

March 27, 2023

Ms. Vanessa Countryman
Secretary
US Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Prohibition Against Conflicts of Interest in Certain Securitizations (File No. S7-01-23)

Dear Ms. Countryman:

The Investment Company Institute¹ appreciates the opportunity to comment on the Securities and Exchange Commission’s (SEC or “Commission”) re-proposal of a rule to prohibit conflicts of interest in certain securitization transactions (“Re-Proposed Rule”).² The rule would implement the prohibition under Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). Section 621, which added new Section 27B to the Securities Act of 1933 (“Securities Act”), prohibits material conflicts of interest in connection with certain securitizations. As investors in the asset-backed securities (ABS) markets, our members generally support the Re-Proposed Rule and believe it would serve to protect ABS investors against certain conflicts of interest which may be raised by the activities of securitization participants.

ICI provided detailed comments on the Commission’s 2011 Proposal.³ We appreciate the Commission addressing many of our concerns and recommendations in the Re-Proposed Rule. As such, we support the Commission:

¹ The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia, and other jurisdictions. Its members manage total assets of \$29.7 trillion in the United States, serving more than 100 million investors, and an additional \$8.1 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through [ICI Global](https://www.ici.org/global).

² Prohibition Against Conflicts of Interest in Certain Securitizations, Securities Act Release No. 33-11151 (January 25, 2023), 88 FR 9678 (Feb. 14, 2023) (“Proposing Release” or “Proposal”), *available at* <https://www.govinfo.gov/content/pkg/FR-2023-02-14/pdf/2023-02003.pdf>.

³ Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (Feb. 13, 2012) (“ICI 2012 Letter”), *available at* <https://www.sec.gov/comments/s7-38-11/s73811-27.pdf>; *see* Prohibition Against Conflicts of Interest in Certain Securitizations, 76 FR 60320 (Sept. 28, 2011) (“2011 Proposal”), *available at* <https://www.sec.gov/rules/proposed/2011/34-65355fr.pdf>.

- Defining in the rule text key terms regarding the persons subject to the rule, although we recommend providing further certainty that acts routinely taken by actual or potential long-only investors in ABS would not cause them to be deemed “sponsors” for purposes of the rule;
- Acknowledging that there is a common market understanding that fund⁴ securities are not considered ABS for purposes of the Securities Exchange Act of 1934 (“Exchange Act”);⁵ and
- Including in the rule text a definition of “conflicted transaction” that we believe would:
 - (i) clarify that the rule would not apply to investments in ABS by funds or advisers;⁶ and
 - (ii) provide certainty for market participants that the rule would not unduly restrict liquidity arrangements that are typical for asset-backed commercial paper (ABCP) facilities.

As discussed below, however, we continue to have concerns about the potential for any final rule to impose an unwarranted compliance burden on affiliates or subsidiaries of securitization participants that have no role in structuring or distributing an ABS. We therefore recommend that the Commission:

- Clarify that funds’ and advisers’ hedging activities through ABS indices would not be considered a “conflicted transaction” for purposes of the Re-Proposed Rule;
- Implement in any final rule an information barriers exception;
- Adopt the conditions that the Proposing Release suggests for an information barriers exception, subject to our recommended modifications; and
- Provide either a specific exception from any information barriers requirement under the Re-Proposed Rule for funds and advisers, or an exception from any such requirement for affiliates and subsidiaries that are subject to existing rules and regulations that provide for conflict management or for restricting information flow. As discussed in our letter, funds and advisers are already subject to extensive laws and regulations addressing conflicts of interest, including information barrier requirements.

We additionally recommend that the Commission provide an implementation period of at least 12 months from publication of any final rule in the Federal Register, which would provide those entities that would be deemed securitization participants with adequate time to implement the changes that the Commission proposes.

⁴ In this letter, we use the term “fund” to refer to an investment company registered under the Investment Company Act of 1940 (“Investment Company Act”).

⁵ As discussed below, we confirm that common market understanding is that funds do not issue ABS and their securities are not classified as ABS under the Exchange Act

⁶ In this letter, we use the term “adviser” to refer to an investment adviser registered under the Investment Advisers Act of 1940 (“Advisers Act”).

Furthermore, we are disappointed by the unnecessarily short comment period that the Commission is providing for the Re-Proposed Rule. We appreciate that the Commission is eager to complete this rulemaking, which was mandated by Section 621 of the Dodd-Frank Act.⁷ However, we strongly believe that, almost twelve years after the rulemaking was required to be completed, the Commission has the obligation to take the time necessary to complete it in a thoughtful manner that optimizes the benefits of protections for ABS investors against material conflict of interest, while avoiding inadvertent consequences to market participants engaged in legitimate business activities. We agree with Commissioner Peirce in this regard, who noted that “an extra month or two for comments would not add materially to the amount of time that has passed since Congress mandated [the Commission] to adopt this rule. For comparison, the comment period on the 2011 Proposal extended to almost five months after two extensions.”⁸

I. We Support the Commission Clarifying the Scope of the Re-Proposed Rule

Like the 2011 Proposal, the Re-Proposed Rule would apply to an underwriter, placement agent, initial purchaser, or sponsor of an ABS, or any affiliate or subsidiary of any such entity (collectively, “securitization participants”). The 2011 Proposal, however, did not define any of these terms and noted only that the term “underwriter” is defined in the Securities Act. We commend the Commission for expressly defining key terms in the Re-Proposed Rule consistent with ICI’s recommendations.⁹ Doing so would provide much needed certainty for persons to determine whether they are subject to the Re-Proposed Rule’s prohibition.

Notably, the Commission proposes a definition of “sponsor” that is intended to cover, among other things, any person “that directs or causes the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS *other than in connection with their acquisition of a long position in the ABS.*”¹⁰ We agree with the Commission that long-only ABS investors should not be considered “sponsors” under the Re-Proposed Rule. However, we urge the Commission to include this clarification in the rule text to provide certainty to market participants that acts routinely taken by actual or potential long investors in ABS (*e.g.*, providing input with respect to the structure of the ABS investment or the underlying pool of assets for the purpose of maximizing the expected value of its ABS investment) would not cause them to be deemed “sponsors” for purposes of the rule.

⁷ Securities Act Section 27B(b) mandated that “no later than 270 days after the date of enactment of this section, the Commission shall issue rules for the purpose of implementing [the prohibition in Section 27B(a)].”

⁸ Commissioner Hester Peirce, Statement on Proposed Rule: “Prohibition Against Conflicts of Interest in Certain Securitizations” (Jan. 25, 2023) (“Commissioner Peirce Statement”), *available at* <https://www.sec.gov/news/statement/peirce-statement-prohibition-against-conflicts-interest-012523>.

⁹ See ICI 2012 Letter at 2-3.

¹⁰ Proposing Release at 9686 (emphasis added). The Commission explains that “an ABS investor that is interested in acquiring a long position in an ABS would not be considered to direct the composition of assets merely because such investor expresses its preferences regarding the assets that would collateralize its ABS investment.” *Id.*

ICI's 2012 Letter also recommended that the Commission clarify that securities issued by funds would not be treated as ABS under the rule.¹¹ The Re-Proposed Rule expressly defines an ABS as having the same meaning as under the Exchange Act.¹² The Commission explains that there is a common market understanding of whether fund securities "are Exchange Act ABS and whether other rules that use the definition of Exchange Act ABS, such as Regulation RR, apply to them."¹³ We agree with the Commission. As we noted in our 2012 Letter, although some funds invest in debt securities or other fixed-income instruments, common market understanding is that funds do not issue ABS and that their securities are not classified as ABS under the Exchange Act.

II. We Support the Commission Defining "Conflicted Transaction" in the Re-Proposed Rule

Unlike the 2011 Proposal, the Re-Proposed Rule provides that a material conflict of interest results when a securitization participant engages in what the Commission defines as a "conflicted transaction," to make clear which types of transactions are subject to the rule. We strongly support defining this term in the rule text, as it effectively focuses on the intent of the rule to prohibit a securitization participant from entering into a transaction that is, in effect, a bet against the ABS that such securitization participant created and/or sold to investors.¹⁴ This defined term would provide clarity that ordinary course investment by funds and advisers in ABS, as well as liquidity arrangements that are typical for asset-backed commercial paper (ABCP), would not result in conflicted transactions.

We are concerned, however, that the proposed definition of "conflicted transaction" may inadvertently capture transactions that Section 27B is not intended to prohibit,¹⁵ specifically, routine hedging transactions by an affiliate or subsidiary of a securitization participant undertaken independently of, and not in connection with, a securitization. Our recommended revisions to the proposed definition, below, would help prevent this result.

A. ABS Investments and ABCP Liquidity Facilities Would Not Result in Conflicted Transactions

Under the Re-Proposed Rule, funds and advisers could be considered securitization participants if they are affiliated with a sponsor or other entity that has a role in structuring or distributing an

¹¹ ICI 2012 Letter at 3.

¹² The definition would also include synthetic ABS, as well as hybrid cash and synthetic ABS. *See* Proposed Rule 192(c).

¹³ Proposing Release at 9681, n. 32.

¹⁴ *See id.* at 9694.

¹⁵ *Id.* at 9697, Request for Comment 47.

ABS. These funds and advisers, however, would have no role in structuring or distributing an ABS. Rather, their interest is generally as investors in the ABS (or, in the case of advisers, investing in a fiduciary capacity on behalf of funds or other clients). Thus, the Re-Proposed Rule would not apply to actions taken by a fund or adviser in connection with investing in ABS. Such actions would not involve a “conflicted transaction,” as they would not represent a bet against the ABS and would be independent of, and not in connection with, the relevant securitization.

We additionally agree with the Commission that the definition of “conflicted transaction” provides certainty for market participants that the Re-Proposed Rule would not unduly restrict liquidity arrangements that are typical for asset-backed commercial paper (ABCP).¹⁶ Regardless of whether funds may be deemed securitization participants by virtue of being affiliates or subsidiaries of entities that structured or distributed an ABS, funds may invest in ABCP, which could be subject to the Re-Proposed Rule. As we have explained in prior letters, ABCP has unique characteristics that distinguish it from typical ABS, including liquidity facilities for the benefit of investors that often are provided by the sponsoring bank or one of its affiliates.¹⁷ This liquidity feature is of critical importance to investors.

Like the 2011 Proposal, the Re-Proposed Rule includes an exception implementing the statutory exception from the prohibition under Section 27B, for purchases and sales of ABS made pursuant to liquidity commitments by securitization participants.¹⁸ In our 2012 Letter, we requested that the Commission clarify that the liquidity commitment exception would encompass liquidity arrangements that are typical in the marketplace for ABCP, including those which provide liquidity through means other than just purchases and sales of ABS.¹⁹ While the Commission, in the Proposing Release, declined to take a more expansive view of the liquidity exception, it explains that, given that the definition of “conflicted transaction” focuses on transactions that are a bet against the relevant ABS, it would not cover activity such as a securitization participant’s extension of credit to support the ABS’s performance.²⁰ We appreciate this clarification, which addresses our concerns.

¹⁶ *Id.* at 9704.

¹⁷ *See, e.g.*, Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, et al. (Oct. 30, 2013), *available at* <https://www.sec.gov/comments/s7-14-11/s71411-414.pdf>; ICI 2012 Letter at 7-9; Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, et al. (July 29, 2011), *available at* <https://www.sec.gov/comments/s7-14-11/s71411-184.pdf>.

¹⁸ Proposed Rule 192(b)(2).

¹⁹ ICI 2012 Letter at 7-10.

²⁰ Proposing Release at 9704. The Commission recognizes that “commitments to provide liquidity may take a variety of forms in addition to purchases and sales of the ABS, such as commitments to promote full and timely interest payments to ABS investors or to provide financing to accommodate differences in the payment dates between the ABS and the underlying assets.” *Id.*

B. Ordinary Course Hedging on ABS Indices Should Not Result in a Conflicted Transaction

A fund or adviser may seek to hedge its portfolio exposure to a segment of the ABS market by taking a position on an ABS index (*e.g.*, the CMBX) designed to track the performance of a basket of ABSs.²¹ While an ABS index may reference a specific ABS that a securitization participant structured or distributed, a fund or adviser affiliated with that securitization participant would not take the position on the ABS index for the purpose of betting against the relevant ABS. Rather, the fund or adviser would take such a position for routine hedging purposes, and the transaction would be independent of, and not in connection with, the securitization.²² Such hedging through ABS indices is an important tool that certain funds and advisers may use to effectively manage their credit risk, protect their returns, and achieve their investment objectives on behalf of investors.

As proposed, the definition of “conflicted transaction” could impose unwarranted restrictions on such independent hedging activity by treating it as a conflicted transaction.²³ To avoid this result, we recommend that the Commission clarify in any adopting release that it would not treat as a “conflicted transaction” a fund or adviser (as a fiduciary on behalf of a fund or other client) taking a position on an ABS index that includes ABS for which an affiliate served or serves as a securitization participant. If this ordinary course hedging activity were treated as a conflicted transaction, funds and advisers would be required to engage in costly and burdensome pre-trade monitoring and compliance that they are not required to do today. Further, as discussed below, such monitoring would not be consistent with the existing information barriers that many multi-service financial firms have in place to comply with other legal requirements.

Importantly, treating this ordinary course hedging activity as a conflicted transaction is unnecessary to achieve the Commission’s goals and would, instead, cast the net more widely than Congress intended by inadvertently capturing positions on ABS indices taken by funds and advisers independently of, and not in connection with, a securitization.²⁴ Our recommended

²¹ The CMBX is an index that tracks the performance of a basket of 25 commercial mortgage-backed securities (CMBS). Currently, there are 13 separate CMBX indices. A fund may, for instance, take a position on a CMBX index by entering into a CMBX contract, which is just like any other credit default swap agreement, and allows the fund to purchase or sell protection with respect to certain negative credit events that may affect the obligations of the CMBSs referenced in the index.

²² As discussed further below, funds and advisers that are part of multi-service financial firms typically are already subject to information barriers that would prevent the sharing of this type of information.

²³ Specifically, such hedging through ABS indices could be captured under subsections (a)(3)(ii) and (iii)(A) of proposed Rule 192.

²⁴ We believe that the Commission correctly determined that, consistent with the Congressional intent behind Section 27B, “transactions that are wholly independent of, and not in connection to, the relevant securitization” should not be covered by the Re-Proposed Rule. *See* Proposing Release at 9696; 156 Cong. Rec. S3470 (daily ed.

approach would be consistent with the approach to ABS indices taken in Regulation RR, the risk retention rule.²⁵ Moreover, we note that the Investment Company Act comprehensively regulates conflicts of interest that may arise from transactions between funds and their affiliates, as does the Investment Advisers Act.²⁶ These provisions would further mitigate the types of conflicts of interest the Re-Proposed Rule is intended to address.

II. The Commission Should Provide an Information Barriers Exception

While the Re-Proposed Rule does not provide an information barriers exception for affiliates and subsidiaries of a securitization participant, the Proposing Release asks several questions regarding the use of information barriers, including whether the Commission should include an information barriers exception subject to certain conditions. We urge the Commission to include such an exception in the final rule. We generally support the Commission's suggested conditions for an information barriers exception, subject to our recommended modifications below. Further, in response to the Commission's questions, we believe that information barrier requirements in any final rule should not apply to advisers and funds that have no role in securitizations, as their business activities are separate from the securitization activities of their related entities.

Alternatively, we would support providing an exception for affiliates or subsidiaries already subject to laws and regulations addressing conflicts of interest—a requirement that funds and advisers would meet due to the existing information barriers and conflicts of interest provisions to which they already are subject.²⁷

May 10, 2010) (statement of Sen. Levin) (noting that the intent of Section 27B is to “prevent firms that assemble, underwrite, place or sponsor [ABS] from making proprietary bets against those same instruments”).

²⁵ See 12 CFR § 244.12(d)(2)(i).

²⁶ See, e.g., Section 17(a) of the Investment Company Act (prohibits an affiliated person, promoter, or principal underwriter of a fund, or an affiliated person of any such person, from engaging, as principal, in purchases and sales of securities or other property with, or borrowing money or other property from, the company); Section 17(d) of, and Rule 17d-1 under, the Investment Company Act (prohibit an affiliated person of, or principal underwriter for, a fund, or an affiliated person of any such person, from engaging in joint transactions with the fund except pursuant to an order of exemption issued by the Commission); Section 17(e) of, and Rule 17e-1 under, the Investment Company Act (prohibit an affiliated person of a fund, or an affiliated person of such person, acting as agent, from accepting compensation, other than regular salary or wages, for the purchase and sale of property to or for the fund except in the course of such person's business as an underwriter or broker; a broker may receive a “usual and customary broker's commission” if certain conditions are satisfied); and Section 10(f) of, and Rule 10f-3 under, the Investment Company Act (prohibit registered funds from knowingly purchasing or otherwise acquiring a security from an affiliated underwriter except pursuant to the conditions set forth in the rule); Section 204A of the Advisers Act (requires an adviser to establish and maintain written policies and procedures reasonably designed to prevent the misuse of material non-public information); Section 206(3) of, and Rule 206(3)-2 under, the Investment Advisers Act (prohibits principal transactions between advisers and their clients and permits agency cross-transactions subject to strict conditions).

²⁷ We note that, even if funds or advisers that are affiliates or subsidiaries of a securitization participant do not rely on any information barriers exception the SEC ultimately provides, their investments in ABS still would not be subject to the Re-Proposed Rule's prohibition because they would not be “conflicted transactions.” Likewise, as discussed above, funds' and advisers' ordinary course hedging activities through ABS indices should not be deemed

A. An Information Barriers Exception Would be Consistent with Existing Practices by Multi-Service Financial Firms

As the Proposing Release notes, the Commission has recognized the use of information barriers, in the form of reasonably designed policies and procedures, in other areas of the federal securities laws and rules to address or mitigate potential conflicts of interest or other restricted activities.²⁸ For instance, broker-dealers may use information barriers to prevent potential misuse of material non-public information to comply with Section 15(g) of the Exchange Act. Similarly, Regulation M under the Exchange Act includes an exception for affiliated purchasers if, among other requirements, the distribution participant, issuer, or selling security holder maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of Regulation M.

While underwriters, placement agents, initial purchasers, and sponsors may have direct roles in the structuring and distribution of ABS, affiliates and subsidiaries of such entities generally do not have such roles. In the case of multi-service financial firms, a securitization participant may have several affiliates or subsidiaries in multiple locations, including separately regulated legal entities such as broker-dealers, banks, insurance companies, advisers, and funds, each operated independently. The different business units and legal entities within multi-service financial firms are likely already subject to existing laws and regulations requiring the use of information barriers. These barriers are intended to impede the flow of information within a firm and make it very difficult for one business unit or legal entity to be aware of, let alone monitor or influence, the activities of other business units or entities.

We strongly support the Commission including an exception in the final rule for affiliates or subsidiaries of securitization participants that are not involved in the securitization process, subject to certain conditions intended to prevent the flow of information to and from the affiliate.²⁹ This approach would recognize that many multi-service financial firms currently utilize information barriers. Importantly, such an exception would prevent the enormous and unwarranted compliance burden that such affiliates and subsidiaries would face if any final rule does not reflect current practices and account for the separation between a securitization participant's activities and the independent activities of its affiliates and subsidiaries that are not involved in structuring or distributing of ABSs.

“conflicted transactions,” as they are conducted independently of, and not in connection with, a securitization. Nevertheless, including an exception for funds and advisers would provide much needed certainty for these entities and prevent any unwarranted compliance burden that a final rule would otherwise impose on them.

²⁸ See Proposing Release at 9690; 2011 Proposal at 60341.

²⁹ Proposing Release at 9692, Request for Comment 32.

In declining to propose an information barriers exemption, the Commission explains that it is “concerned about the potential to use an affiliate or subsidiary to evade the re-proposed rule’s prohibition.”³⁰ We believe that the stringent conditions the Commission suggests that securitization participants would have to meet to rely on an information barriers exception (if adopted as discussed below), coupled with the Re-Proposed Rule’s anti-circumvention provision,³¹ should allay any concerns the SEC may have about potential evasion of the rule.

B. Without an Information Barriers Exception, the Rule Will Result in Breaches of Existing Information Barriers

An information barriers exception for affiliates and subsidiaries of securitization participants is necessary because, to comply with the rule as proposed, an affiliate or subsidiary would likely need to breach any *existing* information barriers in order to be *aware* of the securitization participants’ activities and monitor for potential “conflicted transactions.” This would directly conflict with existing laws and regulations requiring that such information barriers be maintained and enforced. As Commissioner Peirce appropriately noted, “[a]ffiliates and subsidiaries will find it difficult to comply with the [rule’s] prohibition, particularly because they may not even be aware of—and, in some instances, may be legally prohibited from knowing about—the conduct that triggered it.”³² A rule that would require the breach of existing information barriers within financial services firms would appear to be inconsistent with the Commission’s objectives in the Re-Proposed Rule and would hamper compliance with other legal requirements.

We also note that, without an information barriers exception, the proposed timeframe for the prohibition, particularly its “commencement point,” if adopted as proposed, would make compliance with any final rule even more challenging for multi-service financial firms that currently rely on information barriers.³³ The Proposing Release states that this timeframe would begin once a person “has reached, or has taken substantial steps to reach, an agreement” to become a securitization participant.³⁴ It is unclear, within a multi-service financial firm that has implemented information barriers, how an affiliate or subsidiary of a person who “took substantial steps” to become a securitization participant would be aware that the person had done so. Indeed, as we describe above and as the Commission correctly identifies in its request for comment, existing information barriers within many multi-service financial firms may prevent

³⁰ *Id.* at 9690.

³¹ Proposed Rule 192(d). The Commission notes that this proposed rule “would address a securitization participant’s circumventing the re-proposed rule’s prohibition on material conflicts of interest by structuring one or more transactions to fall outside of the prohibition (including its permitted exceptions) while nonetheless engaging in a transaction that is economically equivalent to a type of transaction specified in the proposed definition of “conflicted transaction.” Proposing Release at 9699.

³² Commissioner Peirce Statement, *supra* note 8.

³³ *See* Proposing Release at 9692.

³⁴ *Id.*

the person seeking to become a securitization participant from informing its affiliates and subsidiaries that it had taken substantial steps to reach an agreement to do so.³⁵

C. We Support the Commission’s Suggested Conditions for an Information Barriers Exception, Subject to Certain Modifications

As part of its request for comment, the Commission suggests the following conditions for an information barriers exception for affiliates or subsidiaries of securitization participants:³⁶

- (1) the underwriter, placement agent, initial purchaser, or sponsor of the ABS:
 - (i) Establishes, implements, maintains, enforces, and documents written policies and procedures to prevent the flow of information to and from the affiliate or subsidiary that might result in a violation of the re-proposed rule;
 - (ii) Establishes, implements, maintains, enforces, and documents a written internal control structure governing the implementation of, and adherence to, the written policies and procedures;
 - (iii) Obtains an annual, independent assessment of the operation of such policies and procedures and internal control structure;
- (2) The affiliate or subsidiary has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the underwriter, placement agent, initial purchaser, or sponsor of the ABS, and was not involved in the creation or distribution of, or otherwise involved in providing services with respect to, the related ABS; and
- (3) A person may not rely on the exception if, in the case of any specific securitization, the person knows or reasonably should know that notwithstanding satisfying the conditions, a transaction would involve or result in a material conflict of interest.

We support these conditions, with two recommended modifications. The Commission’s suggested conditions appear largely to be based on the conditions to the exception under Regulation M for affiliated purchasers.³⁷ We understand that many entities that could be deemed securitization participants (*e.g.*, broker-dealers) already have policies and procedures in place to comply with the Regulation M exception. Likewise, many affiliates or subsidiaries (*e.g.*, funds and advisers) of those securitization participants may currently rely on the information barriers established under Regulation M to qualify for the affiliated purchaser exception. Aligning any conditions for an information barriers exception under the Re-Proposed Rule as closely as possible with the conditions under the Regulation M exception, where possible, would facilitate compliance for many regulated entities.

³⁵ *Id.* at 9693, Request for Comment 42.

³⁶ *See id.* at 9690-9692, Request for Comment 32.

³⁷ Rule 100 of Regulation M (definition of “affiliated purchaser”).

We therefore recommend that the Commission modify condition (1)(i) above to require that, similar to paragraph (3)(i)(A) under Rule 100 of Regulation M, any written policies and procedures be “reasonably designed” to prevent the flow of information to and from the affiliate or subsidiary. Requiring that policies and procedures be “reasonably designed” is standard under various provisions of the federal securities laws.³⁸ This language helps to ensure that policies and procedures are appropriate to achieve their intended purpose, tailored to the entity’s needs and goals, and proportionate to the risks and challenges that the entity faces.

Additionally, we recommend that, with regards to condition (1)(iii) above, the Commission confirm that an internal audit group may conduct the annual independent assessment, if such group is independent from the securitization participant. The Commission has taken this same approach with respect to the analogous condition under Regulation M,³⁹ and providing such flexibility to conduct the independent assessment would greatly facilitate compliance with the condition under the Re-Proposed Rule, if ultimately adopted.

D. We Support an Exception for Funds and Advisers from Any Information Barriers Requirements Under the Re-Proposed Rule

The Commission requests comment on whether there should be an exception from any specific information barriers requirements under the Re-Proposed Rule for affiliates and subsidiaries that: (i) engage in specific types of business that are unrelated to the creation and distribution of ABS,⁴⁰ or (ii) already are subject to existing rules and regulations that provide for conflict management or for restricting information flow.⁴¹ We recommend providing an exception specifically for funds and advisers, as their business activities are generally separate from the securitization activities of their related entities. Alternatively, we would support providing an exception for affiliates or subsidiaries already subject to laws and regulations addressing conflicts of interest, a requirement that funds and advisers would meet.

³⁸ See, e.g., Rule 100 of Regulation M (definition of “affiliated purchaser”); Section 204A (“Prevention of Misuse of Nonpublic Information”) of, and Rule 206(4)-7 (“Compliance procedures and practices”) under the Advisers Act; Rule 38a-1 under the Investment Company Act (“Compliance procedures and practices of certain investment companies”). See also Shortening the Securities Transaction Settlement Cycle, Release Nos. 34-96930; IA-6239 (Feb. 15, 2023) 88 FR 13872, 13900 (“T+1 Adopting Release”), available at <https://www.govinfo.gov/content/pkg/FR-2023-03-06/pdf/2023-03566.pdf> (amending the proposed policies and procedures requirement for central matching service providers to add “reasonably designed” to the rule text).

³⁹ Anti-manipulation Rules Concerning Securities Offerings, Release Nos. 33-7375; 34-38067 (Dec. 20, 1996), 62 FR 520, 523 (Jan. 3, 1997), available at <https://www.govinfo.gov/content/pkg/FR-1997-01-03/pdf/97-1.pdf> (stating that with regards to the independent assessment requirement under the exception in Regulation M, “an internal audit group may perform the review if such group is independent of the distribution participant, issuer, or selling security holder’s corporate financing, trading, and advisory departments.”).

⁴⁰ Proposing Release at 9692, Request for Comment 36.

⁴¹ *Id.* at 9692, Request for Comment 37.

As noted above, funds and advisers' businesses are generally unrelated to, and independent from the structuring or distribution of ABS. Importantly, advisers are fiduciaries and must act in the best interests of their clients, including the funds they manage.⁴² In order to satisfy their fiduciary duty, they must be able to purchase and sell securities in a manner that is in the best interest of their clients. This obligation may result in advisers to funds or other clients independently effecting transactions that take a view of an ABS or its reference portfolio that is directionally opposed to that taken by another part of the same firm. Furthermore, funds and advisers are subject to a variety of information barriers that mitigate conflicts of interest, including those conflicts that otherwise could be raised by the activities of separate units within a multi-service financial firm.

Indeed, funds and advisers are already subject to laws and regulations that provide for conflict management and restrict the flow of information in a way that we believe achieves the policy objectives of the Re-Proposed Rule. For instance, advisers are required by the Advisers Act to establish and maintain written policies and procedures reasonably designed to prevent the misuse of material non-public information,⁴³ which may include information barriers. As discussed above, funds and their affiliates also are subject to comprehensive regulation with respect to conflicts of interest, which further mitigate the types of conflicts the Re-Proposed Rule is designed to address.⁴⁴ An adviser is a fiduciary to its clients, including the funds it manages, which requires the adviser to act in the clients' best interest, and to eliminate or make full and fair disclosure of all conflicts of interest which might incline the adviser to render advice which is not disinterested.⁴⁵ Furthermore, Federal securities law requirements applicable to ABS issuers as well as those applicable to funds and advisers mandate clear disclosure of potential conflicts of interest.⁴⁶

⁴² An adviser's fiduciary duty requires it to act in its clients' best interest and to, among other things, eliminate or make full and fair disclosure of all conflicts of interest which might incline the adviser—consciously or unconsciously—to render advice which is not disinterested. *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248 (June 5, 2019), 84 FR 33669, 33675 (July 12, 2019) ("IA Fiduciary Duty Interpretation"), available at <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf>. Advisers Act Section 206(2) further prohibit an adviser from engaging in a transaction that operates as a fraud or deceit upon a client.

⁴³ Section 204A of the Advisers Act.

⁴⁴ *See supra* note 26 and accompanying text. *See also* Rule 38a-1 under the Investment Company Act ("Compliance procedures and practices of certain investment companies"); Compliance Programs of Investment Companies and Investment Advisers, Release Nos. IA-2204; IC-26299 (Dec. 17, 2003) 68 FR 74714 (Dec. 24, 2003), available at <https://www.govinfo.gov/content/pkg/FR-2003-12-24/pdf/03-31544.pdf> (stating that "fund advisers should incorporate their section 204A policies into the policies required by rule 38a-1" and that "[a] fund's compliance policies and procedures should also address other potential misuses of nonpublic information").

⁴⁵ *See* IA Fiduciary Duty Interpretation at 33671.

⁴⁶ *See, e.g.*, Item 1119 of Regulation AB (affiliations and certain relationships and related transactions); Items 7 (financial industry affiliations and private fund reporting) and 8 (participation or interest in client transactions) of Part 1A of Form ADV; Items 8 (financial intermediary compensation), 19 (investment advisory and other services),

Ultimately, providing either of the exceptions on which the Commission requests comment would appropriately recognize the separation between an underwriter, placement agent, initial purchaser, or sponsor of an ABS, on the one hand and, on the other hand, funds and advisers that are affiliates or subsidiaries, but are not involved in the securitization process. Furthermore, providing either of these exceptions would recognize the existing regulatory frameworks for funds and advisers, which address the types of conflicts of interest that the Re-Proposed Rule is intended to address, making it unnecessary to subject funds and advisers to a separate set of information barriers under the Re-Proposed Rule.

IV. The Commission Must Provide an Adequate Implementation Period

We recommend that the Commission provide an implementation period of at least 12 months from the date of publication of any final rule in the Federal Register, to give those entities that would be deemed securitization participants adequate time to implement the changes that the SEC proposes. In particular, if the Commission adopts the information barriers exception and its suggested conditions, underwriters, placement agents, initial purchasers, and sponsors of ABS will need adequate time to implement the necessary policies, procedures, and systems to monitor and ensure their compliance with the conditions to the exception. Likewise, if the Commission declines to adopt our recommendation regarding funds' and advisers' hedging activities through ABS indices, funds and advisers that engage in such hedging activities will need adequate time to, among other things, develop policies and procedures to engage in pre-trade monitoring and compliance, including potentially making changes to existing information barriers in order to know if an ABS index includes ABS for which an affiliate served as sponsor, underwriter, initial purchaser, or placement agent. As discussed above, this would be costly and burdensome, and inconsistent with existing information barriers that multi-service financial firms maintain today.

* * *

We hope that this information and recommendations are helpful to the Commission as it works to finalize the Proposal. If you have any questions, please contact Sarah Bessin at sarah.bessin@ici.org or Nicolas Valderrama at nvalderrama@ici.org.

Regards,

/s/ Sarah A. Bessin

and 21 (brokerage allocation and other practices) of Form N-1A. We note that the Final Volcker Rule explicitly permits a banking entity to address and mitigate material conflicts of interest through either timely and effective disclosure or information barriers. *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 FR 5536, 5662 (Jan. 31, 2014) (“2013 Final Volcker Rule”), available at <https://www.govinfo.gov/content/pkg/FR-2014-01-31/pdf/2013-31511.pdf>.

Ms. Vanessa Countryman

March 27, 2023

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Sarah A. Bessin

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The Honorable Hester M. Peirce
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