(a)(1) through (3) of Regulation AB or Item 1115 of Regulation AB 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 or support 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 or support if the loss, addition or modification of such enhancement or support materially affects, directly or indirectly, the asset-backed securities, the pool assets or the cash flow underlying the asset-backed securities.

2. To the extent that any information called for by this Item regarding the enhancement or support is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8–K filing under this Item 6.03 containing such information within four business days after the information is determined or becomes available.

3. The instructions to Items 1.01 and 1.02 of this Form apply to this Item.

4. Notwithstanding Items 1.01 and 1.02 of this Form, disclosure regarding changes to material enhancement or support is 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, and such failure is material, identify the failure and state the nature of the failure to make the timely distribution.

Item 6.05 Securities Act Updating Disclosure.

Regarding an offering of asset-backed securities registered on Form S–3 (17 CFR 239.13), if any material pool characteristic of the actual asset pool at the time of issuance of the asset-backed securities differs by 5% or more (other than as a result of the pool assets converting into cash in accordance with their terms) 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 1111 and 1112 of Regulation AB (17 CFR 229.1111 and 17 CFR 229.1112) regarding the characteristics of the actual asset pool. If applicable, also provide information required by Items 1108 and 1110 of Regulation AB (17 CFR 229.1108 and 17 CFR 229.1110) 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 Securities Act Rule 424 (17 CFR 230.424).

* * * * *

■ 76. Amend § 249.220f by revising paragraph (a) 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 (15 U.S.C. 78l) of the Securities Exchange Act of 1934 (the

''Exchange Act'') (15 U.S.C. 77a *et seq.*) or as an annual or transition report filed under section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)).

* * * * *

■ 77. 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 the first sentence of paragraph (a) 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;

■ b. Removing Instruction 4 to Item 16A;

■ c. Removing Instruction 4 to Item 16B;

■ d. 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.

■ 78. 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);

■ d. Adding General Instruction J.;

■ e. Adding an Instruction to Item 9B; and

■ f. 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 4, Submission of Matters to a Vote of Security Holders;

(e) Item 5, Market for Registrant's Common Equity and Related Stockholder Matters;

(f) Item 6, Selected Financial Data;

(g) Item 7, Management's Discussion and Analysis of Financial Condition and Results of Operations;

(h) Item 7A, Quantitative and Qualitative Disclosures About Market Risk;

(i) Item 8, Financial Statements and Supplementary Data;

(j) Item 9, Changes in and Disagreements With Accountants on Accounting and Financial Disclosure;

(k) Item 9A, Controls and Procedures;

(l) If the issuing entity does not have any executive officers or directors, Item 10, Directors and Executive Officers of the Registrant, Item 11, Executive Compensation, Item 12, Security Ownership of Certain Beneficial Owners and Management, and Item 13, Certain Relationships and Related Transactions; and

(m) 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 1112(b) of Regulation AB;

(c) Items 1114(b)(2) and 1115(b) of Regulation AB;

(d) Item 1117 of Regulation AB;

(e) Item 1119 of Regulation AB;

(f) Item 1122 of Regulation AB; and

(g) Item 1123 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 function) 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).

* * * * *

■ 79. 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.

■ 80. 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.

■ 81. 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, as specified in the governing documents for such 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 function) 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 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)).

BILLING CODE 8010–01–P

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 .....

Part I—Distribution Information

Item 1. Distribution and Pool Performance Information.

Provide the information required by Item 1121 of Regulation AB (17 CFR 229.1121), 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 1121 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 the information required by Item 1121 of Regulation AB.

Part II—Other Information

Item 2. Legal Proceedings.

Provide the information required by Item 1117 of Regulation AB (17 CFR 229.1117). 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.

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:

(a) 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.

(b) Also provide the information required by paragraph (e) of Item 1113 of Regulation AB (17 CFR 229.1113(e)) regarding such securities.

(c) No information required by Item 701(c) of Regulation S–K need be provided with respect to securities which were not registered under the Securities Act.

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 1112(b) of Regulation AB (17 CFR 229.1112(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 1112(b) of Regulation AB. 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 Items 1114(b)(2) and 1115(b) of Regulation AB (17 CFR 229.1114(b)(2) and 229.1115(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 enhancement provider is required pursuant to Items 1114(b)(2) or 1115(b) of Regulation AB. 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.

(Depositor)

Date: _____

(Signature)**

[or]

(Issuing entity)

Date: _____

By:

(Servicer)

(Signature)**

*See General Instruction E to Form 10–D.

**Print the name and title of each signing officer under his or her signature.

■ 82. Amend § 249.322 by revising paragraph (a) to read as follows:

§ 249.322 Form 12b–25—Notification of late filing.

(a) This form shall be filed pursuant to § 240.12b–25 of this chapter by issuers who are unable to file timely all or any required portion of an annual or transition report on Form 10–K and Form 10–KSB, 20–F, or 11–K (§ 249.310, 249.310b, 249.220f or 249.311), a quarterly or transition report on Form 10–Q and Form 10–QSB (§§ 249.308a and 249.308b), or a distribution report on Form 10–D (§ 249.312) pursuant to section 13 or 15(d) of the Act (15 U.S.C. 78m or 78o(d)) or a semi-annual, annual, or transition report on Form N–SAR (§§ 249.330; 274.101) or Form N–CSR (§§ 249.331; 274.128) pursuant to section 13 or 15(d) of the Act or section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a–29). The filing shall consist of a signed original and three conformed copies, and shall be filed with the Commission at Washington, DC 20549, no later than one business day after the due date for the periodic report in question. Copies of this form may be obtained from ''Publications,'' Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549 and at our Web site at *http://www.sec.gov.*

* * * * *

■ 83. Amend Form 12b–25 (referenced in § 249.322) by:

■ a. Revising the preamble;

■ b. Revising paragraph (b) of Part II; and

■ c. Revising Part III.

The revisions read as follows:

Note: The text of Form 12b–25 does not, and this amendment will not, appear in the Code of Federal Regulations.

United States Securities and Exchange Commission

Washington, DC 20549

Form 12b–25

Notification of Late Filing

(Check One):____Form 10–K____Form 20–F____Form 11–K____Form 10–Q____Form 10–D____Form N–SAR____Form N–CSR

* * * * *

Part II—Rules 12b–25(b) and (c)

* * * * *

(b) The subject annual report, semi-annual report, transition report on Form 10–K, Form 20–F, Form 11–K, Form N–SAR or Form N–CSR, or portion thereof, will be filed on or before the fifteenth calendar day following the prescribed due date; or the subject quarterly report or transition report on Form 10–Q or subject distribution report on Form 10–D, or portion thereof, will be filed on or before the fifth calendar day following the prescribed due date; and

* * * * *

Part III—Narrative

State below in reasonable detail why Forms 10–K, 20–F, 11–K, 10–Q, 10–D, N–SAR, N–CSR, or the transition report or portion thereof, could not be filed within the prescribed time period.

* * * * *

By the Commission.

Dated: December 22, 2004.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–53 Filed 1–6–05; 8:45 am]

BILLING CODE 8010–01–P