

MEMO# 25532

October 5, 2011

ICI Files Comment Letter on ABS Shelf Re-Proposal

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TO: SEC RULES MEMBERS No. 117-11
FIXED-INCOME ADVISORY COMMITTEE No. 72-11
MUNICIPAL SECURITIES ADVISORY COMMITTEE No. 50-11
CLOSED-END INVESTMENT COMPANY MEMBERS No. 72-11
SMALL FUNDS MEMBERS No. 62-11 RE: ICI FILES COMMENT LETTER ON ABS SHELF RE-PROPOSAL

On October 4, 2011, ICI filed a comment letter with the Securities and Exchange Commission (the "Commission") on the Commission's re-proposal (the "Re-Proposal") of certain rules that were initially proposed in April 2010 (the "ABII Proposal") related to the disclosure, reporting, and offering process for asset-backed securities ("ABS"). Our comment letter is attached, and is summarized below.

I. Shelf Eligibility Criteria

The Commission has proposed to revise the shelf eligibility criteria in recognition of changes made by the Dodd-Frank Act, as well as comments the Commission received on the ABII Proposal. [\[1\]](#) The comment letter supports the revised shelf eligibility criteria and states that requiring shelf offerings to meet these heightened requirements would strengthen protections for ABS investors. The proposed revised shelf eligibility criteria are:

- at the time of each takedown from a shelf registration statement, a certification would have to be provided by either the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor;
- the underlying transaction documents of each ABS offering would have to 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; and
- an underlying transaction agreement for a shelf offering would have to include a provision obligating the party responsible for making periodic filings with respect to the ABS to include in the filing (Form 10-D) any request from an investor to communicate with other investors related to an investor's rights under the terms of the ABS.

II. Disclosure Requirements

A. Information to be Filed and Filing Deadlines

The Re-Proposal would 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. The comment letter strongly supports this proposed requirement, as we believe it would provide investors with critical information about an ABS transaction prior to making an investment decision. The letter also reiterates ICI's support for the Commission's standard in the ABII Proposal 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.

B. Private Offerings

The letter expresses concern with the potential treatment under the Commission's proposed disclosure rules of notes issued by asset-backed commercial paper ("ABCP") programs and securities issued pursuant to municipal tender option bond ("TOB") programs. 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 under the Securities Act of 1933 (the "Securities Act Safe Harbors"), [\[2\]](#) 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. [\[3\]](#) 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 on the Securities Act Safe Harbors is backed by assets of an asset class for which there are prescribed asset-level reporting requirements in Regulation AB. [\[4\]](#)

The comment letter states that we generally support specific disclosure requirements for private offerings of structured finance products made in reliance on the Securities Act Safe Harbors, but acknowledges that such disclosure may not be appropriate or necessary for all privately offered structured finance products. The letter recommends that the Commission take an approach in which it evaluates structured finance products offered in reliance on the Securities Act Safe Harbors 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.

The letter states that 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. The letter requests 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. The letter explains 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. The comment letter further explains that we believe the existing disclosure framework for these products is sufficient, and that the proposed rules would not further benefit investors or the markets.

The comment letter explains that ABCP differs from typical ABS, for example, by 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. The letter further explains that ABCP disclosure is frequent and comprehensive. It states that the proposed rules emphasize asset-level disclosure but that, in the case of ABCP, investors would not find more detailed asset-level disclosure to enhance their decision-making process, because the underlying asset portfolio is only one component of the overall creditworthiness of the issuer.

The letter states that, although TOBs have certain features that are similar to those of ABS, market participants generally do not perceive TOBs as ABS. It explains that TOBs do not have the features of ABS that would make it appropriate to apply the proposed disclosure rules to them. It further explains that ICI members, as institutional investors, have significant experience investing in TOBs and believe that the proposed disclosure requirements would not offer any additional benefit to investors or the TOB market.

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[Attachment](#)

endnotes

[1] Unlike the ABII Proposal, the Re-Proposal does not include conditions regarding risk retention and ongoing reporting under the Securities Exchange Act of 1934 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.

[2] Rule 144, Rule 144A, and Rule 506 of Regulation D under the Securities Act of 1933.

[3] 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.

[4] 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.