

publication or distribution does not represent the initiation of publication of research reports about such issuer or its securities or reinitiation of such publication following discontinuation of publication of such research reports.

(2) *Industry reports.* (i) The issuer is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 or satisfies the conditions in paragraph (a)(1)(i)(B) of this section;

(ii) The condition in paragraph (a)(1)(ii) of this section is satisfied;

(iii) The research report includes similar information with respect to a substantial number of issuers in the issuer's industry or sub-industry, or contains a comprehensive list of securities currently recommended by the broker or dealer;

(iv) The analysis regarding the issuer or its securities is given no materially greater space or prominence in the publication than that given to other securities or issuers; and

(v) The broker or dealer publishes or distributes research reports in the regular course of its business and, at the time of the publication or distribution of the research report, is including similar information about the issuer or its securities in similar reports.

(b) *Rule 144A offerings.* If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§ 230.144A).

(c) *Regulation S offerings.* If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:

(1) Constitute directed selling efforts as defined in Rule 902(c) (§ 230.902(c)) for offerings under Regulation S (§§ 230.901 through 230.905); or

(2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§ 230.902(h)) for offerings under Regulation S.

(d) *Definition of research report.* For purposes of this section, *research report* means a written communication, as de-

defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

Instruction to § 230.139. Projections. A projection constitutes an analysis or information falling within the definition of research report. When a broker or dealer publishes or distributes projections of an issuer's sales or earnings in reliance on paragraph (a)(2) of this section, it must:

1. Have previously published or distributed projections on a regular basis in order to satisfy the "regular course of its business" condition;

2. At the time of publishing or disseminating a research report, be publishing or distributing projections with respect to that issuer; and

3. For purposes of paragraph (a)(2)(iii) of this section, include projections covering the same or similar periods with respect to either a substantial number of issuers in the issuer's industry or sub-industry or substantially all issuers represented in the comprehensive list of securities contained in the research report.

[70 FR 44803, Aug. 3, 2005, as amended at 71 FR 7413, Feb. 13, 2006; 73 FR 967, Jan. 4, 2008]

§ 230.139a Publications by brokers or dealers distributing asset-backed securities.

The publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to asset-backed securities meeting the criteria of General Instruction I.B.5 of Form S-3 (§ 239.13 of this chapter) ("S-3 ABS") shall not be deemed to constitute an offer for sale or offer to sell S-3 ABS registered or proposed to be registered for purposes of sections 2(a)(10) and 5(c) of the Act (15 U.S.C. 77b(a)(10) and 77e(c)) (the "registered securities"), even if such broker or dealer is or will be a participant in the distribution of the registered securities, if the following conditions are met:

(a) The broker or dealer shall have previously published or distributed with reasonable regularity information, opinions or recommendations relating to S-3 ABS backed directly (or, with respect to securitizations of other securities, indirectly) by substantially similar collateral as that directly or

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indirectly backing S-3 ABS that is the subject of the information, opinion or recommendation that is proposed to be published or distributed.

(b) If the registered securities are proposed to be offered, offered or part of an unsold allotment or subscription, the information, opinion or recommendation shall not:

(1) Identify the registered securities;

(2) Give greater prominence to specific structural or collateral-related attributes of the registered securities than it gives to the same attributes of other asset-backed securities that it mentions; or

(3) Contain any *ABS informational and computational material* (as defined in § 229.1101 of this chapter) relating to the registered securities.

(c) Sufficient information is available from one or more public sources to provide a reasonable basis for the view expressed by the broker or dealer with respect to the asset-backed securities that are the subject of the information, opinion or recommendation.

(d) If the material published by the broker or dealer identifies asset-backed securities backed directly or indirectly by substantially similar collateral as that directly or indirectly backing the registered securities and specifically recommends that such asset-backed securities be preferred over other asset-backed securities backed by different types of collateral, then the material shall explain in reasonable detail the reasons for such preference.

[70 FR 1615, Jan. 7, 2005, as amended at 70 FR 44804, Aug. 3, 2005]

§ 230.140 Definition of “distribution” in section 2(11) for certain transactions.

A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, including the levying of assessments on its assessable stock and the resale of such stock upon the failure of the holder thereof to pay any assessment levied thereon, to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of the securities of such issuer or affiliated issuers

within the meaning of section 2(11) of the Act.

[24 FR 6386, Aug. 8, 1959]

§ 230.141 Definition of “commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commissions” in section 2(11), for certain transactions.

(a) The term *commission* in section 2(11) of the Act shall include such remuneration, commonly known as a spread, as may be received by a distributor or dealer as a consequence of reselling securities bought from an underwriter or dealer at a price below the offering price of such securities, where such resales afford the distributor or dealer a margin of profit not in excess of what is usual and customary in such transactions.

(b) The term *commission from an underwriter or dealer* in section 2(11) of the Act shall include commissions paid by an underwriter or dealer directly or indirectly controlling or controlled by, or under direct or indirect common control with the issuer.

(c) The term *usual and customary distributors’ or sellers’ commission* in section 2(11) of the Act shall mean a commission or remuneration, commonly known as a spread, paid to or received by any person selling securities either for his own account or for the account of others, which is not in excess of the amount usual and customary in the distribution and sale of issues of similar type and size; and not in excess of the amount allowed to other persons, if any, for comparable service in the distribution of the particular issue; but such term shall not include amounts paid to any person whose function is the management of the distribution of all or a substantial part of the particular issue, or who performs the functions normally performed by an underwriter or underwriting syndicate.

[2 FR 1075, May 26, 1937]

§ 230.142 Definition of “participates” and “participation,” as used in section 2(11), in relation to certain transactions.

(a) The terms *participates* and *participation* in section 2(11) (48 Stat. 74, 48