INVESTMENT COMPANY INSTITUTE

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October 4, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment (File No. S7-08-10)

Dear Ms. Murphy:

The Investment Company Institute[1] has consistently supported the Securities and Exchange Commission's ("SEC" or "Commission") efforts to improve disclosure and reporting requirements for asset-backed securities ("ABS").[2] As investors in ABS, funds devote substantial time and resources to analyzing offerings of these securities. The Institute provided detailed comments on the Commission's April 2010 proposal (the "ABII Proposal") to substantially enhance the disclosure and reporting framework for ABS.[3] We appreciate the Commission re-proposing certain rules that were originally proposed as part of the ABII Proposal in light of changes made to the federal securities laws by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and comments the Commission received on the ABII Proposal (the "Re-Proposal").[4] We also appreciate

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $12.5 trillion and serve over 90 million shareholders.

[2] *See* Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated November 15, 2010 ("November 2010 Letter"); Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated August 2, 2010 ("August 2010 Letter").

[3] August 2010 Letter, *supra* note 2.

[4] *Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment*, Securities Act Release No. 9244 (July 26, 2011), *available at* http://www.sec.gov/rules/proposed/2011/33-9244.pdf.

that the Commission is continuing to consider the comments it received with respect to those rules proposed as part of the ABII Proposal that are not being re-proposed.

The Re-Proposal, among other things, would revise and strengthen the conditions for an ABS issuer to be eligible for shelf registration, and require an ABS issuer to file underlying transaction documents at the same time as a preliminary prospectus. We believe these proposed changes would provide important protections to investors in ABS and are an improvement from the ABII Proposal.

We continue to have concerns, however, about the potential treatment under the proposed rules of notes issued by asset-backed commercial paper ("ABCP") programs and securities issued pursuant to municipal tender option bond ("TOB") programs. As discussed in our August 2010 Letter and discussed further below, we believe that these products have unique characteristics that distinguish them from typical ABS and make it inappropriate to apply the Commission's proposed disclosure standards to them. Furthermore, we believe the existing disclosure framework for these products is sufficient. We therefore request that the Commission: (1) provide an exemption for ABCP from the proposed rules; and (2) confirm that TOBs are not within the scope of the proposed rules or provide an exemption for TOBs.

I. Shelf Eligibility Criteria

In recognition of changes made by the Dodd-Frank Act, as well as comments the Commission received on the ABII Proposal, the Re-Proposal includes shelf eligibility criteria that are revised from the ABII Proposal.[5] We support the revised shelf eligibility criteria and believe that requiring shelf offerings to meet these heightened requirements would strengthen protections for ABS investors.

A. Certification

The Re-Proposal would require that at the time of each takedown from a shelf registration statement, a certification must be provided by either the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor. The certification would address the disclosure in the prospectus, as well as whether the securitization is designed to generate cash flows sufficient to service expected payments on the ABS. We support the certification requirement, which has been revised from the ABII Proposal, and believe it should encompass both the structure of the transaction and the prospectus disclosure, as the Commission has proposed. We also support the more explicit wording of the certification, as compared to the ABII Proposal, as we believe it would provide important assurances to investors and the market.

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[5] Unlike the ABII Proposal, the Re-Proposal does not include conditions regarding risk retention and ongoing reporting under the Securities Exchange Act of 1934 ("Exchange Act") because, as a result of the Dodd-Frank Act, most registered ABS offerings will be obligated to satisfy such requirements. *See* Sections 941 and 942 of the Dodd-Frank Act.

B. Credit Risk Manager and Repurchase Request Dispute Resolution Provisions

The Re-Proposal also would require that the underlying transaction documents of each ABS offering must provide for appointment of a credit risk manager to review the underlying assets upon the occurrence of certain events and provide a report of the findings and conclusions of its review to the trustee. The transaction documents would provide that a review would be required, at a minimum, when credit enhancement requirements, as specified in the underlying transaction agreements, are not met, or at the direction of investors, as provided in the transaction agreement and disclosed in the prospectus. The Commission explains that this proposed condition would be in lieu of the proposed condition in the ABII Proposal that would have required a provision in the pooling and servicing agreement requiring the party obligated to repurchase assets for breach of representations and warranties to periodically furnish an opinion of an independent third party.[6] We support the revised condition in the Re-Proposal. We believe it would provide investors with a stronger basis to pursue remedies under the transaction agreement for violations of representations and warranties relating to pool assets, and create better incentives for obligated parties to consider and monitor the quality of the assets in the pool.

C. Investor Communications

The Re-Proposal includes a new proposed shelf eligibility condition relating to investor communications. This condition would require an underlying transaction agreement for a shelf offering to include a provision obligating the party responsible for making periodic filings on Form 10-D to include in the Form any request from an investor to communicate with other investors related to an investor's rights under the terms of the ABS.[7] We understand that the Commission proposed this condition in response to concerns raised by commenters regarding the inability of investors to locate other investors to enforce rights contained in transaction agreements and, in particular, those relating to the repurchase of underlying pool assets for breach of representations and warranties. We share these concerns and support this proposed condition. It can be very difficult for ABS investors to communicate with other ABS investors when attempting to enforce these rights. Providing for a specific means of investor communication is a critical component of improving investors' ability to pursue concerns relating to potentially non-conforming collateral or structural issues with respect to an ABS pool.

[6] The opinion would have addressed whether the obligated party acted consistently with the pooling and servicing agreement with respect to any securitized assets that were not repurchased following a demand for repurchase based on an alleged breach of representations or warranties.

[7] The Commission also is proposing to revise Regulation AB and Form 10-D to include disclosure requirements related to the investor communication shelf eligibility condition. These disclosure requirements would apply only if the transaction was a registered shelf offering.

II. Disclosure Requirements

A. Information to be Filed and Filing Deadlines

The Commission proposes to require ABS issuers to file copies of the underlying transaction documents, in substantially final form, at the same time as a preliminary prospectus is filed. We strongly support this proposed requirement, as we believe it would provide investors with critical information about an ABS transaction prior to making an investment decision. In order for this information to be useful, it is important that the exhibits be in substantially final form.

We also note that in the ABII Proposal, the Commission had proposed that ABS issuers be required to file a preliminary prospectus with the Commission for each shelf takedown at least five business days prior to the first sale in the offering. In the Re-Proposal, the Commission explains that, while commenters generally either supported or did not object to this approach, some commenters asked that the Commission shorten the five-day period. The Commission states that it has not reached a conclusion on this aspect of the proposal and it remains outstanding. In our August 2010 Letter, we expressed our support for the proposed five-day period, explaining that it would ensure that investors have the most accurate information at their disposal, not only prior to sales being effected, but also early enough in the offering process to enable them to make an informed investment decision. If the Commission considers a shorter period, we believe that an investor should be provided with no less than a three-day period to enable the investor to evaluate an ABS offering.

B. Private Offerings

Under the ABII Proposal, when the sale of a "structured finance product" to an investor is made in reliance on the safe harbors from registration provided by Rule 144, Rule 144A, or Rule 506 of Regulation D under the Securities Act of 1933 ("Securities Act") (together, the "Securities Act Safe Harbors"), the issuer would be required to provide to an investor, upon request, substantially the same information that the issuer would be required to provide to an investor in a public offering of the ABS.[8] Under the ABII Proposal, this information would include asset-level disclosures, along with other disclosures required by Regulation AB. In response to concerns expressed by commenters about whether sufficiently clear information requirements exist for certain types of ABS that are not typically offered under Regulation AB, the Commission requests comment in the Re-Proposal on whether it should only require asset-level disclosures where the structured finance product being sold in reliance

[8] Those aspects of the ABII Proposal and the Re-proposal relating to privately-issued ABS would apply to any "structured finance product," which would be defined more broadly than "asset-backed security" under Regulation AB.

on Rule 144A or Regulation D[9] is backed by assets of an asset class for which there are prescribed asset-level reporting requirements in Regulation AB.[10]

As we stated in our August 2010 Letter, we generally support specific disclosure requirements for private offerings of structured finance products made in reliance on the Securities Act Safe Harbors. Just as with public offerings, investors must have access to, and sufficient time to adequately consider, material information regarding ABS in the private market to make informed investment decisions. The increase in information about sponsors, servicers, originators, and the characteristics of the ABS that would result would allow for better analysis of the historical performance and financial viability of these securities. As institutional investors in ABS, our members recognize, however, that such disclosure may not be appropriate or necessary for all privately offered structured finance products. We believe that it would be overly narrow to limit asset-level disclosures, as the Commission suggests, to only those privately offered structured finance products that are backed by assets of an asset class for which there are prescribed asset-level reporting requirements in Regulation AB. We recommend that the Commission, instead, take an approach in which it evaluates other structured finance products on a product-by-product basis to determine whether their structure is sufficiently different from typical ABS and their existing disclosure adequate such that imposing the proposed disclosure rules would be unnecessary to achieve the Commission's regulatory goals.

Applying this analysis to ABCP and TOBs, which are sold in private placements and resold in reliance on the Securities Act Safe Harbors, results in the conclusion that they should not be within the scope of the structured finance disclosure regime. ABCP and TOBs have unique structural characteristics that distinguish them from typical ABS. Our members believe the existing disclosure regimes for these products generally have served them well, and that subjecting ABCP and TOBs to the disclosure standards that have been proposed for publicly-offered ABS would not further benefit investors. Instead, it could harm these important markets.

1. <u>Asset-Backed Commercial Paper Programs</u>

ABCP typically is sold to investors in Section 4(2) private offerings and almost all ABCP programs provide for resales of ABCP in reliance upon Rule 144A. Our members are experienced investors in the ABCP markets.[11] As discussed in detail below, ABCP has unique features that

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[9] We note that the Re-Proposal does not mention Rule 144 in connection with this request for comment. We assume that the Commission's request for comment would extend to structured finance products sold in reliance on Rule 144, however, given the Commission's similar treatment of such products in the ABII Proposal.

[10] As proposed, this would include: residential mortgage-backed securities, commercial mortgage-backed securities, automobile loans or leases, equipment loans or leases, student loans, floor plan financings, corporate debt, and resecuritizations.

[11] As of August 2011, taxable money market funds held $130 billion of ABCP outstanding, which represented approximately 5.6 percent of taxable money market funds' total assets as of that date. Source: iMoneynet.

distinguish it from typical ABS including, among other things, its short term, the continuous manner in which it is offered, the diversity and revolving nature of its assets, and its credit and liquidity facilities, which provide a source of repayment for investors. Because of these features, we believe that ABCP is not the type of product the Commission intended to capture within the scope of the proposal, and that the existing regulatory framework for ABCP more appropriately serves investors' needs. For these reasons, we recommend that the Commission exempt ABCP from the proposed rules.

a. Background

ABCP programs are short-term, senior-secured investment vehicles that issue instruments in the money markets. They are used by a wide variety of corporations – such as banks, finance companies, and broker-dealers – to obtain low-cost financing for a diverse range of financial receivables.

ABCP is offered continuously and carries repayment dates that usually range from overnight up to 270 days. ABCP programs are referred to as "asset-backed" because the bankruptcy remote, special-purpose vehicles that issue the ABCP own, or have security interests in, multiple pools of various types of financial receivables.

ABCP programs typically are supported by credit enhancement and committed liquidity facilities. The liquidity support for an ABCP program typically equals the face amount of ABCP outstanding, to protect investors in case of a market interruption or any timing differences with respect to repayment.[12] For ABCP programs referred to as "fully supported," the liquidity facilities can be drawn to fund all of the receivables held by the program, even if some of those receivables are deemed to be "defaulted." For "partially supported" ABCP programs, the liquidity facilities will fund only "performing" receivables, *i.e.*, those not deemed to be in default. As a means of offsetting this potential source of risk, partially supported programs have credit enhancement facilities at both the pool level[13] (supporting individual transactions, often in the form of overcollateralization) and at the program level.[14] Generally, investors analyze ABCP transactions primarily on the strength of the ABCP program sponsor and of these programs' credit and liquidity arrangements, and less on the receivables being financed.

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[12] In the event that maturing ABCP cannot be refunded in the money markets, the administrator of the program (which is often the financial institution sponsoring the program) will draw upon the liquidity facilities in an amount sufficient to redeem all maturing ABCP.

[13] In some cases, the amount of pool-level credit enhancement for a given transaction is set dynamically, in that it increases to offset deteriorating pool performance.

[14] Program-level credit enhancement is often in the form of a letter of credit or a cash collateral account, effectively providing a five to ten percent subordinated cushion for the ABCP.

ABCP disclosure is frequent and comprehensive. For example, an ABCP offering memorandum generally includes: (i) a description of the program documentation, specifically the administration agreement, the program-wide credit enhancement agreement, the liquidity support agreement(s) and the terms under which such liquidity will (and will not) fund; (ii) a general discussion of the investment guidelines which limit the types and credit quality of assets and asset originators that may be financed by such ABCP conduit; (iii) the circumstances under which poor asset performance or other risk events will result in the occurrence of "ABCP stop issuance events," which will promptly shift such asset performance risk to the sponsor financial institution (and/or others) through the liquidity and credit support facilities provided to the ABCP conduit; (iv) a description (including financial information, usually incorporated by reference) of the parties who administer the program and provide its credit and liquidity support; and (v) a description of the offering and resale restrictions applicable to such ABCP. In addition to the detailed offering memorandum, ABCP investors receive monthly reports regarding the performance of the program and its underlying assets. In fact, to acquire and maintain investors, sponsors of ABCP programs must continuously update the disclosure provided to investors because of the short-term nature of the products and the fact that the individual offerings contain diverse and revolving pools of assets.[15]

b. *Applying the Proposed Disclosure Requirements to ABCP is Inappropriate and Would Not be in the Public Interest*

The proposed rules emphasize asset-level disclosure but, in the case of ABCP, the underlying asset portfolio is only one component of the overall creditworthiness of the issuer. Investors also are analyzing liquidity, operational, and structural risk. Significantly, current ABCP disclosure is well designed to provide investors with the information they need in the timeframe they need to make informed investment decisions. Our members, as institutional investors, are experienced in using this disclosure to make investment decisions and would not find more detailed asset-level disclosure to enhance their decision-making process.

[15] The need to continuously update disclosure also pertains to the program-level legal documents that govern the terms and conditions of a particular program. Examples of such documents include management agreements, administration agreements, program-level liquidity asset purchase agreements, program-level liquidity loan agreements, swing line loan agreements, letters of credit, letter of credit reimbursement agreements, indentures, issuing and paying agency agreements, depositary agreements, and security agreements; template forms of receivable purchase agreements, template forms of transaction-level liquidity asset purchase agreements, and template forms of transaction-level liquidity loan agreements; issuer conduit organizational documents (*e.g.*, certificates of organization/formation, bylaws, limited liability company agreements, etc.); and the various legal opinions pertaining to all of the above. Given the critical nature of its liquidity and credit-enhancing facilities to an ABCP program, a review of the program-level legal documents is an important element of the credit review process.

Further, any benefits to investors from asset-level disclosure would be outweighed by the risk of shrinking the $314 billion ABCP market further.[16] Many sponsors of ABCP programs do not have the ability or willingness to comply with the enhanced disclosure requirements of the proposed rules and would likely seek alternative sources of funding, at potentially higher costs.[17] If ABCP programs were subject to the proposal, ABCP lending would slow significantly, with negative repercussions for ABCP sponsors, investors, and businesses seeking funding through this financing method.

In essence, ABCP programs have exposure to multiple pools of various types of financial receivables; fund those assets by issuing notes on a continuously offered basis; have the benefit of committed liquidity facilities equaling 100 percent of outstanding ABCP;[18] and provide extensive, continuous disclosure. Consequently, investors are much better served by reviewing existing legal documentation defining the contractual obligations of the counterparties providing liquidity and credit support facilities to a conduit, and assessing the creditworthiness of those counterparties, than they would by receiving loan-level detail on each of the many pools of financial receivables held by that conduit. While asset composition and performance can be important considerations in assessing the overall creditworthiness of an ABCP program (especially for partially supported programs), they are not the only, or even primary, factors. In light of the various support mechanisms inherent to ABCP programs, the current market standard for asset disclosure is adequate.

2. <u>Municipal Tender Option Bond Programs</u>

As is the case for ABCP, securities issued by TOB trusts are sold to investors in Section 4(2) private offerings and any resales typically are effected in reliance on Rule 144A. Although TOBs have certain features that are similar to those of ABS, market participants generally do not perceive TOBs as ABS. For the reasons discussed below, we believe TOBs do not have the features of ABS that would make it appropriate to apply the proposed disclosure rules to them. Our members, as institutional investors, have significant experience investing in TOBs.[19] They believe that the proposed disclosure requirements would not offer any additional benefit to investors or the TOB market. We therefore

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[16] Data as of September 21, 2011. Source: Federal Reserve Board of Governors, *available at* www.federalreserve.gov/releases/cp/outstanding.htm.

[17] Applying the proposed disclosure rules to ABCP would be unwarranted and operationally difficult because of the substantial variety of assets underlying a single offering and the frequency with which they change. It would be very difficult for program sponsors (and their commercial customers funding the financial receivables in the conduits) to collect the information mandated by the heightened disclosure requirements and to provide it to investors in a timely manner.

[18] In the case of partially supported programs, they have the benefit of program-level credit enhancement amounting to five to ten percent of outstanding ABCP.

[19] Industry participants estimate that TOBs represent approximately 20-25 percent of the assets of tax-exempt money market funds, and that such money market funds hold over 80 percent of the TOBs currently outstanding, although there is no firm data.

recommend that the Commission clarify in any adopting release that TOBs are not within the scope of the proposed disclosure requirements or provide an exemption for TOBs from the proposal.[20]

a. Background

A municipal TOB program is created by a sponsor bank that deposits one or more high-quality municipal bonds into a trust which issues two classes of tax-exempt securities: a short-term security (the "floater") that is supported by a liquidity facility and an inverse floating rate security (the "residual").[21] The floater is a variable-rate demand security that bears interest at a rate adjusted at specified intervals (daily, weekly, or other intervals up to one year) according to a specific index or through a remarketing process. The liquidity facility supports a "put" or demand feature, allowing the floater holder to tender the security and receive, with specified notice, face value plus accrued interest, typically either from remarketing proceeds or a draw on the liquidity facility.[22] Floater holders bear limited and well-defined insolvency and default risks associated with the underlying bonds, and rely upon their largely unfettered put right to manage these risks. Tax-exempt money market funds are the principal holders of the floaters. The residuals generally are held by the entity that selects the underlying municipal bonds that serve as collateral for the trust. Holders of residuals are typically long-term investors, such as the TOB program sponsor bank or an affiliate, tax-exempt bond funds, closed-end funds, or other institutional investors in municipal bonds. Residual holders receive all interest payments from the underlying bonds that are not needed to pay interest on the floaters and expenses of the trust.

TOBs have many features that distinguish them from typical ABS. For example, the underlying collateral in a TOB trust is limited to municipal bonds, which have very different characteristics than the privately negotiated loans and trade receivables that serve as collateral for many types of ABS. These municipal bonds are of high quality, are typically rated in the top two long-term rating categories

[20] In addition, as we have commented previously, we believe the Commission should take a holistic approach to municipal securities disclosure generally. *See* November 2010 Letter, *supra* note 2. As we discussed in that letter, we are concerned that a piecemeal approach to municipal securities disclosure may have the unintended effect of creating confusion for investors and issuers alike because different classes of municipal securities would be subject to different disclosure requirements. We acknowledge that the Commission has determined, in the context of Section 943 of the Dodd-Frank Act, to apply its disclosure rules to municipal securitizers. It has, however, delayed compliance for municipal securitizers by three years, in part, to determine whether changes to the rule may be appropriate based on information the Commission learns during that time. *See Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Securities Act Release No. 9175 (January 20, 2011), at 17-19.

[21] TOBs generally are structured with a single long-term municipal bond in the trust but they may be structured with a pool of long-term municipal bonds.

[22] The liquidity facility is subject to termination upon certain major credit events affecting the issuer of the underlying municipal bonds (such as bankruptcy and ratings falling to below investment grade). Under these circumstances, the TOB trust would be collapsed and the floater holders would be paid from the sale of the collateral, or would receive the collateral if such proceeds were not sufficient to pay the holders in full.

of nationally recognized statistical ratings organizations, and generally are publicly traded. In addition, a TOB trust typically holds securities of only one municipal issuer and information for that issuer is publicly available, resulting in greater transparency than in a typical ABS transaction. TOB trusts do not utilize tranching, and therefore have a simpler and more transparent structure than typical ABS. The TOB trust documentation extensively describes the program's structure and the obligations of each of the trust's participants (*i.e.*, liquidity provider, remarketing agent, trustee), as well as information regarding the underlying collateral in the trust. Each trust is individually rated with a long-term rating based on the credit quality of the collateral and a short-term rating based on that of the liquidity provider, unlike typical ABS which are rated on the basis of the program's over-collateralization and generalized characteristics of the entire pool of collateral.

b. Applying the Proposed Disclosure Requirements to TOBs is Inappropriate and Would Not be in the Public Interest

We do not believe that a primary purpose of the proposal, to provide asset-level disclosure regarding a pool underlying an ABS, would be accomplished by applying the proposed disclosure requirements to TOBs. Whether one or several municipal bonds underlie a TOB, our members believe that the existing level of disclosure is sufficient to provide them with the information they require to make investment decisions. The disclosure documents for a TOB include an offering memorandum, supporting documents related to the collateral (*i.e.*, official statement and secondary market disclosure for the related municipal bonds), the liquidity facility, and the credit enhancement, as well as legal opinions and rating letters from the rating agencies. Members do not believe that the proposed requirements offer any additional benefit to investors or the TOB market from a disclosure perspective.

Furthermore, TOBs provide an important source of demand for municipal bonds, which benefits municipalities with funding needs. Including TOBs within the scope of the proposal would likely have the unintended consequence of reducing TOB issuance because of the additional regulatory burdens.

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If you have any questions on our comment letter, please feel free to contact me directly at (202) 326-5815 or Sarah Bessin at (202) 326-5835.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel

cc: The Honorable Mary L. Schapiro
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
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