INVESTMENT COMPANY INSTITUTE

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August 2, 2010

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

Re: Asset-Backed Securities (File No. S7-08-10)

Dear Ms. Murphy:

The Investment Company Institute[1] supports the Commission's efforts to improve disclosure and reporting requirements for asset-backed securities ("ABS"). As purchasers of ABS, funds devote substantial time and resources to analyzing offerings of these securities. The Commission's proposal requiring more detailed and current information about the pooled assets and additional time to make investment decisions should better protect investors in the securitization market by allowing them to more accurately assess the risk of ABS at the time of initial purchase and on an ongoing basis.[2] In addition, improvements to the disclosure regime for publicly offered ABS should enhance the quality and integrity of the financial markets generally.

We do, however, have concerns that the proposal would have unintended consequences for money market participants, as discussed below. We therefore recommend that the Commission clarify that securities issued pursuant to municipal tender option bond ("TOB") programs are not within the scope of structured finance products subject to the proposal or, alternatively, provide an exemption for municipal TOBs from the proposal. We also recommend that the Commission provide an exemption from the proposal for asset-backed commercial paper ("ABCP") programs.

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $11.18 trillion and serve almost 90 million shareholders.

[2] *See* SEC Release Nos. 33-9117; 34-61858 (April 7, 2010), 75 FR 23327 (May 3, 2010) ("Release"), available at http://www.sec.gov/rules/proposed/2010/33-9117.pdf.

I. Disclosure Enhancements

The increasing complexity and innovation in the ABS market over the last few years has not been accompanied by necessary updates to the securitization regulatory regime. As observed by Chairman Schapiro, there are gaps in the ABS regulatory framework, some of which stem from the fact that the general disclosure regime under the Securities Act of 1933 was designed for issuers in actively managed businesses; ABS generally are less liquid securities and are based on underlying pooled assets.[3] The adoption of Regulation AB in 2004[4] substantiates the fact that the unique character, complexity, and diversity of ABS call for specifically tailored disclosures to ensure that investors have the information necessary to evaluate the credit quality of the assets underlying an ABS transaction at inception and over the life of the transaction.[5] Much has happened in the securitization market since 2004 and we commend the Commission for recognizing the need to update and expand the disclosure regime for ABS within Regulation AB and, more broadly, within the scope of the Securities Act to ensure that investors have a comprehensive and accurate picture of all of the components of an ABS. We also commend the Commission for its recognition that the value of disclosure information is significantly enhanced by its timely availability and/or delivery, both at the time of the initial offer and throughout the existence of the security.

A. Disclosure Items

The proposal would make numerous enhancements to the disclosure regime for ABS, greatly expanding the amount of information made available to investors regarding loan-level disclosure and pool assets as a whole. Significantly, it would require ABS issuers to provide specific, granular data regarding the characteristics for each loan in the asset pool, related obligors, and collateral, as well as information on the performance of pool assets both at the time of securitization and on an ongoing basis.[6] Such information is critical to an investor's ability to analyze the performance, risks, and potential returns of an ABS offering, and it results in improved investor protection by facilitating a

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[3] *See* "The Road to Investor Confidence," speech by Mary Schapiro, Chairman, Securities and Exchange Commission, at SIFMA Annual Conference, October 27, 2009.

[4] *See* SEC Release Nos. 33-8518; 34-50905 (December 22, 2004), 70 FR 1506 (January 7, 2005).

[5] Chairman Schapiro has suggested that, in addition to the disclosure requirements of the Securities Act, the distinct character of ABS would justify the creation of a new act directed solely at securitizations, much like the Investment Company Act of 1940 is specifically directed at funds. *See supra* note 3.

[6] We believe the proposed requirement for a unique identifying number for each loan would be a useful tool to permit investors to track performance at the individual level. We also support clarification of the disclosure requirements regarding the extent to which assets contain "layered" risk (*i.e.*, the extent to which the loans have multiple non-traditional features that tend to increase the riskiness of the loans) and requiring a description of how the static pool assets differ from the assets underlying the offered securities.

better understanding of the securities in question. Further, the requirement to provide these new disclosures may bring greater market discipline to the ABS market because investors will have the tools to thoroughly analyze and compare offerings before choosing whether to invest.[7]

Inadequate disclosure and transparency about certain securities products, including information about their specific risks, their underlying assets, and assumptions underlying their credit ratings contributed to many of the problems relating to events in the credit markets over the last few years. For these reasons, we believe that the Commission's effort to significantly enhance the disclosure regime for ABS is both warranted and necessary. In so doing, it is essential that the regulatory framework balance the required disclosure to ensure that it is meaningful to investors without overwhelming them with less relevant information.[8] This is particularly true for complex products such as ABS.

The proposal includes numerous provisions to standardize certain ABS disclosure, such as static pool disclosure, and would require that loan-level information be provided in a standardized, tagged-data format using eXtensible Markup Language. We support the proposed standardization of the data elements and the format of the data. We believe that standardization provides an important starting point for investors to perform their due diligence when evaluating an offering. Standardization lets them effectively and efficiently sort through information, determining which data is important to their particular investment decision. Further, it allows for easier comparison between products, providing investors with a valuable tool to analyze ABS offered by the same, or different, issuers or sponsors. We encourage the Commission to require standardization of ABS disclosure wherever possible.

B. Timing of Disclosure

Under the proposal, investors would receive information on a more timely basis, allowing them additional time to study the offerings of ABS. An issuer would be required to file a preliminary prospectus with the Commission for each offering at least five business days prior to the first sale in that ABS.[9] In addition, material changes to the preliminary prospectus would require a new filing with the

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[7] Investment in ABS has been limited primarily to institutional and other sophisticated investors. Incomplete, unreliable, or dated disclosure will hinder an investor's ability to assess the risk and value of an ABS regardless of the type of investor. On the other hand, the provision of quality disclosure improves an investor's ability to judge the true risk of an ABS and, for an institutional investor, enhances its ability to perform its fiduciary duty.

[8] Recognizing the need to balance the interests of both issuers and investors, the Commission should ensure that its disclosure requirements produce useful information for investors. For example, we question the utility of requiring grouped account data for credit card pools. As the Commission notes, the requirement to provide this data could result in 14,256 grouped account data lines. We believe this would be an overwhelming volume of data that would not be particularly useful to investors and would be unnecessarily burdensome for issuers.

[9] We also support the provision in the proposal that would subject ABS securities to the requirement that broker-dealers deliver a preliminary prospectus to a purchaser 48 hours prior to delivery of a sales confirmation. We opposed the

Commission, which would trigger a new five-day waiting period. Currently there is no required minimum period by which disclosure must be provided.

We support the proposed five-day period and believe that it will ensure that investors have the most accurate information at their disposal, not only prior to sales being effected, but also early enough in the offering process to enable them to make an informed investment decision. If the Commission considers a shorter period, we believe that an investor should be provided with no less than a three-day period to enable the investor to evaluate an ABS offering. In addition, we believe that the Commission should provide some clarity regarding material changes to the preliminary prospectus that would trigger a new five-day waiting period. Increasing the size of an offering, for example, should not warrant a new five-day period.

The proposal also would require the filing of all transaction documents related to an offering, through the Commission's EDGAR system, by the date the final prospectus is required to be filed. We believe this requirement would ensure timely filing of these materials; presently, there is no consistency as to when these filings are made, resulting in instances of delayed filings by some issuers.

C. Shelf-Offerings

The proposal would modify the criteria for shelf-offering eligibility by eliminating the ability of an ABS issuer to suspend reporting with the Commission after one year, so long as a non-affiliate holds securities issued in the offering.[10] Instead, an issuer electing to pursue a shelf-offering would have to agree to file Exchange Act reports with the Commission on an ongoing basis. We strongly support this provision, and have advocated for such a change in the past.[11] The recent credit crisis provides the clearest example of how quickly the credit quality of ABS can change and, thus, the added importance to investors of having continuous, fulsome disclosure to be able to analyze the implications of these

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Commission's creation of an exemption for broker-dealers, in connection with ABS eligible for shelf offerings, from this delivery requirement in 2004. *See* Letter from Amy B.R. Lancellotta, Senior Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated July 12, 2004 ("2004 ICI Letter"). ABS offered in shelf offerings should not be accorded special treatment; each ABS offering involves a new and unique security. Moreover, the current exemption for broker-dealers has resulted in the perverse situation where investors in public ABS offerings receive less disclosure than those in private offerings because investors in private offerings have standing to negotiate for better and more timely information.

[10] We note that the Dodd-Frank Wall Street Reform and Consumer Protection Act amends Section 15(d) of the Securities Exchange Act of 1934 to exclude ABS issuers from the provisions that allow issuers to discontinue periodic reporting if the related securities are held of record by fewer than 300 persons. As with the Commission's proposal, we support the requirement for issuers to provide ongoing disclosure regarding ABS.

[11] *See* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated March 26, 2009 ("2009 ICI Letter") and 2004 ICI Letter.

changes to their investments. We also believe that a regular reporting obligation should contribute to the reliability and accuracy of information provided to investors.

D. Private Offerings

The proposal would require specific disclosures to investors for private offerings of structured finance products conducted in reliance upon the safe harbors in Rule 144, Rule 144A, and Regulation D under the Securities Act.[12] Just as with public offerings, investors must have access to, and sufficient time to adequately consider, material information regarding ABS in the private market to make informed investment decisions. The increase in information about sponsors, servicers, originators, and the characteristics of the ABS will allow for better analysis of the historical performance and financial viability of these securities. We therefore support the proposed changes to the disclosure regime for privately placed ABS. We recognize that the proposal is likely to alter the mix of issuers making private placements but we do not believe the changes will compromise the function of the private placement market as a means of efficient capital formation.[13] To the contrary, we believe the proposed changes will improve the quality of privately offered ABS.

II. Scope of the Proposal

The proposal would expand the scope of securities subject to Regulation AB by modifying the definition of an "asset-backed security." We support the proposed changes. We also generally support the proposed application of the expanded private placement disclosure provisions to "structured finance products," a universe of securities that is broader than the definition of asset-backed security. Currently, the disclosure for structured finance products falling outside the definition of asset-backed security is not specifically addressed in Commission rules or regulations (other than to the extent that they are subject to general rules about antifraud and material information) because the vast majority of those securities are sold in transactions that are exempt from registration. The proposal would address this considerable gap in disclosure by greatly enhancing the amount of information provided to investors and the amount of time investors have to consider such information before making an investment decision.

We are concerned, however, that the proposal would have unintended consequences for money market participants if it were applied to municipal TOBs and ABCP. With respect to municipal TOBs, we do not believe that the Commission intended to capture these products within the

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[12] The proposal also would require issuers to file a notice with the Commission regarding the initial placement of securities eligible for resale under Rule 144A. The notice would include the major participants in the securitization, the securities offered, the basic structure, and the assets in the pool.

[13] We recognize that some ABS issuers may have difficulty accessing the market once investors have greater insights into the details and mechanics of a particular offering. We believe this is precisely how the market is supposed to work.

definitions of "asset-backed securities" or "structured finance products." Further, we believe that the current disclosure requirements for these securities are sufficient. To eliminate any ambiguity, we recommend that the Commission either clarify in any adopting release that municipal TOBs are not within the scope of the proposal or provide an exemption for municipal TOBs from the proposal.

Similarly, we are concerned about the inclusion of ABCP within the scope of the structured finance regulatory regime. Due to the unique structure of, and existing disclosure framework for, ABCP, we do not believe the proposal would improve transparency surrounding these products. To the contrary, we believe the additional burdens on ABCP issuers and programs would harm this critical market. We therefore recommend that the Commission provide an exemption for ABCP from the proposal.

A. TOBs

The proposed definition of structured finance product would include a fixed-income or other security collateralized by any pool of self-liquidating financial assets, such as loans, leases, mortgages, and secured or unsecured receivables that entitles its holder to receive payments that depend on the cash flow from the assets, including a security that at the time of the offering is commonly known as an asset-backed security or a structured finance product. We believe that this catchall provision may have the unintended effect of encompassing securities, such as municipal TOBs, that structurally differ from the proposed definition of structured finance product but may be labeled as such because of industry parlance or Commission rules designed for other purposes.

Municipal TOBs are variable-rate demand securities which bear interest at a floating, or variable, rate adjusted at specified intervals (daily, weekly, or other intervals up to one year) according to a specific index or through a remarketing process. A municipal TOB is created through the deposit of one or more municipal bonds into a trust which issues short-term, tax-exempt securities that are supported by a liquidity facility, and in some circumstances a credit enhancement facility.[14] The liquidity facility supports a "put" or demand feature for the TOB, allowing the bondholder to tender the security back to the remarketing agent and receive face value plus accrued interest with specified notice. Municipal TOB liquidity providers and credit enhancers are not related to the underlying bond issuers.

The definition of "asset-backed security" under Rule 2a-7 of the Investment Company Act encompasses municipal TOBs, potentially pulling them within the proposal's catchall phrase "commonly known as an asset-backed security." We do not believe that the definition of asset-backed security in Rule 2a-7 was drafted with Regulation AB in mind or vice versa. We also do not believe that the structure of municipal TOBs satisfies the requirement in the proposed definition of structured

[14] TOBs generally are structured with a single long-term municipal bond in the trust but they may be structured with a pool of long-term municipal bonds. Some municipal TOBs contain taxable municipal bonds known as Build America Bonds.

finance product that the security be "collateralized by any pool of self-liquidating financial assets" because the collateral held in a municipal TOB trust (*i.e.*, the municipal bond or bonds) is not self-liquidating during the life of the trust. The vast majority of TOB trusts "terminate" or mature on or before a date that is equivalent to 80 percent of the expected life of the collateral. At that time, the holders of the trust certificates are repaid from the proceeds of the sale of the bonds into the market or from a draw on the trust's credit enhancement facility or liquidity facility.

A subset of trusts in the municipal TOB market are structured to terminate coincident with the maturity of the underlying collateral, but the vast majority of those trusts are also "collapsed" prior to the stated termination date; the holders of the trust are paid either from the proceeds of the sale of the underlying collateral into the market or from a draw on the trust's credit enhancement facility or liquidity facility. If the Commission is concerned about this small segment of the municipal TOB market, we recommend that it exempt from the scope of the proposal municipal TOBs in which the trust "terminates" or matures at a date that is equivalent to 80 percent of the expected life of the collateral. This narrower scope is likely to parallel action expected from the Internal Revenue Service in amending Revenue Procedure 2003-84 which outlines the criteria for a TOB to qualify as a partnership for tax purposes (and thus allow the flow through of the tax-exempt income from the municipal bonds held in the trust). The expected amendment is anticipated to require that a trust must terminate at 80 percent of the useful life of the collateral in order to qualify for partnership status.[15]

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

Moreover, including TOBs within the scope of the proposal may have the unintended consequence of reducing municipal TOB issuance because of the additional regulatory burdens. TOBs provide an important source of demand for municipal bonds, which benefits municipalities with funding needs. In addition, TOBs meet the money market investors' need for short-term, tax-exempt, floating-rate securities. In recent years, market forces have taken a dramatic toll on the available supply of municipal TOBs. Applying the proposed disclosure obligations for structured finance products to TOBs likely would further reduce the size of the municipal TOBs market, significantly impacting tax-

[15] *See* IRS Notice 2008-80.

exempt money market funds, which are the principal holders of municipal TOBs.[16] This, in turn, would significantly limit demand for municipal bonds which could increase financing costs for municipalities.

B. ABCP

In the Release, the Commission states that ABCP is often sold in reliance on the private placement statutory exemption and the Section 4(2) exemption for private resales rather than the safe harbors provided under Rule 506 of Regulation D or Rule 144A. ABCP typically is sold to investors in Section 4(2) private offerings but, importantly, almost all ABCP programs provide for resales of ABCP in reliance upon Rule 144A.[17] Consequently, most ABCP offerings would be subject to the proposal, including the heightened disclosure requirements for private placements. Given that ABCP investors do not depend upon the cash flows generated by the financial receivables to which the ABCP program has exposure for repayment, we believe that ABCP is not the type of ABS the Commission intended to capture within the scope of the proposal and that the existing regulatory framework for ABCP more appropriately serves investors' needs.

ABCP is a short-term, senior-secured investment vehicle issued in the money markets by a wide variety of corporations – such as banks, finance companies, and broker-dealers – to obtain low-cost financing. It is continuously offered and carries repayment dates that usually range from overnight up to 270 days. ABCP programs are referred to as "asset-backed" because the bankruptcy remote, special-purpose vehicles that issue the ABCP (known as "conduits") own, or have security interest in, multiple pools of various types of financial receivables. The programs are supported by cash inflows from the underlying assets, although maturing ABCP generally is repaid from the net proceeds of a new issuance rather than the cash flows underlying maturing ABCP.

ABCP is supported by liquidity features, including letters of credit and fully-committed liquidity facilities. The liquidity support for an ABCP conduit typically is designed to equal the face amount of ABCP outstanding to protect investors in case of a market interruption or any timing differences with respect to repayment.[18] For ABCP programs referred to as "fully supported," the liquidity facilities can be drawn to fund all of the receivables held by the conduit, even if some of those

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[16] Industry participants estimate that TOBs account for approximately 15 to 20 percent of the assets of tax-exempt money market funds, and that such money market funds hold approximately 75 percent of the TOBs currently outstanding. *See* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated September 8, 2009.

[17] *See Short-Term Fixed Income, J. P. Morgan U.S. Fixed Income Markets Weekly* (July 16, 2010).

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

receivable have been deemed to be "defaulted." For "partially supported" ABCP programs, the liquidity facilities will fund only "performing" receivables, *i.e.*, those which have not been deemed to be in default. As a means of offsetting this potential source of risk, partially supported programs have credit enhancement facilities at both the pool level[19] (supporting individual transactions, often in the form of overcollateralization) and at the program level.[20]

ABCP disclosure is frequent and comprehensive. For example, an ABCP offering memorandum generally includes: (i) a description of the program documentation, specifically the administration agreement, the program-wide credit enhancement agreement, the liquidity support agreement(s) and the terms under which such liquidity will (and will not) fund; (ii) a general discussion of the investment guidelines which limit the types and credit quality of assets and asset originators that may be financed by such ABCP conduit; (iii) the circumstances under which poor asset performance or other risk events will result in the occurrence of "ABCP stop issuance events," which will promptly shift such asset performance risk to the sponsor financial institution (and/or others) through the liquidity and credit support facilities provided to the ABCP conduit; (iv) a description (including financial information, usually incorporated by reference) of the parties who administer the program and provide its credit and liquidity support; and (v) a description of the offering and resale restrictions applicable to such ABCP. In addition to the detailed offering memorandum, ABCP investors receive monthly reports regarding the performance of the program and its underlying assets. In fact, to acquire and maintain investors, sponsors of ABCP programs must continuously update the disclosure provided to investors because of the short-term nature of the products and the fact that the individual offerings contain diverse and revolving pools of assets.[21]

The proposal emphasizes asset-level disclosure but, in the case of ABCP, the underlying asset portfolio is only one component of the overall creditworthiness of the issuer. Investors also are analyzing liquidity, operational, and structural risk. Significantly, current ABCP disclosure is well

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

[20] Program-level credit enhancement is often in the form of a letter of credit or a cash collateral account, effectively providing a 5 to 10 percent subordinated cushion for the ABCP.

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

designed to provide investors with the information they need in the timeframe they need to make informed investment decisions. To the contrary, applying the proposal to ABCP would be unwarranted and operationally difficult because of the substantial variety of assets underlying a single offering and the frequency with which they change. Specifically, it would be very difficult for program sponsors (and their commercial customers funding the financial receivables in the conduits) to collect the information mandated by the heightened disclosure requirements and to provide it to investors in a timely manner.

Further, the benefits to investors from asset-level disclosure would be outweighed by the risk of shrinking the $400 billion ABCP market. Many sponsors of ABCP programs do not have the ability or willingness to comply with the enhanced disclosure requirements in the proposal and would likely seek alternative sources of funding, at potentially higher costs. If the ABCP market is reduced further, money market funds, which provide an important source of funding for the ABCP market, would have fewer options for investment, making management of such funds more difficult.[22]

In essence, ABCP programs have exposure to multiple pools of various types of financial receivables; fund those assets by issuing notes on a continuously offered basis; have the benefit of committed liquidity facilities equaling 100 percent of outstanding ABCP;[23] and, provide extensive, continuous disclosure. Consequently, investors would be much better served by reviewing the legal documentation defining the contractual obligations of the counterparties providing liquidity and credit support facilities to a conduit, and assessing the creditworthiness of those counterparties, than they would by receiving loan-level detail on each of the many pools of financial receivables held by that conduit. While asset composition and performance can be important considerations in assessing the overall creditworthiness of an ABCP program (especially for partially supported programs), they are not the only, or even primary, factors. In light of the various support mechanisms inherent to ABCP programs, the current market standard for asset disclosure is adequate.

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If you have any questions on our comment letter, please feel free to contact me directly at (202)

[22] The operational difficulties of complying with the heighted disclosure requirements could lead some program sponsors to forgo the use of Rule 144A and to rely upon other registration exceptions. Money market investors, however, would be much less likely to purchase ABCP in the event that ABCP could not be resold in reliance upon Rule 144A, because such ABCP would then be deemed illiquid.

[23] In the case of partially supported programs, they have the benefit of program-level credit enhancement amounting to 5 to 10 percent of outstanding ABCP.

326-5815, Heather Traeger at (202) 326-5920, or Ari Burstein at (202) 371-5408.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel

cc: The Honorable Mary L. Schapiro
The Honorable Kathleen L. Casey
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes

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