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The Bond Market Association
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Securities and Exchange Commission
Division of Corporation Finance
100 F Street, N.E.
Washington, D.C. 20549
Attn: Mr. Jeffrey Cohan, Special Counsel,
Office of Chief Counsel

Re: Disclosure Required under Item 1115 and Item 1114 of Regulation AB

Dear Mr. Cohan:

The International Swaps and Derivatives Association ("ISDA"), The Bond Market Association ("TBMA") and The American Securitization Forum ("ASF") welcome the opportunity to respond to your invitation to provide the information and analysis contained below in furtherance of our telephone conversation with respect to the disclosure obligations of certain derivatives counterparties under Item 1115 of Regulation AB ("Item 1115").

Similar concerns may apply with respect to certain types of credit enhancement providers under Item 1114 of Regulation AB ("Item 1114"). However, this letter will focus primarily on issues and fact patterns pertaining to derivatives counterparties under Item 1115.

ISDA, which represents participants in the privately negotiated derivatives industry, is the largest global financial trade association, by number of member firms. ISDA was chartered in 1985 and today has approximately 700 member institutions from 50 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities. Information about ISDA and its activities is available on its web site at *www.isda.org*. TBMA, with offices in New York, Washington, D.C. and London, represents securities firms, banks and asset managers that underwrite, invest in, trade and sell debt securities and other financial products globally. More information about TBMA is available on its website at *www.bondmarkets.com*. ASF is a broadly-based professional forum of

participants in the U.S. securitization market. Among other roles, ASF members act as issuers, underwriters, dealers, investors, servicers, guarantors and professional advisers in connection with securitization and structured credit transactions. ASF represents the securitization market and its participants on a wide range of legal, regulatory, accounting and market practice issues. More information about ASF's members and activities is available at *www.americansecuritization.com*.

This letter has been prepared based on review by and input from separate working groups from all three of the above organizations. References below to views and concerns of investors are based on input from a number of investor members of ASF.

The Securities and Exchange Commission (the "Commission") adopted Items 1115 and 1114 as part of Regulation AB in December of 2004. Regulation AB is effective with respect to registered asset-backed securities ("ABS") offerings commencing on or after January 1, 2006. Items 1115 and 1114 require registrants to provide stipulated narrative and, under certain conditions, financial information about (i) derivative instruments and their providers and (ii) credit enhancements and their providers, respectively. Registrants must provide basic information about the derivative counterparty and the terms of the derivative instrument under Item 1115 and basic information about the enhancement or support under Item 1114. Item 1115 requires the agreement relating to the derivative and Item 1114 requires any credit enhancement agreement to be filed as an exhibit to the corresponding registration statement.

Item 1115 and Item 1114 both also require additional financial information about the derivative counterparty or enhancement provider depending on the significance of the maximum probable exposure under the derivative or enhancement instrument relative to the value of the principal balance of the corresponding pool of assets. Disclosure is required under Item 1115 as to whether the significance percentage is below 10%, between 10% and 20%, or over 20%.

Item 1115(b)(1) and (2) state in pertinent part that where "the aggregate significance percentage related to any entity or group of affiliated entities providing derivative instruments" is "10% or more but less than 20%" or "20% or more", as the case may be, the registrant must provide either "financial data required by Item 301 of Regulation S-K" under Item 1115(b)(1) or "financial statements meeting the requirements of Regulation S-X" under Item 1115(b)(2), in each case "for such entity or group of affiliated entities".

Similarly, Item 1114(b)(2)(i) and (ii) state that where "any entity or group of affiliated entities providing enhancement or other support . . . is liable or contingently liable to provide payments representing 10% or more, but less than 20%" or "20% or more", as the case may be, "of the cash flow supporting any offered class of asset-backed securities", the registrant must provide either "financial data required by Item 301 of Regulation S-K" under Item 1114(b)(2)(i) or "financial statements meeting the requirements of Regulation S-X" under Item 1114(b)(2)(ii), in each case "for such entity or group of affiliated entities".

In either case under Item 1115 or Item 1114, our questions have concerned the identity of the entity for which the required financial information must be provided. Item 1100(c)(1) of Regulation AB ("Item 1100") addresses situations where third party financial information required under certain items of Regulation AB, including Item 1115 and Item 1114, may be

provided by "incorporation by reference". Item 1100(c)(1) permits incorporation by reference of reports filed by a third party by incorporating the reports of the entity that consolidates the third party, subject to certain conditions, including that the reports of the entity that consolidates the third party "include (or properly incorporate by reference)" the financial statements of the third party.

As we and certain of our members have recently discussed with you, questions have arisen with respect to exactly what type of financial information about the derivatives counterparty Item 1115 requires where the significance percentage of the derivatives equals or exceeds 10% and 20%, respectively, of the corresponding pool assets. The derivatives counterparties that are the subject of Item 1115 in many cases are consolidated subsidiaries of large, multinational financial institutions. These institutions typically have complex corporate structures,[1] and the selection of the particular subsidiary to be the derivative counterparty results from a variety of factors. In these situations, where a subsidiary, rather than the parent company itself, is the derivative counterparty, we understand that you have informally interpreted Item 1115 to require selected financial data or financial statements, as the case may be, of the subsidiary rather than selected financial data or consolidated financial statements of the parent holding company. You also have noted that Item 1100(c)(1)(iii) of Regulation AB would prevent the registrant from incorporating the financial information of the parent holding company in order to satisfy the requirements of Item 1115. Similar questions and concerns would potentially be applicable to the financial information disclosure requirements for certain types of credit enhancement providers under Item 1114.

We believe that this interpretation may not result in investors receiving the highest quality or most material disclosure available, would pose a number of hardships for our members and could limit the number of participants in this very important market. Our primary concerns are the following:

- Separate financial statements of a consolidated subsidiary counterparty are not material, and should not be required, where the consolidated financial statements of the parent are provided and the parent fully and unconditionally guarantees the obligations of the subsidiary counterparty on the derivatives. In practice, investors generally base their investment decisions on the ratings of the counterparty, or the parent which is the effective counterparty where the parent unconditionally guarantees the obligations of the subsidiary counterparty. Consolidated financial statements of the parent holding company (which would include financial information relating to the particular subsidiary counterparty on a consolidated basis, but not separate financial statements of the subsidiary counterparty) are likely to provide more useful and material disclosure (as compared to subsidiary counterparty financial statements) to investors where the parent company is providing a guarantee and is the ultimate credit.

[1] The principal, broad difference among members is that some have a holding company structure where the holding company only owns one subsidiary which is the derivatives counterparty, with or without a guarantee from the parent, and other members have a holding company with many subsidiaries in addition to the derivatives counterparty with or without guarantees from the parent.

- The requirement to provide subsidiary counterparty financial information is inconsistent with requirements of the Office of the Comptroller of the Currency (the "OCC") that apply to our bank members, which members are significant participants in the market as derivatives counterparties.

- The above-described interpretations of Item 1115 could conflict with Item 3-10(b) of Regulation S-X, which, in the comparable circumstance of finance subsidiary disclosure, permits finance subsidiaries to omit their separate financial statements and instead only include parent financial information in satisfaction of Commission disclosure requirements where their parent guarantees their securities. We believe that a subsidiary whose parent guarantees its obligations, whose activities are limited to acting as a derivatives counterparty and who otherwise meets the definition of "finance subsidiary" in Item 3-10(b) should be treated as a finance subsidiary and not required to provide separate financial information under Regulation AB. We believe that this interpretation is consistent with the intent and purpose of Regulation AB with respect to applying the existing mechanics of financial reporting under Regulation S-X when applicable.

- Largely due to the regulatory framework existing prior to the adoption of Regulation AB, the subsidiary counterparty generally does not, in the ordinary course of business, prepare its own separate audited financial information meeting the requirements of Regulations S-X and S-K, and the cost and time required to produce such information in response to Item 1115 would be considerable.

- If you retain the current interpretation of Item 1115, in some cases derivatives counterparties may be required to be replaced under contractual termination events that are triggered when financial information disclosure is required and cannot be provided. These termination events may lead to market disruption or illiquidity.

Information Considered Material by Investors

In considering the acceptability of a derivatives counterparty, it is our understanding that investors focus and rely on the credit ratings of the counterparty, or the parent which is the effective counterparty where the parent unconditionally guarantees the obligations of the subsidiary counterparty. Investors set their own parameters for minimum acceptable ratings of derivatives counterparties. In addition, investors are mindful that, to the extent the ratings of the ABS are dependent on the cash flow available from the derivative, the credit worthiness of the derivative counterparty will be a factor in determining the ratings of the ABS. Under current market practice, investors generally do not consider separate GAAP financial statements for subsidiary derivatives counterparties to be material. Moreover, separate GAAP financial statements for subsidiary derivatives counterparties are generally not available, and investors are willing to rely on credit ratings of the subsidiary derivatives counterparties (or their guarantors) in making their investment decisions.

In light of the foregoing, where a parent company wholly guarantees the obligations of its subsidiary that is a derivatives counterparty, we believe that the financial statements or information of such parent/guarantor would provide sufficient disclosure and be most material to investors, since (1) the parent company is the ultimate credit of the derivative or of the enhancement and would provide material information to investors with respect to the credit risk to the derivative counterparty, and (2) the derivative counterparty is frequently an entity with limited operations independent of its parent, whose financial statements or information would not present a clear picture of the credit risk associated with the relevant derivative.

Inconsistency with Current OCC Requirements

Many of our members are banks subject to regulation by the OCC. The staff interpretation of Item 1115, however, contradicts OCC guidance on subsidiary financials. The OCC permits bank subsidiaries to file consolidated financial statements of the holding company rather than separate financial statements of the bank subsidiary, whether or not the holding company guarantees the obligations of the subsidiary. The OCC Comptroller's Handbook ("Special Reporting Situations – Consolidated Reporting by Holding Company Subsidiaries") provides: " . . . any bank that is a subsidiary of a holding company may, regardless of its size, file the audited consolidated financial statements of the holding company in place of separate financial statements". In addition, 12 USC 363.1(b) also provides that "[t]he audited financial statements requirement . . . may be satisfied for an insured depository institution that is a subsidiary of a holding company by audited financial statements of the consolidated holding company".

We would ask you to interpret the Item 1115 and Item 1114 financial disclosure requirements in a manner that is consistent with OCC requirements for the obvious operational efficiencies for our bank members. We also note that the apparent OCC conclusion that it is appropriate to allow subsidiary counterparties to provide holding company consolidated financial information, whether or not the holding company guarantees the subsidiary's obligations, supports our contention that holding company consolidated financial statements provide sufficiently high quality disclosure about a subsidiary derivative counterparty.

It is our understanding that in making an investment decision relative to a derivative or credit enhancement that is provided by a bank, investors focus and rely on the credit ratings of the bank, as well as non-audited financial information about the bank including "call reports" which federal banking regulations may require and which are publicly available.

Consistent with the foregoing, we would ask you to interpret the Item 1115 and Item 1114 financial disclosure requirements as not requiring separate audited financial statements of a bank subsidiary, where a bank subsidiary is acting as either a derivatives counterparty or a credit enhancement provider, and regardless of whether the holding company guarantees the obligations. Instead, the financial statements or information of the holding company should be viewed as providing sufficient disclosure.

Inconsistency with Item 3-10(b) of Regulation S-X

The current staff interpretation of Item 1115 also fails to give full effect to Item 3-10(b) of Regulation S-X. Item 3-10(b) of Regulation S-X permits a "finance subsidiary" to omit its separate financial statements and instead only include parent financial information in satisfaction of Commission disclosure obligations, where the subsidiary's parent fully guarantees its securities. Under Regulation S-X, an entity is a "*finance subsidiary* if it has no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the security being registered and any other securities guaranteed by its parent company", Item 3-10(h)(7). While Item 1115 of Regulation AB has incorporated the standards of Regulation S-X to govern the required financial disclosures for derivatives counterparties, Regulation AB is silent as to how to interpret the "finance subsidiary" definition in this context. That is, it is not clear how Regulation S-X's reference to "assets" or "operations" related to "the security being registered and any other securities guaranteed by its parent company" should be applied where no "security" is actually being "registered" by the subsidiary or its parent, and the relevant obligation is actually a derivative. It would be helpful to clarify the application of the "finance subsidiary" definition in this context, because many derivatives subsidiaries operate in substance as finance subsidiaries: all their swap transactions with non-affiliates are guaranteed by a reporting parent company, and the derivative subsidiary has no assets or operations other than in connection with these guaranteed derivatives operations. In situations where the derivatives counterparty being considered for purposes of Item 1115 is such a subsidiary, the economics of the transaction and the needs of investors for disclosure is thus identical to the situations that Item 3-10(b) of Regulation S-X contemplates.

The staff should interpret Item 1115 of Regulation AB in a manner that gives full effect to the Regulation S-X standards for finance subsidiaries. Where (i) the parent of a derivatives counterparty subsidiary guarantees its obligations in compliance with the requirements of subparagraphs (1) through (4) of the exemption in Regulation S-X for finance subsidiaries and (ii) the subsidiary has no assets, operations, revenues or cash flows other than those related to the subsidiary's operations as a derivatives counterparty in transactions guaranteed by its parent, such a subsidiary should be permitted to omit its own financial information and instead include only parent company financial information, in reliance on the Regulation S-X definition of "finance subsidiary".

Availability of Financial Information

The current staff view that Item 1115 requires financial information from subsidiary counterparties presents difficulties for our members for the simple reason that most such counterparties do not prepare separate audited financial statements. While in some instances a subsidiary produces its own, separate financial information, for the reasons discussed above, including OCC requirements, Item 3-10(b) of Regulation S-X and the exclusion of derivatives from the definition of a "security" in Section 2(a) of the Securities Act, generally these entities do not do so.

On the one hand, for most of our members, the requirement that their subsidiaries which are derivative counterparties provide independent, audited financial statements would be prohibitively costly and time consuming. On the other hand, in almost all cases, the parent

company is a reporting company and has available audited consolidated financial statements reflecting the financial condition of the entire corporate structure (to the extent consolidated with the parent), including the relevant subsidiary counterparty.

Unintended Consequences of Requirement

We understand that a practice already has evolved since the implementation of Item 1115 where derivatives contracts in public ABS transactions now include a provision whereby, if the significance percentage of the derivatives instrument equals or exceeds the 10% or 20% significance threshold, and Item 1115 therefore requires financial information disclosure, the counterparty will be replaced if it is not able or willing to provide the required financial information under Item 1115. Such a requirement and a resulting replacement may arise after the closing date of a particular ABS issue, because the significance percentage test is an ongoing requirement. See SEC Division of Corporation Finance, Manual of Publicly Available Telephone Interpretations, Regulation AB and Related Rules, paragraph 19.01.

The consequences of this trend will not benefit investors or the market as a whole. Increased use of the type of termination event noted above may lead to market disruption and/or illiquidity at just the point in time where the disclosure otherwise would occur, so that the regulation would not serve its intended purpose.

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We are aware that some industry participants did not raise these specific objections to Item 1115 or Item 1114 during the Regulation AB comment process. However, it is only due to the experience that we, our members and other industry participants have had in attempting to comply with Item 1115 since Regulation AB took effect that we have been able to identify these problems precisely and articulate clearly our and our members' concerns.

It is our view that commentators on the Regulation AB proposal did not realize that the word "include" as used in Item 1100(c)(1)(iii) would be interpreted to require separate financial statements (as opposed to having the information subsumed within the parent's consolidated financial information), in light of the existing regulatory framework and accounting practice under which separate financial statements of the derivatives subsidiary or enhancement provider are not required or provided.

Therefore, for the reasons discussed in this letter, we would ask you to confirm for us that you will interpret Item 1115 and Item 1114 as follows. Where the parent holding company guarantees the obligations of the subsidiary derivatives counterparty, or subsidiary enhancement provider, as the case may be, any applicable financial disclosure requirements of Item 1115 or Item 1114 may be satisfied by providing the summary financial data or consolidated financial statements, as applicable, of the parent holding company, rather than of the subsidiary derivatives counterparty or subsidiary enhancement provider, as the case may be. Even if this approach were not to apply to all parent-guaranteed derivatives, at a minimum the staff should confirm that the foregoing treatment would apply where the subsidiary derivatives counterparty would be considered a "finance subsidiary" as described above. Moreover, where the counterparty is a bank, the same interpretation would apply with respect to summary financial

data or consolidated financial statements, as applicable, of the parent holding company, even if the parent holding company did not guarantee the bank's obligations under the derivative or the enhancement instrument. We also would ask you to confirm that, in the foregoing circumstances, consolidated holding company financial information could be incorporated by reference under Item 1100(c)(1)(iii) of Regulation AB in satisfaction of Item 1115 or Item 1114, even where the consolidated holding company financial information does not include separate subsidiary financial statements of the subsidiary counterparty.

ISDA, TBMA and the ASF appreciate this opportunity to present their concerns about Item 1115 and Item 1114, and we would be happy to discuss any questions that you or the Commission may have about the foregoing discussion, provide further information that you may find helpful in assessing Item 1115 and Item 1114 and/or play a role in connection with any further rule making or any statement by the Commission in regard to Item 1115 and Item 1114. Should you have any questions, please do not hesitate to contact Robert G. Pickel of ISDA at (212) 901-6000, Micah S. Green of TBMA at (212) 440-9206 or George P. Miller of the ASF at (646) 637-9216.

Yours sincerely,

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