



May 17, 2024

Rolaine Bancroft
Chief, Office of Structured Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Responses to Questions Raised During Our January Zoom Meeting Regarding
CREFC's October 12, 2023 Letter Relating to C&DI 111.01

Dear Ms. Bancroft:

We appreciate the time you and your colleagues spent on January 25, 2024 clarifying your questions with respect to our letter of October 12, 2023 (the "October Letter") regarding Compliance & Disclosure Interpretation 111.01, Form SF-3 Eligibility Requirements, Timely Transaction Documents (the "C&DI") published on August 30, 2023 by the Division of Corporation Finance (the "Division") of the Securities and Exchange Commission (the "SEC" or the "Commission").¹ We have set forth our responses to the Division's questions below, commencing with Section II, by first restating our understanding as to the Division's questions and following with our responses.

¹ As noted in the October Letter, the CRE Finance Council ("CREFC") comprises over 400 institutional members representing U.S. commercial and multifamily real estate investors, lenders, and service providers – a market with over \$5 trillion of commercial real estate ("CRE") debt outstanding. Our principal functions include setting market standards, facilitating the free and open flow of market information and educating at all levels. One of our core missions is to foster the efficient and sustainable operation of CRE securitizations. To this end, we have worked closely with policymakers to educate and inform legislative and regulatory actions, to help optimize market standards and regulations and to ensure that CRE debt liquidity remains available to this important component of the U.S. economy. For additional information, visit CREFC's website: www.crefc.org.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 275,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,000 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org

I. Background

The C&DI purports to address the meaning of “timely” in the context of the Eligibility Requirement in Section I.A.1 of Form SF-3, which states that, in order to use Form SF-3 for an offering of asset-backed securities (“ABS”), the depositor and each issuing entity “must have filed on a timely basis... all transaction agreements containing” certain specified provisions of the Form SF-3 Transaction Requirements. The C&DI refers to the requirement in Item 1100(f) of Regulation AB (“Reg AB”) that final agreements must be filed no later than the date the final prospectus is required to be filed under Rule 424 of the Securities Act of 1933, as amended (the “Securities Act”).

In the case of ABS, the C&DI notes that the Instruction to Paragraph (b) of Rule 424 (the “ABS 424(b) Instruction”) provides that the final prospectus must be filed no later than the second business day following “the date it was first used.” The C&DI then states that “[f]or purposes of [the ABS 424(b) Instruction] only, ‘first use’ of the final prospectus in [ABS] offerings would include its use at time of sale to satisfy an issuer’s obligations under Section 5(b) of the Securities Act to provide a Section 10(a) prospectus at or prior to the time of sale.” It states that, accordingly, “the required documents and agreements would be considered timely if filed no later than the second business day following first use of the final prospectus.”

The C&DI goes on to include the following example (the “C&DI Example”): “If the date of sale of a tranche of securities in an asset-backed securities offering under Rule 415(a)(vii) or (xii) is Tuesday, May 2, then the requirements of Rule 424(b)(2) or Rule 424(b)(5), and the conditions of Securities Act Rule 172, would be met if the registrant filed the final prospectus no later than Thursday, May 4.” Accordingly, the C&DI notes, “the required documents and agreements must also be filed no later than Thursday, May 4 to be deemed timely for purposes of Form SF-3.”

II. The Application of Section 11 of the Securities Act

Question Posed by the Division:

We would like the analysis, originally put forth in the October Letter, to treat more specifically liability for the issuer and the underwriters under Section 11, including how the provisions of Rule 430D and Rule 424 relate to the attachment of that liability under Section 11.

Response:

Section 11 of the Securities Act imposes liability on issuers, underwriters, and others for damages caused by untrue statements of material fact or omissions to state a material fact in a registration statement at the time it becomes effective. Pursuant to Rule 430D(f)(1) of the Securities Act, information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) of Rule 430D, and subsequently contained in a form of prospectus filed with the Commission pursuant to Rule 424(b)(2) or (b)(5), shall be deemed to be part of and included in the registration statement on the earlier of the date such subsequent form of prospectus is first used or the date and time of the first contract of sale of securities in the offering to which such subsequent form of prospectus relates.

Rule 430D(f)(2) specifies that the date on which a form of prospectus is deemed to be part of and included in the registration statement pursuant to Rule 430D(f)(1) shall be deemed, for purposes of liability under Section 11 of the issuer and any underwriter at such time only, to be a new effective date of the part of such registration statement relating to the securities to which such form of prospectus relates.

Hence, Section 11 liability for the issuer and underwriters attaches in a shelf-registered ABS offering no later than the first pricing date, even if the final prospectus is not available and has not been “used” or filed on that date.

Such effective date for purposes of Section 11 expressly applies to prospectuses filed with the Commission pursuant to Rule 424(b)(2) or (b)(5), reflecting that a different set of rules governs the actual filing of prospectuses. Rule 430D(f)(2) also notably uses the word “deemed,” such that the date on which a prospectus is “deemed” to be included in the registration statement is “deemed,” for purposes of liability under Section 11 to be a new effective date for such portion of the registration statement, which further distinguishes the concept of effective date from the date of actual use or filing of a prospectus.

Thus, the fact that the ABS 424(b) Instruction permits a final prospectus to be filed on a date subsequent to its effective date or the pricing date does not eliminate or diminish in any respect an investor’s ability to bring a Section 11 claim relating to information in that prospectus as of its effective date established pursuant to Rule 430D.

III. The Distinction Between Shelf Registered and Non-Shelf Registered Offerings and Historical CMBS Transaction Agreement Filing Practices

Question Posed by the Division:

What is the extent to which the filing of exhibits and final prospectuses in the shelf registered ABS context “mirrors” the filing of exhibits and final prospectuses in the non-shelf registered ABS context?

Response:

The Shelf and Non-Shelf Filing Timeframes are Different: Although the Reg AB II Adopting Release² states that “ABS shelf offerings were designed to mirror non-shelf offerings in terms of filing the exhibits and final prospectuses,”³ the requirements of the relevant governing regulations are quite different.

- In the non-shelf offering context, Form SF-1 requires that the exhibits must be filed by the time of effectiveness, whereas in the shelf offering context, Form SF-3 requires that those exhibits must be filed no later than the date on which the final prospectus must be filed. Filing these exhibits pursuant to Rule 430D(f)(1) will cause the information to be deemed

² See Asset-Backed Securities Disclosure and Registration, 79 Fed. Reg. 57184 *et seq.* (Sept. 24, 2014) [hereinafter “Reg AB II Adopting Release”].

³ Reg AB II Adopting Release at 57296.

to be included in the registration statement on the earlier of the date such final prospectus is first used or the date and time of the first contract of sale. Pursuant to Rule 430D(f)(2), that date will be deemed to create a new “effective date” for Section 11 purposes.

- The timeframes within which the final prospectus must be filed also differ, based upon the differences between: (1) in the case of a non-shelf offering, the requirements of Rule 430A and Rule 424(b)(1)/(b)(4); and (2) in the case of a shelf offering, the requirements of Rule 430D and the ABS Rule 424(b) Instruction.

Non-shelf offerings: In the context of non-shelf registered ABS offerings, the documents that must be filed as exhibits to the registration statement are specified in the Form SF-1, through reference to Item 601 of Regulation S-K; and the information that may be omitted from the prospectus at effectiveness is set forth in Rule 430A.⁴

- The final prospectus must be filed no later than the second business day following the earlier of the date of determination of the offering price or the date it is first used after effectiveness. Both Rule 424(b)(1) or (b)(4) (as applicable) provide this timeframe for when an issuer relying upon Rule 430A must file a final prospectus.⁵
- The exhibits to the Form SF-1 must be filed by the time of effectiveness.⁶

Shelf offerings: In a shelf registered ABS offering, Form SF-3 also specifies through reference to Item 601 of Regulation S-K the documents that must be filed as exhibits. However, Rule 430D sets forth the information that may be omitted from the non-final prospectus, which, as noted in Section II above, refers to the filing of omitted information pursuant to Rule 424(b)(2) or (b)(5) (rather than Rule 424(b)(1) or (b)(4)).

- As noted in the C&DI, the timeframe within which the final prospectus for a shelf-registered ABS offering must be filed is governed by the ABS Rule 424(b) Instruction, which supersedes the requirements of 424(b)(2) and (b)(5) by providing that the final prospectus must be filed no later than the second business day following “first use.” As discussed in the October Letter, the Commission intentionally eliminated, more than 30 years ago, the pricing date as the filing trigger for shelf-registered ABS final prospectuses, in recognition of the fact that structuring mortgage-related securities offerings and preparing the applicable prospectuses involves complexities not typical of non-ABS

⁴ See Reg AB II Adopting Release at fn. 928 (noting that, for offerings of ABS on Form SF-1, existing Rule 430A would apply).

⁵ Rule 430A further provides that, unless a final prospectus is filed within fifteen business days after the registration statement is declared effective, a post-effective amendment must be filed containing the omitted information. This provision encourages a Form SF-1 registrant to price quickly upon effectiveness, rather than allowing the 15-day period to elapse.

⁶ See Reg AB II Adopting Release, *supra* n. 2, at 57296. This is consistent with the approach followed with respect to offerings on Form S-1. See Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, 76 Fed. Reg. 47948, at fn. 118 (Aug. 5, 2011) [hereinafter, “Reg AB II Re-Proposal”]; Asset-Backed Securities, 75 Fed. Reg. 23328, at 23388 (May 3, 2010) [hereinafter, “Reg AB II Proposal”].

offerings.⁷

- Because the ABS Rule 424(b) Instruction links the filing of the final prospectus in a shelf registered ABS offering to the date of “first use,” rather than to the pricing date, and because Rule 172 has eliminated the need to include a final prospectus with each confirmation of sale,⁸ “first use” of an ABS final prospectus in an Form SF-3 offering is not defined by reference to a specific statutory or regulatory date, other than the statutory prohibition under Section 5(b)(2) of the Securities Act against delivering the ABS unless accompanied or preceded by a final prospectus.

As originally adopted, Reg AB did not explicitly specify the timeframe in which final transaction agreements must be filed as exhibits. The 2014 amendments to Reg AB, however, amended Item 1100(f) to “make explicit” that those agreements must be filed no later than the date the final prospectus is required to be filed under Rule 424.⁹

As discussed below, market practice in a shelf offering nonetheless has been to deliver CMBS prospectuses two business days prior to the closing date and to file that prospectus and the final transaction agreements on the closing date.¹⁰ Given the applicable statutory and regulatory framework, those transaction agreements thus are filed within the timeframe prescribed by Item 1100(f) and are filed on a “timely basis” for purposes of the Form SF-3 registration requirement.

Question Posed by the Division:

How is the historical CMBS transaction agreement filing practice consistent with the concerns expressed by the Commission during the 2010 and 2011 process of proposing revisions to Reg AB and with the revisions the Commission adopted in 2014 as part of that process?

Response:

The filing practice followed by CMBS issuers complies with Item 1100(f), which is consistent with the revisions to Reg AB adopted by the Commission in 2014.

⁷ As discussed in the October Letter and in Section IV below, this position was initially taken in no-action letters issued to Skadden Arps and Brown & Wood, but was subsequently codified by the Commission in the ABS Rule 424(b) Instruction. Most recently, the Commission referenced the ABS Rule 424(b) Instruction in the Reg Adopting Release (at footnote 881).

⁸ As the Division is aware, Rule 172 was adopted in 2005 as part of Securities Offering Reform and specifies that written confirmations of sale are exempt from the provisions of Section 5(b)(1) of the Securities Act if, among other things, the issuer “will make a good faith and reasonable effort to file a [final prospectus] within the time required under Rule 424... .”

⁹ See Reg AB II Adopting Release, *supra* n. 2 at 57295; Reg AB II Re-Proposal, *supra* n. 7 at 47964; Reg AB II Proposals, *supra* n. 6 at 23388.

¹⁰ The date two business days prior to the closing date therefore would be the date on which the final prospectus is “first used” for purposes of the ABS Rule 424(b) Instruction. Please see, in this regard, the discussion of “first used” in the October Letter.

We recognize that the Commission conveyed its concern during the Reg AB amendment process that “some ABS issuers have delayed filing ... material agreements with the Commission until several days or even weeks after the offering of securities off a shelf registration statement.”¹¹

- **Reg AB II Proposal:** The Commission accordingly proposed in 2010 that Item 1100(f) of Reg AB be amended to “explicitly state” that final transaction agreements in a Form SF-3 offering must be filed no later than the date on which the final prospectus is required to be filed.¹² However, it sought comment as to whether it would be appropriate to “instead require filing at the time of filing the 424(h)” preliminary prospectus.¹³
- **Reg AB II Re-Proposal:** In the Reg AB II Re-Proposal, the Commission formally proposed to require that the transaction agreements, in substantially final form, be filed by the date a preliminary prospectus must be filed under Rule 424(h); *i.e.*, no later than three business days before the first sale in the offering.¹⁴ That requirement would have been in addition to amending Item 1100(f) to “make explicit” that “final agreements” must be filed no later than the date on which a final prospectus is required to be filed.

The Commission received mixed comments regarding the Reg AB II Re-Proposal to include a Rule 424(h) filing requirement for transaction agreements, with certain investors supporting the proposal and certain issuers expressing their concerns.

The issuer concerns included that the need to file “substantially final” transaction agreements in the Rule 424(h) timeframe would: (1) provide no material benefit to investors because the preliminary prospectus already contains all material information; (2) likely result in additional costs to issuers and consumers; (3) restrict the parties’ ability to tailor a transaction to meet investor requests; (4) lead to errors and inconsistencies between the preliminary prospectus and the final prospectus; (5) require the same documents to be filed three times; (6) be impossible in the case of certain transaction agreements (such as swaps that are negotiated after pricing) or certain data points (such as the technical REMIC provisions); and (7) delay issuers’ access to the market, thereby exposing both issuers and investors to potentially adverse market movements.¹⁵

Reg AB II Adopting Release: After considering the comments it had received, the Commission adopted only its 2010 proposal; *i.e.*, to amend Item 1100(f) to require that transaction agreements be filed no later than the date on which the final prospectus is required to be filed.¹⁶ It **did not adopt** an additional filing requirement linked to Rule 424(h).

The Commission indicated that this change would “clarify existing exhibit filing requirements by making [the filing date] explicit” and expressed the view that “this revision should address the

¹¹ See Reg AB II Adopting Release, *supra* n. 2 at 57295; see also Reg AB II Re-Proposal, *supra* n. 7 at 47964; Reg AB II Proposals, *supra* n. 6 at 23388.

¹² See Reg AB II Proposals, *supra* n. 6 at 23388.

¹³ *Id.*

¹⁴ See Reg AB II Re-Proposal, *supra* n. 6 at 47948.

¹⁵ See Reg AB II Adopting Release, *supra* n. 2 at 57295.

¹⁶ *Id.* at 57296.

problem that [the Commission] noted ... about some issuers delaying their filing of the transaction agreements with the Commission until several days and, in some cases, even weeks after a shelf offering of the securities.”¹⁷

The Commission stated that the Reg AB II Re-Proposal to require that transaction agreements be filed in substantially final form by the date on which a preliminary prospectus is required to be filed under Rule 424(h) “remains outstanding and unchanged.”¹⁸ The Commission indicated that it would continue to “consider the balance between investors’ interest in having access to the transaction documents earlier and the costs and difficulties with requiring issuers to provide transaction documents in substantially final form by the time of the prospectus.”¹⁹

In other words, although the Commission expressed concern about the timeframe within which ABS final transaction agreements were being filed in shelf registered offerings, the approach the Commission chose to follow in the Reg AB II Adopting Release was to amend Item 1100(f) to require that transaction agreements be filed no later than the date on which the final prospectus is required to be filed and to refrain from adopting an additional filing requirement linked to Rule 424(h).

Consequently, as discussed above, because the filing practice followed by CMBS issuers complies with Item 1100(f), that practice is consistent with the revisions made by the Commission in 2014. Respectfully, to require an earlier filing of transaction agreements by linking such filing to the pricing date, rather than the date specified in Item 1100(f), would, by legal necessity, need to be accomplished through further action by the Commission.

IV. The Continuing Relevance of the Facts Underlying the Skadden Arps and Brown & Wood No-Action Letters

Question Posed by the Division:

Which of the facts established in the Skadden Arps and Brown & Wood 1987 no-action letters relating to Rule 424(b) continue to be relevant to CMBS and other mortgage-backed securities (“MBS”) offerings and does the ability to file electronically on EDGAR alleviate some of the concerns addressed therein?

Response:

A. Overview of the No-Action Letters and the Commission’s Response

The Skadden Arps no-action letter was issued less than three months following the adoption of the Rule 424(b)(2) and (b)(5) prospectus filing provisions;²⁰ and the Brown & Wood no-action letter

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ See Certain Mortgage Related Securities Under Rule 415(a)(1)(vii) and Prospectus Filing Requirements of Rule 424(b)(2) and (5), 1987 SEC No-Act. LEXIS 2376 (Aug. 18, 1987).

was issued approximately a month after the Skadden letter.²¹ The position taken in those letters was reiterated in a Telephone Interpretation issued under Rule 415²² and was codified by the ABS 424(b) Instruction.²³

Skadden's request letter had asserted, among other things, that structuring and pricing an MBS transaction is "a complex process, with variables changing constantly as marketplace changes affect investor desires, prices for available collateral and assumed prepayment rates." The request letter also noted that "often it is virtually impossible" to determine the exact structure of an MBS transaction prior to preliminary pricing; and that, even after preliminary pricing has occurred, some of the information necessary to prepare a final prospectus is not immediately available. The letter asserted, in that regard, that much of the statistical data contained in the prospectus is prepared after preliminary pricing and must be "checked and rechecked" by accountants.

The letter noted that a substantial number of MBS final prospectuses, therefore, would not be in a form satisfactory for filing by the second business day after the preliminary pricing had occurred (as Rule 424(b)(2) would have required) and that "the interests of investors clearly are better served by a careful and unhurried review of the structure and related disclosure." It noted that the need to comply with the Rule 424(b)(2) filing requirement could result in "drafts containing incomplete or potentially incorrect information, which is neither in the interests of our clients or the investing public." It therefore requested assurance that filing a final MBS prospectus no later than the second business day following the date on which the prospectus is **first used** be deemed to comply with Rule 424(b)(2), noting that "this approach would eliminate the unnecessary additional time pressure being placed on preparing" final prospectuses and "ultimately be in the best interests of issuers, underwriters and the investing public."

The Brown & Wood no-action request emphasized similar concerns, noting that MBS offerings are "complex transactions that may require more than a week after the date of pricing to prepare a prospectus and prospectus supplement in final form." It noted that the complexity stems from: (1) the structure of the securities; (2) the type of collateral used; and/or (3) the need for statistical data to be verified by accountants.

The Division's no-action responses to both letters provide that Rule 424(b)(2) and (b)(5) would be deemed to be satisfied in the MBS context so long as the final prospectus was filed no later than two business days following the date it is first used. Those responses noted "particularly the process, as described in [the request letters], of determining the exact structure of mortgage related securities offered on a delayed basis and preparing the prospectus."

Neither the Skadden Arps nor Brown & Wood no-action request letters appear to have focused on the practical difficulty of making Rule 424(b) filings within two business days of pricing (as opposed to the current ability to file via EDGAR). Rather, the key difference between the facts emphasized in those letters and the current situation is that the 2005 adoption of Rule 172

²¹ See Mortgage-Related Securities Under 415(a)(1)(vii) & Securities Act of 1933 Rule 424(b)(2), 424(b)(5), 1987 SEC No-Act. LEXIS 2448 (Sept. 16, 1987).

²² See Manual of Publicly Available Telephone Interpretations, Section D Rule 415, Interpretation 39.

²³ See Simplification of Registration Procedures for Primary Securities Offerings, Securities Act Rel. No. 33-6944 at fn. 15 (Oct. 22, 1992).

eliminated the need to deliver a final prospectus along with a confirmation of sale. However, the Commission was certainly aware of that change when it amended Item 1100(f) of Regulation AB in 2014.

B. Continuing Relevance of No-Action Letter Facts

As discussed in the October Letter and reiterated below, the complexities discussed in the no-action letters are present to a particularly significant, and often greater, degree in current CMBS transactions.

As noted in the October Letter, pricing a CMBS transaction and finalizing the transaction structure remains a complex process; and the complexity and volume of documentation accompanying a CMBS transaction is far greater than in other asset classes, making it burdensome to complete all documentation in two business days. CMBS transactions can include up to 12 loan sellers, multiple split loans with related (up to 10) co-lender agreements, multiple servicing agreements, and a collateral pool that is evolving up to the time of printing. Risk retention structures vary in CMBS depending on pricing sensitivities and are often not finalized until shortly prior to printing.

The pricing of principal and interest (“P&I”) classes affects the availability of cashflow for certain interest-only (“IO”) classes. Therefore, the P&I classes must be priced before the related IO classes can be priced. It is not always possible to efficiently price all classes on the same business day (P&I classes generally cannot be priced until late morning to accommodate West Coast accounts). Typically, IO classes are priced one or two business days following the pricing of the P&I classes. Neither the final prospectus nor the final documentation can be finalized until the IO classes have priced; and the related statistical data for all classes must then be prepared and checked by accountants and lawyers.²⁴ In short, documentation cannot be completed until the entire deal has priced (both P&I and IO classes).

Additionally, due to the sheer volume of required documents, the “EDGARization” process further reduces the available filing time. We also note that certain days may be considered business days for purposes of the rule, but are religious, cultural, or other observed holidays whereby certain members of deal parties may not be available. Depending on the timing of these days, it may not be possible to complete, EDGARize, and file the documents within two business days.

Perhaps most importantly, the additional legal, accounting, and business costs required to rush pricing and filing will make the process more expensive, ultimately affecting the pricing of CMBS loans for borrowers at a time of rising interest rates and inflationary costs. In addition, having to schedule deal execution on a date that allows for additional time to process and review the many documents described above (*e.g.*, immediately preceding a weekend) could result in less-than-optimal pricing economics. Attempting to comply with a compressed filing timeframe inevitably will result in the same heightened potential for errors that the Skadden no-action request identified.

²⁴ Among many checks that are performed, pass-through rates payable on most classes of securities need to be individually checked and analyzed in light of the interest rates and prepayment restrictions on every single loan in order to determine whether interest rate caps need to be placed in order to comply with rules applicable to “real estate mortgage investment conduits,” which are tax structures used in virtually every SEC-registered CMBS transaction.

V. Date of Final Prospectus

Question Posed by the Division:

Why are the final prospectuses in CMBS offerings typically dated as of the first pricing date and does that dating convention comply with the requirements of Rule 423?

Response:

As the Division is aware, Rule 423 provides, in pertinent part, that: “Except for a prospectus used after the effective date of the registration statement and before the determination of the offering price as permitted by Rule 430A(C)...each prospectus used after the effective date of the registration statement shall be dated approximately as of such effective date...” Given that both Rule 430D and Rule 430B (which was applicable to shelf-registered ABS offerings prior to the adoption of Rule 430D) provide that the date of the first sale creates a new “effective date” for purposes of Section 11 liability, it has been CMBS market practice to date the final prospectus as of that date. We accordingly believe that practice is consistent with Rule 423.

VI. Process for Dealing with Material Changes Occurring Between the Date of the Preliminary Prospectus and the Final Prospectus

Questions Posed by the Division:

How often does information (other than pricing information) change between the preliminary prospectus and the final prospectus? What types of non-pricing information are subject to change? How is such changed information communicated to investors?

Response:

It is not uncommon for a few non-material items of collateral information to change between any given preliminary prospectus and final prospectus. The changes are a natural byproduct of the extensive disclosure regarding the underlying mortgaged properties and the related borrowers that are included in CMBS prospectuses. Those changes may include updates on zoning matters, litigation involving borrower sponsors, expected occupancy dates for new tenants etc.

However, sometimes a material item of information may change after the preliminary prospectus is delivered to investors. In almost all these cases, the transaction has not yet priced, and so the updated information would be provided to investors in the form of a supplement to the preliminary prospectus. In the exceedingly rare cases where a material item of information changes after the transaction has priced, then typically reformation notices are distributed to investors offering them the chance to either reject or affirm their contracts of sale.

VII. CMBS Transaction Timeline

Question Posed by the Division:

Can you walk us through a typical CMBS transaction timeline? What documents are reviewed by which parties and when?

Response:

A sample transaction calendar is attached as Annex A hereto.

Specifically, drafts of operative transaction agreements and offering documents are typically circulated among a working group of transaction parties for review and comment as early in the life cycle of the transaction as is practicable. Meanwhile, the depositor, underwriters, and sponsors diligence the mortgage loans and provide and/or review disclosure. Often, the final mortgage loans are closed, the mortgage pool is finalized, and the certificate structure is determined within the same week that the offering documents are finalized.

Because the mortgage loans are secured by properties of various types, the failure of certain loans to close in time to be included in the mortgage pool affects what other loans can be included in the mortgage pool. Accordingly, aggregated data regarding the mortgage pool is not available until late in the process. Due to the focus on collateral-level disclosure and certificate structure at this stage, the parties effectively negotiate and finalize the material provisions of the operative documents by commenting on and revising the relevant prospectus disclosure, with the correspondingly revised operative documents to follow.

All parties sign off on the material provisions of the operative transaction agreements and on the substance of the preliminary prospectus. The preliminary prospectus is then finalized and compiled with all exhibits by a financial printer, which is commonly referred to as “printing.” The as-printed versions of the term sheet and preliminary prospectus are provided to the members of the underwriting syndicate following printing, which typically occurs on a non-business day. The transaction is announced on the next business day.

Once there are sufficient orders for the offered securities, the securities are usually priced on three separate days, with the P&I classes being priced first, followed by the interest-only classes and then the non-economic REMIC residual class. Once pricing has been completed, the operative transaction agreements are revised to incorporate pricing-dependent information such as document dates, times of sale, class sizes, and interest rates. The final prospectus is prepared to include the pricing-dependent information, which in addition to class sizes and interest rates also includes price/yield tables.

The operative documents and final prospectus are circulated to the working group for comments and ultimately for final sign-off. The final prospectus is then finalized and compiled with all exhibits by the financial printer; and the as-printed version is provided to members of the underwriting syndicate for delivery to investors. Due to the prevalence of “split loans” in CMBS transactions as compared to other asset classes, the operative documents include multiple servicing agreements and multiple (often more than 10) co-lender agreements to be negotiated and filed. Given the increase in the number of loan sellers (as many as 12) participating in a single CMBS transaction, there are usually between 4 and 12 mortgage loan purchase agreements, together with related exhibits, to be filed. Converting the numerous material agreements into an EDGAR-compatible format for filing under Form 8-K is often quite time-consuming.

Accountants, B-piece buyers and their counsel, underwriters and their counsel, service providers and their counsel, and rating agencies review various materials such as loan documents, third-party

reports, exceptions to loan-level representations, transaction agreements, offering documents and legal opinions at various stages of the transaction as described in Annex A hereto.

VIII. Request for Revision or Clarification of the C&DI

We were pleased to learn during our call that, notwithstanding the C&DI Example, the Division understands that times (including the pricing date and date of first use) can vary from ABS transaction to ABS transaction and that the C&DI was not intended by the Division to imply that all of the points in time are the same in every ABS offering. Based on that clarification from the Division, it appears that one should interpret the C&DI Example as purely an illustration of a possible ABS transaction scenario, rather than a statement that the Division views Section 5(b) of the Securities Act as requiring that a final prospectus be provided at or prior to the time of sale in an ABS transaction and, therefore, filed no later than two business days after the first time of sale. However, given that the C&DI as currently written could be subject to varying interpretations, we believe it is important for the Division to clarify this point.

We respectfully submit that, unless such clarification is made, there will continue to be confusion regarding the Division's interpretation of Section 5(b) and as to when final prospectuses are deemed to be filed "on a timely basis." Such confusion could lead to inconsistent practices among ABS issuers and varying investor expectations. As noted in the October Letter, as well as in Section III above, interpreting the time of sale as the date of "first use," even if a final prospectus is not available and has not been used at that point, impairs the ability of CMBS issuers to efficiently price their transactions, leads to multiple unnecessary filings of the same transaction documents and jeopardizes CMBS issuers' ability to assure the accuracy and completeness of the final prospectuses and transaction agreements. This interpretation of the C&DI also creates the erroneous inference that the document filing practices that CMBS issuers and their outside law firms have followed for many years have been inconsistent with applicable legal requirements.²⁵

Based on the foregoing, **we request that the Division revise or clarify all or select aspects of the C&DI**, as the Division deems appropriate, most significantly by elucidating that, notwithstanding the particular fact pattern and the C&DI Example, given that Section 5(b)(2) requires only that a final prospectus be delivered on or before the settlement date for a security (subject to Rule 172(b)), there may be other examples of timeframes for delivery and filing of a final prospectus and filing of transaction documents in ABS transactions, provided that such timeframes comply with Item 1100(f) of Regulation AB, Rule 424(b)(2) or Rule 424(b)(5), and the conditions of Rule 172.

IX. Conclusion

²⁵ The October Letter articulates our view that a final prospectus is not required to be delivered, and should not be deemed to be "first used," at or prior to the time of the first sale in an ABS transaction and that any suggestion to the contrary would be inconsistent with the language of Section 5(b)(2) of the Securities Act and with the ABS Instruction to Rule 424(b). We are aware that you received a similar letter from the Federal Regulation of Securities Committee and the Committee on Securitization & Structured Finance of the American Bar Association (the "ABA Letter"). As emphasized in both the ABA Letter and our October Letter, Section 5(b)(2) requires only that a final prospectus be delivered on or before the securities settlement date (a requirement as to which Rule 172 now affords an "access equals delivery" approach).

As both the responses set forth herein and the October Letter make clear, the transaction agreement filing practices that have been used in the CMBS context are consistent with the current regulatory framework applicable to shelf-registered ABS and are driven by the complexity of structuring those transactions and finalizing the transaction documents.

Again, we wish to thank you again for the opportunity to speak with you and your staff to better understand your questions and concerns and we sincerely hope that the foregoing has been helpful in addressing them. Please do not hesitate to reach out to Sairah Burki (sburki@crefc.org) with any additional questions.

Sincerely,

Commercial Real Estate Finance Council

Mortgage Bankers Association

Annex A

Sample Securitization Calendar

Sample Securitization Timeline

XXX Commercial Mortgage Trust 2024-X

Securitization Calendar

January/February 2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
28	29	30 Open 17g-5 Site and Intralinks Dataroom Begin Making Information Available to NRSROs and Potential B-Piece Buyers	31	1	2	3
4	5	6	7	8	9 Engage Accountant, Trustee, Certificate Administrator and Operating Advisor	10
11	12	13	14	15	16	17
18	19 President's Day	20	21	22	23 Engage Rating Agencies and Special Servicer Select B-Piece Buyer	24
25	26	27 Engage Master Servicer	28	29 Distribute Initial Draft Preliminary Prospectus		

XXX Commercial Mortgage Trust 2024-X

Securitization Calendar

March 2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6 Begin Distribution of Draft Co-Lender Agreements as Split Loans Close	7 Distribute Initial Draft Mortgage Loan Purchase Agreements Initial Rep Exceptions Due	8	9
10	11 Distribute Initial Draft PSA	12	13	14	15	16
17	18	19 Begin Distribution of Draft Top 15 Loan Write-ups for Term Sheet	20	21 Begin Distribution of Footnotes to Annex A-1 of the Prospectus	22	23
24	25	26	27 Final Loan Closing(s) Finalize Pool of Mortgage Loans, including Size of Split Loans Distribute Initial Draft Term Sheet	28 Accountant Completes Diligence of Loan and Property Information Furnish Form ABS 15-G	29 Finalize Certificate Structure	30 Loan Sellers Complete Diligence and Disclosure Finalize Rep Exceptions and Material Servicing Terms
31 Finalize and Print Term Sheet and Preliminary Prospectus						

XXX Commercial Mortgage Trust 2024-X

Securitization Calendar

April 2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1 Deliver and File Term Sheet and Preliminary Prospectus Marketing	2 Marketing	3 Marketing Begin EDGAR Process of Material Agreements	4 Marketing	5 Price P&I Classes	6
7	8 Price Interest-Only Classes Finalize Final Prospectus and Material Agreements	9 Price REMIC Residual Class Print and File Final Prospectus and Material Agreements	10 Begin Review of Closing Deliverables of Transaction Parties	11	12	13
14	15	16	17 Finalize Closing Deliverables of Transaction Parties	18 Close Transaction	19	20
21	22	23	24	25	26	27
28	29	30				

Securitization Timeline

Date	Event
1/30	Open 17g-5 Site and Dataroom; Begin Making Information Available to NRSROs and Potential B-Piece Buyers
2/9	Engage Accountant, Trustee, Certificate Administrator and Operating Advisor
2/23	Engage Rating Agencies and Special Servicer; Select B-Piece Buyer
2/27	Engage Master Servicer
2/29	Distribute Initial Draft Preliminary Prospectus
3/6	Begin Distribution of Draft Co-Lender Agreements as Split Loans Close
3/7	Distribute Initial Draft MLPAs; Initial Rep Exceptions Due
3/11	Distribute Initial Draft PSA
3/19	Begin Distribution of Draft Top 15 Loan Write-ups for Term Sheet
3/21	Begin Distribution of Footnotes to Annex A-1 of the Prospectus
3/27	Final Loan Closing(s); Finalize Pool of Mortgage Loans, including Sizes of Split Loans
3/27	Distribute Initial Draft Term Sheet
2/9 - 3/28	Accountant Diligence of Loan and Property Information
3/28	Furnish Form ABS-15G
3/29	Finalize Certificate Structure
1/30 - 3/30	Loan Sellers Diligence Loans as They Close and Draft Disclosure and Rep Exceptions
3/11 - 3/30	Negotiate Material Servicing Terms
3/31	Finalize and Print Term Sheet and Preliminary Prospectus
4/1	Deliver and File Term Sheet and Preliminary Prospectus to Investors
4/1 - 4/4	Marketing
4/3	Begin EDGAR Process of Material Documents
4/5	Price P&I Classes
4/8	Price Interest-Only Classes; Finalize Final Prospectus
4/9	Price REMIC Residual Class; Print and File Final Prospectus and Material Agreements*
4/10 - 4/17	Finalize and EDGARize PSA, Co-Lenders, MLPAs as Pricing and Other Information is Collected; Collect and EDGARize other Servicing Agreements as They are Finalized
4/10 - 4/17	Review and Finalize Closing Deliverables of Transaction Parties
4/18	Close Transaction