October 12, 2023

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

Re: August 30, 2023 C&DI re: Form SF-3 Eligibility Requirements

Dear Ms. Bancroft:

The Commercial Real Estate Finance Council ("CREFC") is writing to express our concerns 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").

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 ensure that CRE debt liquidity remains available to this important component of the U.S. economy.

Although the C&DI potentially could be read to apply only to a circumstance, however unlikely, in which a final prospectus is available and furnished to investors at the time of sale, we are concerned that the intent of the C&DI is to require the filing of the final prospectus two business days after the first time of sale, whether or not a final prospectus has been used. We have two fundamental problems with the position the C&DI appears to be articulating.

(i) Many of our members have advised that the C&DI appears to change current rules upon which the commercial mortgage-backed securities ("CMBS") industry has relied, thereby impairing their ability to efficiently price their SEC-registered CMBS transactions and to close those transactions in a careful, responsible manner that assures that final prospectuses and transaction documents are accurate and complete prior to filing; and

(ii) The C&DI could create the implication that the document filing practices that CMBS issuers and their outside law firms have followed for many years have been inconsistent with applicable regulatory requirements.

If the Division's position as reflected in the C&DI is intended for the circumstance in which a final prospectus is available and furnished to investors at the time of sale, then we respectfully request that the C&DI be revised to make that clear. However, if the Division's position is that a final prospectus is "first used" at pricing (irrespective of its actual existence or availability) and that required transaction documents and agreements must be filed within two business days of pricing in each and every ABS transaction, then we respectfully request that the Division defer implementation of the C&DI until we have had an opportunity to discuss with the Staff of the Division (the "Staff") our legal analysis of the C&DI and transactional difficulties that compliance with the C&DI would present, as further set forth below. In particular, we believe that:

(i) Current industry practice is consistent with the existing law;

(ii) The C&DI would be changing legal standards, rather than interpreting them; and

(iii) There would be a significant adverse impact on the CMBS market if compliance with the C&DI were required.

Overview: The C&DI is Unclear and Potentially Problematic

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 certifications required by I.B.1.(a) and all transaction agreements containing the provisions that are required by I.B.1(b), I.B.1(c) and I.B.1(d). The C&DI is based on the requirement in Item 1100(f) of Regulation 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"). It notes that, in the case of ABS, 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 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: "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."

Based on the text of the C&DI—particularly the example—our members are not clear on what the Division's position is. Namely, is it that if a final prospectus *is actually* delivered or made available on the date of sale of an ABS, then the final prospectus and the required transaction documents and agreements *must* be filed within two business days of the date of sale in order for the timely filing requirements to have been satisfied? Or, rather, is it that a final prospectus is *required* to be delivered on the date of sale of an ABS, and therefore the final prospectus and the required transaction documents and agreements must be filed within two business days of such date of sale?

We are concerned that the second characterization set forth above is the one that truly reflects the Division's position. Accordingly, assuming that is the Division's position, we highlight the legal analysis on why such a position is flawed and the disruptive effects that such a position is likely to visit on the CMBS markets.

Legal Analysis

As discussed below, our view is that a final prospectus is not required to be delivered or used at or prior to the time of sale, and any characterization that requires such delivery or use would disregard existing Commission regulations, particularly the ABS 424(b) Instruction, and the language of Section 5(b)(2) of the Securities Act.

A. *Neither Section 5(b) of the Securities Act Nor Any Rule Thereunder Requires that the Final Prospectus Be Delivered or Used at or Prior to the Time of Sale*

The C&DI seems to suggest that Section 5(b) of the Securities Act obligates an issuer to deliver a Section 10(a) prospectus "at or prior to the time of sale." The obligation to deliver a Section 10(a) prospectus is found only in Section 5(b)(2), which relates to the *delivery of the security itself after sale*.[1] Section 5(b)(2) requires only that a final prospectus be delivered on or before the settlement date.[2] Rule 172(b), meanwhile, specifies that "[a]ny obligation under section 5(b)(2) of the [Securities] Act to have a prospectus that satisfies the requirements of section 10(a) of the [Securities] Act precede or accompany the delivery of a security" will be satisfied if, among other things, the issuer "will make a good faith and reasonable effort" to file the final prospectus within the timeframe prescribed by Rule 424 (or as soon as practicable thereafter).

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[1] *See, e.g.*, Securities Offering Reform, 70 Fed. Reg. 44722 at 44782 (Aug. 3, 2005) ("SOR Adopting Release") (noting that Section 5(b)(2) makes it unlawful to **deliver** a security unless accompanied or preceded by a final prospectus).

[2] We note that Section 5(b) makes it unlawful "to **carry or cause to be carried through the mails or in interstate commerce any such security** for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10." (Emphasis added.) The emphasis on "carrying through the mails," along with various SEC releases, make clear that the focus of this section is on delivery of the security itself. *See, e.g.*, Exchange Act Rel. 34-94196 (Feb. 9, 2022), at fn. 223 (noting that "Section 5(b)(2) makes it unlawful to deliver (*i.e.*, as part of settlement) a security 'unless accompanied or preceded' by a prospectus that meets the requirements of Section 10(a)…(known as a 'final prospectus').").

In the "time of sale" context, it is Section 5(b)(1) that is relevant, as that section prohibits transmitting through any means of interstate commerce "any prospectus" relating to any security with respect to which a registration statement has been filed unless that prospectus "meets the requirements of Section 10." Pursuant to Rule 430D(c), an ABS prospectus that satisfies the requirements of 430D(a) (*i.e.*, a preliminary prospectus) is deemed to be a "prospectus that meets the requirements of Section 10" for purposes of Section 5(b)(1). Thus, a preliminary prospectus can be disseminated to ABS investors without Section 5(b)(1) concerns and serve as the basis upon which an ABS investor makes its "time of sale" investment decision.

Neither Section 5 nor any Commission rule adopted thereunder mandates that a final prospectus be delivered or used at or before the time of sale.

B. *Since 2005, the SEC Regulatory Framework Has Minimized the Primary Market Significance of Final Prospectuses*

In 2005, the Commission adopted Securities Offering Reform ("SOR"), substantially liberalizing the securities offering model and realigning the securities law liability associated therewith, and thereby enhancing the significance of the preliminary prospectus and minimizing the significance of the final prospectus.[3] Those changes were premised on a desire to make the offering process more efficient for issuers and were facilitated by the fact that technological innovations, especially the Internet, had expedited and expanded issuers' means of providing information to investors.[4]

One key piece of Securities Offering Reform, Rule 159, provides that, for purposes of Sections 12(a)(2) and 17(a)(2) of the Securities Act, liability for material misstatements and omissions is determined based upon the information conveyed to a securities purchaser on or before the "time of sale." That rule specifies that any information conveyed to the purchaser thereafter—including, by implication, by means of a final prospectus—will not be taken into account.[5] The SOR Adopting Release makes clear that "the time of sale" is "the time at which an investor has taken the action the investor must take to become committed to purchase the securities, and has therefore entered into a contract of sale…."[6] Hence, if material information becomes available after the sale date, issuers and underwriters typically initiate a "contract reformation" process[7]; they do not simply include the information in the final prospectus.

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[3] *See* SOR Adopting Release.

[4] Id. at 44731 ("Modern communications technology, including the Internet, provides a powerful, versatile, and cost-effective medium to communicate quickly and broadly"), 44783 ("For example, prospectuses and other filings now are available through EDGAR and other electronic sources, including the Internet, immediately upon filing"), 44739 ("The rules will enable issuers and market participants to take greater advantage of the Internet and other electronic media to communicate and deliver information to investors"), 44796 ("we believe that the rules will . . . [r]eflect the increased importance of electronic dissemination of information, including the use of the Internet").

[5] Id. at 44804.

[6] Id. at 44765.

[7] Id. at 44767-44768.

In connection with the adoption of Rule 159, the Commission made clear that "an investor's purchase commitment and the resulting contract of sale of securities to the investor in the offering generally occur **before** the final prospectus is required to be delivered under the Securities Act."[8] The SOR Adopting Release therefore recognizes that investment decisions typically are made on the basis of the preliminary prospectus, rather than the final prospectus.[9] Indeed, the release asserts that "the greatest utility of a final prospectus may be as a document that informs and memorializes the information for the aftermarket."[10] Because the release recognizes that "actual delivery to [primary market] purchasers is not necessary" to inform the aftermarket,[11] the Commission in SOR also adopted Rule 172, permitting an "access equals delivery" approach to be taken with respect to the final prospectus.[12] However, in recognition of the paramount role played by the preliminary prospectus, it declined to take an "access equals delivery" approach with respect to preliminary prospectuses.[13]

The time of sale preeminence of the preliminary prospectus in the public ABS markets was underscored when Regulation AB II ("Reg AB II") was adopted in 2014,[14] as that rulemaking added a new paragraph (h)—applicable only to ABS—to Rule 424, requiring that a preliminary prospectus be filed at least three business days before the date of the first sale and that a prospectus supplement be filed at least 48 hours before the first sale if there has been a "material change" in the information contained in the preliminary prospectus. These requirements were designed to "allow investors additional time to analyze the specific structure, assets and contractual rights of each transaction."[15] The key role played by the preliminary prospectus is underscored, as well, by the fact that Reg AB II expanded Securities Exchange Act Rule 15c2-8(b) to encompass ABS

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[8] Id. at 44782 (emphasis added); s*ee also* Id. at 44765 (noting that "at the time of sale investors generally will be relying upon information other than the final prospectus" and that "[t]he Securities Act registration regime permits final prospectuses to become available **after** an investor becomes committed to purchase a security") (emphasis added).

[9] *See, e.g.*, Id. at 44784 (expressing the Commission's belief that "it's important for the preliminary prospectus to be sent to investors," rather than to merely be available on an "access equals delivery" basis).

[10] Id. at 44782. *See also* Id. at 44794 ("Given that the final prospectus delivery obligation generally affects investors only after they have made their investment decisions and that investors and the market have access to the final prospectus upon its filing, [the Commission believes] that the obligation can be satisfied through a means other than physical delivery").

[11] Id. at 44782.

[12] Rule 172(b) specifies that any "obligation under Section 5(b)(2) to have a prospectus that satisfies the requirements of section 10(a) … precede or accompany the delivery of a security" will be satisfied if, among other things, the issuer "will make a good faith and reasonable effort" to file the final prospectus within the timeframe prescribed by Rule 424. In the event the issuer fails to file timely, the rule requires the issuer to file "as soon as practicable thereafter." That is, it contains a "cure period."

[13] *See* footnote 9, *supra.*

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

[15] Reg AB II Adopting Release at 57189 and 57260.

offerings,[16] thereby requiring a preliminary prospectus to be delivered to each expected purchaser at least 48 hours before trade confirmations are sent. The Regulation AB II Adopting Release notes that this expansion "will benefit investors by allowing them more time to consider the characteristics of the offering."[17] Both of those provisions clearly are predicated on the assumption that ABS investors will be making their "time of sale" investment decisions on the basis of the preliminary prospectus, rather than the final prospectus.

C. *The C&DI Would Effectively Remove the ABS 424(b) Instruction and Is Inconsistent with the Commission's Descriptions of "First Used"*

The C&DI does not appear to account for an important distinction in the construction and development of Rule 424. As discussed below, the ABS 424(b) Instruction, distinguishing itself from Rule 424(b)(2) and (b)(5), specifically excludes a reference to "pricing" and instead exclusively references "first used" as the trigger for filing. By defining "first used" to include "pricing," the C&DI would effectively render useless the ABS 424(b) Instruction.

The ABS 424(b) Instruction has a long history and was added in response to concerns raised by issuers and underwriters of mortgage-backed securities ("MBS"). It was added in 1992 as a codification of Staff guidance previously provided in no-action letters. By way of background, paragraphs (b)(2) and (b)(5), which specify the filing timing requirements for final prospectuses, were added to Rule 424 in 1987, as part of a broad revision of the prospectus filing process.[18] Less than three months later, the Staff issued a no-action letter to Skadden Arps[19] (which was acting on behalf of a group of MBS underwriters and issuers) providing relief from the requirements of Rule 424(b)(2) for MBS transactions. 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

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[16] ABS offerings effected on Form S-3 previously were excepted from this provision, initially pursuant to a Staff no-action position and subsequently by rule. *See* Reg AB II Adopting Release at 57290.

[17] Id. at 57291.

[18] *See* Elimination of Certain Pricing Amendments and Revision of Prospectus Filing Procedures, Securities Act. Rel. No. 33-6714 1987 SEC LEXIS 4597 (May 27, 1987) (the "424(b)(2) Release").

[19] *See* Certain Mortgage Related Securities Under Rule 415(a)(1)(vii) and Prospectus Filing Requirements of Rule 4242(b)(2) and (5), 1987 SEC No-Act. LEXIS 2376 (Aug. 18, 1987).

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."

In apparent recognition of the fact that MBS transactions involve complexities that other transactions do not, the Staff no-action response provides 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. That response noted "particularly the process, as described in [the request letter], of determining the exact structure of mortgage related securities offered on a delayed basis and preparing the prospectus." A similar no-action letter was issued to Brown & Wood a month later.[20] The position taken in the Skadden and Brown & Wood no-action letters was codified five years later in the ABS 424(b) Instruction in conjunction with the SEC's amendments to then Form S-3 to increase the classes of issuers and transactions eligible to use then Form S-3 and consequently the shelf offering registration procedures of Rule 415.[21][22]

Furthermore, the 424(b)(2) Release provides Commission guidance regarding the Rule 424 meaning of "first used," noting that: "The concept of 'first use' is not limited to the provision of the prospectus to purchasers with their confirmations. Rather, it refers to availability of the prospectus to the managing underwriter, syndicate members or offerees."[23] The meaning of this term also is discussed in the SOR Adopting Release, which cites the 424(b)(2) Release and states that: "We already have made clear that the date of first use for purposes of Securities Act Rule 424 is not the date that the prospectus supplement is given to a purchaser in connection with a sale. Rather, it refers to the date that the prospectus is available to the managing underwriter, syndicate member, or any prospective purchaser."[24] Neither the 424(b)(2) Release nor the SOR Adopting Release suggests that a final prospectus is deemed to be "first used" on the pricing date. Furthermore, nothing in the now 35-year history of the ABS 424(b) Instruction contemplated that final prospectuses would be provided at pricing. Accordingly, the C&DI's expectations as to the

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[20] *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).

[21] *See* Simplification of Registration Procedures for Primary Securities Offerings, Securities Act Rel. No. 33-6964 at fn. 15 (Oct. 22, 1992) (stating that the ABS 424(b) Instruction was intended to "codify a staff interpretive position").

[22] The SEC's adoption of the ABS 424(b) Instruction was itself prominent. After referring in general terms to the expansion of classes of issuers and transactions eligible to use then Form S-3 and the shelf offering procedures of Rule 415, the summary section of Securities Act Rel. No. 33-6964 states: "Furthermore, an instruction has been added to the prospectus filing rule, rule 424, to allow prospectus supplements containing pricing and other transaction specific information with respect to mortgage-related and investment grade asset-backed offerings to be filed no later than two business days after first use."

[23] *See* 424(b)(2) Release at text at fn. 88.

[24] *See* SOR Adopting Release at fn. 426.

availability of final prospectuses and what constitutes "first use" of the same would be at odds with existing regulatory guidance.

In sum, the C&DI appears to read the ABS 424(b) Instruction out of Rule 424. The Commission adopted the ABS 424(b) Instruction for the specific purpose of allowing ABS issuers to file their final prospectuses on a date that is more than two business days following the pricing date, in recognition of the complexity of structuring and pricing an ABS transaction. As discussed in greater detail below, those complexities are present to a particularly significant degree in CMBS transactions. Now, the C&DI appears to disallow precisely what the ABS 424(b) Instruction was adopted to permit (and has by its terms continuously permitted for 35 years).

We recognize that the Commission proposed in 2010 and re-proposed in 2011 requiring ABS transaction documents to be filed by the date that the preliminary prospectus is required to be filed.[25] However, the Commission stated in the Reg AB II Release that such proposal "remains outstanding and unchanged."[26] Accordingly, any change in the filing deadline for transaction documents—which is what the objective of the C&DI appears to be—would, by legal necessity, need to be accomplished through a rulemaking in accordance with the Administrative Procedure Act, rather than through a Staff interpretation.

D. *Application of the Foregoing to CMBS Transactions*

Because CMBS issuers and underwriters rely upon the preliminary prospectus for "time of sale" purposes and file the final prospectuses and final transaction documents no later than two business days after the final prospectus is made available to the underwriters, our view is that those practices are compliant with both Section 5(b)(2) and the SEC regulations as currently written. The fact that issuers and underwriters of other, less complicated classes of ABS have generally filed their final prospectuses within two business days of the pricing date does not make the CMBS industry filing practice inconsistent with the statutory requirements and regulatory guidance.

SEC-Registered CMBS Transactions Are Extremely Complex

We imagine that the impetus for the C&DI may have arisen from the Division's observation that issuers of registered ABS in other asset classes often deliver final prospectuses and file transaction documents within two business days following pricing and that CMBS issuers do not currently do so. We believe that such a one-size-fits-all view of the ABS market ignores the unique characteristics of registered CMBS transactions. Other ABS asset classes, such as automobile loans, automobile leases, credit card receivables, equipment loans and student loans, generally feature pools comprised of a large number of generally fungible assets—assets which can largely be described with statistical information. The commercial real estate loans that underlie registered CMBS transactions are not fungible. Assembling a CMBS loan pool involves managing many competing factors, including but not limited to assessing on an iterative basis:

(1) Which loans will be closed in time to be included in the pool;

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[25] *See* Asset-Backed Securities, 75 Fed. Reg. 23328 (May 3, 2010); Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, 76 Fed. Reg. 47948 (August 5, 2011).

[26] *See* Reg AB II Adopting Release at 57296.

(2) What concentration of various property types and jurisdictions are optimal to satisfy rating agency and investor expectations; and
(3) What loan seller contribution percentages will maximize the pool.

Often times a loan might not close in time to be included, or the B-piece investor will insist that a loan be cut down in size. Late-breaking events such as those often have cascading effects. They materially change property type concentrations and seller concentrations, and they often result in other loans having to be removed or re-sized in order to balance the competing factors. Accordingly, the final pool characteristics are not determined until shortly before the offering is announced, and only at that point do rating agencies provide final feedback regarding enhancement levels, which affects the transaction structure. Final disclosure on the many diverse assets requires a great deal of diligence by many parties including accountants through the printing process. Risk retention structures, which vary from deal to deal, may not be decided until the loan pool has materialized, and must be woven through the prospectus and ultimately the servicing agreement. Consequently, the issuer and underwriters, and their accountants and lawyers, are all focused on producing a preliminary prospectus that is accurate and complete so that the transaction can be announced in a timely fashion.

In addition, SEC-registered CMBS transactions have multiple servicers and multiple servicing agreements, multiple loan sellers, an operating advisor, a controlling class representative who has input on certain servicing decisions, and loans that are split among various transactions. The transaction agreements—and therefore the preliminary prospectus—go into great detail regarding the servicers, the loan sellers, the operating advisor, the controlling class representative, the split loans and the interplay among them all. These non-homogeneous features, together with the collateral complexities discussed above, make assembling and structuring a CMBS transaction and preparing a preliminary prospectus a unique challenge in the ABS world. Other registered ABS classes mentioned above do not have such complexity and hence do not face the same final prospectus filing challenges.

The C&DI Will Likely Create Significant Difficulties for CMBS Transactions

Although practices have evolved since the ABS 424(b) Instruction was added to Rule 424(b), 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. 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 have to 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 can't be priced until late morning to accommodate West Coast accounts). Typically, IO classes are often 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 is prepared and then checked by accountants and lawyers.[27] In short, documentation cannot be completed until

[27] 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

the entire deal has priced (both P&I and IO classes), which creates a question around the pricing event to which the C&DI refers.

Additionally, due to the sheer volume of required documents, the "Edgarization" process would take a minimum of 12 hours for each material document, further reducing 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. Finally, such a short timeframe would likely result in the same heightened potential for errors highlighted in the no-action requests dating from 1987.

CMBS Investor Perspective

As noted above, CREFC's members include many investors. CREFC seeks to present the views of industry participants as a whole. We typically limit our advocacy to situations in which our members have a general consensus. In connection with the C&DI, we raised the topic of the C&DI with our investor members. CREFC's investor members believe that requiring deal documents to be filed two business days after pricing would not improve transparency ahead of making investment decisions; *i.e.*, the pricing date. All credit work by investors is completed prior to pricing using the preliminary prospectus and, if applicable, any pre-pricing supplements to the preliminary prospectus and/or any ABS informational and computational material.[28]

Investors have access to all the information they need to make an informed investment decision through the preliminary prospectus, since all material terms of the offering on which investment decisions are based would have been disclosed in the preliminary prospectus and any pre-pricing supplements and/or ABS informational and computational material. This investor acceptance regarding the timing of receipt of the final prospectus is consistent with the Commission's reason for adopting Rule 172. Accordingly, we see the C&DI as playing no role in furthering the interests of issuers, underwriters or investors.

Conclusion

In sum, we firmly believe that current CMBS issuer practices are in compliance with all statutes and regulations currently in effect, and that further rulemaking by the Commission in

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.

[28] Item 1101(a) of Regulation AB.

accordance with the Administrative Procedure Act would be required to effect the change that appears to underpin the C&DI.

Notwithstanding the foregoing, if the Division's position as reflected in the C&DI is intended for the circumstance in which a final prospectus is available and furnished to investors at the time of sale, then we respectfully request that the C&DI be revised to make that clear. However, if the Division's position is that a final prospectus is "first used" at pricing (irrespective of its actual existence or availability) and that required transaction documents and agreements must be filed within two business days of pricing in each and every ABS transaction, then we respectfully request that the Division defer implementation of the C&DI until we have had an opportunity to discuss with the Staff our legal analysis of the C&DI, the transactional difficulties that compliance with the C&DI would present and the significant adverse impact it would have on the CMBS market.

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We look forward to speaking with you soon and, in the meantime, please do not hesitate to reach out to Sairah Burki at sburki@crefc.org with any questions.

Sincerely,

Commercial Real Estate Finance Council

Mortgage Bankers Association