Principles for Ongoing Disclosure for Asset-Backed Securities

Consultation Report

TECHNICAL COMMITTEE
OF THE
INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS

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Foreword

The International Organization of Securities Commissions' (IOSCO) Technical Committee (TC) has published this Consultation Report on *Principles for Ongoing Disclosure for Asset Backed Securities* with the of developing principles which will enhance investor protection by providing guidance to regulators that are developing or reviewing their disclosure regimes for offerings and listings of asset backed securities.

The disclosure topics highlighted in these *ABS Ongoing Disclosure Principles* are intended as a starting point for consideration and analysis by securities regulators that are developing or reviewing ongoing disclosure requirements applicable to ABS. Some regulators may find it useful to incorporate all of the disclosure topics into their ABS disclosure requirements. Others may conclude that the relevance of specific disclosure topics in their jurisdictions may vary according to the characteristics of their specific regulatory framework, the characteristics of the issuing entity, or the characteristics of the securities involved, and may therefore wish to incorporate the *Principles* on a more selective basis. The principles-based format allows for a wide range of application and adaptation by securities regulators.

How to Submit Comments

Comments may be submitted by one of the three following methods **on or before Friday, 20 April 2012**. To help us process and review your comments more efficiently, please use only one method.

Important: All comments will be made available publicly, unless anonymity is specifically requested. Comments will be converted to PDF format and posted on the IOSCO website. Personal identifying information will not be edited from submissions.

1. Email

- Send comments to ongoing-abs@iosco.org;
- The subject line of your message must indicate ***Principles for Ongoing Disclosure for Asset-Backed Securities***.
- If you attach a document, indicate the software used (e.g., WordPerfect, Microsoft WORD, ASCII text, etc) to create the attachment.
- Do not submit attachments as HTML, PDF, GIFG, TIFF, PIF, ZIP or EXE files.

2. Facsimile Transmission

Send by facsimile transmission using the following fax number: + 34 (91) 555 93 68.

3. Paper

Send 3 copies of your paper comment letter to:

Jonatan Bravo
IOSCO General Secretariat
International Organization of Securities Commissions (IOSCO)

Calle Oquendo 12
28006 Madrid
Spain

Your comment letter should indicate prominently that it is a "*Public Comment on* ***Principles for Ongoing Disclosure for Asset-Backed Securities***."

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Chapter 1 – Introduction

In May 2008, the International Organization of Securities Commissions (IOSCO) published the *Final Report of the Task Force on the Subprime Crisis* (*IOSCO Subprime Report*).[1] In this report, the IOSCO Task Force analyzed the turmoil in the subprime market and its effects on the public capital markets, and made certain recommendations for work that could be undertaken by IOSCO in response to regulatory concerns. In particular, the Task Force recommended that IOSCO develop international principles regarding the disclosure requirements for public offerings of asset-backed securities (ABS) if the Technical Committee (TC) concluded that IOSCO's currently existing disclosure standards and principles did not apply to such offerings.

IOSCO has published a number of disclosure principles and standards, most notably the *Principles for Periodic Disclosure by Listed Entities*[2] (*Periodic Disclosure Principles*), *International Debt Disclosure Principles for Cross-Border Offerings and Listings of Debt Securities by Foreign Issuers*[3] (*International Debt Disclosure Principles*), and *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers*[4] (*International Equity Disclosure Standards*), which have been accepted internationally as disclosure benchmarks. These disclosure principles and standards, however, are not wholly applicable to public offerings and listings of ABS due to the unique nature of both ABS and ABS issuers, which have several distinguishing characteristics compared to other fixed income securities and their issuers. For example, the issuing entity of an ABS is designed to be a solely passive entity without management. Therefore, some of the information that would be viewed as important for a corporate issuer would not be relevant to an ABS issuer. In addition, ABS investors are more interested in the characteristics and quality of the underlying assets, the standards for the servicing of the assets, the timing and receipt of cash flows from those assets, and the structure for the distribution of those cash flows. In many cases, the types of disclosure that would be deemed most material to ABS investors are not captured by the existing IOSCO disclosure standards and principles.

To begin to address the need for disclosure principles designed to suit the characteristics of ABS and ABS issuers, the TC developed *Disclosure Principles for Public Offerings and Listings of Asset-Backed Securities*[5] (*ABS Disclosure Principles*). The objective of the *ABS Disclosure Principles* is to enhance investor protection by providing guidance to regulators that are developing or reviewing their disclosure regimes for offerings and listings of ABS.[6]

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1 See *Report on the Subprime Crisis – Final Report*, Report of the Technical Committee of IOSCO, May 2008, available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD273.pdf.

2 See *Principles for Periodic Disclosure by Listed Entities - Final Report*, Report of the Technical Committee of IOSCO, February 2010, available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD317.pdf.

3 See *International Disclosure Principles for Cross-Border Offerings and Listings of Debt Securities by Foreign Issuers - Final Report*, Report of the Technical Committee of IOSCO, March 2007, available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD242.pdf.

4 See *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers*, Report of IOSCO, September 1998, available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf.

5 See *Disclosure Principles for Public Offerings and Listings of Asset-Backed Securities - Final Report*, Report of the Technical Committee of IOSCO, February 2010, available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD318.pdf.

6 In developing the *ABS Disclosure Principles*, IOSCO used as the starting point of its analysis the *International Debt Disclosure Principles* based on the expectation that some of those principles are

The *ABS Disclosure Principles* expressly do not address continuous reporting disclosure mandates or requirements to disclose material developments. Therefore, the TC has developed these *Principles for Ongoing Disclosure for Asset-backed Securities* (*ABS Ongoing Disclosure Principles* or *Principles*) as a complement to the *ABS Disclosure Principles.*[7] The term "ongoing disclosure" encompasses both periodic disclosure (i.e. disclosure that covers a specific time period) and event-based or ad hoc disclosure (i.e. disclosure of events or information not covering a specific time period).[8]

The disclosure topics highlighted in these *ABS Ongoing Disclosure Principles* are intended as a starting point for consideration and analysis by securities regulators that are developing or reviewing ongoing disclosure requirements applicable to ABS. Some regulators may find it useful to incorporate all of the disclosure topics into their ABS disclosure requirements. Others may conclude that the relevance of specific disclosure topics in their jurisdictions may vary according to the characteristics of their specific regulatory framework, the characteristics of the issuing entity, or the characteristics of the securities involved, and may therefore wish to incorporate the *Principles* on a more selective basis. The principles are highlighted in italics, and are generally followed by a narrative to describe specific disclosure considerations for how the principle could be implemented and/or examples to illustrate disclosure practices in some jurisdictions that implement the principle. These considerations and examples are not necessarily the only ways in which a principle can be implemented. The principles-based format allows for a wide range of application and adaptation by securities regulators. As with the *ABS Disclosure Principles*, these *ABS Ongoing Disclosure Principles* do not address antifraud prohibitions.

Scope of the Principles

The definition of ABS for purposes of these *ABS Ongoing Disclosure Principles* is the same as the definition under the *ABS Disclosure Principles*: ABS are those securities that are primarily serviced by the cash flows of a discrete pool of receivables or other financial assets that by their terms convert into cash within a finite period of time. As with the *ABS Disclosure Principles*, these *ABS Ongoing Disclosure Principles* would not apply to securities backed by asset pools that are actively managed (such as securities issued by investment companies), or that contain assets that do not by their terms convert to cash (such as most collateralized debt obligations). In most jurisdictions, securities regulators regulate the ABS covered by these *ABS Ongoing Disclosure Principles* and the *ABS Disclosure Principles* under a different regulatory framework than securities issued by investment companies; in other jurisdictions, securities regulators regulate both types of securities under the same regulatory regime. In both sets of principles, ABS are defined narrowly in order to facilitate the applicability of the principles across all jurisdictions. However, as with the *ABS Disclosure Principles*, these *ABS Ongoing Disclosure Principles* may also provide a useful starting point for disclosure about other types of securities backed by asset pools.

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universally applicable to investors in all fixed income securities. Occasionally, the *ABS Disclosure Principles* refer to the *International Debt Disclosure Principles* as a source of additional guidance on certain disclosure items that are highlighted in the *ABS Disclosure Principles*.

7 The TC took a similar approach of distinguishing listing and offering disclosure from continuous disclosure in the case of equity securities, in which development of the *Periodic Disclosure Principles* (February 2010) was undertaken as a separate project from the *International Equity Disclosure Standards* (1998).

8 Such as, for instance, disclosures that are covered by price sensitive information requirements or by a predefined list of events.

Taking into account the variation in regulatory approaches and disclosure requirements in different jurisdictions,[9] and to encourage broad application of these *Principles* and to allow jurisdictions the greatest degree of flexibility to implement them in the context of their specific regulatory and market structures, these *ABS Ongoing Disclosure Principles* are written without specific reference to whether the ABS to which they are to apply are public or private, or to whether the ABS are listed or offered.

Regulatory Coordination

These *Principles* are prepared on a comprehensive basis. However, securities regulators to whom the objectives of these *Principles* are directed may look to the implementation of other initiatives within their jurisdictions, whether by the securities regulator itself, central banks, or other authorities.

Regulators in different jurisdictions should, wherever possible, consider all aspects to achieve consistency of ongoing disclosure requirements for ABS in order to achieve best practice and avoid overlapping or conflicting disclosure requirements. Because of the interrelation of global capital markets, enhanced regulatory coordination will encourage both consistent investor protection and efficient markets across jurisdictions and sectors. Coordination of disclosure requirements should be sought, to the extent possible, by securities regulators, prudential regulators, central banks, and other regulatory bodies that may set ongoing disclosure requirements for ABS.

In some disclosure areas, jurisdictions may use differing means to achieve the same regulatory objectives. In areas in which a jurisdiction is developing new disclosure initiatives, consideration of regulatory practices in other jurisdictions and the expressed views of other regulators would help promote consistency. IOSCO would support measures that encourage coordination of already existing disclosure requirements.

Coordination of disclosure requirements across borders would be helpful to investors by enhancing their ability to compare information. In our efforts to gather information from investors and issuers in the preparation of these *Principles*, we have heard from several market participants that the encouragement of globally accepted or comparable definitions of key terms used in an ABS would be useful in this regard. We believe that this objective should be encouraged but may be challenging to implement given differences in legal frameworks across jurisdictions and questions about whether it is best achieved through regulation or market participants. We believe, for example, that market participants could play an important role in the development of a *glossary* to facilitate comparison of terms as used in different jurisdictions. Another potential but parallel approach may be for a regulator that is developing definitions for key terms within its own jurisdiction to consider existing definitions used in comparable markets, including those used by other (non-regulatory)

[9] For example, in some jurisdictions the regulation(s) to which ABS are subject may vary depending on the terms of the offer, whether the securities are admitted to trading on either a regulated market or an organized market, or whether the securities are offered without being listed. By contrast, in other jurisdictions the disclosure requirements for ABS are a function of whether the securities are publicly registered or not. In such jurisdictions, the disclosure obligations for publicly registered ABS generally do not vary based on the market on which the ABS are traded, and private ABS are either exempted from reporting or subject to less periodic or ongoing disclosure obligations.

authorities. In order to better inform our development of a relevant disclosure principle, we are soliciting public feedback in this area. For example:

Questions:

- Does current variation of definitions across jurisdictions create confusion or lack of comparability for investors or other market inefficiencies? What practical problems occur as a result in variation of definitions?

- If variation in definitions across jurisdictions does create confusion, do respondents believe the issue is best addressed through a) greater standardization of definitions, b) improving comparability, or c) another method (please describe)? Please provide reasons and examples.

- In addition to encouraging standardized definitions, should regulators also encourage, where possible, standardized disclosure templates and disclosure formats? If so, what are the areas where that would be most necessary? How would standardized disclosure templates best be achieved?

Investor Needs

In the *Subprime Report*, IOSCO emphasized the importance of investor due diligence in order to ensure their clear understanding of each type of investment, particularly with regard to their specific risk profile.[10] Investor due diligence is a necessary component of an efficient market. In order for investors to make informed investment decisions regarding ABS, regulators should require issuers to provide full and fair ongoing disclosure about ABS to provides investors with the information they will need to perform due diligence independently and effectively. In prescribing disclosure requirements, regulators should take into account the needs of all types of investors.

Presentation

Information that is disclosed in a periodic or event-based report for ABS should be presented in a clear and concise manner without reliance on boilerplate language.

In addition to requiring certain disclosures to be made in an ongoing report, the securities and company laws and regulations of many countries may require issuers in those jurisdictions to file additional documents as documents on display or exhibits. If a jurisdiction does not require these documents to be included with a report, the documents may be available to the public through the facilities of the regulatory authority or the stock exchange on which the ABS are listed, or kept on file at the offices of the issuer or other

[10] See the *Report on the Subprime Crisis*, Final Report, Report of the Technical Committee of IOSCO, May 2008, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD273.pdf, Section II. IOSCO has elsewhere emphasized the importance of due diligence, by investors as well as other market participants. See *Good Practices in Relation to Investment Managers' Due Diligence When Investing in Structured Finance Instruments – Final Report*, Report of the Technical Committee of IOSCO, July 2009, available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD300.pdf.and *Transparency of Structured Finance Products – Final Report*, Report of the Technical Committee of IOSCO, September 2009, available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD326.pdf.

designated party. The document should indicate where these additional documents may be inspected and whether copies may be obtained.

These principles are intended to provide disclosure guidance that may be relevant to both public and private ABS. Disclosure to investors of the information referred to in these principles should be made in a manner consistent with a jurisdiction's disclosure framework for public or private securities, as appropriate, as some aspects of these principles may pertain differently to private ABS. For example, a jurisdiction might require ongoing reports for public ABS to be publicly filed, whereas ongoing information for private ABS might be provided only to investors. In such a case, the principle of equal and simultaneous access to disclosure (Principle IX) should be implemented for private ABS in a manner consistent with that jurisdiction's disclosure framework for private securities.

Supplementary Information

Any material change or inaccuracy in the contents of a disclosure document that affects the issuing entity, the assets or the ABS should be adequately disclosed.

Request for Comment

Existing requirements for ongoing disclosure of ABS have, in many cases, not been adapted to the characteristics of ABS. For that reason, development of the disclosure principles in this Consultation Report has been informed by preliminary outreach to ABS investors and issuers. The Report will be finalized after consideration of comments received from the public. In order to encourage feedback, we have included specific questions on certain aspects of these *Principles*. These questions are posed in the relevant sections throughout this Consultation Report and aggregated in Appendix A. We request and encourage any interested person to submit comments on any matter described in this Consultation Report or on other matters that may affect the recommended principles it contains.

Chapter 2 – Other Relevant International Work

A number of regulatory bodies and other authorities in different jurisdictions have recently undertaken, or are in the process of undertaking, initiatives that relate to ongoing ABS disclosure. Those initiatives have been considered in the preparation of the principles for ongoing ABS disclosure that are recommended in this Consultation Report, which have been developed on a comprehensive basis to provide guidance to securities regulators who are developing or reviewing their regulatory disclosure regimes for ongoing ABS disclosure.[11] Appendix B to these *Principles* provides a summary of several initiatives pertaining to ongoing disclosure for ABS by regulatory bodies and other authorities in various jurisdictions.

[11] This approach is consistent with the approach taken in the *ABS Disclosure Principles*.

Chapter 3 – Glossary of Defined Terms

ABS transactions can follow a variety of structures. In some jurisdictions, the Issuing Entity is organized as a limited liability company, while in other jurisdictions, the Issuing Entity is a trust. The following terms attempt to describe some of the functions that are performed by different entities within an ABS transaction. In some cases, some of the functions described are performed by the same party. Unless the context indicates otherwise, the following definitions apply to certain terms used hereinafter in the *ABS Ongoing Disclosure Principles:*

Affiliate - A person or entity that, directly or indirectly, either controls, is controlled by or is under common control with, a specified person or entity.

Arranger - Entity that organizes and arranges a securitization transaction, but does not sell or transfer the assets to the Issuing Entity. It also structures the transaction and may act as an underwriter for the deal. In jurisdictions where an arranger is used, the arranger's role is similar to that of a sponsor in other jurisdictions.

Asset-Backed Securities - As used in these *Principles*, asset-backed securities are securities that are 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 period of time, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders. In an ABS transaction, the financial assets are transferred to a passive entity that issues securities to investors that are backed by the assets transferred to it. These *Principles* would not apply to covered bonds, such as mortgage bonds, which are regulated by different laws and regulations in some jurisdictions.

Credit Enhancement - Rights or other assets designed to assure timely distribution of proceeds to ABS holders. Such credit enhancements may include, among other things, insurance or other guarantees, swap or hedging arrangements, liquidity facilities, and lending facilities. Internal credit enhancements may also be structured into the securitization transaction to increase the likelihood that one or more classes of ABS will pay in accordance with their terms. Examples of these include subordination provisions, overcollateralization, reserve accounts, and cash collateral accounts.

Depositor - In some jurisdictions, an intermediate entity is created by the Sponsor, and sells or transfers a group of assets from the Sponsor to the Issuing Entity for a securitization program. If the Sponsor does not use an intermediate entity to act as Depositor in a transaction, the Sponsor itself would be considered the Depositor.

Directors and Senior Management - This term includes (a) an entity's directors, (b) its executive officers, and (c) members of its administrative, supervisory or management bodies.

Issuing Entity - Passive special purpose entity that issues ABS to investors that are either backed by or represent interests in the assets transferred to it. In some jurisdictions, the Issuing Entity is typically a trust with an independent trustee. The Issuing Entity is created at the direction of another entity, described in some jurisdictions as an Arranger or as a Sponsor, that owns or holds the pool assets. The Issuing Entity is the entity in whose name the ABS supported or serviced by the pool assets are issued.

Obligor - 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.

Originator - Entity that creates the receivables, loans or other financial assets that will be included in the asset pool.

Servicer - Entity responsible for the administrative management or collection for the pool assets, or for making allocations or distributions to holders of the ABS. The Servicer is responsible for carrying out the functions involved in administering the assets and calculates the amounts (net of fees) due to the ABS investors, and is often an affiliate of the Arranger/Sponsor. In some jurisdictions, some of these functions are carried out by separate and independent entities that carry out custodial and administrative functions for the Issuing Entity.

Sponsor - Entity that organizes and arranges a securitization transaction by selling or transferring assets, either entirely or indirectly, including through an Affiliate, to the Issuing Entity. The assets are either originated by the Sponsor, or are purchased by the Sponsor from the originators of the receivables, or in the secondary market.

Trigger Event - An event the occurrence of which could result in the event of default of ABS or accelerated payment or suspension of payment of interest or principal on ABS, or which otherwise modifies the cash flow waterfall or payment terms of the ABS transaction, or any other such event as set forth in the ABS offering document.

Trustee - The entity that holds a security interest in or is owner of the assets for the benefit of the ABS holders and carries out specific functions set forth in the transaction documents that govern the securities, such as the pooling and servicing agreement, indenture, or similar contract**.** The trustee's duties are typically ministerial in nature. In some jurisdictions, this role is performed by an independent management company.

Chapter 4 – Principles for Ongoing Disclosure for Asset-Backed Securities

The TC has identified the following principles as essential for any ongoing disclosure regime for ABS.

1. Information regarding ABS should be provided on a periodic basis.

Principle ***Updated information regarding the ABS should be disclosed in reports prepared on an annual and other periodic basis, as appropriate to the type of information to be disclosed and its usefulness to investors.***

The purpose of an annual report would generally be to provide finalized performance information (typically, with audited financial information) regarding the asset pool or issuer for that financial year, updates of material information that has been previously disclosed or included in the prospectus, listing document or previous annual report for the ABS, and any material changes, or new information not previously disclosed as of the end of financial year.

Interim periodic reports should be prepared on a regular basis to provide investors with current information for the specific relevant period about the performance of the assets, and any material updates to previous disclosure. Each annual and periodic report should include information as of the latest practicable date, except where the applicable law or regulation requires the information to be provided for the financial year covered by the report or as of a specified date.

2. Material events regarding ABS should be disclosed in event-based reports.

Principle ***The occurrence of material events and other current or ad hoc information should be disclosed in event-based disclosure reports***

The occurrence of material events relating to ABS and other current or ad hoc information about the ABS not covering a specific time period should be disclosed on event-based reports. Such reports should also be used to disclose price sensitive information and information pertaining to a predefined list of events as required by the regulations of a jurisdiction.

3. Periodic and event-based disclosure reports should contain sufficient information to increase transparency and to help enable investors to perform due diligence in their investment decisions independently.

Principle ***Periodic and event-based disclosure should contain sufficient information in order to increase the transparency of information for investors and to allow investors to independently perform due diligence in their investment decisions regarding the specific ABS.***

Each jurisdiction should determine the disclosure requirements for periodic and event-based reports as appropriate to its national regulatory framework and in a manner consistent with these *Principles*. This may include the extent to which reports contain updates of information previously disclosed in an offering document. If securities regulators are developing or reviewing ongoing disclosure requirements applicable to ABS, they should consider the

disclosures described under this principle as examples of the type of information that would be useful to investors.

To help increase transparency, information contained in periodic and event-based disclosure reports should be readily understandable by investors, relevant to their decision-making needs, and reliable. Information that is reliable represents fully and fairly the transactions and other events that it purports to represent or could reasonably be expected to represent. It also represents transactions and other events in accordance with their substance and economic reality and not merely their legal form. Disclosure that an entity provides in a periodic or event-based report should facilitate comparability both with disclosure in other reports of that entity and with disclosure provided by other entities for similar securities.

a) Updated Information on the Parties Involved with the ABS

Investors and other interested parties need to know the identity of the relevant parties involved with the securities. In addition to the Issuing Entity, this information, which is generally disclosed at the time of securitization, would often include the Sponsor, the Depositor (if applicable), and the Arranger. Updated disclosure should be made on an ongoing basis of any changes to the relevant parties involved with the ABS or to the material advisors or other material parties involved with servicing the ABS. Disclosure of any material changes in the functions or responsibilities of any significant parties involved with the ABS would also be useful to investors.

b) Financial Information about Significant Obligors

A securitized asset pool typically represents obligations of a large number of separate Obligors such that information on any individual Obligor may not be material. However, if the pool assets of a particular Obligor or group of affiliated Obligors represent a significant portion of the asset pool, or if a single property or group of related properties secure a pool asset and the pool asset represents a significant portion of the asset pool, disclosures with respect to that Obligor or property or group of related Obligors or properties become highly relevant. In order to show the nature of the concentration of the pool assets, the stratified concentration with a specific number of Obligors would be useful disclosure (e.g., the specific percentage of the loans/debtors that make up a specific percentage of the outstanding amount of the pool of assets).

Depending on the level of concentration, financial information with respect to the significant Obligor would be relevant to investors. If pool assets relating to a significant Obligor represent a substantial portion of the asset pool, the report should include the audited financial statements of the significant Obligor and its consolidated subsidiaries. Item XIII (Financial Information) of the *International Debt Disclosure Principles* provides more guidance on the financial statement disclosures.

The information described above should be disclosed in a manner that does not violate national legal requirements, such as those relating to confidentiality and related civil liabilities, but confidentiality should not be used to avoid disclosure of material risks related to an Obligor.

c) Information regarding significant enhancement providers

Credit Enhancement or other support for ABS can be provided through features internally structured into the transaction to provide support, as well as externally provided enhancement, such as insurance or guarantees. Because Credit Enhancements may support payment on the pool assets or payments on the ABS themselves, ongoing disclosure about these enhancements and how they are designed to affect or ensure payment of the ABS would be very relevant to investors.

Investors may find updated financial information about significant enhancement providers to be relevant. In some jurisdictions, regulations require that if any entity or group of affiliated entities that provides enhancement or other support is liable or contingently liable to provide payments representing a significant portion of the cash flow supporting any offered class of the ABS, audited financial statements for such entity or group of affiliated entities and its consolidated subsidiaries should be provided in ongoing reports. Item XIII (Financial Information) of the *International Debt Disclosure Principles* provides more guidance on the information that should be provided in such financial statements.

d) Derivative Instruments

Certain derivative instruments, such as interest rate and currency swap agreements, are used to alter the payment characteristics of the cash flows from the Issuing Entity and their primary purpose is not to provide Credit Enhancement related to the pool assets or the ABS. Because of the impact that these instruments may have on the timing and form of payment on the ABS, disclosure about the existence and key features of these derivative instruments would be highly relevant to investors.

Updated financial information about the entity or group of affiliated entities that provide derivative instruments may be relevant to investors. In some jurisdictions, the measurement of the financial significance of the derivative instrument is determined based on a reasonable good faith estimate of the maximum exposure of a counterparty, made in substantially the same manner as that used in the Sponsor's internal risk management process in respect of similar instruments. The resulting significance estimate is measured against the aggregate principal balance of the pool assets (when measured as a percentage, referred to as *significance percentage*). However, if the derivative only relates to certain ABS classes, the significance estimate is measured against the aggregate principal balance of those classes. The significance percentage for each derivative counterparty may also be useful information to investors.

In the jurisdictions where financial significance is measured as described in the preceding paragraph, if the aggregate significance percentage related to any entity or group of affiliated entities that provides derivative instruments is significant, the report includes the audited financial statements of such entity or group of affiliated entities and its consolidated subsidiaries consolidated. Item XIII (Financial Information) of the *International Debt Disclosure Principles* may provide general guidance on the financial information that should be disclosed.

e) Legal Proceedings

Information about material legal proceedings that are pending against the participants in the

securitization program provides ABS holders with an indication of whether the Issuing Entity and other participants in the securitization program will be able to fulfill their obligations on the securities. To be useful to investors, the disclosure should provide investors with sufficient information to assess the significance of the action and its potential impact on the financial viability of any of the participants, or on the ability of these participants to adequately perform their obligations.

Information about any legal proceedings pending against the material parties to the ABS transaction (such as the Arranger, Sponsor, Depositor, trustee, Issuing Entity, any significant Servicer, or any Originator of a significant portion of the pool assets), or of which any property of the foregoing is subject, should be disclosed if it would be material to ABS holders. Any governmental proceedings pending or known to be contemplated, including investigations, should also be disclosed.

f) Affiliations and certain relationships and related transactions

Disclosure regarding affiliations, certain relationships and transactions with related parties helps investors by informing them about parties who may be able to influence or control the issuer. This disclosure also provides information regarding transactions that the issuer has entered into with persons affiliated with the issuer who are potentially able to engage in abusive self-dealing with the issuer, and whether the terms of the related transactions are fair to the issuer or could be viewed as negotiated on an arm's-length basis.

Disclosure about the relationships among the participants in the securitization transaction, including affiliations among the participants, relationships outside the ordinary course of business, and relationships related to the securitization transaction itself would provide information material to an investor's understanding of the ABS. In addition, disclosure of the general character of these relationships would help investors more fully understand the structure of the securitization transaction and the potential benefits to various participants in the program.

i). Affiliations Among Participants in the Securitization Transaction. Disclosure should be made to describe if, and how, significant transaction parties or any other material parties related to the ABS, including a significant Servicer or Credit Enhancement provider, are affiliated to each other.

ii). Relationships Outside the Ordinary Course of Business Among Participants in the Securitization Transaction. Disclosure should be made of the general character of any business relationship, agreement or understanding that is 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 securitization transaction, between the significant transaction participants and any other material parties related to the ABS, or any of their Affiliates, that currently exists or that existed during the past few years and that is material to an investor's understanding of the ABS.

iii).<u>Relationships Related to the Securitization Transaction or Pool Assets.</u> To the extent material, any specific relationships involving or relating to the securitization transaction or the pool assets, including the material terms and approximate amount involved, between the Arranger/Sponsor, Depositor or Issuing Entity and a significant

Servicer, the trustee, an originator of a significant portion of the pool assets, a significant Obligor, underwriter, a Credit Enhancement or support provider, or any other material parties related to the ABS, or any of their Affiliates, that currently exists or that existed during the past few years should be disclosed in the report. The types of arrangements that should be disclosed could include, for example, loan agreements or repurchase agreements to finance the acquisition or origination of pool assets, and servicing agreements.

g) Assessment of Compliance with Applicable Servicing Criteria

An assessment of the performance of the servicer and an independent third party check of some aspects of the servicing function are used in some jurisdictions to provide some assurance and transparency regarding the Servicer's performance and may be an important element affecting an investor's assessment of a particular ABS.

One method for providing material information about the performance of the servicer to investors would be to include an assessment and attestation regarding servicing compliance in an annual report. The performance of the servicing function is of material importance to the performance of an ABS transaction. As in other securities markets, in the ABS market there is a need for appropriate controls and processes and mechanisms to assess compliance with controls and processes.

Jurisdictions should have standardized servicing criteria for these reporting purposes. 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 could help to identify potential weaknesses that may adversely affect security holders. Reports on assessments of compliance with servicing criteria could be included from each party participating in the servicing function, with associated attestation reports from registered public accountants that express an opinion concerning the asserting party's assessment of compliance with the servicing criteria.

Reports assessing compliance with servicing criteria could include:

- 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 annual report. The report also should 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.

A statement of compliance from the Servicer could be included in the annual report, signed by an officer of the Servicer, to the effect that a review of the servicer's activities during the reporting period and of its performance under the servicing agreement has been made under the supervision of that officer, and that the servicer has fulfilled all obligations under the agreement throughout the reporting period. If there has been any material failure to fulfil such obligations, each such failure and the status thereof must be specified.

An alternative method for investors to obtain material information about the performance of the servicer that could help them monitor transactions, and thus their investments, more efficiently is through the report of an independent auditor, if audited financial statements are required for the Issuing Entity. That report provides equivalent level of assurance about the information provided in the periodic reporting and about the compliance of the servicer since the audit will include the cash-flow statement and, thereby, an audit of collections and payments made by the servicer.

h) Distribution and Pool Performance Information

Disclosure should be provided regarding the distribution for the related distribution period and the performance of the asset pool during the distribution period. This information should be provided promptly after each distribution date on the ABS, as specified in the governing documents for the securities. There should be appropriate introductory and explanatory information to introduce any material terms, parties or abbreviations used. Statistical information should be presented in tabular or graphical format where such presentation would aid understanding. While material information regarding related distribution and pool performance will vary depending on the ABS, such information would generally relate to either the assets or their impairment:

i). Asset Information, such as:

- 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;
- Interest rates applicable to the assets and the asset-backed securities, as applicable. Issuers 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, and

amounts still available, if known and applicable; and

- 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.

ii). <u>Asset Impairment Information, such as:</u>

- Delinquency and loss information for the period;

- 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 performance trigger and whether the trigger was met.

Distribution reports should also contain disclosure regarding 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, such as additions or removals in connection with a prefunding or revolving period and pool asset substitutions and repurchases. Such information would include any material changes in solicitation, credit-granting, underwriting, origination, acquisition, or pool selection criteria or procedures.

Ongoing reports should include disclosure of all information necessary for investors to assess the credit quality of the assets underlying the ABS over the lifetime of the securities. The data provided should be transparent and comparable, and should be presented in a way that illustrates material changes in the asset pool, with more granular information provided about the assets when appropriate.

Disclosure of asset-level information would allow better monitoring of ABS by investors and other market participants by enhancing their ability to track the performance of the assets, as well as to assess the performance of the originator, sponsor or servicer. This ability will allow investors to continue their independent analysis of the ABS rather than relying on credit ratings agencies or other third parties to alert them of changes to the risk profile of the ABS. Regulators should consider requiring disclosure of other ratios that may assist investors in evaluating risk, such as loan-to-value and credit-to-servicing ratios. Where there has been a material change to the risk profile or risk environment of a loan, for example property loans without any equity contribution, property loans with enhancing interest and/or debt retirement, or loans with mortgage insurance, information previously disclosed in an offering document or prospectus should be updated.

i) Repurchase and Replacement Activity

Issuers should disclose, on a periodic basis, historical information about all assets of the pool that were subject of a demand to repurchase or replace for breach of the representations and warranties contained in the transaction agreements underlying the asset securitization. This information will help investors to identify asset originators with clear underwriting deficiencies.

j) Event-Based Reporting

The occurrence of material events should be disclosed promptly in event-based reports. Disclosure of a material event in an event-based report does not preclude its subsequent disclosure in other periodic reports where a jurisdiction permits or requires it. Examples of events that should be disclosed include, but are not limited to, the following:

i). Change of servicer or trustee. If a servicer or a trustee had resigned or had been removed, replaced or substituted, or if a new servicer or trustee had been appointed, disclosure of the date the event occurred and the circumstances surrounding the change should be made. In addition, information relating to the transition would also be useful to investors. If a new servicer or trustee had been appointed, disclosure should include a description of that entity.

ii). Change in credit enhancement or other external support. The loss, addition or material modification of any material credit enhancement or other support provided by a third party should be disclosed. 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, and a brief description of the material circumstances surrounding the termination. If any new enhancement or support is added, disclosure regarding the new enhancement or support should also be made. If any existing material enhancement or support has been materially modified, a brief description of the material terms and conditions of the amendments should be included.

iii). 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, disclosure of the failure and the nature of the failure should be made.

iv). Changes to credit rating. If an ABS issuer obtains and is required to disclose a credit rating for an ABS issuance, or if the issuer voluntarily discloses such a credit rating, updated information regarding any change in that rating should be disclosed on an ongoing basis in a manner consistent with the jurisdiction's regulatory approach for rating agencies. In providing disclosure regarding a change to a credit rating, care should be taken to provide appropriate context so as to avoid undue investor reliance on the credit rating.

v). **Change of credit rating agency from which a rating has been obtained.** If a credit rating agency from which an issuer had obtained a credit rating for an ABS has been removed, replaced or substituted, or if a new credit rating agency has been engaged, disclosure of the date the event occurred and the circumstances surrounding the change should be made. In addition, disclosure relating to the transition would also be useful to investors.

vi). **Changes to internal credit check policy.** If an ABS has a revolving asset pool and the offering document included disclosure regarding internal credit checks of the securitized loans, then the disclosure should be updated promptly following any material change to that policy.

vii). **Payment and Performance Information.** Updated disclosure should be made of any other event that materially affects payment or pool performance. For examples of this type of information, see Principle II, Section 8, above.

viii). **Early redemption.** If the Originator, Issuing Entity or other party that may influence the Issuing Entity decides to redeem the securities prior to the maturity date, the date and terms of the early redemption should be disclosed.

Question:

In addition to the events related to credit rating agencies specified above, IOSCO has also considered whether issuers should provide information about the oversight to which credit rating agencies are subject. The background for this consideration is an obligation under the EU Rating Regulation.[12] Where a prospectus published under Directive 2003/71/EC and Regulation (EC) No. 809/2004 contains a reference to a credit rating or credit ratings, the issuer, offeror, or person asking for admission to trading on a regulated market shall ensure that the prospectus also includes clear and prominent information stating whether or not such credit ratings are issued by a credit rating agency established in the Community and registered under this Regulation. IOSCO is considering the extent to which such disclosure in the securities prospectus should be part of ongoing disclosure and seeks market feedback.

Should an issuer be responsible in its ongoing reports for providing disclosure about the oversight/supervision of a credit rating agency that provided a rating for the issuer's ABS? If so, when and how frequently should the issuer disclose the information, what type of information should the issuer disclose, and what impact might it have on investors' decisions regarding the ABS? What would the benefits and concerns be with issuers providing information about CRA oversight/supervision in their ongoing reports, either as foreseen or based on your experience with the matter in other jurisdictions?

4. Disclosure should be fair, complete, clear, and not misleading.

Principle ***The information disclosed in ongoing reports should be fairly presented, not be misleading or deceptive and should not contain any material omission of information. Moreover, information disclosed in an ongoing report should be***

[12] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, available at http://www.esma.europa.eu/system/files/L_302_1.pdf.

presented in a clear and concise manner without reliance on boilerplate language.

Regulators should implement a principle of materiality under which any information that is deemed necessary to keep the mandated disclosure from being misleading or incomplete should be provided. This principle of materiality should complement requirements for itemized disclosure.

If information related to an issuer's ongoing reports is disseminated by other means, such as provided on the issuer's website, it should be substantially the same as the information provided in the issuer's reports to the relevant regulator.

5. Disclosure should be presented to facilitate analysis by investors.

Principle ***Disclosure should be presented in a format that facilitates the analysis of information by investors.***

Disclosure should be presented in a format that facilitates analysis of the information contained in the report. To that end, some regulators are investigating the use of adequate technology as a means of providing a quick and easy way for investors and others to extract, analyze and compare financial information that has been filed with regulators. The enhanced search and comparison capabilities afforded by the use of such technology could improve investors' ability to understand the available financial information, and could enable issuers to communicate their disclosure more effectively.

Question:

How do the means through which information is delivered affect the utility of disclosure?

6. Parties responsible for the disclosure should be clearly identified.

Principle ***The person or entity responsible for publishing the disclosure and the person or entity responsible for gathering the information from other persons or entities involved in the ABS should be clearly identified.***

Ongoing disclosure reports should be signed by the issuer or servicer or authorized representatives of the issuer or servicer. If there are multiple servicers, then the master servicer or authorized representative of the master servicer should sign the report.

7. Information should be available to the public on a timely basis.

Principle ***The information provided in the ongoing report should be disclosed in a timely manner, such that the information is sufficiently current and disclosed with sufficient frequency so as to be of use to investors.***

An appropriate time period for the due date of periodic reports may depend on the nature of the information being disclosed. Consideration should be given to more frequent disclosure of performance information, for example requiring it to be done in conjunction with a payment date or quarterly, on a timing basis that facilitates comparison by investors. Due dates for reports should be established by the relevant laws, regulations or listing rules of the

jurisdiction in which the report must be made available to the public. Event-based or ad hoc disclosure should be made promptly after the occurrence of the event, in accordance with the applicable event-based or ad hoc disclosure regime.

Question:

Should periodic reporting depend on the information being disclosed? If so, what should be the basis for establishing reporting periods?

8. All investors and market participants should have equal and simultaneous access to disclosure.

Principle ***Material information that is disclosed to any investor, market participant or other third party should be provided to all investors, market participants and other third parties at the same time.***

The disclosure of material information to certain investors (whether current or prospective security holders) or other interested parties before it is disclosed to the public may reduce investor confidence in the fairness of those markets. Prohibiting such disclosures will reduce the likelihood of insider trading or abusive use of such information. However, in some jurisdictions such disclosures may be allowed in certain circumstances, such as when other types of regulations are considered to adequately deal with insider trading or abusive use of material non-public information. For example, these exceptions could include communications with advisers and rating agencies, or communications made in the ordinary course of business. Such communications may include communications with persons with whom the company is negotiating, or intends to negotiate, a commercial, financial or investment transaction; and communications with representatives of the company's employees or trade unions acting on their behalf. In all these cases, the recipients of this information may have a duty to keep the information confidential. In other jurisdictions, there are very limited exceptions for price sensitive information. Information should be disclosed in a manner that does not violate national legal requirements, such as those relating to confidentiality and related civil liabilities, but confidentiality should not be used to avoid disclosure of material information.

Equal access to disclosure should be provided to all investors at the same time. In some jurisdictions, dissemination of information effected via different means, such as press releases and newspaper notices of the availability of the periodic reports on the issuer's website or elsewhere, is viewed as providing investors with equal access at the same time. In other jurisdictions, equal access is viewed as provided by free public access to the periodic reports on the regulator's website when the reports are filed with the regulator, so that it is available to all investors and the public at the same time.

9. Disclosure should be equivalent in all markets.

Principle ***If securities are listed or admitted to trading in more than one jurisdiction, the material periodic information made available to one market should be made available promptly to all markets in which they are listed.***

10. Ongoing reports should be filed with or otherwise made available to the relevant regulator.

Principle ***Ongoing reports should be filed with the relevant regulator or otherwise made available in compliance with applicable regulations to permit regulators to review the reports, when appropriate, to ensure compliance with the relevant laws and regulations***

The means of filing may include transmission of the ongoing report to the relevant regulator, or by sending the relevant regulator notice of the filing on a separate registry, among other things. Regardless of the means used, the relevant regulator has means of obtaining the report for its regulatory purposes.

11. The information should be stored to facilitate public access to it.

Principle ***The relevant law or regulation should ensure that there is storage of the ongoing information in order to facilitate public access to the information.***

Access to information should be at the lowest cost possible to investors. Electronic storage is one means of achieving this objective. This information should be easily accessible, whether with the relevant regulator or another authorized repository, and be available for a sufficient period of time given a jurisdiction's legal framework and other appropriate considerations.

Appendix A – Questions

For the convenience of the reader, the specific questions posed throughout this Consultation Report are reproduced below. In addition to seeking feedback on these questions, we also solicit comment from any interested person on any matter described in this Consultation Report, or on other matters that may affect the recommended principles that it contains.

Regulatory Coordination

1. Does current variation of definitions across jurisdictions create confusion or lack of comparability for investors or other market inefficiencies? What practical problems occur as a result in variation of definitions?

2. If variation in definitions across jurisdictions does create confusion, do respondents believe the issue is best addressed through a) greater standardization of definitions, b) improving comparability, or c) another method (please describe)? Please provide reasons and examples.

3. In addition to encouraging standardized definitions, should regulators also encourage, where possible, standardized disclosure templates and disclosure formats? If so, what are the areas where that would be most necessary? How would standardized disclosure templates best be achieved?

III. Periodic and event-based disclosure reports should contain sufficient information to increase transparency and to help enable investors to perform due diligence in their investment decisions independently.

4. Should an issuer be responsible in its ongoing reports for providing disclosure about the oversight/supervision of a credit rating agency that provided a rating for the issuer's ABS? If so, when and how frequently should the issuer disclose the information, what type of information should the issuer disclose, and what impact might it have on investors' decisions regarding the ABS? What would the benefits and concerns be with issuers providing information about CRA oversight/supervision in their ongoing reports, either as foreseen or based on your experience with the matter in other jurisdictions?

V. Disclosure should be presented to facilitate analysis by investors.

5. How do the means through which information is delivered affect the utility of disclosure?

VII. Information should be available to the public on a timely basis.

6. Should periodic reporting depend on the information being disclosed? If so, what should be the basis for establishing reporting periods?

Appendix B – Summary of Initiatives Pertaining to Ongoing ABS Disclosure in Various Jurisdictions

1. Canada: CSA Proposal for Continuous Disclosure for Securitized Products

On April 1, 2011, the Canadian Securities Administrators (the CSA) proposed a framework for the regulation of securitized products in Canada. Under the proposed framework, reporting issuers would be required to provide investors with information on the features and risks of securitized products. This information would be provided to investors at the time of product distribution and on an ongoing basis.

The Proposed Continuous Disclosure Rule (Proposed CD Rule) requires that reporting issuers with issued and outstanding securitized products file specific continuous disclosure in addition to complying with the general continuous disclosure obligations applicable to reporting issuers that are not investment funds.

The following is a summary of several significant features of the Proposed CD Rule:

a) Payment and performance report

A reporting issuer must file a *Payment and Performance Report for Securitized Products* within 15 days after each payment date for each series or class of securitized products it has issued. The report must contain information regarding payment distribution and pool performance reflecting the pool's performance at the most recent payment distribution period. The issuer must provide the required disclosure to the extent applicable. If none of the disclosure in this report is applicable due to the attributes of the securitized product or the structure of the securitized product, the reporting issuer can file an alternative report that contains all information that would be material to an investor regarding the payment distribution and performance of the series or class of securitized products.

b) Timely disclosure of significant events

If a specified event occurs, a reporting issuer must immediately issue and file a news release disclosing the event, and file a *Report of Significant Events Relating to Securitized Products* describing the event no later than two business days after the event. In addition, the CSA have also included a more general disclosure trigger which requires disclosure of any other event that affects payment distribution or pool performance that an investor would consider material.

c) Annual servicer report

Each servicer whose servicing activities relate to more than five percent of the pool assets must assess its compliance with each servicing standard set out in the Proposed CD Rule that it has identified as being applicable to it. The servicing standards in the Proposed CD Rule are not legal obligations under securities law, and are intended only as uniform measures against which the servicing of a particular asset pool can be assessed.

The servicer must prepare a report that states whether the servicer complied with each standard during the reporting issuer's most recently-completed financial year. The servicer report must be audited.

The servicer must provide the report to the reporting issuer, who in turn must file it by the later of the date it files its Annual Information Form (AIF) or its annual financial statements and annual Management Discussion and Analysis (MD&A).

d) Annual servicer certificate

Specified servicers must provide a reporting issuer with a certificate that discloses the extent of the servicer's compliance with the applicable servicing agreement for the reporting issuer's most recently completed financial year. There is no prescribed form of certificate. The reporting issuer must file the certificate by the later of the date it files its AIF or its annual financial statements and annual MD&A.

e) Disclosure of servicer non-compliance

A reporting issuer's MD&A must include a discussion of any significant instance of non-compliance with the applicable servicing standards in the proposed CD Rule, or the relevant servicing agreement, that has been disclosed to it by a servicer through the servicer report or servicer certificate it has provided to the reporting issuer.

f) The Proposed Certification Amendments

The CSA are proposing amendments to the certification requirements that exempt reporting issuers that issue securitized products and that are subject to the proposed CD Rule from the requirements to establish and maintain disclosure controls and procedures and internal control over financial reporting. The proposed amendments also provide for modified forms of certificate for reporting issuers who are subject to proposed CD Rule.

2. European Union: Disclosure rules under the Capital Requirements Directive II

As a response to the financial crises the European Union introduced the Capital Requirements Directive II (CRD II)[13] which includes, among others, enhanced disclosure rules regarding ABS.

Under the new Article 122a (7) of CRD II each financial institution acting as sponsor or originator of a securitisation is subject to comprehensive disclosure obligations towards prospective investors.

In particular such financial institutions need to ensure that prospective investors have readily

[13] Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0097:0119:EN:PDF.

available access to:

- all materially relevant data on the credit quality and performance of the individual underlying exposures, cash flows and collateral supporting a securitisation exposure; and

- all information that is necessary to conduct comprehensive and well informed stress tests on the cash flows and collateral values supporting the underlying exposures.

Further, such financial institutions have to disclose their individual retention level to the investor[14] and have to keep all the materially relevant data available for the investors.

The guidelines of the Committee of European Banking Supervisors (the CEBS Guidelines)[15] specify certain terms regarding the application of Article 122a of the CRD. The term "readily available" means that "gaining access to the information should not be overly prohibitive (in terms of search, accessibility, usage, cost and other factors that might impede availability), so that fulfilling their due diligence requirements is not overly burdensome on investors."

The term "individual underlying exposures" typically means that "such data should be provided on an individual exposure (loan-level) basis, as opposed to on a collective basis." However, it is recognised that there may be circumstances in which such loan-level disclosure is not appropriate; for instance, securitisations with a large volume of exposures that are highly granular. On the other hand, in many circumstances loan-level disclosure is a material necessity for the due diligence process; for instance, securitisations with large concentrations of non-granular exposures. In determining whether such information should be provided on an individual or aggregate basis, a credit institution, when acting as originator or sponsor, should consider the information that a credit institution when acting as investor would need in order to fulfil its requirements under Paragraphs 4 and 5 of Article 122a.

However, it must be highlighted that the disclosure requires (as well as the timing and the mean of dissemination) by Article 122a (7) only refer to credit institutions. It does not take into account the fact that the securitisation products may or may not be listed. It is worth recalling that once the securitisation bond is admitted to trading on a regulated market, information given by the issuer must be freely, easy and timely accessible to all market participants.

Further, the CEBS Guidelines clarify that the disclosure requirements "need not extend to the provision of information that would directly or indirectly breach other legal or regulatory requirements of such credit institutions (for instance, market abuse and confidentiality restrictions, including (but not limited to) those related to clients and customers)."

In the case of a material breach of the 5% retention rule, the competent authorities impose an increased risk weight that is at least 3.5 times higher than the risk weight regularly applied to the retention exposure (maximum 1,250%) depending on the type and the duration of the infringement.

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[14] This retention rule forbids a European credit institution from investing in a transaction involving securitized product unless the originator is exposed at least to the extent of 5% to the underlying assets. As a result, the responsibility (and the consequence) of the retention rule is put on investors.

[15] Guidelines to Article 122a of the Capital Requirements Directive as of 31 December 2010.

It must be noted that the 5% retention rule should also apply soon to investment managers (articles 19 and 41 of the AIFM directive) and insurance companies (Solvency II).

3. Other Central Bank Regulatory Requirements

1. Bank of England: Disclosure Requirements for Eligible Collateral

Since December 2007 the Bank of England (the Bank) has accepted asset backed securities and covered bonds (ABS) as collateral eligible for its liquidity insurance operations. One of the Bank of England's guiding principles for its market operations is that it must be able to risk manage and value the collateral it accepts. In view of this, the Bank considered the information required from the issuers of ABS in order to be able to risk manage its collateral more effectively and efficiently.

Following a Market Consultation the Bank of England decided to amend its eligibility criteria to require enhanced disclosure of information relating to these securities. While driven by the Bank's own risk management requirements, the Bank considered it important that this information be provided not only to the Bank but also to market participants as a way of ensuring that market-wide transparency was enhanced. This reflected the information asymmetry between the information routinely and publicly provided by ABS issuers and that required by investors to manage these instruments.

In order to be eligible in the Bank's operations, the Bank of England now requires that originators of ABS make the following available to market participants in order for their securities to remain eligible:

- Detailed information about the loans included within the securitisation. For most asset classes this will take the form of loan-level data including details of the borrower, underlying assets and performance of each loan, to be provided on every quarter;

- The prospectus and other key legal documents;

- Monthly reports about the security containing a standard set of minimum information:

- A summary of the structure of individual transactions including the rights of bond or note holders; and

- A cash-flow model of each transaction which accurately represents how cash flows through the structure to the end-investor (not applicable to covered bonds).

The implementation of these requirements has been staggered. The publication of the prospectus and other key documents was required from July 2011 for all asset classes. The remaining requirements for residential mortgage-backed securities and covered bonds backed by residential mortgages will come into force on 1 December 2011 and the application of the full requirements will be extended to remaining asset classes by the end of 2012.

2. European Central Bank

The European Central Bank (ECB) is currently implementing measures similar to those of the Bank to require specific loan level information for ABS accepted as collateral in Eurosystem credit operations. The ECB intends these measures to help investors with their due diligence through providing to market participants more transparency of information and in a standardized format and so to help restore confidence in the securitization market.

The Eurosystem will introduce loan level information requirements for RMBS first and then gradually extend them to other asset classes such as CMBS and SME transactions. The requirements will apply to existing and newly issued ABS and are being implemented over 2011 to mid-2012.

The requirement is for information to be provided on a quarterly basis on interest payment dates or within one month of that date. The data will include:

- borrower information;
- loan characteristics;
- interest rate info;
- p**r**operty/additional collateral; and
- performance information**.**

3. United States

The United States Securities and Exchange Commission (the Commission) has undertaken a number of regulatory initiatives related to ABS, many of which contain specific provisions for ongoing disclosure.

In April 2010, the Commission issued proposed revisions to rules applicable to ABS transactions.[16] Several of these proposals pertained to ongoing disclosure requirements. Specifically, the Commission proposed to require the filing of tagged, computer-readable, standardized information about the specific assets, or loans, in the pool. This loan-level information would be provided both at the time the security is sold as well as on an ongoing basis. The Commission also proposed to change the requirements for pool-level disclosure regarding delinquency presentation in periodic reports from a materiality standard to an objective standard. In another provision, the Commission proposed to lower, from five percent to one percent, the threshold of change in the material pool characteristics that would be necessary to trigger the requirement to file a current disclosure report on Form 8-K. The proposal also included a provision to require the ABS issuer to file on the Commission website a computer program that provides investors with a tool to analyze asset information. This computer program would show the effect of the so-called "waterfall" so investors can analyze how the borrowers' loan payments are distributed to investors in the ABS, how

[16] See SECURITIES AND EXCHANGE COMMISSION 17 CFR Parts 200, 229, 230, 232, 239, 240, 243 and 249 Release Nos. 33-9117; 34-61858; File No. S7-08-10 RIN 3235-AK37 ASSET-BACKED SECURITIES, available at http://sec.gov/rules/proposed/2010/33-9117.pdf.

losses or lack of payment on those loans will be divided among the investors, and when administrative expenses, such as loan servicing fees, are paid to service providers.

The April 2010 proposal also sought to increase transparency in the private ABS market by revising the Commission's safe harbors (which provide an exemption from registration with the Commission). The proposed revisions would require ABS issuers to file a notice of ABS offerings conducted in reliance on the safe harbor, and to represent in their transaction agreement that they will make available to investors the same information about the securities that would be provided if the offering were publicly registered.

After the Commission's April 2010 ABS proposals, the United States Congress passed the *Dodd-Frank Wall Street Reform and Consumer Protection Act*[17] (Dodd-Frank Act or the Act), which among other things, also sought to address concerns in the ABS market. The Dodd-Frank Act provides for new requirements on the ABS process, including three provisions that apply to ongoing disclosure requirements.

Section 942(a) of the Act eliminates the automatic suspension of Exchange Act reporting obligations for ABS issuers so that in the future, ABS issuers will continue to file Exchange Act reports as long as securities are held by non-affiliates of the issuer.[18] Section 942(a) also granted the Commission the authority to suspend or terminate the duty of an ABS issuer to file disclosure reports. The Commission amended on August 17, 2011 its rules relating to the Exchange Act reporting obligations of ABS issuers.[19] The Commission's rule amendments include a provision for the suspension of the reporting obligations for ABS issuers for any semi-annual fiscal period, if, at the beginning of that period, there are no longer any ABS of the class sold in a registered transaction held by non-affiliates of the depositor.

Section 942(b) of the Act requires the Commission to adopt regulations to require issuers of ABS, at a minimum, to disclose asset-level or loan-level data regarding the assets backing the ABS, if such data are necessary for investors to independently perform due diligence. As part of its April 2010 proposal, the Commission had proposed new requirements for the disclosure of asset-level information in prospectuses and in Exchange Act periodic reports to augment the existing pool-level disclosure requirements. In July 2011, the Commission

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17 *Dodd-Frank Wall Street Reform and Consumer Protection Act* available at http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

18 Exchange Act Section 15(d) generally requires an issuer with a registration statement that has become effective pursuant to the Securities Act of 1933 to file ongoing Exchange Act reports with the Commission. Prior to enactment of the Act, Exchange Act Section 15(d) provided that for issuers without a class of securities registered under the Exchange Act the duty to file ongoing reports is automatically suspended as to any fiscal year, other than the fiscal year within which the registration statement for the securities became effective, if the securities of each class to which the registration statement relates are held of record by less than 300 persons. As a result, the reporting obligations of ABS issuers, other than those with master trust structures, were generally suspended after the ABS issuer filed one annual report on Form 10-K because the number of record holders was below, often significantly below, the 300 record holder threshold. As a result of Section 942(a)'s statutory amendment, ABS issuers no longer automatically suspend reporting under Exchange Act Section 15(d).

19 See SECURITIES AND EXCHANGE COMMISSION 17 CFR Parts 240 and 249 [Release No. 34-65148; File No. S7-02-11] RIN 3235-AK89 Suspension Of The Duty To File Reports For Classes Of Asset-Backed Securities Under Section 15(D) Of The Securities Exchange Act Of 1934, available at http://www.sec.gov/rules/final/2011/34-65148.pdf.

issued a release requesting additional comment on whether the April 2010 proposals appropriately implement Section 942(b) of the Dodd-Frank Act.[20]

Section 943 of the Act requires the Commission to prescribe regulations on the use of representations and warranties in the ABS market. To implement this, the Commission adopted rules that require ABS issuers to disclose the history of repurchase requests they received regarding potential breaches of the representations and warranties they made relating to the pool assets (including the quality of the pool assets, and their origination) and whether the requests were fulfilled or unfulfilled.[21] Also, the final rules require Nationally Recognized Statistical Rating Organizations to provide a description of the representations, warranties and enforcement mechanisms available to investors in an ABS offering and how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities.[22]

Section 945 of the Act requires the Commission to issue rules requiring an asset-backed issuer in a Securities Act registered transaction to perform a review of the assets underlying the ABS, and disclose the nature of such review. Final rules also were adopted on January 20, 2011, to implement Section 945, requiring asset-backed securities issuers whose offerings are registered under the Securities Act to conduct a review of the assets underlying those securities and make certain disclosures about those reviews.

In July 2011, the Commission re-proposed the proposals relating to ABS shelf eligibility from the April 2010 release.[23] The ABS shelf eligibility proposals included, among other requirements, two requirements for shelf eligibility that trigger certain ongoing disclosure requirements. First, the Commission proposed that ABS issuers must agree to provide a notice in their Exchange Act reports of an investor's desire to communicate with other investors. Second, the Commission proposed that issuers must agree to include provisions in the underlying transaction agreements requiring that the trustee of the issuing entity appoint a "credit risk manager" to review the underlying assets upon the occurrence of certain trigger events and provide its report of the findings and conclusions of the review of the assets to the trustee. Issuers would then be required to disclose information related to the appointment or dismissal of this credit risk manager and to file the credit risk manager's report regarding its review of the pool assets, if received during the distribution period. As part of the July 2011 re-proposal, the Commission also solicited comment on the provision contained in the April 2010 proposal to require a privately-issued ABS issuer to represent in the transaction

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20 These requests for comment were issued in the same release in which the Commission re-proposed certain ABS shelf eligibility requirements. See SECURITIES AND EXCHANGE COMMISSION 17 CFR Parts 229, 230, 239 and 249 Release Nos. 33-9244; 34-64968; File No. S7-08-10 RIN 3235-AK37 Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment, available at http://sec.gov/rules/proposed/2011/33-9244.pdf.

21 See SECURITIES AND EXCHANGE COMMISSION 17 CFR Parts 229, 232, 240 and 249 Release Nos. 33-9175; 34-63741; File No. S7-24-10 RIN 3235-AK75 DISCLOSURE FOR ASSET-BACKED SECURITIES REQUIRED BY SECTION 943 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, available at http://sec.gov/rules/final/2011/33-9175.pdf.

22 Ibid.

23 See SECURITIES AND EXCHANGE COMMISSION 17 CFR Parts 229, 230, 239 and 49 Release Nos. 33-9244; 34-64968; File No. S7-08-10 RIN 3235-AK37 Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment http://sec.gov/rules/proposed/2011/33-9244.pdf.

agreement that it will make available to investors the same information about the securities that would be provided if the offering were publicly registered.

With respect to credit risk retention, Section 941 requires the Commission, the Federal banking agencies, and, with respect to residential mortgages, the Secretary of Housing and Urban Development and the Federal Housing Finance Agency to prescribe rules that require a securitizer to retain an economic interest in a material portion of the credit risk for any asset that it transfers, sells, or conveys to a third party. To implement Section 941(b), the Commission, and other Federal agencies charged with jointly prescribing regulations, issued proposed rules in March 2011 relating to credit risk retention requirements.[24] Consistent with the Act, the proposed rules generally would require a sponsor to retain an economic interest equal to at least five percent of the credit risk of the assets collateralizing an issuance of ABS. The proposed rules would permit a sponsor to choose from a menu of risk retention options. The proposed rules also include disclosure requirements specifically tailored to each of the permissible forms of risk retention including material information concerning the sponsor's retained interests in a securitization transaction and the assumptions used in determining the aggregate value of ABS to be issued.

Section 621 of the Dodd-Frank Act prohibits an underwriter, placement agent, initial purchaser, sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security from engaging in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity for a period of one year after the date of the first closing of the sale of the asset-backed security. In September 2011, the Commission proposed new Rule 127B under the Securities Act to implement Section 621.

5. The Joint Forum Report on Securitisation Incentives

The Joint Forum[25] released its *Report on Asset Securitisation Incentives* in July 2011. [26] In that report, the Joint Forum analyses the incentives to engage in securitization throughout the market before the financial crisis, the distortions created by misalignments and conflicts of interest which emerged, and the responses of governments, regulators and industry standard-setters intended to re-establish securitization on a sustainable basis after the crisis. The report recognizes the role of regulators in establishing a framework for securitization so that, conducted prudently, it continues to provide a source of funding and available credit to support the real economy. The report recommends that authorities, as part of that role, should encourage markets to improve transparency to ensure that investors, other market participants and supervisors have access to relevant and reliable information. The report also

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24 See U.S. SECURITIES AND EXCHANGE COMMISSION 17 CFR Part 246 Release No. 34-64148; File No. S7-14-11 RIN 3235-AK96, available at http://www.sec.gov/rules/proposed/2011/34-64148.pdf.

25 The Joint Forum was established in 1996 under the aegis of the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS) to deal with issues common to the banking, securities and insurance sectors, including the regulation of financial conglomerates. The Joint Forum is comprised of an equal number of senior bank, insurance and securities supervisors representing each supervisory constituency.

26 See *Report on Asset Securitization Incentives*, Joint Forum, 13 July 2011, available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD355.pdf.

recommends that authorities encourage greater document standardization, which should assist in reducing information asymmetries and stimulating liquidity in the secondary markets.